LIABILITY PROVISIONS—COST-REIMBURSEMENT (7-92)

(a) Applicability. This clause is not applicable to small business concerns or to nonprofit organizations.

(b) Definitions. (1) The term "fines and penalties," as used in this clause, means sums of money the payment of which Federal or state law or regulation exacts as a punishment or deterrence against doing some act that is prohibited, or not doing some act that is required, by law or regulation. Fines or penalties may be imposed in a civil enforcement action or result from a criminal conviction. Fines or penalties shall not be construed as including assessments that are imposed as damages on the basis of civil litigation or that are imposed on the basis of strict liability (that is, without regard to the fault or negligence of the party involved).

(2) The term "nonprofit organization," as used in this clause, means an organization that is considered nonprofit under the laws of the jurisdiction in which it is incorporated. Subsidiaries may be considered nonprofit organizations if all entities above it in the corporate structure are considered nonprofit under the laws of the incorporating jurisdiction.

(c) Unallowable Costs. This paragraph (c) identifies costs that (i) if incurred by the Seller, are unallowable to the extent specified in paragraph (e) below, notwithstanding any provisions to the contrary in the "Allowable Cost and Payment," "Insurance—Liability to Third Persons," "Government Property," or any other clause of this subcontract; and (ii) if incurred by or assessed against the Company, may be determined by DOE to be unallowable under the Company's management and operating contract:

(1) Fines and penalties, including assessed interest and cost of litigation, that are incurred in whole or in part as a result of negligence or willful misconduct of the Seller or a subcontractor at any tier, where the breach of the legal duty giving rise to such fine or penalty involves an area of responsibility clearly placed on the Company and/or the Seller or subcontractor.

(2) Civil or criminal penalties assessed under the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2273, 2282, and the costs of litigation resulting from such assessments, except as may be specifically provided in regulations implementing those civil or criminal penalty provisions.

(3) Costs that are avoidable and that are incurred in whole or in part as a result of negligence or willful misconduct on the part of any of the Seller's or subcontractor's personnel, in performing work under this subcontract.

(i) Such costs may include, for example, additional programmatic expenses for research and development or production activities, and third-party claims, but (A) shall not include scrap, waste, and other routine damages or losses that occur as part of the cost of doing business and that are reasonably anticipated, and (B) shall not include consequential damages.

(ii) Costs of litigation incurred in bringing or defending claims relating to these costs are also unallowable.

(4) Costs of bonds and insurance (to the extent that they are incurred to protect and indemnify against otherwise unallowable costs such as fines and penalties, third-party claims, negligently or willfully caused damage to or destruction or loss of Government property, and theft or unauthorized use of Government property), except and only to the extent that such insurance or bond is required by the specific written direction of the Company.

(5) (i) Costs and expenses resulting from damage to or destruction or loss of Government property in whole or in part as a result of negligence or willful misconduct of the Seller or subcontractor at any tier. These costs are those incurred in effecting repairs to or replacement of Government property, but do not include scrap, waste, and other routine damages or losses that occur as part of the cost of doing business and that are reasonably anticipated. Costs that are unallowable are the result of circumstances: (i) Clearly within the Company's and/or the Seller's or subcontractor's control, and (ii) resulting in whole or in part from acts or omissions of the Seller or subcontractor, in which the exercise of reasonable care would have avoided the loss, destruction, or damage. In the event that such costs and expenses resulting from damage to or destruction or loss of Government property are also in part caused by third parties, other than DOE or the Company, such costs and expenses are unallowable and will not be reimbursed by the Company.

(ii) In addition, the Seller shall be liable for damage to, or destruction or loss of, Government property stemming from theft, embezzlement, unauthorized use, or any other ultra vires activity by Seller or subcontractor personnel at any tier. Under these circumstances, the Seller shall be required to bear the cost of repairing or replacing the damaged, destroyed, or lost Government property.

(iii) For the purposes of this paragraph (c)(5):

(A) "Negligence" is the failure to exercise that standard of care that a reasonable and prudent person would exercise under the same or similar circumstances or in an identical or similar environment.

(B) "Government property" means: (i) Government-furnished property; (ii) property acquired by the Seller, title to which vests in the Government under the "Government Property" clause of this subcontract; and (iii) Government-owned real and personal property at DOE facilities managed and operated by the Company.

(6) The Seller may, at its own expense and not as an allowable cost, procure for its own protection insurance covering damage to or destruction or loss of Government property to compensate the Seller for any unallowable or nonreimbursable costs incurred in connection with such property.

