PART 17
PATENTS, DATA AND COPYRIGHTS

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17.1   GENERAL GUIDANCE.

POLICY:

(a) BPA honors the rights in data resulting from private developments and limits its demands for such rights to those essential for BPA purposes.

(b) BPA requires contractors to obtain permission from copyright owners before including privately-owned copyrighted works in data required to be delivered under contracts.

(c) BPA honors rights in patents, data, and copyrights and complies with Federal laws in using or acquiring such rights. BPA encourages the maximum practical commercial utilization of inventions made during the performance of BPA contracts.

(d) For all contracts which do not involve development of computer softrware:

  (1) BPA will not generally require indemnification against infringement of U.S. patents and copyrights resulting from performance of contracts, providing the contractor informs the CO within a reasonable time of the facts relating to such infringement.

  (2) BPA encourages the maximum practical commercial utilization of inventions made during the performance of BPA contracts.

(3) BPA will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent or a copyright..

(4) BPA encourages the use of inventions in the performance of contracts and authorizes and consents to such use.

(e) For all contracts which involve development of computer softrware:

(1) BPA will require a contractor to indemnify BPA against claims of infringement of patents and copyrights resulting from performance on computer software projects.

(2) BPA will limit the contractor's ability to apply for patent or copyright for any portion of computer software developed for BPA. BPA will determine on a case by case basis whether to allow any commercialization of computer software and generally restrict the commercialization of software that is essential for BPA's business purposes.

(3) BPA will require the contractor to obtain necessary licenses for any copyright protected software to be used during development of software for BPA..

(4) BPA will generally not authorize or consent to use of any copyrighted or patented computer software in development of computer software for BPA.

17.2   AUTHORIZATION AND CONSENT.

(a) *POLICY:* Except for computer software, BPA generally authorizes and consents to the use of any invention covered by a United States patent and of any work protected under the copyright laws of the United States in the performance of a BPA contract, except for computer software.

(b) *INFORMATION:* In accordance with Federal patent and copyright law, a BPA contractor is protected from suit for patent or copyright infringement when the use of a patented invention or of a copyrighted work is for BPA and with the authorization and consent of BPA. The exclusive remedy for owners of patents or copyrights alleging infringement by a BPA contractor during the conduct of a BPA contract is a suit against BPA in the U.S. Court of Federal Claims. The purpose of this provision of law (28 U.S.C. 1498) is to allow progress on BPA contracts in spite of litigation.

(c) *INFORMATION:* Authorization and consent on the part of BPA may be either express or implied. For example, if an article is both manufactured for and used by BPA, authorization and consent will be implied even if no specific clause is incorporated into the contract. Similarly, BPA specifications or drawings that imply permission to infringe will indicate BPA's authorization and consent to that infringement.

(d) *POLICY:* Except for computer software development, BPA shall not require indemnification by its contractors for patent and copyright infringement unless specifically negotiated into the contract by the CO. If the CO considers indemnification by the contractor to be in the best interests of BPA, the CO shall contact general counsel for advice and assistance. For computer software development, the CO shall refer to Section 17.4.6 for policy guidance on indemnification.

(e) *INFORMATION:* BPA can protect itself in its acceptance of liability for patent or copyright infringement by requiring indemnification by the contractor. If BPA is found liable for the infringement, BPA can then recover its loss from the contractor.

(f) *INFORMATION:* Contractors from a country that is a party to the North American Free Trade Agreement (NAFTA) are required by Article 1709(10) of NAFTA to obtain authorization prior to use of patented technology covered by a valid United States patent. If the CO has reason to

believe that a NAFTA contractor is or will be using a patent without authorization in the performance of a BPA contract, contact the HCA or General Counsel for instructions. (See 9.3.3).

17.2.1   Clause Usage Prescriptions.

PROCEDURE: The CO may insert Clause 17-1, Authorization and Consent, in solicitations and contracts when the timeliness of contract performance requires protection from infringement litigation or when there is possibility of patent or copyright infringement. This clause shall not be used in computer software development contracts. The following purchases are the most likely to be subject to patent or copyright disputes and should be evaluated by the CO to determine if the use of Clause 17-1 would be prudent:

    (1) BPA specification items; and

    (2) Research and development contracts.

17.3   PATENTS.

17.3.1   Definitions.

INFORMATION: As used in this part--

"Subject invention" means any invention of the contractor, conceived or first actually reduced to practice, in the performance of work under a Government contract.

"Royalties" means any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications.

17.3.2   Policy.

(a) Except for computer software developed specifically for BPA, BPA promotes the commercialization of patentable results of federally funded research by granting to all contractors, regardless of size, the title to patents made in whole or in part with BPA funds. In exchange, BPA receives royalty-free use on behalf of the Government.

(b) For computer software developed specifically for BPA, BPA may obtain a patent in the software or in some cases grant the contract permission to apply for patent for any portion of the computer software developed for BPA. BPA will determine on a case by case basis whether to allow any commercialization of computer software and generally restrict the commercialization of software that is essential for BPA's business purposes.

17.3.3   Objectives.

INFORMATION: The objectives of this patent policy for all projects and contracts, and to some limited degree for computer software specifically developed for BPA, are to--

    (a) Use the patent system to promote the utilization of inventions arising from BPA supported research or development;

    (b) Encourage maximum participation of industry in BPA supported research and development efforts;

    (c) Ensure that these inventions are used in a manner to promote free competition and enterprise;

(d) Promote the commercialization and public availability of the inventions made in the United States by United States industry and labor;

(e) Ensure that the Government obtains sufficient rights in BPA supported inventions to meet the needs of the Government and to protect the public against nonuse or unreasonable use of inventions; and

(f) Minimize the costs of administering policies in this area.

