

ATTACHMENT A
BROOKHAVEN SCIENCE ASSOCIATES, LLC
GENERAL TERMS AND CONDITIONS
FOR CONSTRUCTION AND LABOR HOUR CONTRACTS
AT
BROOKHAVEN NATIONAL LABORATORY

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Article 1. Definitions

The following terms shall have the meanings below:

- (a) "BSA" means Brookhaven Science Associates, LLC acting under Prime Contract No. DE-AC02-98CH10886 between BSA and the Government for the operation of Brookhaven National Laboratory, and includes the successor to, or any duly authorized representative of BSA.
- (b) "Contractor" means any person or organization that has entered into this Agreement with BSA.
- (c) "Government" means the United States of America and includes the U.S. Department of Energy (DOE) or any duly authorized representative(s) thereof.
- (d) "Brookhaven", "BNL", and "the Laboratory" mean the Brookhaven National Laboratory site at Upton, New York.
- (e) "BSA's PPM Division" means the BSA Procurement and Property Management Division (PPM) person responsible for contractual matters.
- (f) "Agreement" means contract, Basic Ordering Agreement (BOA), Task Agreement, and any modifications thereto, including all contract documents. It includes without limitation the specifications, drawings, the General Terms and Conditions and any special or supplemental terms and conditions, when incorporated into this agreement by reference or otherwise.
- (g) "Contract Documents" means all documents that comprise this Agreement including without limitation, the specifications, drawings, the General Terms and Conditions and any special or supplemental terms and conditions, when incorporated into this Agreement by reference or otherwise.

Article 2. Order of Precedence

In the event of an inconsistency among provisions of this Agreement, the inconsistency shall be resolved by giving precedence in the following order: (a) the text of this Agreement, (b) special terms and conditions attached thereto, (c) General Terms and Conditions, (d) the Specifications, and (e) the Drawings, if incorporated in this Agreement by reference or otherwise.

Article 3. Complete Agreement

This Agreement expresses the entire Agreement and understanding of the parties with respect to the subject matter hereof and supersedes any prior oral and written agreements between the parties. It may only be modified in writing executed by both BSA and the Contractor.

Article 4. Assignment

The Contractor shall not assign its rights and/or obligations hereunder to third parties without BSA's prior written consent. However, the Contractor may assign its rights to be paid amounts due or to become due under this Agreement to a financing institution if BSA is promptly furnished written notice and a signed copy of such assignment. This Agreement is assignable by BSA to the Government or to a successor contractor to operate Brookhaven National Laboratory. The Contractor agrees to look solely to the Government or to such successor contractor for payment of the part so assigned, and to execute a novation agreement so recognizing the successor contractor if requested to do so by BSA.

Article 5. Independent Contractor; Hold Harmless

- (a) In conducting the work hereunder the Contractor is acting in the capacity of an independent contractor and is not an agent or employee of BSA and/or the Government. However, BSA shall have the right to control the general direction of the work, within the limits of the specifications and the parties agree that such direction shall not constitute a change to this Agreement. Nothing contained in this Agreement or any lower-tier subcontract shall create any contractual relationship between any such lower-tier subcontractor and BSA. The Contractor is solely responsible for its actions and those of its subcontractors, agents and/or employees.
- (b) The Contractor will defend, hold harmless and indemnify the Government and BSA and their respective officers, agents and employees from and against any and all liability, including all losses and damages and any expense connected therewith arising out of or connected with the work, excepting only liability arising

from affirmative acts, done with intent to cause loss, damage or injury, by BSA, the Government or the officers, agents or employees of either.

- (c) The Contractor's obligations under this clause shall not be limited by any legal limitation on the amount or type of damages, compensation or benefits payable under workers' compensation acts, disability benefit acts or other employee benefit acts.
- (d) The Contractor's liability insurance shall provide coverage for the Contractor's obligations under this clause in accordance with the Article on Insurance.

Article 6. Performance and Payment Bond Requirements

- (a) If the contract price exceeds \$25,000 but does not exceed \$100,000, the contractor shall provide either a payment bond or an alternative payment protection method acceptable to and approved by BSA's PPM Division. If the contract price exceeds \$100,000, the Contractor shall furnish performance and payment bonds in the amounts described below with a surety company holding a certificate of authority from the Secretary of the Treasury (see Department of the Treasury Circular 570). Bonds shall be submitted on the forms provided by BSA. Bonds are to be provided within fourteen (14) days after contract award, and before commencing work. In lieu of a payment or performance bond, the Contractor may furnish a certified check payable to BSA in the amount of one hundred percent (100%) of the bond amount.
 - (i) *Performance Bond*: 100% of the contract price;
 - (ii) *Payment Bond*: 100% of the contract price;
 - (iii) *Labor hour contracts*: Require only a payment bond in the amount of \$75,000.
- (b) Performance bonds shall remain effective until the warranty period under the *Warranty of Construction* Article has expired, and payment bonds shall remain effective until final payment under the *Payment* Article.
- (c) After commencing work, BSA may require the Contractor to furnish additional security to protect BSA, the Government and persons supplying labor or materials under this Agreement if any bond furnished becomes unacceptable or the contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of BSA's PPM Division.

Article 7. Compliance with Laws and Regulations

The Contractor shall comply with all applicable federal, state, and local laws and ordinances and all pertinent lawful orders, rules and regulations, including those applicable by reason of the fact that this Agreement is issued under a prime contract with the Government. Such compliance is a material requirement of this Agreement. The Contractor is responsible for obtaining any necessary licenses and/or permits without additional expense to BSA. The Contractor warrants that each chemical substance constituting or contained in supplies furnished under this Agreement is on the list of substances published by the Administrator of the Environmental Protection Agency pursuant to the Toxic Substances Control Act as amended.

Article 8. Compliance with Environment, Safety, Health, and Traffic Regulations

- (a) The Contractor shall take all reasonable precautions to protect the environment and the safety and health of employees and the public in the performance of work hereunder. The Contractor shall comply with the rules and regulations set forth in BSA's Safety Program, Contractor Orientation Program, all applicable OSHA standards, BNL's ES&H Standards, Security Protocols and NY State Vehicle and Traffic Laws.
- (b) **The consumption or unauthorized possession of alcoholic beverages is prohibited in all areas of the BNL site. Personnel who consume alcohol off-site or found in possession of alcoholic beverages shall be restricted from entering BNL.**
- (c) **All contractor personnel that may be working on or near energized electrical equipment (as defined in BNL's Electrical Safety subject area: https://sbms.bnl.gov/sbmsearch/subjarea/192/192_sa.cfm?parentID=192 must provide objective evidence to BSA's Work Control Coordinator/Manager or designee of having satisfactorily completed electrical safety training that meets the requirements of NFPA 70E prior to performing work on site to assure awareness of the hazards and safety-related work practices.**
- (d) If the Contractor fails to comply with said regulations or requirements, BSA may issue an order stopping all or any part of the work hereunder, without prejudice to any other legal or contractual rights BSA may have. A start order for resumption of the work may be issued at Brookhaven's discretion. The Contractor shall make no claim for an extension of time or for compensation or damages by reason of, or in connection with, such work stoppage.
- (e) BSA reserves the right to charge back to the Contractor actual costs incurred by BSA directly or indirectly to perform safety inspections, complete paperwork, investigate and prepare occurrence reports as a result of

the Contractor's failure to comply with said regulation or requirement. A non-negotiable unilateral deduct change order will be issued to the Contractor, and punitive penalties may be assessed to individuals by dismissing them *from* the Brookhaven site based on the extent of the noncompliance. BSA will evaluate the Contractor on its safety performance, including that of its subcontractors. The number and severity of safety and security violations, including traffic violations, will be considered in this evaluation. Repeated and/or willful violations are cause for termination for default and may affect the Contractor's opportunity to bid on future work at BNL.

Article 9. Drug-Free Workplace

(a) Definitions. As used in this clause--

- "Controlled substance" means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812) and as further defined in regulation at 21 CFR 1308.11 - 1308.15.
- "Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.
- "Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.
- "Drug-free workplace" means the site(s) for the performance of work done by the Contractor in connection with a specific contract at which employees of the Contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.
- "Employee" means an employee of a Contractor directly engaged in the performance of work under this Agreement.
- "Directly engaged" is defined to include all direct cost employees and any other Contractor employee who has other than a minimal impact or involvement in contract performance
- "Individual" means a Contractor that has no more than one employee including the Contractor.

