



GENERAL PROVISIONS FOR COMMERCIAL SUPPLIES AND SERVICES (FOREIGN)

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CLAUSE 1 - DEFINITIONS

As used herein, the following terms shall have the indicated meanings:

- "Ordered Items" or "Items" means the commercial items, components, or services, as defined in FAR 52.202-1, contracted for under the Subcontract
- "CFR" means the U. S. Code of Federal Regulations.
- "DOE" means the U. S. Department of Energy.
- "Government" means the United States Government.
- "Subcontract" means the subcontract or agreement entered into with the Seller which includes these General Provisions.
- "LBNL" means the Lawrence Berkeley National Laboratory.
- "Subcontractor" means the party who has entered into the Subcontract, as identified in the Subcontract.
- "University" means The Regents of the University of California, acting through the LBNL.

CLAUSE 2 - SCOPE OF SUBCONTRACT

The scope of the Subcontract shall be limited to the acquisition of commercial items or commercial components, including services, as defined in FAR 2.101, from a foreign source, and shall not include any research, development, or demonstration work.

To the maximum practicable extent the Subcontractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items, as defined in FAR 2.101, as components of items to be supplied under the Purchase Order.

The Subcontract is entered into as a subcontract under the University's Prime Contract No. DE-AC02-05CH11231 with the Government, represented by the DOE, for management and operation of the LBNL and the performance of certain research and development work.

CLAUSE 3 - ACCEPTANCE OF SUBCONTRACT

The Subcontractor's written acceptance of this Subcontract or the performance of any portion of this Subcontract shall constitute the Subcontractor's unqualified acceptance of this Subcontract and all of the Subcontract's terms and conditions. Any alterations made to the documents comprising this Subcontract or any conditions imposed by the Subcontractor upon its written acceptance of this Subcontract are not acceptable and shall constitute a proposal for modification of the Subcontract only and shall have no effect on the validity or the Subcontractor's acceptance of this Subcontract and its terms and conditions, anything to the contrary notwithstanding.

In the event the Subcontractor's business status indicated in the Subcontract or in the Subcontractor's proposal is not accurate and current, in accordance with applicable Federal laws, executive orders, and regulations, the University may cancel the Subcontract, without further obligation.

CLAUSE 4 - SHIPMENTS FOR UNIVERSITY'S ACCOUNT

Except as otherwise provided in the Subcontract, all shipments by the Subcontractor for the University's account shall be (1) shipped FOB Shipping Point and marked as shipped "For the U. S. Department of Energy;" (2) shipped at the maximum declared value for the lowest applicable transportation rate or classification, and the bill of lading shall so note; and (3) self-insured by the University and not insured by the Subcontractor. Airway bills shall be marked with the appropriate "Government Package" entry. Shipping costs in excess of those per the "Shipping Instructions" specified on the face of this Subcontract shall be deducted from the Subcontractor's invoice(s).

CLAUSE 5 - TITLE AND RISK OF LOSS

Unless otherwise provided in the Subcontract, title to the Ordered Items purchased under the Subcontract shall pass directly to the Government upon and the risk of loss or damage to the Ordered Items shall remain with the Subcontractor until, and shall pass to the University upon:

- If F.O.B. Shipping Point: Completion of delivery to the carrier and any loading by the Subcontractor.
- If F.O.B. Destination: Completion of delivery or commencement of unloading by the University at the delivery point.

However, (1) if the Subcontract provides for formal acceptance of any items by the University, then title to such items shall pass directly to the Government upon such formal acceptance; and (2) the title and risk of loss or damage to items that are non-conforming shall remain with the Subcontractor until acceptance of the items by the University as conforming.

CLAUSE 6 - PACKAGING INSTRUCTIONS

The Subcontractor shall suitably package the items to prevent damage during handling and shipping. Any damage resulting from improper packaging, containerizing, or lack thereof shall be the liability of the Subcontractor, anything to the contrary notwithstanding. The Subcontractor shall indicate the University Subcontract number on each container or package. An itemized packing list shall be affixed to the outermost cover of each container or package.

The University encourages the use of biodegradable packaging materials. To assist in this endeavor, the Subcontractor is requested to use every reasonable effort to use biodegradable packaging materials for shipments to the University.