17.3.4   Patent Rights.

(a) *POLICY:* Title to inventions.

(1) A contractor may, after disclosure to BPA as required by Clause 17-2, Patent Rights, elect to retain title to any invention made in the performance of work under a BPA contract. BPA shall have at least a non-exclusive, nontransferable, irrevocable, paid-up license to use, or have used, for or on behalf of the United States, any subject invention throughout the world.

(2) BPA, on behalf of the Government, has the right to receive title to any subject invention if the contractor has not disclosed the invention within the time specified in clause 17-2.

(b) *INFORMATION*: Confidentiality. The publication of information disclosing an invention by any party before the filing of a patent application may create a bar to a valid patent.

(c) *POLICY:*   BPA shall protect the confidentiality of invention disclosures and patent applications required in performance or in consequence of contract awards.

(d) *POLICY:* March-In Rights. With respect to any subject invention in which a contractor has acquired title, BPA shall have rights to license the invention if the contractor unreasonably refuses to do so.

(e) *INFORMATION:*

(1) March-in rights require the contractor, an assignee, or exclusive licensee of a subject invention to grant a non-exclusive, partially exclusive, or exclusive license in any field of use to a responsive applicant(s) upon terms that are reasonable under the circumstances. If the contractor, assignee, or exclusive licensee refuses such request, BPA may "march-in" and grant such a license itself. The HCA must determine that such action is necessary--

(A) Because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(B) To alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee, or their licensees;

(C) To meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the contractor, assignee or licensee; or

(D) Because the agreement to provide preference for U.S. industry has neither been obtained nor waived, or because a licensee of the exclusive right to use or sell any subject invention in the U.S. is in breach of such agreement. (See paragraph (3) below.)

(2) March-in rights shall be exercised only after the contractor has been provided a reasonable time to present facts and show cause why the proposed action should not be taken.

(3) Unless specifically waived, a contractor receiving title to a subject invention must agree that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. This requirement may be waived if the contractor shows that domestic manufacture is not commercially feasible.

17.3.5   Administration.

(a) *PROCEDURE:* It is important that BPA and the contractor know and exercise their rights in subject inventions (1) to ensure their expeditious availability to the public and (2) to enable all parties to avoid unnecessary payment of royalties and to defend themselves against claims and suits for patent infringement. To attain these ends, contracts having subject inventions should be administered so that--

(1) Inventions are identified, disclosed, and reported as required by the contract and elections are made;

(2) The rights of the Government in such inventions are established;

(3) Where patent protection is appropriate, patent applications are filed in a timely manner and prosecuted by contractors or by BPA;

(4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and

(5) Expeditious commercial utilization of such inventions is achieved.

(b) *PROCEDURE:* Follow-up by contractor. Contractors are required by clause 17-2 to establish and maintain effective procedures to ensure that its patent rights obligations are met, and that subject inventions are identified and disclosed in a timely manner and that when appropriate, patent applications are filed. Contractors shall submit all reports required by the CO.

(c) *PROCEDURE:* Follow-up by BPA. CO's shall maintain appropriate follow-up procedures to protect the Government's interest, to verify that subject inventions are identified and disclosed, and, when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. The CO administering the contract is responsible for obtaining all documentation from the contractor relating to subject inventions. Such documentation shall be submitted to General Counsel, which shall be responsible for directing appropriate actions.

(d) *PROCEDURE:* Royalties. It may be appropriate for BPA to collect royalties from the successful application of projects completed or developed with BPA funds. A provision to collect royalties should not be added to a contract unless the probable revenues are expected to exceed the associated administrative costs. A CO who determines that royalties are appropriate shall contact the HCA for advice and assistance.

17.3.5.1   Clause Usage Prescriptions.

PROCEDURE: COs shall insert Clause 17-2, Patent Rights, in a contract, including intergovernmental contracts with other than Federal agencies, for research and development or for any contract that may produce a subject invention, except the CO shall consult with BPA IT staff prior to including this clause in contracts for software developed solely for BPA use.

17.4   DATA AND COPYRIGHTS.

17.4.1   Definitions.

INFORMATION: As used in this part--

"Data" means recorded information, regardless of form or the media on which it may be recorded. The term should be construed broadly, to include all forms of recorded information including not limited technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

"Computer Software" means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does include computer databases or computer software documentation.

"Proprietary data" means data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

"Proprietary computer software" means computer software developed at private expense and that is (1) a trade secret, (2) is commercial or financial and confidential or privileged, or (3) is published, copyrighted computer software. The term includes minor modifications of such computer software.

"Technical data" means data other than computer software, which are of a scientific or technical nature.

"Special Works" means data, including technical data and computer software produced or compiled for BPA's own proprietary use and not released to the public.

17.4.2   Data Rights.

POLICY:

(a) All contracts which require data to be furnished must specify the rights to that data. BPA shall consider the need for unlimited rights in data that will be produced, furnished, or acquired under a contract; however, COs may negotiate specific data rights which are appropriate to the circumstances.

(b) *INFORMATION:* Any such data rights clause only specifies the respective rights of BPA and the Contractor to use, disclose, or reproduce such data.

(c) *PROCEDURE:* Because the data rights clause not specify the data in terms of type, quantity or quality that is to be delivered, the contract should include appropriate terms to specify the data to be delivered.