(b) Within 30 days after award (unless a longer period is agreed to in writing by BSA's PPM Division, or as soon as possible for contracts of less than 30 days performance duration, the Contractor shall

- (1) Publish a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited on the Brookhaven site and specifying the actions that will be taken against employees for violations of such prohibition;
- (2) Establish an ongoing drug-free awareness program to inform such employees about (i) the dangers of drug abuse in the workplace; (ii) the Contractor's policy of maintaining a drug-free workplace; (iii) any available drug counseling, rehabilitation, and employee assistance programs; and (iv) the penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- (3) Provide all employees engaged in performance of the contract with a copy of the statement required by subparagraph (b)(1) of this clause;
- (4) Notify such employees in writing in the statement required by subparagraph (b)(1) of this clause that, as a condition of continued employment on this Agreement, the employee will (i) abide by the terms of the statement; and (ii) notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than 5 days after such conviction;
- (5) Notify the BSA Contractual Representative in writing within 10 days after receiving notice under subdivision (b)(4)(ii) of this clause, from an employee or otherwise receiving actual notice of such conviction. The notice shall include the position title of the employee;
- (6) Within 30 days after receiving notice under subdivision (b)(4)(ii) of this clause of a conviction, take one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace: (i) taking appropriate personnel action against such employee, up to and including termination; or (ii) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency; and
- (7) Make a good faith effort to maintain a drug-free workplace through implementation of subparagraphs (b)(1) through (b)(6) of this clause.

- (c) In addition to other remedies available to BSA, the Contractor's failure to comply with the requirements of paragraph (b) of this clause may render the Contractor subject to suspension of contract payments, termination of the contract for default, and suspension from award of further BSA Contracts.

Article 10. Hazardous Material Identification and Material Safety Data Sheets

With or before each delivery, the Contractor shall submit a Material Safety Data sheet, as prescribed in 29 CFR 1910.1200 and the latest version of Federal Standard No. 313, for all hazardous material delivered under this Agreement which will involve exposure to hazardous materials or items containing these materials, whether or not it is listed in Appendix A of the Standard. As used in this Article, "hazardous material" is as defined in the latest version of Federal Standard No. 313, including revisions adopted during the term of this Agreement.

Article 11. Reporting of Accidents

The Contractor shall notify BSA immediately of any injury or alleged injury, and of any loss, destruction or damage to property of BSA or the government, and shall promptly furnish BSA with a statement concerning such injury, damage or loss in such detail as BSA may require. All accident reports filed with the Contractor's Worker's Compensation carrier (Forms C2.5 and C11) and the total man-hours lost as a result of an accident under this Agreement shall be submitted monthly to BSA's PPM Division.

Article 12. Inspection of Vehicles and Materials

- (a) All vehicles removing materials from anywhere on the Brookhaven site must pass through the unmanned Vehicle Radiation Monitoring System (VRMS) before and after the materials are loaded. If radioactive materials are detected, the driver shall immediately notify BSA by calling the number indicated on the VRMS telephone. The VRMS is located on the north side of Princeton Avenue between Upton Road and Weaver Drive.
- (b) A vehicle found to contain radioactive material may not leave the Brookhaven site until the material is identified and removed. Only vehicles carrying radioactive materials that are properly packaged and labeled in accordance with U.S. Department of Transportation regulations are exempt from this procedure. Materials removed from known radiological areas must be monitored in accordance with the applicable provisions of the procedure FS-SOP-1005, Radiological Surveys required for the Release of Material from Areas Controlled for Radiological Purposes found at: (<https://sbms.bnl.gov/SBMSearch/Id/Id19/Id19d081.doc>), a copy of which is available for review at BSA's PPM Division.
- (c) BSA reserves the right to inspect and search vehicles entering or leaving the site.

Article 13. Insurance

- (a) The Contractor shall, at no cost to BSA, maintain policies providing the following insurance protection, which insurance shall apply to all operations of the Contractor hereunder and employees of the Contractor engaged therein. Unless waived in writing by BSA's PPM Division, the Contractor shall also provide an endorsement to its liability policies either (i) naming Brookhaven Science Associates, LLC and the U.S. Government as additional insureds or (ii) insuring the Contractor's obligations under the paragraph hereof entitled "Independent Contractor; Hold Harmless."
- (1) *Worker's Compensation* – Coverage as provided in the Worker's Compensation Law of the State having jurisdiction, including occupational disease coverage for limits of \$1,000,000 per person in any one case and additional Employees Liability of \$1,000,000 per occurrence.
- (2) *General Liability* – Insurance with limits of \$1,000,000/\$2,000,000 for bodily injury liability and \$100,000 for property damage liability in the comprehensive liability form.
- (3) *Automobile Liability* – Insurance with limits of \$250,000/500,000 for bodily injury liability and \$50,000 for property damage liability in the comprehensive policy form.
- (b) The Contractor may purchase such additional or other insurance protection, as it may deem necessary, at its own expense.
- (c) The Contractor shall furnish BSA's PPM Division a certificate of insurance to show compliance with paragraph (a) above. The insurance certificate shall be submitted within fourteen (14) days of award and prior to issuance of a Notice to Proceed. The Contractor shall also ensure that such certificate states that the insurance carrier(s) will give BSA 30 days, prior written notice if there is any cancellation or material change in such policies. The Contractor shall also ensure that such certificates are kept up to date during the period of contract performance.

Article 14. Contractor's Responsibilities

The Contractor is responsible for all damages to persons or property that occurs, as a result of the Contractor's fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until

completion and acceptance of the entire work, except for any completed unit of work, which may have been accepted under this Agreement. The Contractor's responsibility shall apply to activities of the Contractor, its agents, lower-tier subcontractors, and employees.

Article 15. Superintendence by the Contractor

At all times during performance of this Agreement and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the worksite a competent superintendent from its organization who is satisfactory to BSA and has authority to act for the Contractor.

Article 16. Suspect/Counterfeit Items

"Suspect Items" are items, for which there is an indication by visual inspection, testing, or other information that it may not conform to established Government- or industry-accepted specifications or national consensus standards. "Counterfeit Items" are suspect items that are a copy or substitute without legal authority to do so or whose material, performance, or characteristics are knowingly misrepresented by the supplier, distributor, or manufacturer. Forms of misrepresentation include, but are not limited to, the following:

- falsified product sources (counterfeits);
- falsified or modified quality assurance records;
- false marking as to class, type, or grade;
- mixing of unmarked materials with marked materials;
- false labeling as to qualification or acceptance by testing/certifying organizations; and used and/or refurbished products, misrepresented as new products.

Types of materials, parts, and components, known to have been misrepresented include, but are not limited to:

- lifting materials such as slings, hooks, cables, and shackles;
- threaded fasteners fraudulently marked as high-strength bolts;
- refurbished electrical circuit breakers sold under false certifications;
- valves;
- piping and piping components;
- electrical devices;
- channel members, plate, bar, and flanges;
- and other structural items.

See the Exhibits in the BNL Suspect / Counterfeit Items Subject Area, https://sbms.bnl.gov/sbmsearch/subjarea/72/72_SA.cfm?parentID=72 for more information on identifying suspect/counterfeit items. S/CI's may pose immediate and potential threats to the safety of BSA and contractor workers, the public, and the environment. Failure of a safety or mission critical system due to an S/CI could also have security implications at DOE facilities.

- Items furnished to BSA under this Agreement shall not include suspect/counterfeit parts nor shall such parts be used in performing any work under this Agreement whether on or off the Laboratory site.
- If suspect/counterfeit parts are furnished under this Agreement and are found on the Laboratory site, such parts shall be impounded by BSA or they shall be removed by the Contractor as directed by BSA. The Contractor shall promptly replace such parts with supplies acceptable to BSA and the Contractor shall be liable for all costs relating to impoundment, removal, and replacement. BSA may turn such parts over to the U.S. Office of the Inspector General for investigation and reserves the right to withhold payment pending the outcome of any investigation.
- The rights of BSA in this clause are in addition to any other rights provided by law or under this Agreement.

Article 17. Labor Standards.

The following provisions apply to work performed under this Agreement as if they were set forth herein in their entirety. For more information on clauses incorporated by reference see the Article entitled *Clauses Incorporated by Reference*.

