

PART 17 PATENTS, COPYRIGHTS, AND DATA

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17.1 INTELLECTUAL PROPERTY.

17.1.1 Overview.

INFORMATION:

(a) The Bonneville Project Act grants the Administrator the power to “acquire . . . such real and personal property, or any interest therein . . . as the administrator finds necessary or appropriate” to carry out BPA’s mission. 16 U.S.C. § 832a(c). The term “personal property” includes both tangible and intangible property. Ideas, processes, data, information, symbols, software, and creative expressions such as books and music are all examples of intangible property. The term “intellectual property” refers to legal protections available for intangible property. Intellectual property includes patents, copyrights, trademarks, rights in data, trade secrets, and other confidential data. Intellectual property includes both ownership rights as well as rights to use intellectual property, typically granted via a license, nondisclosure/confidentiality agreement, or other agreement.

(b) Part 17 of the BPI attempts to address the most common transactions that COs encounter which give rise to intellectual property issues. Procurements of Information Technology (“IT”) includes software licenses, computer hardware and equipment, office equipment, such as printers, copiers and faxes, telecommunication systems and any necessary supporting services. Additionally, intellectual property ownership and use issues may arise in financial assistance agreements, grants, and intergovernmental contracts. The transactions described below represent the majority of BPA IT procurements, identified as either commercial or non-commercial. Policy and guidance on these transactions appear after the chart below.

(c) Definitions. BPA procures IT items and services that are either noncommercial, commercial or commercial-off-the-shelf (COTS), as defined in BPI 1.8. “Noncommercial” items mean those

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items which do not meet the definition of “commercial items,” in that they are so BPA specific that use is limited to BPA, or the product will not be, or is not currently, offered for sale to the general public, even if the intent is that the product or work will, or might, eventually become a commercial product.

17.1.2 Commercial Items and Services.

(a) **INFORMATION:**

- (1) It is in BPA’s best interest to procure IT items and services that provide the best value to BPA’s ratepayers. Procuring in the commercial marketplace results in lower cost, shorter lead times and increased product availability, enabling BPA to return best value to its ratepayers. Some of the benefits to BPA of procuring commercial or commercial-off-the-shelf IT items and services include potentially lower lifecycle costs, ease of contract administration, and increased competition. When possible, BPA should procure IT items and services that meet the definition of “commercial.”
- (2) The definition of “commercial” is broad. It encompasses items that have been offered for sale to the general public but not yet sold; items that have been sold but not in “substantial” quantities; items that are sold in substantial quantities so as to be considered COTS; items requiring modifications customary in the marketplace or minor modifications unique to BPA; many services; and certain nondevelopmental items. This broad definition enables BPA to take greater advantage of the commercial marketplace.

(b) **POLICY:** Contractors of commercial IT products typically require the use of their contract document, or “paper,” for the sale of their products and/or services. In direct contrast, per BPI 1.7 and 4.9, BPA procurement contracts must include the required BPI clauses. These commercial products represent minimal risk to BPA.

17.1.3 Noncommercial Items.

(a) **INFORMATION:** Some BPA requirements may be referred to as “custom” or unique to BPA, such as a software system which cannot be utilized by other utilities. Noncommercial items are those which are specific to BPA such that they are not found in the commercial marketplace.

(b) **POLICY:** When necessary, and only when BPA is unable to obtain its requirement(s) from the commercial marketplace, BPA may solicit and procure noncommercial items.

17.1.4 Commercial and Noncommercial Determination Matrix.

PROCEDURE: COs should determine whether the subject BPA requirement is commercial or noncommercial as identified by the definitions in BPI subpart 1.8. The determination of the commercial or noncommercial nature of the requirement will assist the CO in selecting the appropriate BPI clauses to use in the procurement, as described below. A matrix to assist with the commercial and noncommercial item determination appears below.

Type of good/service being procured	Commercial	Noncommercial
Licenses for Commercial Software, including COTS software	x	
Modifications of Commercial Software or COTS software	x	
Software support services	x	
IT subscription services	x	
Software as a Service (SaaS), other “as a Services” such as Cloud Computing, Infrastructure as a Service, hosting, etc.	x	
Computer Hardware, including COTS hardware	x	
IT Equipment, to include equipment such as phones, printers, faxes, etc., including COTS IT equipment	x	

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Type of good/service being procured	Commercial	Noncommercial
Other Equipment, to include equipment with embedded software requiring on-going support/maintenance, including COTS equipment.	x	
Supplemental Labor	x	
Information Technology services (cabling, utility installations, video conferencing, etc)	x	
Software that was, or will be, developed specifically for BPA use that cannot be or has not been sold in the open market or utilized by the general public.		x
Hardware that was, or will be, developed specifically for BPA's use that cannot be sold in the open market or utilized by the general public.		x
Equipment that was, or will be, developed specifically for BPA's use that cannot be sold in the open market or utilized by the general public.		x
Research and development or demonstration of new technologies		x
Development of patentable products		x
Original works of authorship such as videos, audios, books, studies, research, etc.		x
Modifications for BPA use of works of third party authorship.		x

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17.1.4 Clause Matrixes.

PROCEDURE: The clause matrixes below are provided as guidance to the CO in determining whether a clause is applicable to a commercial or noncommercial procurement. COs must refer to BPI policy and consider the specifics and uniqueness of each procurement to assess whether the clause should be utilized in the subject procurement.

17.1.4.1 Clause Usage Matrix for Commercial IT Items and Services.

Clause Number	Clause	Commercial Software	COTS Software	Commercial Hardware and Equipment	COTS Hardware and Equipment	Commercial Services
17-2.1	Patent Rights-Ownership by Contractor	n/a	n/a	n/a	n/a	yes
17-2.2	Patent Rights-Ownership by BPA	n/a	n/a	n/a	n/a	yes
17-6	Commercial Software -No Contractor License	yes	n/a	n/a	n/a	n/a
17-7.1	Infringement Indemnification-Software (Contractor indemnifies BPA)	yes	yes	n/a	n/a	yes
17-7.2	Infringement Indemnification-Patents (Contractor indemnifies BPA)	n/a	n/a	yes	yes	yes
17-8	Source Code Escrow-3 rd Party Agent	yes	n/a	n/a	n/a	n/a
17-9	Source Code Escrow-BPA as Agent	yes	n/a	n/a	n/a	n/a
17-10	Commercial Software-Contractor License	yes	yes	yes; if embedded software	yes; if embedded software	yes
17-12	Modifications to Commercial Software	yes	Yes	n/a	n/a	yes

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17.1.4.1 Clause Usage Matrix for Commercial IT Items and Services.

Clause Number	Clause	Commercial Software	COTS Software	Commercial Hardware and Equipment	COTS Hardware and Equipment	Commercial Services
17-13	Patent and Copyright Infringement Notice	n/a	n/a	n/a	n/a	yes, if using 17-2.1 or 17-2.2
17-14	Software Warranty	yes	yes	Yes	yes	yes; if service provided results in modification to commercial s/w, h/w or equipment
17-15	Hardware and Equipment Warranty	n/a	n/a	Yes	yes	No
17-16	IT Service Warranty	n/a	n/a	n/a	n/a	yes
17-19	Survival of Perpetual License	yes	As appropriate	Yes	As appropriate	n/a
17-20	Information Assurance	yes	n/a	n/a	n/a	n/a
17-21	Nondisclosure for RFO/RFQ	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate
17-22	Nondisclosure for Contract Performance	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate
14-3	Order of Precedence	yes	yes	Yes	yes	yes
23-3	Unauthorized Reproduction or Use of Software	yes	n/a	n/a	n/a	yes
14-17	Homeland Security	yes	yes	n/a	n/a	yes

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17.1.4.2 Clause Usage Matrix for Noncommercial IT Items and Services.

Clause #	Clause Title	Noncommercial Software: Software 1) developed specifically for BPA that cannot be sold in the open market or utilized by the general public; or 2) does not yet exist which may, or may not, eventually become commercial software	Noncommercial Hardware or Equipment: Hardware or equipment developed specifically for BPA's use that cannot be sold in the open market or utilized by the general public	Research & development or demonstration of new technologies	Development of patentable products whether through contract, grant or financial assistance	Creation of new works: Original works of authorship, such as written or visual publications in hard or electronic format, or in other forms of media such as works of art, etc.	Modification of existing work: Third party original works of authorship modified for BPA's use, such as hard or electronic publications, works of art, etc.
17-1.1	Authorization & Consent: Research, Development & Demonstration Projects	n/a	n/a	yes	n/a	n/a	n/a
17-1.2	Authorization & Consent: Noncommercial Items or Services	yes	yes	n/a	n/a	n/a	n/a
17-2.1	Patent Rights-Ownership by Contractor	Consult with OGC on patentable software	yes	yes	yes	n/a	n/a
17-2.2	Patent Rights-Ownership by BPA	Consult w/OGC on patentable software	yes	yes	yes	n/a	n/a

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17.1.4.2 Clause Usage Matrix for Noncommercial IT Items and Services.

Clause #	Clause Title	Noncommercial Software	Noncommercial Hardware or Equipment	Research & development or demonstration of new technologies	Development of patentable products	Creation of new works	Modification of existing work
17-3	Rights in Data-Noncommercial Software	yes	n/a	n/a	n/a	n/a	n/a
17-4	Rights in Data-Use of Existing Works-No Modifications	n/a	n/a	n/a	n/a	n/a	n/a
17-5.1	Rights in Data-New Work	n/a	n/a	n/a	n/a	yes	yes
17-5.2	Rights in Data-New Work, Restricted	n/a	n/a	n/a	n/a	yes	yes
17-7.1	Infringement Indemnification-Software (Contractor indemnifies BPA)	yes	n/a	yes	n/a	yes	yes
17-7.2	Infringement Indemnification-Patents (Contractor indemnifies BPA)	n/a	yes	yes	yes	n/a	n/a
17-8	Source Code Escrow-3rd Party Agent	yes, if contractor owns copyright	n/a	n/a	n/a	n/a	n/a
17-9	Source Code Escrow-BPA as Agent	yes, if contractor owns copyright	n/a	n/a	n/a	n/a	n/a
17-13	Patent & Copyright Infringement Notice	yes, if using 17-2.1 or 17-2.2	yes, if using 17-2.1 or 17-2.2	yes	yes	n/a	n/a

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17.1.4.2 Clause Usage Matrix for Noncommercial IT Items and Services.