(d) *POLICY:* BPA shall normally acquire unlimited rights in the following data for all contracts, including intergovernmental contracts:

   (1) All data including computer software first produced in the performance of the BPA contract (except to the extent such data constitute minor modifications to proprietary data or proprietary computer software) and

   (2) Data (except as may be included with proprietary computer software) that constitute manuals or instructional and training material for installation, operation, or routine

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maintenance and repair of items, components, or processes delivered or furnished for use under a contract.

(c) **POLICY:** For proprietary data, including proprietary computer software, and/or published, copyrighted data required to be delivered to BPA under a contract, BPA will acquire only those rights negotiated as part of the contract award. Generally, limited rights will exclude manufacture or reproduction of the data and disclosure outside of the Government. Limited rights may include specific uses such as the following:

(1) Use by support service contractors, subject to the same restrictions under which the Government acquired the software.

(2) Evaluation by non government evaluators;

(3) Use by other contractors participating in the BPA program of which the specific contract is a part, for information and use in connection with the work performed under each contract;

(4) Emergency repair or overhaul work;

(5) Use or copied for use in a backup computer;

(6) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

(7) Reproduction for safekeeping or backup purposes.

(8) Preparing derivative works, including modifications thereto and/or combining with other computer software, is subject to the same rights.

(d) **PROCEDURE:** The contractor or offeror must identify limited rights data to the CO.

17.4.2.1   Clause Usage Prescriptions.

PROCEDURE: COs shall insert a clause similar to Clause 17-3, Rights in Data, in solicitations and contracts to establish rights to unlimited and limited rights data, unless the contract is solely for the production of special works made solely for BPA. If the contract is for the production of special works make solely for BPA, the CO shall include Clause 17-3, applicable to any data produced that is other than special works.

17.4.3   Copyrighted Data.

(a) **POLICY:** For data first produced in the performance of a BPA contract, except for computer software developed specifically for BPA, contractors may establish a claim to copyright in that data without advance approval of the CO. BPA is entitled to a paid-up, non-exclusive, irrevocable, worldwide license for all such data. The license includes the right to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government all such data. For computer software the scope of BPA's license may include rights to the source code if specifically negotiated into the contract by the CO.

(b) **POLICY:** For data not first produced in the performance of a contract, contractors should acquire for or grant to BPA permission to use the data through copyright license rights for the data.

(c) **PROCEDURE:** If the data first produced in the performance of the contract is scientific or technical information, copies of the data will be required in accordance with BPI 14.14.

17.4.3.1   Clause Usage Prescriptions.

(a) *PROCEDURE:* COs shall insert a clause similar to Clause 17-3, Rights in Data, in solicitations and contracts when copyrighted data are expected to be delivered to BPA in performance of the contract.

(b) *PROCEDURE:* COs shall insert a clause similar to Clause 17-4, Rights in Data--Existing Audiovisual Works, in solicitations and contracts exclusively for the purchase of existing audiovisual and similar works when BPA plans to reproduce, prepare derivative works or perform or display publicly such works.

17.4.4   Production of Special Works.

(a) POLICY: Contracts that require the production or compilation of data, including software development, according to BPA's specifications and for BPA's own proprietary use, may restrict the Contractor's use of the data. BPA may reserve the right to obtain assignment of copyright in any such data or indemnity for liabilities that may arise from disclosure of the data. Indemnification should be included where the software is being developed especially for BPA, and BPA is at risk for an infringement claim.

(b) POLICY: All software source code material and documentation first produced in the performance of the contract are considered to be special work for which BPA shall be deemed the author under Section 201(b) of Title 17, United States Code. The source code material and documentation are the sole and exclusive property of BPA and the contractor shall assign all rights, title and interest in and to the software source code material to BPA. The contractor shall agree not to assert or authorize others to assert any rights or establish any claim of copyright in these computer software works.

17.4.4.1   Clause Usage Prescriptions.

(a) PROCEDURE: COs shall insert Clause 17-5, Rights in Data—Copyright on Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited rights data or proprietary computer software) for BPA's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released or reproduced by the contractor for other than contract performance. Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired (see also Clause 17-4). COs may also use this clause in contracts for architect-engineering services and construction work.

(b) PROCEDURE: COs shall add Alternate 1, BPA Ownership of Special Works where copyrightable material is expected to be produced and/or when it is in the best interests of BPA to obtain title and sole property rights to all source code material and documentation first produced in the performance of the contract. Accordingly, the contractor assigns all rights, title, and interest to BPA in all computer data, computer software and documentation and source code material first produced in performance of the contract.

(c) *PROCEDURE:* Although BPA obtains an assignment of copyright and unlimited rights in special works, the contractor retains use and disclosure rights in that work. If BPA chooses to restrict a contractor's rights to use or disclose special works, the CO must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.

17.4.5   Proprietary Computer Software.

(a) *POLICY:* When contracting for existing proprietary computer software sold commercially under a license or lease agreement restricting its use, disclosure, or reproduction, COs shall ensure that BPA has sufficient rights to the data.

(b) *INFORMATION:* When purchasing proprietary computer software, COs should fully consider the purposes and needs for which the software is being acquired in negotiating BPA's rights to it. For example, networking needs or requirements for use from remote terminals may necessitate specific terms in the contract.

(c) *PROCEDURE:* COs shall review the supplier's license or lease agreement, if any, to determine if it gives BPA sufficient rights to fulfill the need for which the software is being purchased, and if the agreement is in BPA's best interests. If the supplier's agreement is acceptable, the CO may sign it and incorporate it into the contract. If the supplier's agreement is not acceptable as written, the CO should negotiate the terms to be included in the contract. General Counsel or HCA may be consulted, as needed.