<i>Clause</i>	<i>FAR Reference</i>
Davis-Bacon Act	52.222-6
Withholding of Funds	52.222-7
Payrolls and Basic Records	52.222-8
Apprentices and Trainees	52.222-9
Compliance with Copeland Act Requirements	52.222-10
Subcontracts (Labor Standards)	52.222-11
Contract Termination – Debarment	52.222-12
Compliance with Davis-Bacon and Related Act Regulations	52.222-13
Disputes Concerning Labor Standards	52.222-14
Certification of Eligibility	52.222-15
Notice of Requirement for Affirmative Action to Ensure Equal Employment	52.222-23
Opportunity for Construction (applicable to agreements > \$10,000)*	
Affirmative Action Compliance Requirements for Construction (applicable to agreements > \$10,000)	52.222-27

*For purposes of the Notice, the “covered area” is Suffolk County, New York. The goals for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area (5380 Nassau-Suffolk, New York), are as follows:

Goals for Minority Participation for Each Trade	5.8%
Goals for Female Participation for Each Trade	6.9%

These goals are applicable to all of the Contractor's construction work performed in the covered area. If the Contractor performs construction work in a geographical area located outside of the covered area, the Contractor shall apply the goals established for the geographical area where the work is actually performed. Goals are published periodically in the *Federal Register* in notice form, and these notices may be obtained from any Office of Federal Contract Compliance Programs office.

Article 18. Notice Regarding Labor Disputes

- (a) If the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this Agreement, the Contractor shall immediately give notice, including all relevant information, to BSA’s PPM Division.
- (b) The Contractor agrees to insert the substance of this clause, including this paragraph (b) in any subcontract hereunder, except that each subcontract shall provide that required notice be given to the next higher tier subcontractor, or the Contractor, as the case may be of all relevant information with respect to such dispute(s).

Article 19. Notice Regarding Late Performance

If the Contractor encounters difficulty in meeting performance requirements, or anticipates difficulty in complying with the delivery schedule or date, the Contractor shall immediately notify BSA’s PPM Division in writing, giving pertinent details, including the date by which it expects to complete performance or make delivery. This data shall be informational only, and BSA’s receipt of this notice shall not be construed as a waiver of any schedule or date, or any rights or remedies provided by law or under this Agreement.

Article 20. Payment

- (a) Within fourteen (14) days after award, the Contractor shall submit a Schedule of Values broken down as required in the Supplementary Conditions of the Specifications, which will provide a basis for determining progress payments. The Schedule of Values will be subject to BSA’s approval.
- (b) BSA will make progress payments against the contract price on a monthly basis, or at more frequent intervals as determined by BSA’s PPM Division, as the work proceeds. If BSA disagrees with the percentage complete of any item included in an invoice, it shall confer with the Contractor, but if

agreement cannot be reached BSA shall authorize payment as it determines is appropriate and the Contractor may submit a Claim for the difference in accordance with the Disputes Article. Each application for payment shall be accompanied by the following signed certification:

“The undersigned Contractor certifies that to the best of the Contractor’s knowledge, information and belief, the work covered by this application for payment has been completed in accordance with the Contract Documents, and that all work for which previous payments have been received is free and clear of liens, claims, security interests or encumbrances of any kind. The Contractor further warrants that title to all work covered by this application for payment will pass to the Government no later than the time of payment.”

- (c) In making such progress payments, BSA shall retain 10% of the estimated amount until final completion and acceptance of the work. However, if BSA’s PPM Division determines that the Contractor has achieved satisfactory progress during any period for which a progress payment is to be made, BSA’s PPM Division may authorize such payment to be made either with a reduced retention or in full without retention. Also, when the work is substantially complete, BSA shall retain an amount it considers adequate to protect BSA and the Government, and at its discretion, may release all or a portion of any excess amount to the Contractor. Furthermore, on completion and acceptance of each separate building or other division of the contract on which this agreement states a separate price, payment may be made therefore without retention of a percentage.
- (d) All equipment, material and work covered by progress payments made shall thereupon become the sole property of the Government, but this shall not be construed as: (1) relieving the Contractor from the sole responsibility for all equipment, material and work upon which payments have been made or the restoration of any damaged work, or (2) waiving BSA’s rights to require fulfillment of all this Agreement’s terms.
- (e) If performance and/or payment bonds are required under this Agreement, BSA shall reimburse the Contractor the total premiums paid to obtain the bonds. This reimbursement shall be made at one time together with the first progress payment otherwise due after the Contractor has –
 - (1) furnished the bonds (including the coinsurance and reinsurance agreements, when applicable),
 - (2) furnished evidence of full payment to the surety company, and,
 - (3) submitted a request for such payment.
- (f) BSA’s reimbursement of the bond premiums shall not be made as increments of the individual progress payments and shall not be in addition to the contract price.
- (g) On completion and acceptance of all work hereunder and presentation of a properly executed invoice, BSA shall pay the Contractor the Contract Price, less progress payments made provided the Contractor shall have first furnished BSA a Release of Liens from all subcontractors, together with a release by the Contractor of all claims against BSA and the Government arising by virtue of this Agreement, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor’s claim to amounts payable under this Agreement has been assigned to a bank, trust company, or other institution, including a Federal lending institution, a release may also be required of the assignee. BSA may withhold from any final payment the amount of any Claim it has against the Contractor arising out of the contract work, provided it has first given the Contractor notice of the Claim and the amount for which BSA believes the Contractor is liable.

Article 21. Taxes

This Agreement’s price includes all applicable Federal, State and local taxes and duties. In determining the applicability of any tax or duty, due consideration shall be given to the relationship of the subject matter of this Agreement to the Government, and the fact that BSA is exempt from New York State and local sales and use taxes under Exempt Organization Certificate No. EX-216880.

Article 22. Changes

- (a) At any time, without notice to the sureties, BSA may, by written notice designated as a change order, make changes within the general scope of this Agreement, including but not limited to changes: (1) in the specifications (including drawings and designs), (2) in the method and/or manner of performance, (3) in the Government-furnished facilities, equipment, materials, services, or site; or (4) directing acceleration in performance.
- (b) BSA’s inspectors and project coordinators may issue field change orders up to \$5,000. Such change orders must be in writing and signed by the authorized inspector or project coordinator and the Contractor. All field change orders must be incorporated into this Agreement by a formal amendment prior to contract completion.

- (c) Except any herein provided, no order, statement, or conduct of BSA's Technical Representative shall be treated as a change under this article or entitle the Contractor to an equitable adjustment hereunder. If the Contractor considers that any direction or instruction by BSA's technical personnel constitutes a change other than an authorized field change order as described in Paragraph (b) above, the Contractor shall not rely on such direction or instruction without obtaining written confirmation from BSA's PPM Division.
- (d) If any properly authorized change causes a difference in the cost or the time required for performance, BSA shall make an equitable adjustment in the price and/or delivery schedule and other affected provisions. Such adjustment shall be made by written amendment to this Agreement signed by both parties. The Contractor must assert any claim for adjustment within 30 days from the date it receives BSA's change notice; however, BSA may, in its sole discretion, receive and act on any claim for adjustment at any time before final payment. Failure to agree to any adjustment shall be settled in accordance with the *Disputes* article of these General Terms and Conditions. Nothing in this clause, including any disagreement with BSA about the equitable adjustment, shall excuse the Contractor from proceeding with work hereunder, as changed.
- (e) When costs are a factor in any determination of a price adjustment pursuant to this clause or any provision of this Agreement, such cost shall be in accordance with the cost principles and procedures in FAR Subpart 31 and DEAR Subpart 931.

Article 23. Notification of Claims and Documentation

- (a) A Claim is a written demand by one party for an interpretation of terms, adjustment to the contract price or adjustment to the time in which to perform the Contract. A Claim may arise from, without limitation, issues concerning the acceptability of work, progress of work, differing site conditions, ambiguities or defects in the Contract Documents and whether work the Contractor is performing is included in this Agreement. The Contractor shall give BSA's Contractual Representative written notice no later than 5 days prior to beginning any work that it believes constitutes a change to the work required by or time in which to perform this Agreement; and expressly waives the right to make any Claim pertaining thereto if it fails to give this required notice. Unless a provision of this Agreement expressly provides for more or less time, the Contractor shall give BSA notice of all other Claims within 14 days of the time the condition giving rise to the Claim first becomes known the Contractor. A Claim is known to the Contractor provided it is known to the project superintendent or any foreman reporting to the superintendent. The Contractor shall include the requirements of this clause in all subcontracts and purchase orders and BSA shall not be liable for any Claim of any subcontractor or supplier that has failed to comply with this notification provision.
- (b) A Claim shall provide complete documentation, including:
 - (1) the Contractor's certification, by its owner or an officer, under penalty of perjury, that (i) the Claim is made in good faith, (ii) supporting data are accurate and complete to the best of the Contractor's and subcontractor's (if applicable) knowledge and belief, and (iii) the amount requested accurately reflects the Contract adjustment for which the Contractor believes the Owner is liable;
 - (2) full disclosure of facts and detailed reasons supporting the Claim with citations to relevant provisions in the Contract Documents; and
 - (3) complete documented cost of doing the work for which the Claim is being made
- (c) BSA will make a final decision on all Claims prior to the date of final payment. BSA's decision will be in writing, will be consistent with the intent of the Contract Documents and will cite the basis on which it is made. BSA's decision is a condition precedent to proceeding in the manner set forth in the Disputes Article. BSA's decision shall be final and binding on the Contractor unless the Contractor, within 30 days following receipt of BSA's decision, notifies BSA's PPM in writing that it intends to proceed under the Disputes Article. Failure to provide such notice shall constitute a waiver of the Claim(s), and the Contractor shall thereafter indemnify and hold harmless BSA from any and all liability arising out of or relating to such Claim(s).