CLAUSE 7 - INSPECTION

The University reserves the right to inspect all and every part of the Items under the Subcontract, during and after completion of performance. The University shall not be obligated to inspect the Items, and neither the inspection nor the lack of inspection by the University shall relieve the Subcontractor of its responsibility for

providing the Items in accordance with the terms and conditions of the Subcontract. The inspection or use of or payment for an Item under the Subcontract, either wholly or in part, shall not be construed as an acceptance.

If any Item or any part of it is not in accordance with the terms and conditions of the Subcontract, the University shall notify the Subcontractor that the Item is rejected. Thereupon, the Subcontractor shall, at its own expense, take the necessary corrective action. The University shall reject performance or revoke its acceptance of an Item: (1) within a reasonable time after a defect is discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the Item, unless the change is due to a defect in the Item.

CLAUSE 8 - INVOICES

The Subcontractor shall submit its invoice at the time of final shipment of the Ordered Items of final completion of the services, unless otherwise provided in the Subcontract. The invoices shall reference the Subcontract Number and include a complete description of the Ordered Items, prices, and ship dates, and the name of the University's Procurement Specialist. Failure to comply with any of these requirements may result in a delay in payment of the invoices.

CLAUSE 9 - PAYMENT

Payment shall be made for delivered Ordered Items, including completed services, accepted by the University. Unless otherwise provided in the Subcontract, the terms of payment shall be 30 days after receipt of the Subcontractor's properly submitted invoice. Any offered discount shall be taken if payment is made within the discount period indicated by the Subcontractor. Invoices must be accompanied by transportation receipts, or facsimiles, if transportation is payable and charged as a separate item. Payments may be made by check or electronic funds transfer, at the option of the University. Payment shall be deemed to have been made as of the date of mailing or the date on which an electronic funds transfer was made.

CLAUSE 10 - QUALITY OF SUPPLIES

A. The Ordered Items(s), including any materials and supplies furnished or used by the Subcontractor in the performance of any services, shall as a minimum: (1) conform to the requirements of this Subcontract and be as warranted; (2) be new and not be of such age or so deteriorated as to impair their usefulness or safety; and (3) not contain any counterfeit/suspect items. The furnishing of reconditioned Ordered Items must be specified in the Subcontract or approved by the University's Procurement Specialist, and shall be warranted the same as new items.

B. The University will not accept any Ordered Items, including any services involving the furnishing or use of materials or supplies, found by the University to not meet the minimum requirements of paragraph A, above; to be reconditioned; or to constitute suspect/counterfeit items, notwithstanding any inspection or acceptance of delivery by the University, unless such condition is specifically approved in writing by the University Procurement Specialist. The Subcontractor shall promptly replace such items at its expense with conforming items.

C. The University will impound any suspect/counterfeit items furnished or used under this Subcontract and may provide such items to the appropriate authorities for investigation. The University reserves the right to withhold payment for the suspect/counterfeit items pending the results of any such investigation.

D. A suspect item is any material, part, or component that visual inspection, testing, or other information indicates may not conform to established Government or industry-accepted specifications or national consensus standards. A counterfeit item is a suspect item that is a copy or substitute made without legal right or authority or whose material, performance, or characteristics are knowingly misrepresented by the Subcontractor, supplier, distributor, or manufacturer. Types of known suspect or counterfeit items include, but are not limited to: fasteners, circuit breakers, valves, piping components, electrical devices, plate, bar, shapes, and channel members. Such items may be falsely labeled as a different class of part, or be used or refurbished parts that are falsely represented as new parts.

CLAUSE 11 - WARRANTY

The Subcontractor warrants that the Ordered Items will be merchantable and fit for use for the particular purpose described in the

Subcontract and that services performed will be as specified in the descriptions and specifications of this Subcontract and free from defects in workmanship, material, and Subcontractor's design or engineering contributions. The Subcontractor shall correct any nonconformance with this warranty discovered within one year after acceptance or initial use of the supplies or services. Except as otherwise provided by an express or implied warranty, the Subcontractor will not be liable to the University for consequential damages resulting from any defect or deficiencies in accepted Ordered Items.

CLAUSE 12 - FORCED, CONVICT, AND INDENTURED LABOR

(a) By signing or accepting this subcontract, the Subcontractor hereby certifies that no equipment, materials, or supplies furnished to the University pursuant to this subcontract will be produced in whole or in part by forced labor, convict labor, or indentured labor under penal sanction.