Clause #	Clause Title	Noncommercial Software	Noncommercial Hardware or Equipment	Research & development or demonstration of new technologies	Development of patentable products	Creation of new works	Modification of existing work
17-14	Software Warranty	yes	yes; if embedded	yes	Consult /OGC on patentable software	n/a	n/a
17-15	Hardware and Equipment Warranty	n/a	yes	yes	yes	n/a	n/a
17-16	IT Service Warranty	yes	yes	yes	yes	yes	yes
17-19	Survival of Perpetual License	yes	yes; if embedded software	n/a	n/a	n/a	n/a
17-20	Information Assurance	yes	yes	yes	yes	yes	yes
17-21 (RFO/RFQ)	Nondisclosure for RFO/RFQ	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate
23-3	Unauthorized Reproduction or Use of Software	yes	yes	yes	yes	yes	yes
17-22	Nondisclosure during Contract Performance	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate

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17.2 COMMERCIAL SOFTWARE (COPYRIGHT).

17.2.1 General.

(a) **POLICY:** BPA shall procure licenses to commercial software whenever doing so represents the best value to BPA. Procuring licenses to commercial software represents potentially significant savings and efficiencies to BPA and its ratepayers.

(b) **POLICY:** BPA's policy is to acquire commercial software under the same license that contractors offer to the general public. Contractors of commercial software identify the use rights granted to BPA in their license documents. BPA honors the intellectual property rights of others and will comply with the provisions of the commercial software licenses it purchases. Commercial software licenses may be included as an attachment in the BPA contract. For commercial software which is provided to BPA without a contractor's software license agreement, BPA will accept the software with restricted rights, provided the software contains proprietary markings substantially similar as set forth in 17-6.

(c) **POLICY:** Certain clauses are required to ensure BPA's ability to comply with the contract terms and conditions and with federal law. Therefore, BPA's required clauses for the procurement of commercial items and services must be included in the solicitation and contract. Any modifications to the required clauses must be approved by the HCA.

(d) **POLICY:** BPA will negotiate for fixed term or perpetual software licenses. Where BPA's contract expires prior to the term of the contractor's software license, the contractor's software license shall survive the expiration of the BPA contract and shall be implemented in the same manner it would have been if the BPA contract had not expired.

(e) **PROCEDURE:** Only COs with warranted authority may commit BPA funds for the procurement of licenses, including break-the-seal or click-through licenses. Any unauthorized commitments by unwarranted individuals are subject to BPI 2.4 and 6.16, Ratification of Unauthorized Contract Commitments. Break-the-Seal or Click-Through licenses are COTS software. See discussion in BPI 17.2.3 on COTS software policy.

(f) **PROCEDURE:** COs may use a contractor's contract documents for the purchase of commercial software in conjunction with BPA's required commercial terms and conditions. The contractor's contract documents should be attached to the BPA terms and conditions, utilizing Clause 14-3 Order of Precedence. If the contractor's agreement is not acceptable as written or BPA is unable to comply with the terms of the contractor's license as written, the CO should negotiate specific terms to be included in the contract. General Counsel or HCA may be consulted, as needed.

17.2.1.1 Clause Usage Prescriptions.

PROCEDURES:

(a) COs shall include Clause 14-3, Order of Precedence in all solicitations and contracts for commercial software, including COTS software.

(b) COs may use a clause similar to Clause 17-10, Commercial Computer Software—Contractor License, in solicitations and contracts for the purchase of proprietary commercial computer software when the contractor's software license or lease agreement is included as an attachment to BPA's commercial terms and conditions.

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(c) COs may use a clause similar to Clause 17-6, Commercial Computer Software—No Contractor License, in solicitations and contracts for the purchase of proprietary commercial computer software when the contractor's software license or lease agreement is not included as an attachment to BPA's commercial terms and conditions. The clause need not be used if Contractor's license or lease agreement is included in the BPA contract. If Contractor's license or lease agreement is used, then COs may use Clause 17-10 Commercial Software-Contractor License. This clause should not be used with COTS software.

(d) COs shall include Clause 17-19 Survival of Perpetual Licenses in all solicitations and contracts where BPA receives a perpetual use license.

17.2.2 Development of New Software Products.

(a) **INFORMATION:** Commercial software licenses are typically for object code versions of the software making the creation of new software products, or derivative products, difficult. At issue whenever new products are developed is the ownership rights of the derivative product. The development of new software products, including resulting ownership rights, is discussed under noncommercial products. This should be distinguished from modifications to commercial software, in that the modification is considered to be commercial.

(b) **PROCEDURE:** COs shall consult with OGC where there may be difficulty determining whether a new products may result from a BPA contract.

17.2.3 Commercial Off-the-Shelf (COTS) Software.

(a) **INFORMATION:** COTS software is a subset of commercial software in that COTS software is sold in such quantities that the licenses are standardized to industry practices, eliminating the need for negotiation.

(b) **POLICY:** It is in BPA's best interest to procure COTS software where the products can be utilized by BPA in the same form as available to the general public. Licenses for COTS are drafted to reflect industry practices eliminating any need for negotiation. Additionally, source code is typically not placed into escrow for COTS software.

(c) **PROCEDURE:** COs may accept a contractor's license agreements for COTS software without negotiating the terms and conditions, provided BPA can comply with the requirements therein. The CO must document in the DAD the basis for determining that the product meets the COTS definition. COTS procurements must meet all other BPI procurement requirements for commercial procurements, including competition, price reasonableness, etc. Source Code Escrow is not required for COTS products.

17.2.4 GSA Schedule Contracts – Commercial Software.

PROCEDURE: The CO may utilize available government contracts, such as GSA Schedule contracts, to fulfill BPA's IT software and equipment requirements only when the GSA Schedule represents the best buy for the agency as stated in BPI 11.1.2 and 11.1.3. If necessary to address specific BPA agency risks and requirements, the CO will negotiate appropriate terms and conditions to mitigate such risks or address BPA's requirements.

17.2.5 Modifications to Commercial Software.

(a) **INFORMATION:** At times, commercial software must be modified to meet BPA's needs. If commercial software is customarily modified for licensee use, per the commercial item definition in BPI 1.8, the resulting modification is also commercial. If the software is not customarily modified for use by licensees, but the modification is minor, the resultant modification will also be

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considered commercial. Where BPA pays for a modification to a contractor's commercial software, it is in BPA's best interest to be granted use rights to that modification without further license fees.

(b) **POLICY:** BPA treats a modification to commercial software as a commercial item. Where BPA pays for a modification of commercial software, BPA should receive a fully paid-up, non-exclusive, irrevocable world-wide license for the use of the modification.

17.2.5.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include a clause similar to Clause 17-12, Modifications to Commercial Software in solicitations and contracts where commercial software is modified, or is expected to be modified, to meet BPA's needs, regardless of whether the modification is initiated in the initial acquisition or in a later modification/request by BPA. If there is no expectation of modifications at the time of award, but later a need for a modification arises, the CO shall include a clause similar to Clause 17-12 at the time of modification.

17.2.6 Modifications that Result in New Software Products.

PROCEDURE: If there is a likelihood that a new software product may be developed by the contractor as a result of a BPA commercial procurement, the CO shall determine in advance the ownership and license rights of the new product, per BPI 17.5.4, Rights in Data.

17.2.7 Limited Rights Licensing – Commercial Software.

POLICY: Many software contractors are concerned that by licensing to BPA they are licensing the entire Federal government, or conversely that their software has just entered the public domain. BPA's policy is that software licensed to BPA will not be shared with other federal government entities and that contractors' ownership and rights in the software are preserved.

17.2.8 Commercial Software Documentation.

INFORMATION: Commercial software, at times, is provided with documentation either electronically or in hard copy. For procurement purposes, if the documentation is procured separate from the software, it is considered a commercial item and procured in the same manner as the software.

17.2.9 Support and Maintenance.

(a) **INFORMATION:** Support and maintenance of commercial software is addressed either in the software license agreement, or a separate document. Support and maintenance (when procured under a contract document other than the software license agreement) is considered a commercial service. "Software as a Service" and other services under that delivery model are also commercial services and discussed below.

(b) **PROCEDURES:**

(1) The CO shall contract for support and/or maintenance for licensed commercial software, where appropriate, from either the software licensor or a qualified third party. Support agreements cover upgrades, updates and bug-fixes. These may be stand-alone agreements or incorporated into the software license agreement. Support and support renewals for COTS software, while services, are treated as COTS items for the purpose of negotiating contract terms and conditions.

(2) Maintenance is ongoing support of embedded software in either hardware or equipment. Where continued maintenance is necessary, the CO will contract for maintenance through the original procurement document, a separate contract or purchase

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order, reflecting the contractor's and BPA's commercial terms and conditions, with the contractor's support agreement as an attachment where possible. Maintenance and maintenance renewals for COTS hardware are also treated as COTS.

(3) The CO will utilize Software as a Service and similar IT service delivery models such as Infrastructure as a Service, and Cloud computing, when the service meets the sourcing requirements in BPI 17.6.1, in addition to representing a best buy to the agency. Special consideration should be given to data sensitivity and return of data issues. These services are considered commercial services; see BPI 17.4 Commercial IT Services as well as 17.4.5 Software as a Service.

17.2.10 Warranty – Commercial Software.

POLICY:

(a) Contractors shall warrant to BPA that their product shall perform substantially in accordance with applicable technical documentation as represented to BPA.

(b) BPA's IT systems support the region's critical transmission and power systems. All software procured by BPA must be virus and mal-ware free at the time of initial procurement. Therefore, BPA requires contractors to warrant that their products, as developed by the contractor and as delivered to BPA, do not contain any mal-ware or viruses which can disable, or erase software, hardware, or data.

(c) BPA honors the intellectual property rights of others and expects that commercial software delivered to BPA does not infringe upon others' copyright or patent rights. In addition to indemnification for infringement, BPA requires that contractors warrant that they have the rights to license or sublicense the software being delivered to BPA.