Article 24. Determining Costs of Changes

An equitable adjustment shall be determined as follows:

- (a) Unit Prices. To the extent additions to or deletions from the contract work are subject to unit prices agreed upon in this Agreement, those unit prices shall be applied in determining the equitable adjustment and the Contractor shall not be entitled to any other costs or profit.
- (b) Allowable costs shall be limited to costs of direct labor, including foreman engaged in the work but not the Superintendent or other field personnel; costs of materials, supplies and equipment, exclusive of portable or hand tools; costs of premiums for bonds and insurance; the increased or decreased costs of field overhead,

including superintendence, but only if the change affects the Contractor's critical path of construction activities; the costs of any tiered subcontractor's work computed in accordance with this Article, provided that the markup charged by the Contractor and its subcontractors for home office overhead and profit shall be subject to negotiation but in no event shall it exceed 15 percent of the direct costs of the work performed and 5 percent for work performed by subcontractors at lower tiers. When both additions and deletions are related and pertain to the same work item, the mark-up for overhead and profit shall be computed on the net increase or decrease.

Article 25. Extras

Except as otherwise provided in this Agreement, BSA shall not pay for extras unless such extras and the price for them, have been authorized in writing by BSA's PPM Division.

Article 26. Material and Workmanship

- (a) All equipment, material, and articles incorporated into the work covered by this Agreement shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this Agreement. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may use any equipment, material, article, or process that, in BSA's judgment, is equal to that named in the specifications, unless otherwise specifically provided in this Agreement. Unless otherwise agreed, modifications due to use of "or equal" supplies are at the Contractor's expense. If required by BSA, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment furnished under this Agreement.
- (b) The Contractor shall obtain BSA's approval of the machinery and mechanical and other equipment to be incorporated into the work. When required by this Agreement or by BSA, the Contractor shall also obtain BSA's approval of the material or articles which the Contractor contemplates incorporating into the work. When so directed, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.
- (c) The Contractor shall be responsible to BSA and each of its officers, employees, agents and consultants for the acts and omissions of the Contractor's employees, subcontractors and their agents and employees, and other persons performing portions of the work under a contract with the Contractor.
- (d) All work under this Agreement shall be performed in a skillful and workmanlike manner. BSA may require, in writing, that the Contractor remove, from the work any employee BSA deems incompetent, careless, or otherwise objectionable.

Article 27. Subcontractors

- (a) BSA reserves the right to approve or disapprove Subcontractors without change in the contract price. No later than two (2) weeks after signing this Agreement, the Contractor shall submit directly to BSA's technical representative, a complete list of proposed Subcontractors for approval.
- (b) Agreements between the Contractor and subcontractors and suppliers shall: (1) include all terms and conditions, to include any insurance requirements, that the Contractor is required to flow down to its subcontractors and suppliers by the terms of these Contract Documents; and (2) at BSA's option, provide for the assignment of subcontracts to BSA in the event of termination of this Agreement.

Article 28. Inspection of Construction

- (a) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed hereunder conforms to the contract requirements. The Contractor shall maintain complete inspection and test records and make them available to BSA. All work shall be conducted under the general direction of BSA and is subject to BSA inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with this Agreement's terms.
- (b) BSA inspections and tests are for its sole benefit and do not relieve the Contractor of responsibility for providing adequate quality control measures, relieve the Contractor of responsibility for damage to or loss of the material before acceptance, constitute or imply acceptance, or affect BSA's continuing rights after acceptance of the completed work.
- (c) The presence or absence of a BSA inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the written authorization of BSA's PPM Division, except as permitted under the *Changes Article*, paragraph (b).
- (d) The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by

BSA. BSA may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes re-inspection or retest necessary. BSA shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in this Agreement.

- (e) The Contractor shall, without charge, replace or correct work BSA finds does not conform with this Agreement's requirements, unless in its own or the Government's best interest BSA consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.
- (f) If the Contractor does not promptly replace or correct rejected work, BSA may replace or correct the work and charge the cost to the Contractor, or terminate this Agreement for default.
- (g) If, before acceptance of the entire work, BSA decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, BSA shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.
- (h) Unless otherwise specified in this Agreement, BSA shall accept or reject, as promptly as practicable after completion and inspection, all work required by this Agreement or that portion of the work BSA determines can be accepted separately.

Article 29. Warranty of Construction

- (a) In addition to any other warranties in this Agreement, the Contractor warrants, except as provided in paragraph (h) of this article, that work performed under this Agreement conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.
- (b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If BSA takes beneficial occupancy of any part of the work before acceptance, this warranty shall continue for a period of 1 year from the date BSA takes possession through beneficial occupancy.
- (c) The Contractor shall remedy any failure to conform, or any defect at its own expense. In addition, the Contractor shall remedy any damage to Government-owned or BSA-controlled real or personal property at the Contractor's expense, when that damage is the result of the Contractor's failure to conform to contract requirements, or any defect of equipment, material, workmanship, or design furnished by the Contractor.
- (d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement.
- (e) BSA shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.
- (f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, BSA shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.
- (g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this Agreement, the Contractor shall--
 - (1) obtain all warranties that would be given in normal commercial practice;
 - (2) require all warranties to be executed, in writing, for the benefit of BSA, as directed; and
 - (3) enforce all warranties for BSA's benefit, as directed.
- (h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Contractor agrees to subrogate any of its rights and to aid BSA in enforcing lower-tier subcontractor's, manufacturer's, or supplier's warranties.
- (i) BSA's rights and remedies under this article are in addition to any other rights and remedies provided by law or under this Agreement.

Article 30. Existing Conditions

- (a) The Contractor represents that its representatives have visited the site and become familiar with existing and local conditions, which may affect the work and has included all costs associated therewith in its Bid.
- (b) If information on subsurface soil conditions was obtained for design purposes, the Contractor may rely on the boring logs as a representation of soils that existed at the location of the boring at the time the borings

were made, but may not rely on the interpretations or opinions contained in the report nor on the completeness of adequacy of the information for the Contractor's construction purposes.

- (c) The Contractor shall be responsible for:
 - (1) verifying the existence and location of all utilities and underground facilities, including the use of potholing, hand excavations and hand demolitions;
 - (2) coordinating work with BSA's Modernization Project Office;
 - (3) protection of concealed and underground utilities and underground facilities from damage;
 - (4) the repair or replacement of utilities or underground facilities damaged by the Contractor's failure to exercise reasonable care; and
 - (5) damage to others due to loss of utility service resulting from the Contractor's operations.

Article 31. Differing Site Conditions

- (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to BSA of: (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this Agreement, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this agreement.
- (b) BSA shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this Agreement, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and this Agreement modified in writing accordingly.
- (c) No Claim by the Contractor for an equitable adjustment under this Article shall be allowed unless the Contractor has given the written notice required by this Article and otherwise complied with the Notification of Claims and Documentation Article.

Article 32. Suspension of Work

- (a) At any time, BSA's PPM Division may, by written notice to the Contractor, require the Contractor to suspend, delay or interrupt all or any portion of the work hereunder for such period as BSA determines appropriate. On receipt of such notice, the Contractor shall immediately comply with its provisions and take all reasonable steps to minimize the incurrence of costs associated with such suspension as directed by BSA's PPM Division.
- (b) If BSA suspends, delays or interrupts performance of all or any part of the work hereunder for an unreasonable period of time, an adjustment shall be made for any increase in the cost of performance of this Agreement (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption, and this Agreement will be modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay or interruption to the extent –
 - (1) that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or
 - (2) for which an equitable adjustment is provided for or excluded under any other provision of this Agreement.
- (c) As full compensation for such unreasonable delay, the Contractor shall be reimbursed reasonable and allowable actual costs, without duplication, to the extent the cost resulted solely and directly from the unreasonable period of the suspension. Claim for such reimbursement shall be submitted within 14 calendar days after the suspension is terminated. A claim under this article shall not be allowed unless the claim, in an amount stated, is submitted timely.