(b) Any Subcontractor subcontracting with the University who knew or should have known that the equipment, materials, or supplies furnished to the University were produced in whole or in part by forced labor, convict labor, or indentured labor under penal sanction, when entering into a subcontract pursuant to the above, may have any or all of the following sanctions imposed:

(1) The subcontract under which the prohibited equipment, materials, or supplies were provided may be voided at the option of the University; or

(2) The Subcontractor may be removed from consideration for University subcontracts for at least one year.

CLAUSE 13 - LAWS AND REGULATIONS

The Ordered Items shall be designed, produced, sold, and delivered in accordance with, and Subcontractor and its employees and sub-vendors shall at all times comply with, all applicable laws, rules, regulations, and executive orders, including, but not limited to, those relating to wages, hours, employment discrimination, immigration, safety, export control, safety, and environmental protection.

CLAUSE 14 - CHANGES

The University may direct the Subcontractor to make changes within the general scope of this Subcontract to (1) any Ordered Items to be specifically manufactured or assembled for the University, or their method of shipment, packaging, or place of delivery; and (2) any services to be performed or their time and place of performance. If any such changes causes an increase or decrease in the cost of, or the time required for, performance of any part of this Subcontract, the University Procurement Specialist shall make an equitable adjustment in the Subcontract price, the delivery schedule, or both, by a written modification to the Subcontract. Changes in the terms and conditions of this Subcontract may be made only by the written agreement of the parties.

CLAUSE 15 - TAX ASSESSMENT NOTIFICATION

The Subcontractor agrees to notify the University of any State or local law tax, fee or charge levied or purported to be levied on or collected from the Subcontractor in connection with this Subcontract for which an exemption is claimed by the University or concerning which the Subcontractor has reason to believe or the University has advised the Subcontractor that such tax, fee, or charge is or may be inapplicable or invalid. The Subcontractor further agrees to refrain from paying any such tax, fee, or charge, unless otherwise authorized by the University, and to take such steps as may be required by the University to cause such tax, fee, or charge to be paid under protest and, if so directed by the University, to cause to be assigned to the University or its designee any and all rights to the abatement or refund of any such tax, fee, or charge, and to permit the University or its designee to join with the Subcontractor in any proceedings for the recovery thereof or to sue for recovery in the Subcontractor's name.

CLAUSE 16 - ASSIGNMENTS

This Subcontract may be assigned by the University to the Government or its designee(s).

Except as to assignment of payment due hereunder, the Subcontractor shall have no right, power or authority to sell, mortgage, transfer or assign this Subcontract, any portion hereof, any interest herein or any

claim hereunder, nor allow or permit any other party or parties to have any interest in or use any part of the rights or obligations granted hereunder for any purpose whatsoever without the prior written consent of the University.

CLAUSE 17 - DISPUTES

Except as otherwise provided in the Subcontract, any claim for an equitable adjustment under the Subcontract not resolved in the ordinary course of business shall be referred in writing to the University Procurement Specialist within 30 calendar days of the act, event, or order giving rise to the claim. The Subcontractor must submit its claim for an equitable adjustment, if any, within 30 days from receipt of the directed change, or by such other time as the University Procurement Specialist may permit. The representatives of the parties, or their designees, shall then attempt in good faith to resolve the dispute by negotiations. All negotiations shall be confidential and shall be treated as compromise and settlement negotiations, for the purposes of application of rules of evidence. Pending resolution of the dispute, the Subcontractor shall proceed diligently with the performance of the Subcontract, in accordance with its terms and conditions.

Any unresolved dispute with a value under \$100,000 relating to the Subcontract (whether contract, tort, or both), or the breach of the Subcontract shall be arbitrated by and in accordance with the then existing commercial arbitration rules of the American Arbitration Association (AAA). Judgment on the award rendered by the arbitrator may be entered in any court in Alameda County, CA having jurisdiction.

The following modifications are made to the AAA rules: (1) the arbitrator shall be neutral and appointed by the AAA; (2) the location for all arbitration proceedings shall be in Alameda County; and (3) each party to the arbitration shall pay its pro rata share of the arbitrator's fees not including counsel fees or witness fees or other expenses incurred by a party for its own benefit.

The parties shall consider the use of a form of alternate disputes resolution (ADR), including non-binding mediation and binding arbitration, for any unresolved dispute with a value of \$100,000 or more. In the event that ADR fails or is not used for such disputes, the parties may thereafter pursue any remedy they may have, at law or in equity, in a court of competent jurisdiction, in accordance with the provision of these GENERAL PROVISIONS entitled *GOVERNING LAW AND VENUE*.