(d) Recovery from Seller. Subject to the ceiling on the Seller's liability established in paragraph (e) below, and in accordance with the procedures established in paragraph (g) below or by other appropriate means, the Company may recover from the Seller any of the costs identified in paragraph (c) above incurred by or assessed against the Company that DOE determines or proposes to determine to be unallowable.

(e) Ceiling on Certain Liabilities. (1) The financial obligations of the Seller for (i) noncriminal fines and penalties under paragraph (c)(1) of this clause, (ii) "avoidable" costs under paragraph (c)(3), and (iii) damage to or destruction or loss of Government property under paragraph (c)(5) shall be limited to the cumulative amount of the fee actually earned by the Seller under this subcontract during the Company's six-month award-fee evaluation period (*NOTE: under the Company's management and operating contract with DOE, these periods are October through March and April through September*) when the event or events that were caused by the Seller or subcontractor at any tier and that led to the incurrence of costs or liabilities or the imposition of fines and penalties occurred. [This ceiling on liability does not apply to any categories of unallowable costs other than those described in this paragraph (e)(1).]

(2) In the case of continuing activities of the Seller that occur over a number of the Company's award-fee evaluation periods and result in liabilities or costs described in this clause, the potential financial obligation of the Seller shall be limited to the amount of the fee earned by the Seller in the Company's single award-fee evaluation period when the incident(s) or event(s) giving rise to the Seller's disallowed cost or expense took place.

(3) If it is not possible to relate or reasonably allocate particular activities to individual Company award-fee evaluation periods, the financial obligation of the Seller shall be limited to the amount of actual fee earned by the Seller during the evaluation period when the amount of such nonreimbursable costs or liabilities was finally determined.

(4) If the determination of the award-fee evaluation period during which the activity or incident resulting in the unallowable avoidable cost occurred is made after the termination or expiration of this subcontract or after the Seller is otherwise replaced, the actual fee earned by the Seller for the last evaluation period that this subcontract was in effect shall be used, after deducting unallowable costs under this clause that were previously charged to the Seller during that period.

(f) Reimbursement to Seller. To the extent that avoidable costs incurred by the negligence of the Seller are reimbursed by DOE to the Company, the Company will reimburse the Seller for such costs to the extent that the Seller has already paid such costs or incurred them without reimbursement.

(g) Financial Guarantee. (1) Within ten days after the award of this subcontract, and before beginning any work on-site at a DOE installation managed and operated by the Company, the Seller shall establish an irrevocable letter of credit in favor of the Company. If this subcontract has a period of performance of six months or less, the amount of the credit shall be equal to the subcontract fee. If this subcontract has a period of performance of more than six months, the amount of the credit shall be determined by (i) dividing the amount of fee to be paid under this subcontract by the number of months in the period of performance, and (ii) multiplying the quotient by six. The expiration date of the letter of credit shall be no earlier than one year from the date of award of this subcontract.

(2) Except as authorized by paragraph (3) below, each year during the performance of this subcontract the Seller shall renew letters of credit (or establish new irrevocable letters of credit), in the amount specified above, no later than 15 days before their expiration date. The expiration date of the final renewed or replacement letter of credit shall be one year from the date of completion of performance of this subcontract.

(3) In lieu of renewing or completely replacing a letter of credit, the Seller may authorize the Company in writing to retain, as a financial guarantee, a percentage of the earned fee greater than that authorized by the "Fixed Fee" clause of this subcontract. (In appropriate cases, this authorization must be coupled with replacement letters of credit in amounts and with expiration dates sufficient to assure that the combined amount of the retained fee and the replacement letter of credit is at all times no less than the amount of the initial letter of credit specified in paragraph (g)(1) above.

(4) The Company may draw against a letter of credit or apply retained fee to recover its costs that are determined by DOE to be unallowable but that result from negligence or willful misconduct by the Seller or a subcontractor at any tier. In this event, the Company, in order to reestablish the financial guarantee in the amount specified in paragraph (g)(1) above, may in its discretion either or both (i) withhold earned fee beyond that percentage, if any, authorized by the Seller in accordance with paragraph (g)(3) above, or (ii) require the Seller promptly to furnish additional irrevocable letters of credit.

(h) Subcontracts. The Seller shall include the substance of paragraphs (a) through (f) and (h) and (i) of this clause in subcontracts hereunder with large-business concerns for work to be done on site at a DOE facility managed and operated by the Company. Financial guarantees (whether of the types discussed in paragraph (g) of this clause or of any other form) are considered to be a matter for resolution by the Seller and its subcontractors.

(i) Default. If the Seller fails to comply with the provisions of this clause, this subcontract may be terminated for default.