Article 33. Time for Performance and Delays

- (a) This project is to be considered as one where "**time is of the essence**". The contract completion date shall be adhered to. An unexcused failure to be "substantially complete" by the completion date could lead to disqualification from future projects.
- (b) Definition of Terms
 - (1) *Contract Time* is the period of time including authorized adjustments allowed for completion of the work and is measured from the date of contract award to the date of final completion.
 - (2) *Day* is a calendar day beginning and ending at midnight.
 - (3) *Unusual Weather* is defined as when either the number of Wet Days or the number of Freezing Days exceeds the most recently published mean number of Wet or Freezing Days for the period of record, for the same month and for the weather observing station closest to the project site as reported in "Comparative Climatic Data" published by the National Oceanic and Atmospheric Administration. "Wet Days" are defined as days that have at least 0.01 inch of rainfall unless

modified elsewhere in this Agreement. "Freezing Days" are defined as days with a minimum temperature of 32 degrees F or lower.

- (4) *Excusable Delay* means unforeseeable delay beyond the Contractor or BSA's control and not resulting from Contractor's fault or negligence. Excusable Delay includes labor disputes, fire, Unusual Weather, unavoidable casualties and unusual delays in transportation.
- (c) *Computation of Time*. Any period of time referred to in the Contract Documents measured in days shall mean consecutive calendar days and shall exclude the first and include the last day. If the last day falls on a Saturday, Sunday or legal holiday, it shall be omitted from the calculation.
- (d) *Contract Time*. The Contractor confirms that the Contract Time is a reasonable period for performing the Work and includes enough float time to allow for normal unfavorable weather and other reasonably anticipated delays.
- (e) *Damages for Late Completion*. BSA reserves the right to assess the Contractor for actual damages suffered by BSA as a result of completion after the Contract Time. These damages may include, but are not limited to, BSA's cost for inspection and project management for the period beyond the contract completion date.
- (f) *Commencing Work*. The Contractor shall not commence work (1) prior to the date in the Notice to Proceed, (2) prior to giving BSA's technical representative 5 days written notice.
- (g) *Accelerated Work If Required to Meet Schedule*. The Contractor shall proceed expeditiously with adequate forces and shall achieve Final Completion within the Contract Time. If the Contractor's performance falls behind schedule, the Contractor shall accelerate the work as required to get back on schedule at no additional cost to BSA. Accelerated work shall include air or express delivery of materials and equipment, increasing the number of workers, working overtime, working Saturdays, Sundays, and holidays and working additional shifts. The Contractor shall pay BSA for any extra costs of inspection made necessary by accelerated work required under this provision.
- (h) *Excusable Delays*. The Contractor shall be entitled to an extension of Contract Time due to an Excusable Delay if it can show that the Excusable Delay is the sole and unavoidable cause increasing the time actually needed to complete the Work. The Contractor shall not be entitled to an increase in Contract Price due to an Excusable Delay.
- (i) *Compensable Delays*. The Contractor shall be entitled to an extension of Contract Time and an adjustment in Contract Price in accordance with the Determining of Costs of Changes Article due to unreasonable delays that are not due to the fault or neglect of the Contractor and which could not have been reasonably anticipated, including delays: (1) caused by BSA or by BSA's separate contractors or workers, (2) resulting from BSA's failure to provide access to lands or rights-of-way on which the Work is to be performed, or (3) due to suspension of the work ordered by BSA. In making such a Claim, the contractor must demonstrate that the delay was the sole and unavoidable cause for increasing the length of time required to complete the Work. For purposes of settlement of Claims under this paragraph, no mark-up for profit will be allowed.

Article 34. Disputes

- (a) **Good Faith Negotiation**. The parties agree that they will attempt in good faith to resolve through negotiation any dispute, claim or controversy arising out of or relating to this Agreement. Either party may initiate negotiations by providing written notice in letterform to the other party, setting forth the subject of the dispute and the relief requested. The recipient of such notice agrees to respond in writing within five days with a statement of its position on and recommended solution to the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each party with full settlement authority will meet at a mutually agreeable time and place within fifteen days of the date of the initial notice in order to exchange relevant information and perspectives, and to attempt to resolve the dispute. If the dispute is not resolved by these negotiations, the matter will be submitted to JAMS, or its successor, for mediation, following the procedure described in subparagraph (b), below. Pending settlement or a final judgment, the Contractor will proceed diligently with performance of this Agreement according to the instructions of BSA's contractual representative.
- (b) **Mediation**. Except as provided in this Agreement, the parties agree that neither will commence any civil action with respect to any dispute, claim or controversy arising out of or relating to this Agreement until the matter has been submitted to **JAMS (45 Broadway, 28th Floor, New York, NY 10006, 212-751-2700)**, or its successor, for mediation and that process has been completed. Either party, may commence mediation by providing to JAMS and, the other party, a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties agree to cooperate with JAMS and with one another in selecting a mediator from JAMS panel of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in

its costs. The parties further agree that they will treat as confidential all offers, promises, conduct and statements, whether oral or written, made in the course of the mediation, by any of the parties, their agents, employees, experts and attorneys, and by the mediator and any JAMS employees. The parties also agree that they will treat any such communications as privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable will not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Either party may seek equitable relief prior to the mediation to preserve the status quo pending the completion of that process. Except for such an action to obtain equitable relief, neither party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, or 45 days after the date of filing the written request for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so desire. The provisions of this Article may be enforced by any Court of competent jurisdiction, and the party seeking enforcement will be entitled to an award of all costs, fees and expenses, including attorneys fees, to be paid by the party against whom enforcement is ordered.

- (c) **Waiver of Right to Litigate in Court Before Completing Negotiation and Mediation and Waiver of Right to Jury Trial and Designation of Court Sitting in the State of New York.** The Contractor agrees to submit all disputes, claims or controversies arising out of or relating to this Agreement to negotiation and then mediation as described above before bringing any action in court. The contractor further acknowledges that, in the event it brings any such action in court, that it will bring that action in a court sitting in the State of New York, and it further acknowledges that it is hereby waiving any right that it might possess to demand a jury trial for the litigation of that action. The contractor further acknowledges that it is giving up any rights to judicial remedies and procedures to the extent that this Agreement does not specifically provide for them. The contractor further acknowledges that its agreement to this provision for this contract is voluntary.

Article 35. Applicable Law

The parties agree that the Federal common law of government contracts will govern the construction and interpretation of this Agreement and all claims arising under or related to this Agreement or work performed under this Agreement or claims of breach of this Agreement, regardless of the forum in which any party to this Agreement brings action. For purposes of this Agreement, the Federal common law of government contracts will consist of the interpretation of contract clauses and the law enunciated and applied to government contracts by the Boards of Contract Appeals, the Comptroller General (CG), and Federal Courts having jurisdiction over the Boards or the CG. The term "Board of Contract Appeals" means those established under the Contract Disputes Act of 1978, 41 U.S.C. 607(a)(1), and their successor bodies.

Article 36. Termination for Default

- (a) BSA may terminate this Agreement for default, in whole or in part, if the Contractor: (1) fails to supply enough properly skilled workers or materials so as to endanger timely performance; (2) abandons or unreasonably delays performance; (3) fails to comply with laws, safety or environmental regulations, ordinances or BSA instruction; (4) fails to comply with any substantive requirement of this Agreement; (5) fails to make payment to subcontractors or material suppliers; (6) becomes insolvent, commences any form of voluntary bankruptcy proceeding, has any petition or action filed against it under any bankruptcy code or law, makes a general assignment for the benefit of creditors, or if a trustee, receiver or agent is appointed under law to take charge of Contractor's property or operations for the benefit of creditors; (7) fails to retain a valid Contractor's license of the required class, or (8) otherwise commits a material breach of this Agreement. In this event, BSA shall not be liable for any services or supplies not accepted.
- (b) When any of the above reasons exist, and without prejudice to any other rights BSA may have, and after giving the Contractor and the Contractor's surety seven (7) days written notice, BSA may terminate the employment of the Contractor and, subject to any prior rights of the surety, BSA may: (1) take possession and use any materials, tools, equipment and the construction facilities and premises owned by the Contractor; (2) accept assignment of subcontracts pursuant to the Subcontractors Article and finish the work by whatever method BSA deems expedient.
- (c) If BSA terminates this Agreement for cause, the Contractor shall not be entitled to further payment until the work has been completed.
- (d) If the cost of completing the work, including additional engineering services, attorney's fees and administrative expenses made necessary thereby, exceeds the unpaid contract price, the Contractor shall pay the difference to BSA. This obligation for payment shall be binding after termination of this Agreement. If the cost of completing the work, including costs for engineering, legal, and administrative

expenses is less than the unpaid contract price, the difference shall be paid to the Contractor to the extent that such payment was due the Contractor for completed work at the time of termination.