17.2.10.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 17-14, Software Warranty, in solicitations and contracts for commercial software. COs shall also use Clause 17-14 Software Warranty in all noncommercial solicitations and contracts where a contractor is developing, designing, configuring software specifically for BPA. Clause 17-14 is not required for COTS software or software which is sold as "break the seal," "click through," or "license through use."

17.2.11 Rights in Data – Commercial Software.

POLICY: BPA will not pursue rights in technical data for commercial software except as provided to the general public in the contractor's standard commercial license.

17.2.12 Perpetual Software Use Licenses.

(a) ***INFORMATION:*** When a contractor's software license agreement is included in the BPA contract as an attachment, the BPA contract, having a definite term, may expire while the contractor's software license exceeds the term of the BPA contract. In these cases, the contractor's perpetual license shall survive any expiration of the BPA contract, and BPA may continue to use the software within the terms of the rights granted in the contractor's software license agreement.

(b) ***POLICY:*** BPA will comply with the terms of a perpetual software license agreement, notwithstanding any expiration of a fixed term BPA contract as if the contract was still in effect.

(c) ***PROCEDURE:*** The CO should distinguish between a perpetual license right and an evergreen contract. The CO should be aware that an evergreen contract, also referred to as an

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automatically renewing contract, may subject BPA to indefinite financial liability. Automatic renewing contracts are common for support or maintenance services. COs should work with the program office to determine the acceptable length of financial liability that the contract should commit to.

17.2.12.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 17-19 Survival of Perpetual Licenses in all solicitations and contracts where BPA receives a perpetual use license.

17.3 COMMERCIAL IT HARDWARE AND EQUIPMENT (PATENTS).

(a) INFORMATION:

(1) BPA purchases commercial IT hardware and equipment whenever such a purchase represents the best value to BPA. Procuring commercial IT hardware and equipment represents potentially significant savings and efficiencies to BPA and its ratepayers.

(2) BPA purchases hardware and equipment that is developed, manufactured and marketed on the commercial market pursuant to a contractor's patent rights. The CO may procure these products from the manufacturer directly or through a distributor. BPA considers these procurements commercial. BPA may issue a contract or a purchase order for procurements of commercial IT hardware or IT equipment.

(3) Commercial IT hardware and equipment are products offered for sale to the general public as described in the definition of "commercial" at BPI 1.8. COTS hardware and equipment is a subset of commercial hardware and equipment in that COTS products are sold in such quantities that the transactions are standardized to industry practices, eliminating the need for negotiation.

(b) **PROCEDURE:** COs shall review the contractor's sales agreement, if any, to determine if it gives BPA the ability to use the IT hardware and equipment in a manner that fulfills the need for which the products are being purchased, and if the agreement is in BPA's best interests. The CO may incorporate the contractor's sales agreement into BPA's contract or purchase order as an attachment. If the contractor's terms and conditions are not acceptable as written, the CO should negotiate specific terms to be included in the contract. General Counsel or HCA may be consulted, as needed.

17.3.1 Acquisition of Commercial Hardware and Equipment.

(a) **POLICY:** BPA shall procure commercial IT hardware and equipment whenever such a purchase represents the best value to BPA. BPA's policy is to acquire commercial IT hardware and equipment under the same sales or lease agreements that contractors offer to the general public. BPA honors the intellectual property rights of others and will comply with the intellectual property rights granted in hardware or equipment commercial sales or lease agreements, including any license terms applicable to software embedded within contractor's hardware or IT equipment.

(b) **PROCEDURE:** The CO shall procure commercial IT hardware and equipment under BPA's commercial terms and conditions with the contractor's terms and conditions as an attachment, if necessary. COs may utilize contractor's contract documents in conjunction with BPA's required commercial terms and conditions in commercial IT contracts.

17.3.1.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 14-3, Order of Precedence in all solicitations and contracts for the procurement of commercial hardware and equipment.

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17.3.2 Commercial Off-the-Shelf (COTS) Hardware and Equipment.

PROCEDURE: The CO will accept a contractor's sales agreements for COTS hardware and equipment without negotiating the terms and conditions, per BPI 17.3.1, Acquisition of Commercial Hardware and Equipment, provided BPA can comply with the requirements therein. Maintenance and maintenance renewals for COTS products are also considered COTS products.

17.3.3 GSA Schedule Contracts – Commercial Hardware and Equipment.

PROCEDURE: The CO may utilize available government contracts, such as GSA schedule contracts, to fulfill its IT hardware and equipment requirements only when they represent the best buy to the agency as stated in BPI 11.1.2 and 11.1.3. The CO, where necessary to address specific BPA agency risks and requirements, will negotiate appropriate terms and conditions to mitigate such risks and address such requirements.

17.3.4 Modifications to Commercial Hardware or Equipment.

INFORMATION:

(a) Modifications to commercial hardware and equipment are considered commercial with no intellectual property rights for BPA in the modification.

(b) Minor modifications to commercial equipment done at BPA's request or expense, or which result in a modification which is BPA exclusive and/or specific, are considered commercial with no ownership rights for BPA.

17.3.5 Modifications that Result in New Hardware Products.

(a) **INFORMATION:** BPA may request a modification of such scope that an entirely new hardware product results. Per the definition of commercial items, BPI 1.8, modifications that significantly alter the function or essential characteristics of an item are not commercial in nature, and should be addressed under noncommercial items with ownership rights determined and reduced to writing prior to commencement of work.

(b) **PROCEDURE:** COs must evaluate the extent of the modification against the definition of commercial items in BPI 1.8 to determine whether the modified product can be considered a modification, and retain its commercial characterization, or whether the modified product resulted in an entirely new product.

17.3.6 Support and Maintenance of Embedded Software.

(a) **INFORMATION:** Some equipment includes embedded software which must be updated on a regular basis through a support/maintenance agreement. Maintenance is ongoing support of embedded software in either hardware or equipment. The original support/maintenance agreement may be included as a part of the original purchase agreement, or may be executed as a stand-alone agreement.

(b) **PROCEDURE:** Where continued support is necessary, the CO will contract for maintenance through either the original procurement document, a separate contract, or a purchase order, incorporating, if possible, both the contractor's and BPA's commercial terms and conditions, with the contractor's support agreement as an attachment.

(c) **PROCEDURE:** Procurements of support and maintenance of embedded software in either IT hardware or equipment must meet the sourcing requirements as set forth in BPI 17.6.1.

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17.3.7 Warranty – Commercial Hardware and Equipment

POLICY:

(a) Contractors shall warrant to BPA that their product shall perform substantially in accordance with applicable technical documentation as represented to BPA.

(b) BPA's IT systems support the region's critical transmission and power systems. All software embedded in hardware or equipment procured by BPA must be virus and mal-ware free at the time of initial procurement. Therefore, BPA requires that contractors warrant that their products, as delivered to BPA, contain no mal-ware or viruses developed by Contractor to disable, or erase software, hardware, or data.

(c) BPA honors the intellectual property rights of others and expects that commercial hardware or equipment and its embedded software delivered to BPA does not infringe upon others' copyright or patent rights. In addition to indemnification for infringement, BPA requires that contractors warrant that they have the rights to the hardware and equipment being delivered to BPA as well as any licenses or sublicenses to the respective embedded software. .

17.3.7.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 17-15, Hardware and IT Equipment Warranty in all hardware and equipment solicitations and contracts.

17.4 COMMERCIAL IT SERVICES.

17.4.1 General.

(a) *INFORMATION:*

(1) Commercial IT services at BPA include IT supplemental labor, IT subscription services, software support and maintenance services and other services such as modifying commercial software products for BPA use. Contracts for commercial services also include such IT services such as cabling and utility installation services and IT training (see matrix above).

(2) "Commercial IT services" is a broad category that includes installation services, maintenance services, repair services, training services, and other services if such services are procured in support of a commercial item. Commercial IT services are those services (i) which are procured for support of a commercial item regardless of whether such services are provided by the same source or at the same time as the item; and (ii) where the source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the BPA.

(3) Where BPA is contracting for commercial IT services for the development of a noncommercial product, the ownership of the resulting product becomes an issue. Under this scenario, the clauses addressed in the noncommercial goods subpart should be used as appropriate in the commercial IT services contract.

(4) The definition of COTS typically does not include services. However, for procurement of COTS software, hardware and equipment purposes, support and maintenance are treated as COTS products and are discussed briefly below.

(b) ***POLICY:*** BPA shall procure commercial IT services, as defined in BPI 1.8, whenever such a purchase represents the best value to BPA. BPA's policy is to acquire commercial services under the same terms and conditions that contractors offer to the general public.

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17.4.1.1 Clause Usage Prescriptions.

PROCEDURES:

(a) COs shall include Clause 17-2.1 Patent Rights-Ownership by Contractor in all solicitations and contracts when procuring commercial IT services where there is a high likelihood that the performance of the contract may result in a patentable or copyrightable product that the parties have determined will be owned by the contractor.

(b) Alternatively, COs shall include Clause 17-2.2 Patent Rights-Ownership by BPA in all solicitations and contracts when procuring commercial IT services where there is a high likelihood that the performance of the contract may result in a patentable or copyrightable product that the parties have determined will be owned by BPA.

(c) COs shall include Clause 23-3 Unauthorized Reproduction or Use of Software where in all supplemental labor contracts where contractor employees or subcontracts are expected to have access to copyrighted or proprietary software.

(d) COs shall include a clause similar to Clause 17-12 Modifications to Commercial Software in all solicitations and contracts when procuring services to modify commercial software to meet BPA's specific needs.

(e)

PROCEDURE: COs shall include Clause 14-17 Homeland Security in solicitations and contracts when:

- 1) BPA is contracting for hardware, software or services;
- 2) A non-disclosure agreement has been included; or
- 3) Any other instance where the requisitioner or CO determines it is necessary to protect BPA's interests.

17.4.2 Warranty – IT Services.

POLICY: BPA requires that IT services shall be performed in a competent and workmanlike manner in conformity with generally acceptable industry standards for the services provided. BPA is entitled to recover the costs of the nonconforming services if the contractor is unable to cure or correct the nonconforming services in a timely manner.

17.4.2.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include Clause 17-16 IT Service Warranty in all solicitations and contracts for IT services.