17.4.5.1 Clause Usage Prescriptions.

PROCEDURE: COs may use a clause similar to Clause 17-6, Commercial Computer Software-- Restricted Rights, in solicitations and contracts for the purchase of proprietary computer software. The clause need not be used if the CO negotiates to substitute the supplier's license or lease agreement.

17.4.6 Intellectual Property Infringement Indemnification

(a) POLICY: It is BPA's policy that if the software database infringes someone else's rights, the contractor who infringed during performance of the BPA contract will be liable for all expenses that BPA might incur in the event of a claim, including a request to stop use of the software or database because of an alleged infringement, particularly when the software product is developed especially for BPA, and BPA is at greater risk for an infringement claim.

(b) INFORMATION: BPA may use licensed software in a way that creates potential for harm to third parties resulting from such use, irrespective of actions the contractor may take to limit those risks. Statute gives BPA a remedy for infringement, and requiring specific indemnification is a business decision for added protection. Therefore, an indemnification for any liability that may be incurred by BPA for violation of proprietary rights, including copyrights, or right of privacy or publicity, or for libelous or other unlawful matter arising out of or contained in any production or compilation of data, should be acquired from the contractor.

(c) INFORMATION: Preparation of certain types of copyright work requires releases and other permission from copyright owners. Contractors are expected to develop software products without infringing the intellectual property rights of others, that is, without appropriating others' protected ideas or expression.

17.4.6.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include clause 17-7, Intellectual Property Infringement Indemnification, in solicitations and contracts where a software or database license is developed or provided by the contractor.

17.4.7 Source Code Escrow Requirements

(a) POLICY:

> (1) It is BPA's policy that Escrow Agreements shall be used for proprietary software source code developed by a contractor, to protect BPA's interests in obtaining the source code if a contractor goes out of business or becomes bankrupt. When contracting with new or small technology companies, BPA should obtain on-site at BPA the source code and all

subsequent major and minor releases, and build that source code to ensure that the source code matches what is implemented at BPA.

(2) As part of the contract and licensing agreement for non-commercial software, BPA shall negotiate a supplemental escrow agreement, wherein the contractor agrees to place its source code in a "source code escrow".

(3) On-site escrow shall be considered for contracts with new or small technology companies since there is risk if BPA acquires software technology from an unproven software developer. Under these circumstances, BPA should negotiate an on-site source code escrow directly with the contractor in a secure BPA location in lieu of an independent third party escrow account.

(b) INFORMATION:

(1) If a contractor stops developing or maintaining the software product as specified in the contract, or goes out of business, an escrow arrangement permits BPA to access the source code and documentation necessary to maintain the software and/or build the source code.

(2) A source code escrow can provide continuity of BPA's business operation if a contractor no longer supports the software or ceases operations. The escrow agreement is a separate agreement in addition to the licensing agreement and contract. Under the escrow agreement, the contractor deposits the source code and any related documentation with an independent third party, an escrow agent, for the term of the software license. The escrow agreement must state that the contractor is required to regularly update and maintain the source code, and the timing of such updates may be defined in the agreement. The escrow agent is required to maintain the escrowed materials safely and confidentially, surrendering the source code to BPA only upon the occurrence of a specified release event. The two most prevalent release events occur when a contractor ceases to support the source code; or a contractor files for bankruptcy. Once the source code is released to BPA, generally the escrow agreement provides BPA with limited rights in proprietary computer software.

(c) PROCEDURES:

(1) Source Code Escrow Agreements establishing the data escrow account must reflect the escrow agent's software responsibilities and must require, as a minimum, the escrow agent to perform the follwoing services:

(A) Establish and maintain adequate procedures for protecting the source code and documentation delivered to or stored at the escrow agent's repository from unauthorized release or disclosure;

(B) Establish and maintain adequate procedures for controlling the release or disclosure of the source code and documentation from the repository to third parties consistent with BPA's rights in such data;

(C) When required by the contracting officer, deliver the source code in electronic form and documentation in electronic or paper form to BPA, or in other specified media;

(D) Be responsible for maintaining the currency of the source code and documentation delivered directly by BPA contractors or subcontractors to the repository;

(E) Authorize BPA to audit (but not copy) on a quarterly basis the source code material and reports by sampling at the location of the Escrow agent to verify that the source code material is current;

(F) Obtain use and non-disclosure agreements from all persons to whom the source code and documentation is released or disclosed; and

(G) Indemnify BPA from any liability to source code owners or licensors resulting from, or as a consequence of, a release or disclosure of source code data made by the escrow agent or its officers, employees, agents, or representatives.

17.4.7.1   Clause Usage Prescriptions.

(a) **PROCEDURE**: COs shall include clause Clause 17-8, Source Code Escrow Requirement – Third Party Agent, in solicitations and contracts for computer software development of any dollar amount, when BPA desires to protect its access to the source code in the event of a contractor ceasing business operations or discontinuing support of the software.

(b) **PROCEDURE**: COs shall include Clause 17-9, Source Code Escrow Requirement – BPA As Escrow Agent if BPA will maintain the escrow account in lieu of an independent third party escrow agent.

17.5   Copies of Technical Reports.

PROCEDURE: Scientific and technical information delivered to BPA and developed during work supported by BPA must be reported to DOE. See BPI 14.14 and clause 14-15.

17.50   TEXT OF CLAUSES.

The following clauses are referred to in BPI Part 17:

    17-1   Authorization and Consent.
    17-2   Patent Rights
    17-3   Rights in Data
    17-4   Rights in Data--Existing Audiovisual Works
    17-5   Rights in Data—Copyright on Special Works
    17-6   Commercial Computer Software--Restricted Rights
    17-7   Intellectual Property Infringement Indemnification
    17-8   Source Code Escrow Requirement – Third Party Agent
    17-9   Source Code Escrow Requirement – BPA As Escrow Agent

Clause 17-1   AUTHORIZATION AND CONSENT (Sep 98)(BPI 17.2.1)

(a) BPA authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or subcontract at any tier.