- (e) BSA's rights and remedies under this Article are in addition to any other rights and remedies provided by law or under this Agreement.

Article 37. Termination for Convenience

- (a) BSA reserves the right to terminate this Agreement, or any part hereof, for its convenience or that of the Government by delivering a written Notice of Termination specifying the extent of the termination and its effective date. The Contractor shall immediately stop all work so terminated and shall immediately cause any and all of its affected suppliers and subcontractors to cease work and take any action that may be necessary, or that BSA directs, to protect the property related to this Agreement.
- (b) After termination, the Contractor shall submit a final termination settlement proposal to BSA in the form and with the certification prescribed by BSA. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by BSA on the Contractor's written request within this 1-year period. If the Contractor fails to submit the proposal within the time allowed, BSA may determine, on the basis of information available, the amount, if any, due the contractor as a result of the termination and shall pay the amount determined.
- (c) Subject to the terms of this Agreement, the Contractor shall be paid a percentage of the price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges that the Contractor can demonstrate to BSA's satisfaction, have resulted from the termination. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided. The Contractor and BSA may agree on the amount to be paid because of the termination; however, the agreed amount may not exceed the contract price.
- (d) BSA shall exclude from the amounts payable to the contractor the fair value, as determined by BSA, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable.
- (e) The cost principles and procedures of Part 31 of the Federal Acquisition Regulation (FAR) as modified by Part 931 of the Department of Energy Acquisition Regulation (DEAR), in effect on the date of this Agreement, shall govern all costs claimed.
- (f) Unless otherwise agreed or required by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this Agreement for 3 years after final settlement. This includes all books and other evidence bearing on the Contractor's costs and expenses under this Agreement. The Contractor shall make these records and documents available to BSA and the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by BSA, authentic reproductions may be maintained instead of original records and documents.

Article 38. Whistleblower Protection for Contractor Employees

- (a) The Contractor shall comply with the requirements of the *DOE Contractor Employee Protection Program* at 10 CFR Part 708 for work performed on behalf of DOE directly related to activities at DOE owned or leased sites.
- (b) The Contractor shall insert or have inserted the substance of this clause, including this paragraph (b) in subcontracts at all tiers, for subcontracts involving work performed on behalf of DOE directly related to activities at DOE owned or leased sites.

Article 39. Bankruptcy

If the Contractor enters into any proceeding relating to bankruptcy, it shall give written notice to BSA's PPM Division via certified mail within 5 days of initiating the proceedings. The notification shall include the date on which the proceeding was filed, the identity and location of the court and a listing, by BSA contract number, of all BSA contracts for which final payment has not been made.

Article 40. No Waiver

BSA's failure to enforce any of the provisions of this Agreement shall not be construed as evidence to interpret the requirements of this Agreement, nor a waiver of any requirement, nor a waiver of BSA's right to enforce each and every provision. All rights and obligations of the parties shall survive final performance of this Agreement.

Article 41. Patent Indemnity – Subcontracts

The Contractor shall indemnify BSA and the Government and their officers, agents, and employees against liability, including costs, for infringement of U.S. Letters Patent (except Letters patent issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) for any work the Contractor performs under this Agreement.

Article 42. Clauses Incorporated by Reference

This Agreement incorporates the following Federal Acquisition Regulation (FAR) and Dept of Energy Acquisition Regulation (DEAR) clauses by reference, as they exist on the effective date of this Agreement, with the same force and effect as if they were in full text. The FAR clauses are available through the General Services Administration (GSA) at <http://www.arnet.gov/far/>, and the DEAR clauses are available at <http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation>, or they may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. Whenever necessary to make the context of the clauses applicable to this Agreement, the term “Contractor” shall mean the Contractor, the term “Contract” shall mean this Agreement, and where noted or where necessary to derive proper meaning in a subcontract situation the terms “DOE”, “Government” and “Contracting Officer” shall mean BSA, except the terms “DOE”, “Government” and “Contracting Officer” do not change: (1) in the phrases “Government Property”, “Government-Furnished Property”, “Government Equipment” and “Government-Owned Equipment”, or where otherwise intended that title ownership or rights are to remain with the Government; or (2) where statute or regulation vests authority exclusively in specific agencies or officials; or (3) where otherwise specifically modified in this Agreement. However, except in clauses FAR 52.227-1, “Authorization and Consent” and “Alternate I; FAR 52.227-2, “Notice and Assistance Regarding Patent and Copyright Infringement, FAR 52.227-14, “Rights in Data-General” , FAR 52.227-16, “Additional Data Requirements, FAR 52.227-17, “Rights in Data-Special Works”, FAR 52.227-23, “Rights to Proposal Data” (Technical), DEAR 952.227-11, “Patent Rights Retention by the Contractor” (short form), DEAR 952.227-13, “Patent Rights Acquisition by the Government”, and DEAR 970.5227-1, “Rights in Data-Facilities, in which clauses “Government” shall mean the U. S. Government and “Contracting Officer” shall mean the DOE Contracting Officer for Prime Contract DE-AC02-98CH10886 with Brookhaven Science Associates, LLC., (BSA).

Article	Title of Clause	FAR/DEAR Ref.
Article 42.1	Covenant Against Contingent Fees	52.203-5
Article 42.2	Anti-Kickback Procedures (except subparagraph (c)(1))	52.203-7
Article 42.3	Protecting the Government’s Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment	52.209-6
Article 42.4	Utilization of Small Business Concerns	52.219-8
Article 42.5	Prohibition of Segregated Facilities	52.222-21
Article 42.6	Equal Opportunity	52.222-26
Article 42.7	Affirmative Action for Workers with Disabilities (agreements >\$10,000)	52.222-36
Article 42.8	Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans (applicable to agreements of \$25,000 or more)	52.222-37
Article 42.9	Energy Efficiency in Energy-Consuming Products	52.223-15
Article 42.10	Combating Trafficking in Persons	52.222-50
Article 42.11	Buy American Act – Construction Materials	52.225-9
Article 42.12	Restrictions on Certain Foreign Purchases	52.225-13
Article 42.13	Rights in Data-General, with Alternate V and DEAR 927.409(a) and (d)(3). (Alternate II is applicable if limited rights in data is required. Alternate III is applicable if delivery is for restricted computer software).	52.227-14
Article 42.14	Additional Data Requirements	52.227-16
Article 42.15	Rights to Proposal Data (Technical)	52.227-23
Article 42.16	Site Investigation and Conditions Affecting the Work	52.236-03
Article 42.17	Other Contracts	52.236-08
Article 42.18	Use and Possession Prior to Completion	52.236-11
Article 42.19	Specifications and Drawings for Construction	52.236-21
Article 42.20	Subcontracts for Commercial Items and Commercial Components	52.244-6
Article 42.21	Government-Property (Short Form) (applicable when acquisition cost of all GFP is < \$100,000)	52.245-1
Article 42.22	Sensitive Foreign Nations Control	952.204-71
Article 42.23	Patent Rights Retention by the Seller (Applicable to experimental, research & development, demonstration or design work)	952.227-11
Article 42.24	Patent Rights Acquisition by the Government (Applicable to experimental, research & development, demonstration or design work)	952.227-13

Article	Title of Clause	FAR/DEAR Ref.
Article 42.25	Refund of Royalties	970.5227-8
Article 42.26	Accounts, Records and Inspection (Sections A through H)	970.5232-3

The following clauses are applicable to agreements over \$100,000:

Article 42.27	Restrictions on Subcontractor Sales to the Government	52.203-6
Article 42.28	Limitation on Payments to Influence Certain Federal Transactions	52.203-12
Article 42.29	Contract Work Hours and Safety Standards Act – Overtime Compensation	52.222-4
Article 42.30	Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans	52.222-35
Article 42.31	Notification of Employee Rights Concerning Payment of Union Dues or Fees	52.222-39
Article 42.32	Toxic Chemical Release Reporting	52.223-14
Article 42.33	Authorization and Consent (For Research and Development, Demonstration or Design work add Alternate I)	52.227-1
Article 42.34	Notice and Assistance Regarding Patent and Copyright Infringement	970.5227-2

This following clause is applicable to Agreements over \$500,000:

Article 42.35	Contractor Code of Business Ethics and Conduct (applicable to agreements that exceed \$5,000,000)	52.203-13
Article 42.36	Display of Hotline Poster(s) (applicable to agreements that exceed \$5,000,000)	52.203-14
Article 42.37	Displaced Employee Hiring Preference	952.226-74
Article 42.38	Workforce Restructuring Under Section 3161 Of The National Defense Authorization Act For Fiscal Year 1993	970.5226-2

The following clauses apply if checked:

<input checked="" type="checkbox"/>	Article 42.39 Price Reduction for Defective Cost or Pricing Data – Modifications	52.215-11
<input checked="" type="checkbox"/>	Article 42.40 Subcontractor Cost or Pricing Data – Modifications	52.215-13
<input type="checkbox"/>	Article 42.41 Small Business Subcontracting Plan	52.219-9
<input type="checkbox"/>	Article 42.42 Liquidated Damages – Subcontracting Plan	52.219-16
<input type="checkbox"/>	Article 42.43 Rights in Data-Special Works	52.227-17
<input type="checkbox"/>	Article 42.44 Government Property (cost reimbursement, time & materials and labor hour agreements)	52.245-2
<input type="checkbox"/>	Article 42.45 Security	952.204-2
<input type="checkbox"/>	Article 42.46 Rights in Data-Facilities	970.5227-1
<input checked="" type="checkbox"/>	Article 42.47 Workplace Substance Abuse Programs at DOE Sites	970.5223-4

Article 43. Compliance with 10 CFR 851 and Brookhaven Science Associates' Worker Safety and Health Program by Integration of Environment, Safety and Health into Work Planning and Execution.

- (a) In performing work under this Contract, the Contractor and all of its lower-tier subcontractors at all levels shall comply with all applicable federal, state and local environment, safety and health laws and regulations. The Contractor and all of its lower-tier subcontractors at all levels must comply with 10 CFR 851 Worker Safety and Health Program, BSA's Worker Safety and Health Program, and DEAR 970.5223-1, Integration of ES&H into Work Planning and Execution (Dec. 2000). Compliance with 10 CFR 851 and DEAR 970.5223-1 is to be guided by following paragraphs (b) through (e) set forth below.
- (b) The Contractor shall perform work safely, in a manner ensuring adequate protection for employees, the public, and the environment and will be held accountable for the safe performance of work. The Contractor will exercise a degree of care commensurate with the work and the associated hazards. The Contractor will ensure that management of environment, safety and health (ES&H) functions and activities becomes an integral and visible part of the Contractor's work planning and execution process. The Contractor will, in the performance of work, ensure that:
- (1) Personnel possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities, and will retain records respecting such competency and qualifications, making them available upon request.
 - (2) Resources are effectively allocated to address ES&H, programmatic, and operational considerations. Protecting employees, the public and the environment is a priority whenever activities are planned and performed.

- (3) Prior to work performance, the associated hazards will be evaluated and a set of ES&H standards and requirements will be established and implemented to provide assurance that employees, the public, and the environment are protected from adverse consequences.
 - (4) Administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and associated hazards. Emphasis will be on designing the work and/or controls to reduce or eliminate the hazards and to prevent accidents and unplanned releases and exposures.
 - (5) Line management is responsible for the protection of employees, the public, and the environment. Line management includes those contractor and subcontractor employees managing or supervising employees performing work.
 - (6) Clear and unambiguous lines of authority and responsibility for ensuring ES&H compliance will be established and maintained at all organizational levels.
- (c) The Contractor, relative to the Statement of Work and contract specifications, agrees to accept BSA's DOE-approved Worker Safety and Health Program and the Integrated Safety Management Program as its own, and perform and manage work in accordance with such program. The Contractor shall demonstrate through documentation and work practices that performance of work under this contract:
- (1) fulfills the scope of work set out in the contract;
 - (2) identifies and analyzed specific, task-level hazards associated with the work;
 - (3) develops and implemented hazard controls;
 - (4) allows the performance of work within the controls
 - (5) provides feedback on the adequacy of controls and continued improvement in safety management.
- (d) In performing work in accordance with BNL's DOE-approved Worker Safety and Health Program and the Integrated Safety Management Program the Contractor will, prior to initiation of work:
- (1) Demonstrate well-established safety protocols applicable to the scope of work and consistent with the requirements of this clause. Prior to commencement of work on any separately definable construction activity (e.g., roofing, excavation, foundation), the Contractor must
 - (a) Submit a Phase Hazard Analysis (PHA) of the affected work. The analysis must:
 - (i) identify foreseeable hazards and planned protective measures;
 - (ii) address further hazards revealed by supplemental site information (e.g., site characterization data, as-built drawings).
 - (iii) provide drawings and/or other documentation of protective measures for which applicable Occupational Safety and Health Administration (OSHA) standards require preparation by a Professional Engineer or other qualified professional;
 - (iv) identify competent persons required for workplace inspections of the construction activity, where required by OSHA standards; and
 - (v) address hazards identified in the Statement of Work and this Agreement.
 - (b) Ensure workers are aware of foreseeable hazards and the protective measures described within the activity analysis prior to beginning work on the activity.
 - (c) Require that workers acknowledge being informed of the hazards and protective measures associated with the work activity. Those workers failing to utilize appropriate protective measures must be subject to the Contractor's disciplinary process.
 - (d) Provide a "Stop Work" policy similar to that established by BSA.
 - (e) Provide proof that employees were informed of their Workers Rights and Responsibilities set out in 10 CFR 851.20(b).
 - (2) During periods of active construction, the Contractor must have a designated representative on the worksite who is knowledgeable of the project's hazards and has authority to act on behalf of the Contractor. The designate representative must make frequent and regular inspections of the worksite to identify and correct any instances of noncompliance with the project safety and health requirements.
 - (3) Workers must be instructed to report to the Contractor's designated representative, hazards not previously identified or evaluated. If immediate corrective action is not possible or the hazard falls outside the project's scope, the Contractor must immediately notify affected workers, post appropriate warning signs, implement needed interim control measures, and notify BSA of the action taken. The Contractor or designated representative must stop work in the affected area until appropriate protective measures are established.
 - (4) The Contractor will be notified of worker Environmental, Safety and Health plans acceptance by BSA. Acceptance of the Contractor's worker safety and health plans will be at the sole discretion of BSA.