17.4.3 Supplemental IT Services (Supplemental Labor).

(a) ***INFORMATION:*** BPA uses a supplemental labor force to meet a portion of its IT needs. BPA's supplemental labor work force must meet security requirements as set forth by the Department of Energy as well as those set forth by BPA. In addition to the requirements set forth for contractors elsewhere in the BPI, contractors who have access to BPA information or information systems, or who develop, design, support or maintain BPA's information, software or systems must comply with the requirements of this subpart as well.

(b) ***POLICY:*** Supplemental labor contracts for IT services are subject to the sourcing requirements as set forth in BPI 17.6.1.

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17.4.3.1 Clause Usage Prescriptions.

PROCEDURE:

PROCEDURE: COs shall include Clause 14-17 Homeland Security in solicitations and contracts when:

- 1) BPA is contracting for hardware, software or services;
- 2) A non-disclosure agreement has been included; and
- 3) Any other instance where the requisitioner or CO determines it is necessary to protect BPA's interests.

17.4.4 IT Support and Maintenance.

INFORMATION: Most licensed software, whether stand-alone or embedded, requires support/maintenance services to keep the software up to date and free from defects. BPA contracts with contractors to provide support services for its COTS, commercial and noncommercial software as well as for maintenance for hardware and equipment. Support and maintenance contracts are subscription-like arrangements where annual payment is due in advance for an established amount of technical assistance including, but not limited to, bug-fixes, updates, upgrades, and problem-solving. In addition to the requirements of this subpart, IT support sourcing is subject to the requirements set forth in BPI 17.6.1 Sourcing Requirements.

17.4.4.1 Advance Payment.

(a) **INFORMATION:** Licensed software typically requires a support or maintenance subscription to receive on-going technical assistance as well as bug fixes, updates, and upgrades. Support or maintenance is usually billed on an annual basis in advance of the period of performance.

(b) **POLICY:** Advance payment for software support and maintenance service is authorized without review and approval by the HCA under BPI 22.1.4.1(e).

17.4.4.2 Competition Requirement.

(a) **INFORMATION:** Support obtained from the licensor is a cost effective method of keeping licensed software up-to-date rather than attempting to provide support in-house. The software licensor has the technical expertise with their software and is able to develop necessary solutions in a timely and economic manner.

(b) **POLICY:** Pursuant to 11.7.1.2(a), competition is not required where the software support or maintenance is being procured from the software licensor if the licensor does not allow third party support for its products. The CO must, however, note in the DAD the rationale for the source selection. Additionally, the CO must verify upon each contract renewals that the licensor has not out-sourced support of the software.

17.4.4.3 Price Reasonableness.

(a) **INFORMATION:** Price reasonableness is a determination that the pricing is appropriate for the level of effort and complexity of the activity. Additionally, market conditions and product availability as well as functionality may change from year to year. BPA has a responsibility to its ratepayers to verify price reasonableness for new awards as well as renewals of support and maintenance and extensions.

(b) **POLICY:** Price reasonableness must be addressed in the best buy determination. While support and maintenance may not be available from multiple sources, COs must address price

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reasonableness for support procurements. This requires documenting in the DAD an assessment of the proposed price against the contractor level of effort, past performance, complexity of the software and support, and program utilization expectations.

17.4.5 Software as a Service.

(a) **INFORMATION:** Software as a Service (SaaS), and other "...as a Service" delivery methods (sometimes referred to as "cloud computing"), are commercial services in which software is hosted off-site and accessed using a web browser over the Internet. SaaS is referred to as "on-demand software," and is typically accessed via a subscription paid in advance. Unlike traditional software, which is conventionally sold as a perpetual license with an associated up-front licensing fees and ongoing support fees, SaaS providers generally price applications using a subscription fee, most commonly a monthly fee or an annual fee.

(b) **POLICY:** BPA may use cloud computing and SaaS methods and approaches, provided BPA Security and Cyber Security requirements are met. BPA's requirements specific to each service must be included in the contract requirements document or statement of work. Special attention must be given to safeguarding BPA's IT information and data, including the return of the information upon termination of the service. The Statement of Work must identify BPA's requirements for the particular cloud computing or SaaS method being used. The CO must work closely with program office to determine the appropriate approach and special requirements and to ensure accuracy and compliance.

17.5 NONCOMMERCIAL INTELLECTUAL PROPERTY.

17.5.1 General.

(a) **INFORMATION:** When BPA issues contracts, grants and financial assistance with the intent of developing or creating noncommercial items (e.g. hardware, software, and equipment, including transmission and power generation equipment, or works of authorship such as videos, presentations, and books), the issue of title, or who has ownership rights to the end product or work, must be addressed in advance. Failure to identify title prior to commencement of development or creation puts BPA at risk of not having the requisite rights to use the product or work as originally anticipated.

(b) **INFORMATION:** A new product may inadvertently result from a commercial IT services contract where, in the course of performing the services, the contractor either identifies or creates a new patentable or copyrightable product but the primary purpose of the contract was not the creation of that new product. While impossible to anticipate all scenarios where the development of a product may result, in those cases where there is a high probability that a new product may result, the ownership rights should be identified in the contract prior to the commencement of work. In the event that a CO becomes aware of a new patentable or copyrightable product being developed, the CO should work with the contractor to identify ownership rights to the product through modification of the contract.

(c) **INFORMATION:** Noncommercial products are either patentable or copyrightable, depending on the nature of the product and the body of federal law applicable to that product. BPA's patent and rights in data clauses address whether BPA or the contractor owns the rights to the product and what use rights are permitted. BPA's rights to a product copyrightable by a Contractor are conveyed through the Rights in Data clauses.

(d) **POLICY:** BPA treats a product of work paid for using BPA funds resulting from either of the above scenarios as noncommercial as defined in BPI 1.8. The resulting work product will either be so BPA-specific or custom that use is limited to BPA. Alternatively, the resulting product will

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not be, or is not currently, offered for sale to the general public, even if the intent is that the product may eventually become a commercial product.

(e) **PROCEDURE:** When contracting for the creation or development of a noncommercial item, the CO shall include the appropriate patent and rights in data clauses as set forth in this subpart.

If BPA contracts for a service under a commercial IT services contract where there is a high likelihood of creating or developing a noncommercial product, the ownership rights for that product must be addressed using the patent and rights in data clauses set forth in this noncommercial subpart, 17.5.

17.5.2 PATENTS.

(a) **INFORMATION:** Patent rights become an issue in procurement when work performed under federal funding results in a patentable item or a new invention because BPA has the right to retain title to inventions developed with its funds and to prosecute patents for its inventions. BPA procurement is concerned with “utility” patents, which may be granted for a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. §101.

(b) **POLICY:** BPA encourages the maximum practical commercial use of inventions made under BPA contracts. BPA will exercise the rights available to the Federal government to ensure that contractors meet their responsibilities to commercialize inventions.

17.5.2.1 Policy Objectives.

POLICY:

(a) BPA supports the commercialization of inventions arising from BPA-funded research and development. BPA encourages the maximum practical commercial utilization of inventions made during the performance of BPA contracts.

(b) BPA invests in research and development to return benefits to its ratepayers through improvements in the generation, transmission, and conservation of electricity.

(c) BPA adheres to the requirements of the Bayh-Dole Act, P.L. 96-517, codified at 35 U.S.C. §200 et seq., and extends Bayh-Dole's policy of third-party vesting of title to federally-funded inventions to all contractors, regardless of size or for-profit status.

(d) BPA ensures that it obtains sufficient rights in BPA-funded inventions to meet the needs of BPA and protect the public against nonuse or unreasonable use of inventions.

17.5.2.2 Confidentiality of Patentable Information.

(a) **INFORMATION:** Publishing information concerning an invention before a patent application is filed on a subject invention may create a bar to a valid patent. To avoid this bar, BPA may withhold information from the public that would disclose any invention in which the Government owns or may own a right, title, or interest (including a nonexclusive license).

(b) **POLICY:** As necessary to avoid any bar to a valid patent, BPA will only withhold information concerning inventions for a reasonable time in order for a patent application to be filed. Once filed in any patent office, BPA is not required to release copies of any document that is a part of a patent application for those subject inventions.

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17.5.2.3 Title to Inventions.

INFORMATION: Generally, each contractor may, after required disclosure to BPA, elect to retain title to any subject invention. A contract may require the contractor to assign to BPA the title to any subject invention when the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government.

17.5.2.4 License Rights to Inventions.

(a) **INFORMATION:** When BPA acquires title to subject invention, the contractor is normally granted a revocable, nonexclusive, paid-up license to that subject invention throughout the world. The contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the contractor is a part and includes the right to grant sublicenses to the extent the contractor was legally obligated to do so at the time of contract award. The contracting officer shall approve or disapprove, in writing, any contractor request to transfer its licenses. No approval is necessary when the transfer is to the successor of that part of the contractor's business to which the subject invention pertains.

(b) **POLICY:** If a Contractor retains title to the invention, the Contractor must grant BPA at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world. BPA may require additional rights in order to comply with treaties or international agreements, and in such case, these additional rights shall be made part of the contract.

(c) **POLICY:** BPA has the right to receive title to an invention:

- (1) If the contractor has not disclosed the invention within the time specified in the clause;
- (2) In any country where the contractor—
 - (A) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;
 - (B) Has not filed a patent application within the time specified in the clause;
 - (C) Decided not to continue prosecution of patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or
 - (D) No longer desires to retain title;
- (3) If the contractor is a foreign entity; or
- (4) If the subject invention results in disclosure of BPA critical infrastructure, Cyber Security or Physical Security information.

17.5.2.5 Third Party Application.

POLICY: In response to a third party's proper application for an exclusive license, the contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention. The application shall be submitted in accordance with the application provisions in 37 CFR 404 and agency licensing regulations. The contractor's license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the subject invention reasonably access to the public. The license in any foreign country may be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that country.

17.5.2.6 Invention Utilization Reports.

POLICY: BPA has the right to require periodic reporting on how any subject invention is being used by the contractor or its licensees or assignees. In accordance with 35 U.S.C. § 202(c)(5) and 37 CFR 401, agencies shall not disclose such reports to persons outside the Government

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without permission of the contractor. Contractors should mark as confidential/proprietary any report to help prevent inadvertent release outside the Government.