(b) BPA authorizes and consents to all use of any work protected under the copyright laws of the United States in the performance of this contract or subcontract at any tier.

(c) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(d) The terms of this clause shall apply to subcontracts at any tier whether or not incorporated into such subcontracts.

(End of clause)

Clause 17-2   PATENT RIGHTS (Sep 98)(BPI 17.3.5.1)

(a) Definitions.

(1) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

(2) "Made," when used in relation to any invention, means the conception or first actual reduction to practice of such invention.

(3) "Nonprofit organization" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(4) "Practical application" means to manufacture, in the case of a composition of product; to practice, in the case of a process or method, or to operate, in the case of a machine or system; and, in each case under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(5) "Small business firm" means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 12 CFR 121.3-12, respectively, will be used.

(6) "Subject invention" means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract.

(b) Allocation of principal rights. The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) Invention disclosure, election of title, and filing of patent application by contractor.

(1) The Contractor will disclose each subject invention to BPA within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the contractor will promptly notify BPA of the acceptance of any manuscript describing the invention for publication or of any sale or public use planned by the Contractor.

(2) The Contractor will elect in writing whether or not to retain title to any such invention by notifying BPA within 2 years of disclosure to the agency. However, in any case where publication, or sale or public use has initiated the 1 year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be

shortened by BPA to a date that is no more than 60 days prior to the end of the statutory period.

(3) The contractor will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title, or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, sale, or public use. The Contractor will file patent applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure election, and filing under subparagraphs (c) (1), (2), and (3) of this clause may, at the discretion of BPA, be granted.

(d) Conditions when the government may obtain title. The Contractor will convey to BPA, upon written request, title to any subject invention-

(1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that BPA may only request title within 60 days after learning of the failure of the Contractor to disclose or elect within the specified times.

(2) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of BPA, the Contractor shall continue to retain title in that country.

(3) In any country in which the Contractor decided not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum rights to contractor and protection of the Contractor right to file.

(1) The Contractor will retain a non-exclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sub licenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of BPA, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by BPA to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR Part 404 and agency licensing regulations (if any). This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of BPA to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, BPA will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by BPA for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable regulations in 37 CFR Part 404 and BPA regulations, if any, concerning the licensing revocation of modification of the license.

(f) Contractor action to protect the government's interest.

(1) The Contractor agrees to execute or to have executed and promptly deliver to BPA all instruments necessary to-

(A) Establish or confirm the rights the government has throughout the world in those subject inventions to which the Contractor elects to retain title, and

(B) Convey title to BPA when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The Contractor agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters, and in a format suggested by the Contractor, each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent application prior to U.S. or foreign statutory bars.

(3) The contractor will notify BPA of any decisions not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement: "The invention was made with Government support under (identify the contract) awarded by U.S. Dept. of Energy, Bonneville Power Administration. The Government has certain rights in the invention."

(g) Subcontracts.

(1) The Contractor will include this clause, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The subcontractor will retain all rights provided for the Contractor in this clause, and the Contractor will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) The Contractor will include in all other subcontracts, regardless of tier, for experimental, developmental, or research work, a patent rights clause.

(3) In the case of subcontractors, at any tier, BPA, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract

between the subcontractor and the Federal agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(h) Reporting on utilization of subject inventions. The Contractor agrees to submit, on request, periodic reports (no more frequently than annually) on the utilization of subject inventions or on efforts to obtain such utilization instigated by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as BPA may reasonably specify. The Contractor also agrees to provide such additional reports as may be requested by BPA in connection with any march-in proceeding undertaken by BPA in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), BPA agrees it will not disclose such information to persons outside the Government without the permission of the Contractor.

(i) Preference for United States industry. Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by BPA upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States, or that under the circumstances domestic manufacture is not commercially feasible.

(j) March-in rights. The Contractor agrees that, with respect to any subject invention in which it has acquired title, BPA has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of BPA to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a non-exclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, that BPA has the right to grant such a license itself if BPA determines that-

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) Special provisions for contracts with nonprofit organizations. If the Contractor is a nonprofit organization, it agrees that-

(1) Rights to a subject invention in the United States may not be assigned without the approval of BPA, except where such assignment is made to an organization which has as one of its primary functions the management of inventions, provided that such assignee will be subject to the same provisions as the contractor;

(2) The Contractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) The balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and

(4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision of whether or not to give a preference in any specific case will be at the discretion of the Contractor. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business applicants. The Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this subparagraph (k)(4).

(End of clause)

Clause 17-3   RIGHTS IN DATA (Oct 05)(BPI 17.4.2.1; 17.4.3.1)

(a) Allocation of rights. Except as otherwise provided paragraph (b) in this clause, BPA shall have unlimited rights to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so, in--

(1) All data, including but not limited to computer software and source code, first produced in the performance of this contract; and

(2) Data delivered under this contract (except for proprietary computer software) that constitute manuals or instructional and training material for installation, operation or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract.

(b) Copyright.

(1) Data First Produced in the Performance of the Contract. The Contractor may establish claim to copyright subsisting in any data and computer software first produced in the performance of this contract. The Contractor grants to the Government, and others acting on its behalf, a paid-up non-exclusive, irrevocable, worldwide license for all such data and computer software to reproduce, prepare derivative works, distribute copies to the public (except for computer software), and perform publicly and display publicly, by or on behalf of the Government.

