

LIABILITY PROVISIONS—FIXED-PRICE (7-92)

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

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

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

(c) Seller Responsibilities. (1) The Seller shall be solely responsible for all fines and penalties assessed against the Seller and all third-party liability incurred by the Seller in connection with the performance of this subcontract.

(2) The Seller shall be liable for damage to, or destruction or loss of, Government property (as defined in paragraph (d)(4) below) stemming from theft, embezzlement, unauthorized use, or any other ultra vires activity by Seller or subcontractor personnel at any tier. Under these circumstances the Seller shall repair or replace (or at the Company's discretion, shall be required to reimburse the Company's cost of repairing or replacing) the damaged, destroyed, or lost Government property.

(d) Company Unallowable Costs. Under the Company's cost-reimbursement management and operating contract, DOE may determine the following costs incurred by the Company to be unallowable:

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

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

(3) Costs that are avoidable and that are incurred by the Company, without any fault of DOE, in whole or in part as a result of negligence or willful misconduct on the part of any of the Seller's or subcontractor's personnel, in performing work under this subcontract. Such costs may include, for example:

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

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

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

(ii) For the purposes of this subparagraph (d)(4):

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

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

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

(f) Ceiling on Certain Liabilities. (1) The liability of the Seller for (i) noncriminal fines and penalties under paragraphs (d)(1) and (2) of this clause, (ii) "avoidable" costs under paragraph (d)(3), and (iii) damage to or destruction or loss of Government property under paragraph (d)(4) shall be limited to the cumulative amount of the profit actually earned by the Seller under this subcontract during the Company's six-month award-fee evaluation period (*NOTE: under the Company's management and operating contract with DOE, these*

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periods are October through March and April through September) when the event or events that were caused by the Seller or subcontractor at any tier and that led to the incurrence of costs or liabilities or the imposition of fines and penalties occurred; provided, however, that if the amount of profit actually earned cannot be reasonably determined, this amount shall be deemed to be 15% of the subcontract price, prorated to the applicable six-month award-fee evaluation period. [This ceiling on liability does not apply to any categories of potentially unallowable costs other than those described in this paragraph (f)(1).]

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

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

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

(g) Reimbursement to Seller. If costs of the types specified in paragraph (d) above incurred by the Company are reimbursed by DOE to the Company, the Company will reimburse the Seller for such costs to the extent that the Seller has already paid such costs.

(h) Financial Guarantee. (1) Within ten days after the award of this subcontract, and before beginning any work on-site at a DOE installation managed and operated by the Company, the Seller shall establish an irrevocable letter of credit in favor of the Company. If this subcontract has a period of performance of six months or less, the amount of the credit shall be 15% of the subcontract price. If this subcontract has a period of performance of more than six months, the amount of the credit shall be determined by (i) dividing 15% of the subcontract price by the number of months in the period of performance, and (ii) multiplying the quotient by six. The expiration date of the letter of credit shall be no earlier than one year from the date of award of this subcontract.

(2) Except as authorized by paragraph (3) below, each year during the performance of this subcontract the Seller shall renew letters of credit (or establish new irrevocable letters of credit), in the amount specified in paragraph (h)(1) above, no later than 15 days before their expiration date. The expiration date of the final renewed or replacement letter of credit shall be one year from the date of completion of performance of this subcontract.

(3) In lieu of renewing or completely replacing a letter of credit, the Seller may authorize the Company in writing to withhold payment (or a portion of payments) due the Seller for (i) accepted supplies or services or (ii) reimbursement of costs incurred by the Seller in accordance with a progress payment clause, if included in this subcontract. (In appropriate cases, this authorization must be coupled with replacement letters of credit in amounts and with expiration dates sufficient to assure that the combined amount of withheld payments and the replacement letter of credit is at all times no less than the amount of the initial letter of credit specified in paragraph (h)(1) above.

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

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