17.5.2.7 March-In Rights.

(a) **POLICY:** Pursuant to 35 U.S.C. § 203, agencies have march-in rights that require the contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to responsible applicants, upon terms that are reasonable under the circumstances. If the contractor, assignee or exclusive licensee of a subject invention refuses to grant such a license, the agency can grant the license itself. March-in rights may be exercised only if the agency determines that this action is necessary because the contractor or assignee has not taken or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in the field(s) of use.

(b) **PROCEDURE:** BPA shall not exercise its march-in rights unless the contractor has been provided a reasonable time to present facts and show cause why the proposed agency action should not be taken. BPA shall provide the contractor an opportunity to dispute or appeal the proposed action in accordance with 37 CFR 401.11. The CO shall refer the matter to the Office of General Counsel and assist counsel will require proceedings and notices.

17.5.2.8 Administration.

(a) **POLICY:** BPA and the contractor should know and exercise their rights in subject inventions. Contracts having subject inventions should be administered so that—

- (1) Inventions are identified, disclosed, and reported as required the contract and elections are made;
- (2) The rights of the Government in such inventions are established;
- (3) Patent applications are filed in a timely manner and prosecuted by contractors or by BPA;
- (4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and
- (5) Expeditious commercial utilization of such inventions is achieved.

(b) **PROCEDURE:** COs shall maintain appropriate follow-up procedures to protect the Government's interest, to verify that subject inventions are identified and disclosed, and, when appropriate, patent applications are filed, and that the Government's rights therein are established and protected.

(c) **PROCEDURE:** The CO administering the contract is responsible for obtaining all documentation from the contractor relating to subject inventions. Such documentation shall be submitted to General Counsel, which shall be responsible for directing appropriate actions.

17.5.2.8.1 Clause Usage Prescriptions.

PROCEDURE:

(a) COs shall determine whether the title to the patent shall be owned by the contractor or by BPA prior to executing the contract. COs may supplement either clause, below, to require the contractor to provide periodic reporting of subject inventions, information filed for any patent application on any subject invention, copies of each subcontract containing a patent rights clause, and submit periodic reports on the utilization of a subject invention.

(b) COs shall include Clause 17-2.1 Patent Rights-Ownership by Contractor, in solicitations and contract, including intergovernmental contracts with other than Federal agencies, for research and development or for any contract that may produce a subject invention, where the parties

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determine that the contractor shall own the title to the resultant patent. The CO shall consult with BPA IT staff prior to including this clause in contracts for software developed solely for BPA's use.

(c) COs shall include Clause 17-2.2 Patent Rights-Ownership by BPA, in solicitations and contracts, including intergovernmental contracts with other than Federal agencies, for research and development or for any contract that may produce a subject invention, where the parties determine that BPA shall hold title to the resultant patent. The CO shall consult with BPA IT staff prior to including this clause in contracts for software developed solely for BPA's use.

(d) COs shall include Clause 17-2.2 Patent Rights-Ownership by BPA, in solicitations and contracts, including intergovernmental contracts with other Federal agencies, for research and development or for any contract that may produce a subject invention if the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government.

17.5.2.9 Contractor Follow-up.

(a) **INFORMATION:** Contractors are required by Clause 17-2.1 Patent Rights-Ownership by the Contractor to establish and maintain effective procedures to ensure that its patent rights obligations are met, and that subject inventions are identified and disclosed in a timely manner and that when appropriate, patent applications are filed. Contractors shall submit all reports required by the CO.

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

17.5.2.10 Royalties.

(a) **INFORMATION:** It may be appropriate for BPA to collect royalties from the successful application of project or invention completed or developed with BPA funds. A provision to collect royalties should not be added to a contract unless the probable revenues are expected to exceed the associated administrative costs.

(b) **PROCEDURE:** When a CO determines that royalties are appropriate, the CO shall contact the HCA for advice and assistance.

17.5.3 COPYRIGHTS.

17.5.3.1 General.

(a) **INFORMATION:** A copyright protects the expression of authors in certain types of original works. Copyright owners have exclusive privilege to reproduce, perform, or display their original works, or to prepare new works based on them, and may license any of these rights to others. BPA will allow contractors to assert and register copyright for their original works, with the retention of a license to the work for its own use.

(b) **INFORMATION:** Prior to delivery, contractors are required to obtain permission to any copyrighted materials to be delivered to BPA. Contractors are expected to defend and indemnify BPA from any third party claim arising from contractor-supplied software that infringes on any patent, copyright, or trade secret.

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(c) **POLICY:** BPA may own a license to use, reproduce, perform, display, or make derivative works of copyrighted material.

17.5.3.2 Permissions.

POLICY: BPA requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to BPA.

17.5.3.2.1 Clause Usage Prescription.

PROCEDURE: COs shall include 17-7.1 Infringement Indemnification-Software in all solicitations and contracts where commercial and noncommercial software will be delivered to BPA.

17.5.3.3 Noncommercial Copyright.

POLICY:

(a) For noncommercial copyrights, BPA's policy is to determine those rights in advance by including rights in data clauses in the procurement contract. BPA addresses noncommercial copyright through its Rights in Data clauses.

(b) It is BPA policy to allow contract contractors to assert copyright for their original works of authorship including software. This includes allowing contractors to register the copyright, without BPA approval, except that BPA must retain a license to copy, display, perform, or create derivative works for its own use.

(c) BPA may exercise its rights in data for noncommercial intellectual property goods and services including noncommercial software. When a contractor licenses noncommercial software to BPA, BPA receives the software with either limited, restricted, or unrestricted rights. Contractors have an obligation to either mark or license their software with the rights in data that BPA acquires in their software.

(d) BPA will negotiate for fixed term or perpetual software licenses. Where BPA's contract expires prior to the term of the contractor's software license, BPA shall comply with the terms of the contractor's software license notwithstanding any expiration of the BPA contract.

17.5.3.3.1 Clause Usage Prescriptions.

PROCEDURE:

(a) COs shall include Clause 17-19 Survival of Perpetual Licenses in all solicitations and contracts where BPA receives a perpetual use license.

(b) COs shall include Clause 17-8 Source Code Escrow-Third Party Agent in all solicitations and contracts for noncommercial and commercial software utilized in support of BPA's critical business systems when it is in BPA's best interest to have access to the source code in the event that the Contractor ceases to support the software and a third party will hold the code in escrow. COs shall also include Clause 17-8 Source Code Escrow-Third Party Agent in contracts for noncommercial and commercial software where the CO determines it is in BPA's best interest to assure continuity of operations from a contractor's failure to support the software.

In addition to including Clause 17-8, COs shall also include in the official file a fully executed Source Code Escrow Agreement with BPA as a named beneficiary of the escrow account. Clause 17-8 Source Code Escrow-Third Party Agent is not required in COTS software procurements.

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(c) COs shall include Clause 17-9 Source Code Escrow-BPA as Agent in all solicitations and contracts for commercial and noncommercial software used in support of BPA's critical business systems when it is in BPA's best interest to have immediate access to the source code in the event that the Contractor ceases to support the software. COs shall include a clause similar to Clause 17-9 Source Code Escrow-Third Party Agent in all solicitations and contracts for noncommercial solicitations and contracts where software or data may result from research, development & demonstration projects, if appropriate. Clause 18-9 Source Code Escrow-BPA as Agent is not required in COTS software procurements.

17.5.4 RIGHTS IN DATA.

17.5.4.1 General.

(a) **INFORMATION:** "Rights in Data" is an intellectual property right available to federal government entities and is used in contracts for development of products and services specifically for government use. Rights in Data refers to a set of rights only the federal government can exercise to acquire the data associated with noncommercial goods and services. Rights in Data does not apply to commercial software.

It overlaps with other rights, such as copyright and patents. Congress, in 41 U.S.C. § 418a, provided the federal government special rights to data delivered under a contract. Unlike Patent Rights, there is no standard approach to data rights.

Congress recognizes that, while the government must respect the rights of private parties in their intellectual property, the government has special needs in contracting, especially when contracting for development of products and services specifically for government use. For example, BPA may pay a particular company to develop a highly efficient energy saving widget for use on BPA transmission lines. With rights to technical data, BPA may use a competitive solicitation to develop competitive markets for on-going maintenance and spare parts for the widget, as well as secondary markets.

(b) **INFORMATION:** Whenever a BPA contract results in a developed product, there is a certain amount of information or data about that product which is not part of the product specifications or software code. As a federal entity, BPA may have a need to access that information or data in order to carry out its mission or to insure that its competition requirements are met. For example, if a contractor develops noncommercial software specifically for BPA, BPA will have rights in data, enabling it to obtain that data so that competition for the support and maintenance function could take place.

(c) **POLICY:** BPA's policy is to determine data rights to products developed under BPA contract in advance by including patent or copyright (rights in data) clauses in the solicitation and procurement contract. In the typical situation, the contractor will own the work product and BPA will retain a license to make or use the invention. The contractor will have an obligation to commercialize and support the invention. If the contractor fails to do so, BPA could regain ownership of the work product by exercising "march-in" rights, see BPI 17.5.2.7.

(d) **PROCEDURE:** COs shall consult with OGC in procurements where BPA shall take title to developed software and work products.

(e) **PROCEDURE:** COs shall consult BPI 17.1.4.2 for the Clause Usage Matrix for the Rights in Data clauses.

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17.5.4.1.1 Clause Usage Prescriptions.

PROCEDURE:

(a) COs shall include Clause 17-3 Rights in Data-Noncommercial Software in solicitations and contracts where the BPA is contracting for the creation of noncommercial software per definition of BPI 1.8, and the contractor owns the resultant software and will provide support with BPA receiving use rights. COs shall include either Clause 17-8 Source Code Escrow-Third Party Agent or Clause 17-9 Source Code Escrow-BPA as Agent in the contract.

(b) COs shall include Clause 17-4 Rights in Data-Use of Existing Work in solicitations and contracts where the BPA is contracting for use rights (no modifications) for existing work already created by the contractor.

(c) COs shall include Clause 17-5.1 Rights in Data-Creation of New Work in solicitations and contracts where the BPA is contracting for the creation of new work where the contractor will own the resultant work with a use license for BPA.