(2) Data Not First Produced in the Performance of this Contract. The contractor should not, without prior written permission of the Contracting Officer, incorporate in data and computer software delivered under this contract any data or computer software not first produced in the performance of this contract and which contains a copyright notice, unless the Contractor

identifies such data and computer software and grants to the Government, or acquires on its behalf at no cost to BPA, a license of the same scope as set forth in subparagraph (b)(1) of this clause;

(c) Release, publication and use of data.

(1) The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data and computer software first produced or specifically used by the Contractor in the performance of this contract, except to the extent such data may be subject to Federal export control or national security laws or regulations, or unless otherwise expressly set forth in this contract.

(2) The Contractor agrees that to the extent it receives or is given access to data and computer software necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data and computer software in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(d) Omitted or incorrect markings. Data and computer software delivered to BPA without a limited rights notice or a copyright notice shall be deemed to have been furnished with unlimited rights, and BPA assumes no liability for the disclosure, use, or reproduction of such data or computer software.

(e) Protection of limited rights data and proprietary computer software. If the Offeror/Contractor desires to protect data and computer software that embody trade secrets or are commercial or financial and confidential or privileged, that are specified to be delivered under this contract, the Offeror/Contractor shall identify such data and computer software to the Contracting Officer as limited rights data. Limited rights data that are formatted as a computer data base for delivery to BPA are to be treated as limited rights data and not proprietary computer software. All markings to proprietary computer software must be in human-readable form that can be readily and visually perceived and in addition may be in machine-readable form as appropriate and feasible under the circumstances. These markings must be affixed by the contractor to the proprietary computer software before its delivery to BPA. The Contracting Officer may require the delivery of such limited rights data and computer software. If delivery of such data and computer software is so required, the Contractor may affix the following "Limited Rights Notice" to the data, and BPA will thereafter treat the data and computer software in accordance with such Notice:

LIMITED RIGHTS NOTICE

(a) This data and proprietary computer software are submitted with limited rights under BPA Contract No. _____ (and subcontract _____. if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that BPA may disclose these data outside the Government for the following purposes, if any, provided that BPA makes such disclosure subject to prohibition against further use and disclosure: (COs may list additional purposes or if none, so state).

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(End of Notice)

(f) Subcontracting. The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractors obligations to BPA under this contract. If a subcontractor refuses to accept terms affording BPA such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer, and shall not proceed with subcontract award without further authorization.

(g) Relationship to patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of Clause)

Clause 17-4   RIGHTS IN DATA--EXISTING AUDIOVISUAL WORKS (Sep 98)(BPI 17.4.3.1)

(a) Except as otherwise provided in this contract, the Contractor grants to the Government, and others acting on its behalf, a paid-up non-exclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under this contract.

(b) The Contractor shall indemnify BPA and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or (2) any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless BPA provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; and do not apply to material furnished to the Contractor by BPA and incorporated in data to which this clause applies.

(End of clause)

Clause 17-5   RIGHTS IN DATA—COPYRIGHT ON SPECIAL WORKS (Oct 05)(BPI 17.4.4.1)

(a) Allocation of Rights.

   (1) BPA shall have--

      (A) Unlimited rights, meaning the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so, in all data and computer software delivered under this contract, and in all data and computer software first produced in the performance of this contract, except as provided in paragraph (b) of this clause for copyright.

      (B) The right to limit exercise of claim to copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in such data, in accordance with subparagraph (b)(1) of this clause.

      (C) The right to limit the release and use of certain data in accordance with paragraph (c) of this clause.

   (2) The Contractor shall have, to the extent permission is granted in accordance with subparagraph (b)(1) of this clause, the right to establish claim to copyright subsisting in data, computer software and documentation and source code material first produced in the performance of this contract.

(b) Copyright.

   (1) Data, computer software and documentation, and source code material first produced in the performance of this contract.

(A) The Contractor agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any data first produced in the performance of this contract without the prior written permission of the Contracting Officer. If a claim to copyright is made, the Contractor grants to the Government, and others acting on its behalf, a paid-up non-exclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(B) If BPA desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in subdivision (b)(1)(A) of this clause, the Contracting Officer may direct the Contractor to establish, or authorize the establishment of, claim to copyright in such data and to assign, or obtain the assignment of, such copyright to the Government or its designated assignee.

(2) Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contain a copyright notice, unless the Contractor identifies such data and grants to the Government or acquires on its behalf, a license of the same scope as set forth in subparagraph (b)(1) of this clause.

(c) Release and use restrictions. Except as otherwise specifically provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor shall the Contractor release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(d) Indemnity. The Contractor shall indemnify BPA and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless BPA provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules or regulations to participate in the defense thereof, and obtains the contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; nor do these provisions apply to material furnished to the Contractor by BPA and incorporated in data to which this clause applies.

(End of clause)

Alternate 1

(e) BPA OWNERSHIP OF SPECIAL WORKS (Oct 05) (BPI 17.4.4.1)

(1) Contractor agrees to promptly disclose to BPA all ideas, inventions, discoveries and improvements (whether patentable or not), that are made, conceived or reduced to practice by Contractor, solely or jointly with others, that are related to the performance of, or arising out of, the Work Product. Contractor further agrees to assign to BPA all right, title and interest in and to the special works and all such ideas, inventions, discoveries and improvements contained therein which are created, compiled or collected for BPA in connection with this Contract. Contractor understands and agrees that all new developments of the special work product which are subject to copyright protection under the United States Copyright Act of 1976, as amended, shall be considered special works within the meaning of Section 101 of the

Copyright Act and that such works constitute and contain valuable proprietary assets and trade secrets of BPA.