CLAUSE 18 - BANKRUPTCY

If the Subcontractor enters into any proceeding related to bankruptcy, it shall give written notice to the University's Procurement Specialist via certified mail within five days of initiation of the proceeding. The notification shall include the date on which the proceeding was filed, the identity and location of the court, and a listing of the LBNL purchase orders, subcontracts, or agreements affected.

CLAUSE 19 - EXCUSABLE DELAYS

The Subcontractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Subcontractor and without its fault or negligence, such as acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, flood, epidemics quarantine, restrictions, strikes, unusually severe weather, and delays of common carriers. The Subcontractor shall notify the University in writing as soon as reasonably possible after commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give the University written notice of the cessation of such occurrence.

CLAUSE 20 - TERMINATION

The Subcontract may be terminated by either party at any time, at will, with or without cause, with or without the giving of any reasons, and by giving notice to the other party at least 15 calendar days before the termination is to be effective.

In the event of a termination by the University, the Subcontractor shall be paid, subject to the terms and conditions of the Subcontract, a percentage of the Subcontract price reflecting the percentage of work performed prior to the notice of termination, plus any reasonable charges resulting from the termination which the Subcontractor can substantiate to the satisfaction of the University, using the

Subcontractor's standard record keeping system; provided, however, that the total thereof shall not exceed the Subcontract price. The Subcontractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

In the event of a termination by the Subcontractor, the University shall be paid, subject to the terms and conditions of the Subcontract: (1) its costs incurred in obtaining substitute performance from another source, including, without limitation, the difference between the price for the terminated Items and the market price for substitute items at the time of the termination plus the University's costs and expenses incurred in obtaining substitute performance, and any other reasonable expense incident to the termination, but less any expenses saved in consequence of the termination; and (2) any incidental or consequential damages resulting from any delay in obtaining substitute performance beyond the time stipulated for the Subcontractor's performance.

If a default occurs under the Subcontract, and if within 30 calendar days after the non-defaulting party has given the defaulting party notice of the event of default the defaulting party has not cured the default or, if the default cannot be reasonably cured within such time period, if the defaulting party has not commenced the cure within such time period, diligently continued to pursue such cure, and completed it within 45 days after such notice, the non-defaulting party may, at its option, terminate the Subcontract at any time thereafter upon written notice to the defaulting party. In the event of a termination for default, the non-defaulting party may thereafter pursue any remedy they may have, at law or in equity, in a court of competent jurisdiction, in accordance with the provision of these General Provisions entitled *GOVERNING LAW AND VENUE*.

CLAUSE 21 – PRICING OF ADJUSTMENTS

If costs are a factor in determining any price adjustment pursuant to a change made to this Subcontract, such costs shall be in accordance with the contract cost principles and procedures in Part 31 of the Federal Acquisition Regulation (48 CFR Part 31), as supplemented by DEAR Part 931(48 CFR Part 931) in effect as of the date of award of this Subcontract. The University reserves the right to review the Subcontractor's records to verify that such price adjustments conform to these requirements. The review may be performed by University personnel or a cognizant Government audit agency.

CLAUSE 22 - RELEASE OF INFORMATION

The Subcontractor shall coordinate any planned advertisements, news releases, or other public releases of information concerning this Subcontract, the undertaking, or any data developed hereunder with the University's Procurement Specialist prior to release. The Subcontractor may acknowledge the University, the LBNL, and Government sponsorship as appropriate, provided the University's Procurement Specialist is provided written notice thereof.

CLAUSE 23 - DOCUMENTS OF SUBCONTRACTOR

The provisions of any quotation or other documents of the Subcontractor referenced in or incorporated as a part of this Subcontract are referenced or incorporated only for the purpose of specifying the nature of the materials, supplies, or services ordered, the price therefor, and/or the delivery thereof, and any terms and conditions contained in such referenced or incorporated documents shall not apply.

CLAUSE 24 - ENTIRE AGREEMENT AND ORDER OF PRECEDENCE

This Subcontract shall consist of the Subcontract document (including any signature page and schedule of articles), these General Provisions, and any other referenced or incorporated clauses, provisions, and documents, which is the entire agreement between the parties concerning the subject matter hereof and supersedes all prior proposals, representations, negotiations, or agreements, whether written or oral.