(d) COs shall include Clause 17-5.2 Rights in Data-Creation of New Work, Restricted, in solicitations and contracts where the BPA is contracting for the creation of new work where the contractor will own the resultant work with a use license for BPA. Under this clause, the contractor agrees to restrict its use rights as identified by BPA.

17.5.4.2 Assertion of Rights.

POLICY:

(a) BPA recognizes rights in data, including trade secrets and other proprietary information, developed at private expense, and limits its demands for delivery of that data. When such data is delivered, BPA will acquire only those rights essential to its needs.

(b) BPA will only assert its rights in data when contracting for non-commercial items or for research, development, or demonstration of new technologies. When BPA asserts its rights to data, BPA will do so in a way that respects the trade secrets and other proprietary information of others. For example, for data (other than computer software) that embodies a trade secret or is otherwise confidential or privileged, and not developed with government funds, BPA will respect the rights of the contractor through a "limited rights notice." For computer software that is developed at private expense and is a trade secret, BPA will negotiate only for "restricted rights."

17.5.4.3 Administration.

(a) ***POLICY:*** BPA and the contractor should know and exercise their rights in subject data. Contracts having data rights should be administered so that—

- (1) Data is identified, disclosed, and reported as required in the contract and elections are made;
- (2) The rights of the Government in such data are established;
- (3) Patent or copyright applications are filed in a timely manner and prosecuted by contractors or by BPA;
- (4) The rights of BPA in filed patent applications are documented by formal instruments such as licenses or assignments; and
- (5) Expedient commercial utilization of such data is achieved.

(b) ***PROCEDURE:*** COs are responsible for including appropriate reporting and delivery requirements in the SOW or requirements document, including frequency, quantity, quality and content of such reporting and delivery.

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(c) **PROCEDURE:** COs shall maintain appropriate follow-up procedures to protect the Government's interest, to verify that data are identified and disclosed, and, when appropriate, patent applications are filed, and that the Government's rights therein are established and protected.

(d) **PROCEDURE:** The CO administering the contract is responsible for obtaining all documentation from the contractor relating to subject data. Such documentation shall be submitted to OGC, which shall be responsible for directing appropriate actions.

17.5.4.3.1 Clause Usage Prescriptions

PROCEDURE: The CO may supplement the Rights in Data clauses, to require specific periodic reporting and periodic verification of BPA rights.

17.6 OTHER REQUIREMENTS FOR IT AND INTELLECTUAL PROPERTY TRANSACTIONS.

17.6.1 Sourcing Requirements.

(a) **POLICY:** Because of the critical nature of BPA's information and information systems, additional safeguards and requirements are imposed on those procurements which have the potential of impacting the region's critical transmission and power systems and BPA's ability to successfully achieve its mission. Many of these additional obligations are reflected in additional contract clauses which have their origins in Executive Orders, or Department of Energy Directives, as well as BPA specific policy requirements. Deviations requiring waivers are identified below.

17.6.1.1 Buy American Act.

(a) **INFORMATION:** BPA is subject to the Buy American Act (41 U.S.C. § 10(a) et seq.), various international agreements regarding government procurement, and Executive Order 10582, as amended. The requirements under the Buy American Act apply to supply contracts and to the supply portion of contracts for services that involve the furnishing of supplies.

(b) **POLICY:** The Buy American Act shall not be applied to the purchase of information technology equipment and supplies that are commercial products, as set forth in 41 USC §10a et seq.

(c) **PROCEDURE:** COs shall comply with the requirements of the Buy American Act for noncommercial procurements as set forth in BPI 9.1. IT procurements for commercial software and commercial IT hardware and equipment, including COTS software, hardware and equipment are exempt from the requirements of the Act.

17.6.1.2 Restrictions on Citizenship.

(a) **INFORMATION:** U.S. export control regulations apply to the transfer of software and technology to foreign nationals whether within or outside the U.S. The intent of the export control regulations is to safeguard national and economic security. "Technology," when defined for export control purposes, means both technical data and technical assistance. Provision of technology to a foreign national that takes place within the U.S. is considered to be an export to the foreign national's country, and is referred to as a "deemed export." Permanent Resident Aliens are considered to be U.S. persons under export control regulations.

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(b) **POLICY:** The transfer of any BPA information, data or technology to non-citizens must be approved by the BPA Office of Personnel and Information Security pursuant to BPA Manual Chapter 1074.

(c) **PROCEDURE:** BPA's Office of Personnel and Information Security shall approve, in advance, all foreign nationals, whether located within or outside the U.S, who may :

- 1) receive BPA Critical Information as defined in BPI 14.18.1; or
- 2) receive BPA software, data or technology in the performance of a contract.

The BPA Office of Personnel and Information Security shall determine if there is a risk of a deemed export or the need for an export license.

17.6.1.3 Restrictions on Entity and Service Location.

(a) **INFORMATION:** Performance, including research, development, design maintenance and support, under BPA's IT or intellectual property contracts may not be located in countries identified on the Sensitive Country List, as described in BPI 14.8.1 or identified on the Terrorist Country List as designated by the US Secretary of State.

(b) **POLICY:** BPA will not contract with entities located within those countries identified on the U.S. DOE Sensitive Country List or with any country designated as a Terrorist Country by the U.S. Secretary of State. Additionally, the location of contract performance may not be within any country identified on the Sensitive Country or Terrorist Country Lists.

(c) **PROCEDURE:** The BPA Office of Personnel and Information Security and BPA's Office of Cyber Security shall determine if there is a risk associated with contracting for IT design, development, support and/or maintenance services from contractors physically located outside the United States. Additionally, any outsourcing of such services shall be approved by the BPA Offices of Personnel and Information Security, Cyber Security and HCA. COs shall consult BPA Manual Chapter 1074 Unclassified Foreign Visits and Assignments for guidance. COs shall include in the official file any waivers given by the HCA allowing such services to be performed in countries identified on the Sensitive Country or Terrorist Country lists.

17.6.1.3.1 Clause Usage Prescription.

PROCEDURE: COs shall include Clause 14-17 Homeland Security in solicitations and contracts when:

- 4) BPA is contracting for hardware, software or services;
- 5) A non-disclosure agreement has been included; and
- 6) Any other instance where the requisitioner or CO determine it is necessary to protect BPA's interests.

17.6.1.4 Restrictions on Access to Information and Information Systems.

(a) **INFORMATION:** The information and information systems used by BPA are subject to the requirements of the E-Government Act (Public Law 107-347) of 2002, Title III Federal Information Security Management Act (FISMA). FISMA establishes security controls protecting information and information systems from unauthorized access, use, disclosure, disruption, modification or destruction in order to assure integrity, confidentiality, and availability of the information and information systems.

(b) **POLICY:** BPA requires that contractors of information systems comply with the minimum requirements of protection as set forth by the National Institute of Standards and Technology (NIST) for national federal information systems. BPA, as a federal agency, will contract in

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compliance with the requirements of FISMA as adopted by BPA. Any variations or deviations from the policies and standards therein must be approved by the CIO and the HCA.

(c) **PROCEDURE:** COs shall notify BPA's Office of Cyber Security of proposed solicitations and contracts for new information systems or modifications to existing information systems. COs shall also include BPA's Information Assurance requirements in the contract statement of work or requirements document and shall work with the program office to identify necessary requirements for compliance.

17.6.1.4.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 17-20 Information Assurance in all solicitations and contracts where a contractor's software will operate on, or come in contact with, BPA's systems or networks. COs shall include Clause 17-20 Information Assurance in all solicitations and contracts where a contractor has access to BPA information or data that has been determined to be subject to FISMA. Modifications to this clause require both CIO and HCA approval. BPA's implementation of FISMA as well as any specific programmatic requirements must be set forth in the contract's requirements and included in the RFO/RFQ and contract statement of work/specifications document.

17.6.1.5 Standardization.

(a) **INFORMATION:** It is in BPA's best interest to standardize commercial IT hardware or equipment. Standardization allows BPA to achieve efficiencies across the agency where multiple organizations may utilize the same items. Additionally, standardization avoids unnecessary duplication in technological knowledge and training required to maintain multiple brands or specifications of functionally similar IT items.

(b) **POLICY:** Pursuant to BPI 11.7.1.2, BPA may procure only commercial IT hardware or equipment that conforms to BPA standardization determination when the CIO, as the equivalent level manager to the Business Line Vice President, has determined in writing that BPA must standardize the use of the item for business and technological reasons. Such written standardization determination must be available for review by the HCA and addressed in the DAD. Standardization is not applicable to commercial or COTS software; a unique source justification must be provided for such procurements.

17.6.2 Nondisclosure-Safeguarding of Information.

(a) **INFORMATION:** Performance under a BPA contract may require disclosure of either contractor proprietary information, or BPA information, including Critical Information as defined in 14.18.1. Proprietary information is a broad category that includes trade secrets and technical data as well as financial information. A trade secret is information, not generally known, that has economic value and is protected from disclosure by its owner. A trade secret may be a formula, pattern, method, process, or technique. Trade secret protection is frequently used to protect computer software. Contractors often utilize trade secret law to protect their software under a trial use or evaluation agreement by signing a nondisclosure agreement with the potential licensee.

(b) **POLICY:** The timing of information disclosure and who is making the disclosure determines the documentation necessary to protect the information. BPA can protect contractor information, in both the solicitation stage of the procurement and during the performance of a contract, subject to the requirements of the Freedom of Information Act and other statutory authority, through the inclusion of a nondisclosure clause in the contract. The disclosure of BPA information, including CI, requires a stand-alone Nondisclosure Agreement drafted and approved by OGC. See BPI 11.4.3.

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17.6.2.1 Contractor Information.

(a) **INFORMATION:** BPA will prevent unauthorized disclosure of contractor information by informing BPA personnel of the handling requirements, entering into nondisclosure agreements, and utilizing contractor information in accordance with the nondisclosure clauses included in the solicitation and contract.

(b) **POLICY:** Any confidential or proprietary contractor information disclosed by the contractor in the course of performance of a contract must be marked appropriately and disclosed pursuant to the terms of BPA's nondisclosure clause to avoid any confusion about proper handling.