(2) In the event that, notwithstanding the foregoing, title to and ownership of the Work Product initially vests in Contractor, Contractor agrees to execute, at BPA's request, all documents as may be necessary to grant, transfer and assign all such title and ownership to BPA. Contractor shall execute and aid in the preparation of any papers that BPA may consider necessary or helpful to obtain or maintain any patents, copyrights, trademarks or other proprietary rights at no charge to BPA, but at BPA's expense. BPA shall reimburse Contractor for reasonable out-of-pocket expenses incurred.

(3) Contractor agrees to obtain or has obtained written assurances from its employees and subcontractor of their contracts to the terms hereof.

(4) Contractor agrees that the Work Product is BPA's sole and exclusive property. Contractor shall treat the Work Product on a confidential basis and not disclose to any third party with BPA's written consent. except when reasonably necessary to perform the services under this Contract. Contractor shall be relieved of this confidentiality obligation if and when BPA discloses the Work Product without any restriction upon further disclosure.

(5) The provision of this clause shall survive any termination of this contract.

(End of clause)

Clause 17-6   COMMERCIAL   COMPUTER   SOFTWARE--RESTRICTED   RIGHTS   (Sep 98)(BPI 17.4.5.1)

(a) As used in this clause, "proprietary computer software" means any computer program, computer data base, or documentation thereof, that has been developed at private expense and either is a trade secret, is commercial or financial and confidential or privileged, or is published and copyrighted.

(b) Notwithstanding any provisions to the contrary contained in any supplier's standard commercial license or lease agreement pertaining to any proprietary computer software delivered under this purchase order/contract, and irrespective of whether any such agreement has been proposed prior to or after issuance of this purchase order/contract or of the fact that such agreement may be affixed to or accompany the proprietary computer software upon delivery, the supplier agrees that BPA shall have the rights that are set forth in paragraph (c) of this clause to use, duplicate or disclose any proprietary computer software delivered under this purchase order/contract. The terms and provisions of this contract, including any commercial lease or license agreement, shall be subject to paragraph (c) of this clause and shall comply with Federal laws and the Bonneville Purchasing Instructions.

(c)(1)   The proprietary computer software delivered under this contract may not be used, reproduced or disclosed by BPA, except as provided in subparagraph (c)(2) of this clause or as expressly stated otherwise in this contract.

(2)   The proprietary computer software may be--

(A)   Used or copied for use in or with the computer or computers (or its replacements) for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(B)   Used or copied for use in or with a backup computer if any computer for which it was acquired is inoperative;

(C) Reproduced for safekeeping (archives) or backup purposes;

(D) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating any of the delivered, proprietary computer software shall be subject to same restrictions set forth in this purchase order/contract;

(E) Disclosed to and reproduced for use by BPA support service contractors or their subcontractors, subject to the same restrictions set forth in this purchase order/contract; and

(3) If the proprietary computer software delivered under this purchase order/contract is published and copyrighted, it is licensed to BPA, without disclosure prohibitions, with the rights set forth in subparagraph (c)(2) of this clause, unless expressly stated otherwise in this purchase order/contract.

(4) To the extent feasible the supplier shall affix a Notice substantially as follows to any proprietary computer software delivered under this purchase order/contract; or, if the supplier does not, BPA has the right to do so: "Notice--Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of the Government regarding its use, reproduction and disclosure are as set forth in BPA Contract (or Purchase Order) No._____.

(d) If any proprietary computer software is delivered under this contract with the copyright notice of 17 U.S.C. 401, it will be presumed to be published and copyrighted and licensed to the Government in accordance with subparagraph (c)(3) of this clause, unless a statement substantially as follows accompanies such copyright notice: "Unpublished--rights reserved under the copyright laws of the United States."

(End of clause)

17-7   INTELLECTUAL PROPERTY INFRINGEMENT INDEMNIFICATION (Oct 05)(BPI 17.4.6.1)

(a) Contractor shall defend and hold BPA harmless from any claim by a third party that the Software infringes any patent, copyright or trade secret of that third party, provided: (i) Contractor is promptly notified of the claim; (ii) Contractor receives reasonable cooperation from BPA necessary to perform Contractor's obligations hereunder; and (iii) Contractor has sole control over the defense and all negotiations for a settlement or compromise. The foregoing obligation of Contractor does not apply with respect to Software or portions or components thereof: (i) not supplied by the Contractor; (ii) used in a manner not expressly authorized by this Contract (iii) made in whole or in part in accordance with BPA's specifications; (iv) modified by BPA, if the alleged infringement relates to such modification; (v) combined with other products (hardware or software), processes or materials where the alleged infringement would not exist but for such combination; or (vi) where BPA continues the allegedly infringing activity after being notified thereof and provided modifications that would have avoided the alleged infringement.

(b) In the event the Software is held by a court of competent jurisdiction to constitute an infringement and use of the Software is enjoined, Contractor shall do one of the following: (i) procure for BPA the right to continue use of the Software; (ii) provide a modification to the Software so that its use becomes non-infringing; (iii) replace the Software with software which is substantially similar in functionality and performance; or (iv) if none of the foregoing alternatives is reasonably available, the Contractor shall refund the full value of the License fees paid by BPA for the infringing Software,. This clause states Contractor's sole liability and BPA's exclusive

remedy for infringement claims.