- (e) Exposure Monitoring/Occupational Medicine. The Contractor will perform the following additional hazard identification tasks compliant with the BSA Worker Safety and Health Program and the Integrated Safety Management Program and the PHA, prior to commencing work:
- (1) Contractor is responsible for identifying all potential exposures (chemical, biological, radiological, physical) to which its employees or the employees of its lower-tier subcontractors will be exposed while performing work under this contract. Contractor is responsible to provide qualified monitoring and assessment personnel and is responsible for providing the required exposure monitoring and providing employees appropriate personal protective equipment to minimize exposures.
 - (2) Contractor shall have an occupational medicine program that is compliant with the applicable requirements of 10 CFR 851, Appendix A. Contractor shall ensure that its employees and the employees of any lower tier subcontractor employees are medically qualified to perform work associated with any potential exposures and hazards that have been identified. Medical qualification and medical surveillance programs are the sole responsibility of the Contractor. In addition, the Contractor is responsible for maintaining any records associated with the administration of these programs. In the event that the Contractor or lower tier subcontractor employee requires a medical qualification examination or medical surveillance program, it is the Contractor's sole responsibility to obtain these services. Contractor must provide documented evidence that they have an occupational medical provider with a licensed medical physician.
- (f) The Contractor shall notify the BSA Contractual Representative immediately of any OSHA-recordable injuries/illnesses, any "off-normal occurrences," or Government property damaged, that the Contractor determines to have occurred in the course of operations on-site and shall furnish such further information as the BSA Contract Representative may require. An "off-normal occurrence" is any unplanned or unexpected event, including near misses, or the discovery of a deficiency in a procedure, plan, or system that has real or potentially undesirable consequences to personnel, equipment, facilities, the environment, and/or programs. In addition, the Contractor is responsible for ensuring compliance with 10 CFR 851.26 Recordkeeping and Reporting.
- (g) The Contractor's on-site ES&H activities will be subject to review by the Technical Representative of this contract. Other representatives of BSA may conduct periodic inspections of the Contractor's on-site offices, equipment, work and storage areas for compliance with the applicable ES&H requirements. The BSA Contract Representative will notify the Contractor by a written Notice of Non-compliance of any observed non-compliance with applicable ES&H requirements. The Contractor shall immediately take appropriate corrective action. The Contractor shall advise the BSA Contract Representative, in writing, within five (5) working days of the corrective action taken on any safety non-compliance noted on the written Notice of Non-compliance. If the Contractor fails or refuses to correct the safety non-compliance, BSA may perform, or cause to be performed, the necessary corrective work and unilaterally charge the Contractor for the cost thereof. Such charges will be deducted from payments otherwise due the Contractor under this contract. Repeated or willful non-compliances with applicable ES&H requirements by the Contractor shall constitute a default under other provisions of this contract and BSA may terminate the contract in accordance with those provisions.
- (h) The Contractor shall promptly evaluate and resolve any non-compliance with applicable ES&H requirements. If the Contractor fails to provide resolution or if, at any time, the Contractor's acts or failure to act causes substantial harm or an imminent danger to the environment, or health and safety of employees or the public, the BSA Contractual Representative may issue an order stopping work in whole or in part and the Contractor shall be liable for the delay and any costs thereby incurred. Any stop-work order issued by BSA under this clause (or issued by the Contractor to a subcontractor in accordance with this clause) shall be without prejudice to any other legal or contractual rights of BSA. In the event that the BSA Contractual Representative issues a stop-work order, an order authorizing the resumption of the work may be issued at the discretion of the BSA Contract Representative. The Contractor shall not be entitled to an extension of time, or additional cost or fee, or damages by reason of, or in connection with, any work stoppage ordered in accordance with this clause.
- (i) Employee Concerns Program
- (1) The Contractor, its agents, employees or subcontractors, are entitled to use the BSA Employee Concerns Program and Hotline (631)344-8800. The Hotline operates 24 hours per day, 7 days a week. Messages may be left anonymously, and all concerns are handled with confidentiality to the maximum extent possible. Employee concerns may also be submitted in writing to the BSA

- Employee Concerns Office, Building 400, or in person to Susan Foster, Building 400, 344-2888, during normal business hours, Monday through Friday 7:30 a.m. to 4:30 p.m.
- (2) For the purpose of this document, allegations, concerns, and complaints are handled in a like manner and are referred to collectively as “employee concerns.” A concern can consist of a declaration, statement, or assertion of impropriety or inadequacy on the part of one’s employer or others at a DOE Site that has affected (or threatens to affect) aspects of operations, such as the environment, health, safety, quality, or security, and may include fraud, mismanagement, waste, or abuse of authority.
 - (3) No retaliation or retribution shall be taken toward any individual as a result of filing an employee concern compliant with 10 CFR 708.
- (j) Civil Penalties and Indemnification
- (1) The 2002 Bob Stump National Defense Authorization Act amended the Atomic Energy Act by adding section 234C “Worker Health and Safety Rules for Department of Energy Nuclear Facilities.” It required DOE to promulgate a worker safety and health rule. DOE published the Rule in the Federal Register on February 9, 2006. The rule is codified at 10 CFR 851. It establishes worker safety and health requirements that govern the conduct of contractor activities at both nuclear and non-nuclear sites. Contractors that fail to comply with the Rule are subject to civil penalties issued by DOE up to \$70,000.00 per violation, with each day of violation constituting a separate violation, or contractual penalties.
 - (2) The Contractor assumes full responsibility and shall indemnify, hold harmless, and defend BSA, its directors, officers, and employees from any civil liability under §234C of the Atomic Energy Act of 1954, as amended, or DOE’s implementing regulations, arising out of the activities or performance of the Contractor, its subcontractors, suppliers, agents, employees, and their officers, or directors. The Contractor’s obligation to indemnify and hold harmless shall expressly include attorney fees and other reasonable costs of defending any action or proceeding instituted under §234C or DOE’s implementing regulations.
- (k) The Contractor is responsible for its subcontractors’ compliance with the ES&H requirements of this contract. The Contractor shall include a clause substantially the same as this clause in lower-tier subcontracts involving complex or hazardous construction work at a DOE site or BSA-owned or -operated facilities or premises. Such subcontracts shall provide for the right to stop work under the conditions described herein.
- (l) The Contractor must submit a Safety Plan, which satisfies all the requirements of this Article, to BSA’s Technical Representative or Work Control Coordinator/Manager and obtain approval of the Plan from a BSA Construction Engineer before work may proceed. Guidance for the preparation of the Safety Plan (including a template), is available at https://sbms.bnl.gov/sbmsearch/subjarea/117/117_SA.cfm?parentID=117.

Article 44. Identification of Employees

- (a) The Contractor agrees, pursuant to Executive Order 12989, to use an electronic employment Eligibility Verification (E-Verify) system designated by the Secretary of Homeland Security to verify the eligibility of:
- (i) all persons hired during the contract term by the Contractor to perform duties within the United States; and
 - (ii) all persons assigned by the Contractor to perform work within the United States on the Federal Contract.
- The Contractor agrees to incorporate the substance of this clause in all subcontracts under this contract.
- (b) All contractor and subcontractor employees who will perform work on the Brookhaven National Laboratory (BNL) site are required to attend the Contractor/Supplier Orientation Training Course their first day on site and be approved by Brookhaven Science Associates, LLC (BSA). Contractor and subcontractor employees who have not attended the Safety Orientation will be directed to stop work until they have done so.
- (c) At no cost to the Contractor, BSA will issue contractor employee photo identification badges which will be required to obtain access to the site.
- (d) U.S. citizens must bring proof of citizenship, photo ID and proof of Social Security number. Acceptable citizenship proof is a passport, birth certificate, naturalization papers, voting eligibility, or similar documentation. Drivers’ license, military ID cards, union cards, and Social Security cards are insufficient by themselves as proof of citizenship. Proof of Social Security number includes Social Security card, pay

stub, W-2 form or medical insurance card. Handwritten documents are not acceptable. Upon arrival at the BNL Main Gate, they will be sent to the Visitors Trailer to receive a temporary pass, which allows them access to the site to attend CVO training.

- (e) All non-U.S. citizen workers, including Legal Permanent Residents, requiring access to BNL shall complete a BNL Form 473 located on the BNL home page, www.bnl.gov, Guest Registration link. Each worker shall provide the requested personal information and information concerning their company, forwarding the completed form to their designated BNL sponsor. Non-U.S. citizens shall provide documentation showing eligibility to be in the United States. This includes a valid passport and visa. Other documentation, to include but not limited to, a permanent resident card, passport entry "process form 1-551", INS documents 1-94, 1-20, DS-2019, or 1-539 part 3 and proof of Social Security, may be necessary to establish legal status and work on the BNL site. Failure to provide proper documentation will result in access being denied until the required documents are provided. Foreign National Contractor employees must submit all required documents 30 days in advance of the required access date as access approvals may take up to 30 days. All Foreign National Contractor employees are responsible to ensure they remain in legal INS status. BNL ID badges will expire on the expiration date of their current legal status or one year after issuance, whichever comes first. At that point they must reapply with updated documentation to continue eligibility to work at BNL.
- (f) The Contractor shall ensure that all Contractor and Subcontractor employees who will perform work on site promptly obtain a current BNL contractor employee photo identification badge. Badges shall be obtained from the Badging Office in Building 400 (Research Support Building), Monday through Thursday, between 8:30 a.m. and 4:00 p.m. and Fridays between 8:30 a.m. and 1:00 p.m. In order to keep badging times to a minimum, the Contractor should limit sending all of his employees at the same time.
- (g) All Contractor and Subcontractor employees shall wear their ID badges so as to be visible at all times while on-site
- (h) Contractor employee identification badges are valid for one year after issuance and require renewal from the Badging Office in Building 400 (Research Support Building). Immediately on release of employees or project completion, whichever comes sooner, the badge holder or the Contractor's authorized representative shall return badges to the Badging Office in Building 400 (Research Support Building).
- (i) All badge holders shall report lost identification badges immediately to the Badging Office in Building 400 (Research Support Building).