(c) **POLICY:** Contractors may ask BPA to sign nondisclosure agreements or to include confidentiality agreements in contracts in order to protect their proprietary information or trade secrets, including trial use, evaluation or demonstration software. BPA will limit disclosure of contractor's proprietary, sensitive, or financial information pursuant to BPA's nondisclosure clauses, subject to the applicable federal disclosure laws. BPA will protect trade secrets of others pursuant and to the extent of the provisions of Clause 17-21 Nondisclosure for RFO/RFQ and Clause 17-22 Nondisclosure During Contract Performance.

(d) **POLICY:** BPA employees may be asked to sign nondisclosure agreements before potential contractors will disclose information about new products. BPA employees should understand whether or not the contractor is asking the employee to sign on their own behalf, or on behalf of BPA. If the contractor requires the employee to sign on behalf of BPA, the employee must either be a warranted CO or obtain approval from BPA's Office of General Counsel.

(e) **PROCEDURE:** COs shall include any nondisclosure agreements protecting contractor/offeror information in the official file as identified in 12.8.2.

17.6.2.1.1 Clause Usage Prescriptions.

PROCEDURE:

(a) COs shall include Clause 17-21 Nondisclosure for RFO/RFQ in Attachment 1 Instructions to Offerors in solicitations where the offeror may reasonably be expected to include proprietary or confidential information in the offer.

(b) COs shall include Clause 17-22 Nondisclosure During Contract Performance in the RFO/RFQ Attachment 3, draft contract, and the fully executed contract in all procurements where the contractor's proprietary or confidential information may be received by BPA during the performance of the contract.

17.6.2.2 BPA Information.

(a) **INFORMATION:** BPA, as a government entity, does not have trade secrets of its own. Information which is considered critical or sensitive will be marked accordingly. To maintain appropriate system integrity and security, information regarding BPA's current IT system architecture, platforms, operating systems, and specific software applications will only be disclosed on a need to know basis, both within and outside on BPA, per the BPA Program Cyber Security Plan issued by the Office of the Chief Information Officer.

(b) **PROCEDURE:** Contracting Officers and their designees shall not disclose to any outside source, including IT businesses, corporate survey firms, consultants, publications, potential offerors, or current contractors, any information pertaining to BPA IT system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the

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general BPA IT environment, except as authorized by the requisitioner acting under the CIO's policy guidance, and then only as necessary to acquire goods and services required to satisfy the IT need.

(c) **PROCEDURE:** Should the CO and requisitioner determine there is an appropriate rationale to disclose such information to offerors and/or contractors, COs shall consult with OGC prior to any disclosure for guidance on appropriate markings, nondisclosure agreements and procedures.

(d) **PROCEDURE:** COs should refer to BPAM 1080 for guidance and policy on safeguarding critical information.

(e) **PROCEDURE:** IT procurements which require disclosure of information pertaining to BPA system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the general BPA environment must adhere to the disclosure requirements as set forth in BPI 6.8.2(f). Procurements which require disclosure of critical BPA information or data should be referred to OGC for preparation of a nondisclosure agreement. Additionally, any publication of IT requirements must comply with BPI 11.3.

17.6.3 Order of Precedence.

INFORMATION: The Order of Precedence clause insures that, if there is a conflict between BPA's terms and a contractor's terms and conditions, BPA's clauses will be given more weight in deciding which clause shall prevail in a dispute. COs should be aware, however, that courts have discretion in how much weight to allow the disputed clause, given the parties had the opportunity to negotiate differences between the documents prior to executing the contract.

17.6.3.1 Clause Usage Prescription.

PROCEDURE: COs shall include a clause similar to Clause 14-3 Order of Precedence in all solicitations and contracts. COs should modify the clause to meet the needs of a particular purchase. If the contractor's proposal is incorporated into the contract, the clause shall be modified to identify its place in the order of precedence.

17.6.4 Infringement.

17.6.4.1 Injunction/Work Stoppage.

(a) **INFORMATION:** In accordance with Federal patent and copyright law, a BPA contractor is protected from suit for patent or copyright infringement when the use of a patented invention or of a copyrighted work is for BPA and with the authorization and consent of BPA. The exclusive remedy for owners of patents or copyrights alleging infringement by a BPA contractor during the conduct of a BPA contract is a suit against BPA in the U.S. Court of Federal Claims without an injunction. The purpose of this provision of law (28 U.S.C. 1498) is to allow BPA discretion to allow progress on BPA contracts in spite of litigation.

(b) **POLICY:** Authorization and consent on the part of BPA may be either express or implied.

(c) **POLICY:** BPA enjoys additional protection under 17 U.S.C. § 1498, in that a copyright owner is not entitled to injunctive relief should BPA make authorized use of copyrighted material. BPA, at its discretion, may award a contract even if there is a possibility of unauthorized use of a copyright, although it is BPA policy to require contractors to license copyrighted materials to be included in deliveries to BPA. By allowing contracts to be awarded even with the possibility of copyright infringement, BPA can avoid unsuccessful offerors alleging infringement as grounds for protest.

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17.6.4.1.1 Clause Usage Prescription.

PROCEDURES:

(a) COs shall include Clause 17-1.1 Authorization and Consent-Research, Development & Demonstration in solicitations and contracts for research, development, and demonstration of new technologies. Clause 17-1.1 is not used for commercial procurements.

(b) COs shall include Clause 17-1.2 Authorization and Consent-Noncommercial Items or Services in solicitations and contracts for procurement of noncommercial items or services. Clause 17-1.2 is not used for commercial procurements.

17.6.4.2 Infringement Indemnification.

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

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

(c) ***POLICY:*** It is BPA policy, if:

(1) Contractor infringes patent or copyright: In contracts for commercial items, BPA may require indemnification for patent and copyright infringement. BPA will not agree to indemnify a contractor for patent or copyright infringement on commercial software, goods or services.

(2) BPA infringes patent or copyright: Pursuant to Federal law, the exclusive remedy for patent or copyright infringement by or on behalf of BPA is a suit for monetary damages against BPA in the United States Court of Federal Claims.

(d) ***PROCEDURE:*** Except for computer software development, BPA shall not require indemnification by its contractors for patent and copyright infringement unless specifically negotiated by the CO. If the CO considers indemnification by the contractor to be in the best interests of BPA, the CO shall contact OGC for advice and assistance.

(e) ***PROCEDURE:*** It may be in BPA's interest to exempt specific U.S. patents from the patent indemnity clause. Exclusion from indemnity of identified patents shall be approved by the HCA. Upon written approval of the HCA, the CO may insert Clause 17-23, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause.

(f) ***POLICY:*** Where it is in BPA's best interest to exempt, exclude or include specific U.S. patents from the patent indemnity clause, the HCA must approve such actions. COs shall consult with Office of General Counsel to determine if appropriate and what clause to utilize.

17.6.4.2.1 Clause Usage Prescription.

PROCEDURE:

(a) COs shall include clause 17-7.1 Indemnification for Infringement-Software in solicitations and contracts where a noncommercial software or database license is developed or provided by the contractor.

(b) COs shall include Clause 17-7.1 Indemnification for Infringement-Software in solicitations and contracts for commercial software, including COTS.

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(c) COs shall include Clause 17-7.2 Infringement Indemnification-Patents in noncommercial solicitations and contracts for research, development, or demonstration of new technologies where the CO determines after consultation with OGC that inclusion of the clause is in the best interest of BPA.

(d) COs shall include Clause 17-7.2 Infringement Indemnification-Patents in solicitations and contracts for the development of patentable products and for the demonstration of new technologies.

17.6.4.3 Notice of Infringement.

17.6.4.3.1 Research and Development.

(a) **POLICY:** In contracts for research, development, or demonstration or for procurement of non-commercial items, BPA may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents and copyrights. In contracts for research, development, or demonstration or for procurement of non-commercial items, BPA may choose to indemnify the contractor for patent or copyright infringement when it is in the best interest of BPA to do so. This has the effect of extending BPA's protections against patent infringement suits to its contractors.

(b) **POLICY:** In contracts for the purchase of non-commercial items or for research, development, or demonstration projects, BPA has discretion in awarding a contract when prospective contractor may infringe a patent or a copyright. BPA, as a Federal government entity, has certain protections against suits for unauthorized use of items protected by patent and copyright.

(c) **PROCEDURE:** BPA requires notice and assistance from its contractors regarding any claims against a contractor for patent or copyright infringement where BPA has given its authorization and consent.

17.6.4.3.1.1 Clause Usage Prescriptions.

PROCEDURES:

(a) COs should insert Clause 17-13, Patent and Copyright Infringement Notice, in all solicitations and contracts that include Clause 17-1.1, Authorization and Consent-Research, Development and Demonstration Projects.

(b) COs should insert Clause 17-13, Patent and Copyright Infringement Notice, in all solicitations and contracts that include Clause 17-1.2, Authorization and Consent-Procurement of Noncommercial Items or Services.

17.6.4.3.2 Third-Party Rights.

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

(b) **PROCEDURE:** BPA will not refuse or suspend a contract award pending notification to the patent owner.

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(c) **PROCEDURE:** When questions arise regarding the notice requirements or other matters relating to indemnification, the CO should consult with OGC.

17.6.5 Source Code Escrow.

(a) **INFORMATION:** By securing rights to the source code of a software product, BPA is better able to protect itself and provide continuity of operations in the event the software is no longer maintained or supported by the contractor for a number of reasons. If a contractor stops developing or maintaining the software product as specified in the contract, or goes out of business, an escrow arrangement permits BPA to access the source code, source materials and documentation necessary to maintain the software and/or build or modify the source code.

(b) **POLICY:** It is BPA policy that source code escrow agreements shall be used for noncommercial, and commercial where appropriate and available, software developed by a contractor to protect BPA's interests if a contractor goes out of business, or ceases support of the software in accordance with the contract.

(c) **POLICY:** In procurements for noncommercial software resulting in BPA ownership, BPA shall not require source code escrow, but shall require delivery of source code, materials and documentation as a contract deliverable.

(d) **PROCEDURE:** COs shall consider placing source code into escrow where the software is used in support of a critical business function, or where the contractor is new, small, unproven or of financially questionable stability, or where the CO determines there is a risk that the contractor will cease support of the software in accordance with the contract terms.