(End of clause)

Clause 17-8   SOURCE CODE ESCROW REQUIREMENT – THIRD PARTY AGENT (Oct 05) (BPI 17.4.7.1)

(a) The Contractor shall provide reasonable access to its software source code and all relevant software documentation to BPA. The intent of this requirement is to provide security to BPA in its abilities to maintain and develop the software in the event that the Contractor is unable to perform its obligations under this Contract and for the purpose of auditing the internal functionality of the source code.

(b) The Contractor shall notify BPA immediately in the event that Contractor intends to cease maintaining any product(s) or doing business due to bankruptcy or otherwise fails to maintain the product(s). If Contractor is unable to provide reasonable written assurances to BPA within thirty (30) days of such notification that under such circumstances Contractor will be able to continue to support the product(s), then Contractor hereby grants to BPA a license to use the applicable Source Code(s) for the product(s) as may be reasonably required for the purpose of BPA's continued use and maintenance of the product(s).

(c) In order to ensure compliance with the foregoing, the Contractor shall deposit in escrow with an escrow agent, and update as necessary, a copy of the Source Code and related documentation which correspond to the most current Version of each product in use by BPA. The Contractor, shall provide to BPA a tripartite escrow agreement to be signed by all parties. All expenses associated with the agreement will be borne by the Contractor. The escrow agent shall be an institution or entity that routinely engages in the practice of holding software source code for the benefit of third parties licensed to use the related object code or software programs. The escrow agent shall be financially and operationally independent of the Contractor, including the Contractor's parent company, subcontractors, subsidiaries and affiliates.

(d) Within ten (10) calendar days from the Contractor's first delivery of software to BPA, or within ten calendar days from the delivery of changed or updated software to BPA, the Contractor shall deliver to the Escrow agent one copy of the related source code material.   The Contractor warrants that the source code material delivered to the Escrow agent will be complete, accurate and current.

(e) Under the escrow agreement, the escrow agent will release the source code for the Licensed Software upon the occurrence of the conditions set forth in the agreement. BPA or its agent shall have reasonable access to inspect the escrowed source code for compliance herein. BPA shall use the source code for the sole purpose of maintaining the licensed software for itself. One of the following "Triggering Events" shall have occurred:

  (1) Decision by the Contractor or its successor in interest to discontinue maintenance of the licensed software;

  (2) The filing of a bankruptcy petition by or against the Contractor that is not dismissed within 60 days of its filing;

  (3) Appointment of a receiver, trustee, or custodian of all or a substantial portion of Contractor's assets which is not dismissed within 60 days of such appointment;

  (4) An assignment for the benefit of creditors by the Contractor of all or a substantial portion of the Contractor's assets which is not revoked within 60 days of its creation; or

(5) Receipt by the Escrow Agent of a notice or final order to release the source code to BPA issued by either a trustee in bankruptcy appointed for Contractor, or a court having lawful jurisdiction

(f) After a Triggering Event, BPA shall have provided to the escrow agent:

(1) Evidence satisfactory to the Escrow Agent in writing that BPA has previously notified the Contractor of such Triggering Event and the contractor did not object to the release of the source code;

(2) A written demand that the source code be released and delivered to BPA;

(3) A written commitment that BPA will use the source code only as permitted under the terms of the Escrow Agreement;

(4) Specific delivery instructions.

(End of clause)

Clause 17-9   SOURCE CODE ESCROW REQUIREMENT – BPA AS ESCROW AGENT (Oct 05) (BPI 17.4.7.1)

(a) The Contractor shall provide reasonable access to its software source code and all relevant software documentation to BPA. The intent of this requirement is to provide security to BPA in its abilities to maintain and develop the software in the event that the Contractor is unable to perform its obligations under this Contract and for the purpose of auditing the internal functionality of the source code.

(b) The Contractor shall notify BPA immediately in the event that Contractor intends to cease maintaining any product(s) or doing business due to bankruptcy or otherwise fails to maintain the product(s). If Contractor is unable to provide reasonable written assurances to BPA within thirty (30) days of such notification that under such circumstances Contractor will be able to continue to support the product(s), then Contractor hereby grants to BPA a license to use the applicable Source Code(s) for the product(s) as may be reasonably required for the purpose of BPA's continued use and maintenance of the product(s).

(c) In order to ensure compliance with the foregoing, the Contractor shall deposit in escrow with BPA, and update as necessary, a copy of the Source Code and related documentation which correspond to the most current version of each product in use by BPA. BPA shall preserve and protect the material collected for escrow, maintain it in a secure safe with BPA Cyber Security staff completely separate from the product(s) in use, and restrict all access to the materials to one the following "Triggering Events":

(1) Decision by the Contractor or its successor in interest to discontinue maintenance of the licensed software;

(2) The filing of a bankruptcy petition by or against the Contractor that is not dismissed within 60 days of its filing;

(3) Appointment of a receiver, trustee, or custodian of all or a substantial portion of Contractor's assets, which is not dismissed within 60 days of such appointment;

(4) An assignment for the benefit of creditors by the Contractor of all or a substantial portion of the Contractor's assets which is not revoked within 60 days of its creation; or

(5) BPA receives a notice or final order to release the source code, issued by either (1) a trustee in bankruptcy appointed for Contractor, or (ii) a court having lawful jurisdiction.

(d) Within ten (10) calendar days from the Contractor's first delivery of software to BPA, or within ten calendar days from the delivery of changed or updated software to BPA, the Contractor shall also deliver to BPA one copy of the related source code material for deposit into escrow. The Contractor warrants that the source code material delivered for escrow is complete, accurate and current.

(e) BPA, or its agent, shall have reasonable access to inspect the escrowed source code for compliance herein. BPA shall use the source code for the sole purpose of maintaining the licensed software for itself.

(End of clause)