Any inconsistencies in the terms and conditions comprising the Subcontract shall be resolved by giving precedence in the following order: (a) the Subcontract document; (b) these General Provisions, including the FAR and DEAR clauses listed in the clause entitled *Clauses Incorporated by Reference*; (c) any specifications; (d) other documents listed in the Subcontract Article entitled *Incorporated Documents*, if any, in the order in which they are listed; and (e) any other referenced or incorporated clauses, provisions, and documents.

CLAUSE 25 - GOVERNING LAW AND VENUE

The Subcontract shall be interpreted in accordance with the substantive and procedural laws of the State of California. Any action at law or judicial proceeding instituted by either party pertaining to the Subcontract shall be instituted in the State of California in the Superior Court of Alameda County.

CLAUSE 26 – PATENT, TRADEMARK, AND COPYRIGHT INFRINGEMENT

In addition to Patent Indemnity Clause 52.227-3 below, the Subcontractor shall indemnify the University and the Government and their officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this Subcontract, provided the Subcontractor is reasonably notified of such claims and proceedings.

CLAUSE 27 – CLAUSES INCORPORATED BY REFERENCE

The FAR and DEAR clauses listed below, which are located in Chapters 1 and 9, respectively, of Title 48 of the Code of Federal Regulations, are incorporated by this reference as a part of the University's Purchase Order or Subcontract (hereinafter "Subcontract") as prescribed below. As used in the clauses, the term "contract" shall mean the Subcontract; the term "Contractor" shall mean the entity (hereinafter "Subcontractor") who entered into the Subcontract with the University; the term "subcontractor" shall mean the Subcontractor's subcontractor; and the terms "Government" and "Contracting Officer" shall mean the University, except in FAR clauses 52.227-1, 52.227-2, 52.227-3, 52.227-14, and 52.227-19, in which clauses "Government" shall mean the U. S. Government and "Contracting Officer" shall mean the DOE Contracting Officer for Prime Contract DE-AC02-05CH11231 with the University. As used in FAR clause 52.245-1, the terms "Government" and "Contracting Officer" shall mean the University, except with respect to title. As used in DEAR clause 952.227-9, the term "DOE" shall mean DOE and the University. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

APPLICABLE TO ALL SUBCONTRACTS:

- FAR 52.203-6 RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (SEPT 2006) AND ALTERNATE I (OCT 1995), if the Subcontract exceeds \$100,000.
- FAR 52.223-3 HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA (JAN 1997), with Alternate I (JUL 1995). Applies if the Subcontract involves the delivery of any hazardous materials.
- FAR 52.225-13 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (JUN 2008)
- FAR 52.227-1 AUTHORIZATION AND CONSENT (DEC 2007). Applies if the Subcontract exceeds \$100,000.

- FAR 52.227-2 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (DEC 2007). Applies if the Subcontract exceeds \$100,000.
- FAR 52.227-3 PATENT INDEMNITY (APR 1984). Applies if the Subcontract exceeds \$100,000.
- DEAR 952-227-9 REFUND OF ROYALTIES (FEB 1995). Applies if "royalties" are paid under the Subcontract by the Subcontractor, or by a subcontractor at any tier.
- FAR 52.227-14 RIGHTS IN DATA-GENERAL (DEC 2007), with Alternate V, and DEAR 927.409 paragraphs (a) and (d)(3).
Applies if any "data" will be produced, furnished, or acquired under the Subcontract.
If delivery of Restricted Computer Software is required, then Alternate III shall apply.
If delivery of Limited Rights Data is required, then Alternate II shall apply, with the following five purposes added at the end of paragraph (a) of the clause:
 1. Use (except for manufacture) by other contractors;
 2. Evaluation by non-government evaluators;
 3. Use (except for manufacture) by other contractors participating in the Government's program of which the specific subcontracts is a part, for information and use in connection with the work performed under each subcontracts;
 4. Emergency repair or overhaul work; and
 5. 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.
- FAR 52.227-19 COMMERCIAL COMPUTER SOFTWARE LICENSE (DEC 2007). Applies if the Subcontract involves the acquisition of commercially available computer software.
- DEAR 952-227-82 RIGHTS TO PROPOSAL DATA (APR 1994), if the Subcontract is based upon a technical proposal.
- FAR 52.244-2 SUBCONTRACTS (AUG 1998). Paragraph (e) insert regarding consent is: "Any subcontract or purchase order for supplies or services exceeding \$100,000."
- FAR 52.245-1 GOVERNMENT PROPERTY (JUN 2007), with Alternate I

END OF GENERAL PROVISIONS