Source code escrow for commercial software should be considered where the software is utilized on a critical business system and/or where the contractor is small, unproven, or of questionable financial stability. Source code escrow should also be considered for commercial hardware and equipment where there is embedded software critical to the functionality of the items and the items are an integral part of BPA's critical business systems. BPA does not require source code escrow on COTS software or for software that has been embedded in COTS hardware or COTS equipment.

COs shall include the appropriate contract provisions in the solicitation and contract upon the execution of the contract. However, should the market conditions, or the contractor's stability, change during the period of performance, the CO shall consider modifying the contract to include the necessary protections for BPA. COs must obtain CIO and HCA approval of critical business system solicitations and contracts that do not include source code escrow provisions.

(e) **PROCEDURE:** COs should consider including Clause 14-18 Bankruptcy when either Clause 17-8 Source Code Escrow-Third Party Agent or Clause 17-9 Source Code Escrow-BPA as Agent are prescribed.

17.6.5.1 Third Party Agent.

(a) **POLICY:** Where necessary to secure source code through third party escrow, the escrow arrangement must be documented through a separate source code escrow agreement. BPA requires a separate fully executed source code escrow agreement, naming BPA as a named beneficiary. The third party agent for a source code escrow agreement shall be a U.S. company located in the U.S. and the escrow account also must be located within the United States. The escrow agent may not be a parent, subsidiary or affiliate of the contractor.

(b) **PROCEDURE:** COs must obtain CIO and HCA approval for the use of a third party source code escrow agent.

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- (c) **PROCEDURE:** Where a third party is acting as the source code escrow agent, a source code escrow agreement must be included in the official file and must require the escrow agent to:
- (1) Establish and maintain adequate procedures for protecting the source code and documentation delivered to or stored at the escrow agent's repository from unauthorized release or disclosure;
 - (2) Establish and maintain adequate procedures for controlling the release or disclosure of the source code and documentation from the repository to third parties consistent with BPA's rights in such data;
 - (3) When required by the contracting officer, deliver the source code in electronic form and documentation in electronic or paper form to BPA, or in other specified media;
 - (4) Be responsible for maintaining the currency of the source code and documentation delivered directly by BPA contractors or subcontractors to the repository;
 - (5) Authorize BPA to audit (but not copy) on a quarterly basis the source code material and reports by sampling at the location of the escrow agent to verify that the source code material is current;
 - (6) Obtain use and nondisclosure agreements from all persons to whom the source code and documentation is released or disclosed; and
 - (7) Indemnify BPA from any liability to source code owners or licensors resulting from, or as a consequence of, a release or disclosure of source code data made by the escrow agent or its officers, employees, agents, or representatives.

17.6.5.1.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 17-8 Source Code Escrow-Third Party Agent in all solicitations and contracts for commercial and noncommercial software where a third party will hold the source code in escrow for BPA's benefit in support of BPA's critical business systems. COs shall also include Clause 17-8 where the CO determines it is in BPA's best interest to assure continuity of operations from a contractor's failure to support the software. In addition to including Clause 17-8, COs shall also include in the official file a fully executed third party source code escrow agreement which includes BPA as a named beneficiary of the escrow account. The term of the third party source code escrow agreement must match the term of the BPA contract or license agreement and have notice provisions requiring BPA be notified of any termination or expiration of the escrow agreement.

17.6.5.2 BPA as Escrow Agent.

(a) **POLICY:** BPA policy requires that source code escrow for commercial and noncommercial software be maintained by BPA, with BPA as the escrow agent. Under these circumstances, BPA will negotiate an on-site source code escrow directly with the contractor, wherein the source code is held in a secure BPA location in lieu of an independent third party escrow account.

(b) **PROCEDURE:** When contracting with new or small technology companies, the CO shall obtain source code escrow rights with BPA as the escrow agent. BPA shall have rights in escrow to the source code and source materials for the current version and all subsequent releases, documentation and source code build information. Additionally, BPA shall have the right to periodically verify that the source code materials are accurate and current.

17.6.5.2.1 Clause Usage Prescription.

PROCEDURE: COs shall include Clause 17-9 Source Code Escrow-BPA as Agent in all solicitations and contracts for commercial and noncommercial software solicitations and contracts for software utilized in support of BPA's critical business systems. COs shall also include Clause 17-9 where the CO determines it is in BPA's best interest to assure continuity of operations from a contractor's failure to support the software.

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17.6.6 Trademarks.

(a) **INFORMATION:** A trademark or service mark is a work, symbol or device used to identify the source of goods or services. Trademarks are protected under both federal and state law. The federal law, known as the Lanham Act, 15 U.S.C. § 1051-1127, affects BPA in two ways. First, BPA may hold title to a trademark for its own goods or services. Secondly, the Lanham Act waives sovereign immunity, implying that BPA can be sued for infringing on a trademark.

(b) **POLICY:** BPA is subject to, and will comply with, the Lanham Act requirements.

(c) **PROCEDURE:** COs shall consult with OGC on any issues of trademark law.

17.6.7 Audit Rights.

(a) **INFORMATION:** Many software licensing structures require the licensee to allow the licensor to access the installed software or system to verify compliance and usage. Alternate methods of license usage verification include licensee certification, periodic true-ups, and self-reporting.

(b) **POLICY:** Due to the critical nature of BPA's information technology systems as well as the restricted access inherent in critical systems operations, BPA will not allow access to its IT systems for license compliance verification or usage purposes. BPA may agree to self-report its compliance and usage to contractors, upon contractor's written request or as negotiated within the contract documents.

(c) **PROCEDURE:** COs shall not agree in any contract to any audit by contractor or third party of BPA information technology systems or data for license compliance verification or usage purposes. COs may agree to self-reporting, certification or periodic true-ups for compliance and usage verification purposes.

17.50 TEXT OF CLAUSES

The following clauses are referred to in BPI Part 17:

- 17-1.1 Authorization and Consent -- Research, Development, and Demonstration Contracts
- 17-1.2 Authorization and Consent -- Noncommercial Items or Services
- 17-2.1 Patent Rights -- Ownership by the Contractor
- 17-2.2 Patent Rights -- Ownership by BPA
- 17-3 Rights in Data -- Noncommercial Software
- 17-4 Rights in Data -- Use of Existing Work
- 17-5.1 Rights in Data -- Creation of New Work
- 17-5.2 Rights in Data -- Creation of New Work, Restricted
- 17-6 Commercial Software -- No Contractor License
- 17-7.1 Infringement Indemnification -- Software
- 17-7.2 Infringement Indemnification -- Patents
- 17-8 Source Code Escrow -- Third Party Agent
- 17-9 Source Code Escrow -- BPA as Agent
- 17-10 Commercial Software -- Contractor License
- 17-11 (Reserved)
- 17-12 Modifications to Commercial Software
- 17-13 Patent and Copyright Infringement Notice
- 17-14 Software Warranty
- 17-15 Hardware and IT Equipment Warranty
- 17-16 IT Service Warranty
- 17-17 (Reserved)

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- 17-18 (Reserved)
- 17-19 Survival of Perpetual Software License
- 17-20 Information Assurance
- 17-21 Nondisclosure for RFO/RFQ
- 17-22 Nondisclosure During Contract Performance
- 17-23 (Reserved)
- 17-24 (Reserved)
- 17-25 (Reserved)

Clause 17-1.1 AUTHORIZATION AND CONSENT -- RESEARCH, DEVELOPMENT, AND DEMONSTRATION CONTRACTS (Oct 11)(BPI 17.6.4.1.1)

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

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

(End of Clause)

Clause 17-1.2 AUTHORIZATION AND CONSENT -- NONCOMMERCIAL ITEMS OR SERVICES (Oct 11)(BPI 17.6.4.1.1)

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

- (1) Embodied in the structure or composition of any article the delivery of which is accepted by BPA under this contract; or
- (2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with:
 - (A) specifications or written provisions forming a part of this contract or
 - (B) specific written instructions given by the CO directing the manner of performance.

The entire liability to BPA for infringement of a United States patent shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and BPA assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

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

(End of Clause)

Clause 17-2.1 PATENT RIGHTS -- OWNERSHIP BY THE CONTRACTOR (Oct 11)(BPI 17.4.1.1; BPI 17.5.2.8.1)

(a) Contractor's rights.

- (1) Ownership. The Contractor may retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.
- (2) License. The Contractor shall retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the

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Contractor fails to disclose the invention within the times specified in paragraph (b) of this clause. The Contractor's license extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(b) Contractor's obligations.

(1) The Contractor shall disclose in writing each subject invention to the CO within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure shall identify the inventor(s) and this contract under which the subject invention was made. It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale (*i.e.*, sale or offer for sale), or public use of the subject invention, or whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the CO of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(2) The Contractor shall elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer within 2 years of disclosure to the agency. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file either a provisional or a non-provisional patent application on an elected subject invention within 1 year after election. However, in any case where a publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the Contractor shall file the application prior to the end of that statutory period. If the Contractor files a provisional application, it shall file a non-provisional application within 10 months of the filing of the provisional application. The Contractor shall file patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or non-provisional) or 6 months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (b)(1), (b)(2), and (b)(3) of this clause.

(c) Government's rights—

(1) Ownership. The Contractor shall assign to the agency, on written request, title to any subject invention—

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

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

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- (C) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.
- (2) License. If the Contractor retains ownership of any subject invention, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.
- (d) Contractor action to protect the Government's interest.
- (1) The Contractor shall execute or have executed and promptly deliver to the agency all instruments necessary to—
- (A) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and
- (B) Assign title to the agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection for that subject invention in any country.
- (2) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format, each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.
- (3) The Contractor shall notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.
- (4) The Contractor shall include, within the specification of any United States nonprovisional patent and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under Contract # _____ awarded by _____ agency. The Government has certain rights in the invention."
- (e) Reporting on utilization of subject inventions. The Contractor shall submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (f) of this clause. The Contractor also shall mark any utilization report as confidential/proprietary to help prevent inadvertent release outside the Government. As required by 35 U.S.C. 202(c)(5), the agency will not disclose that information to persons outside the Government without the Contractor's permission.
- (f) March-in rights. The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), and in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of contract award.
- (g) Subcontracts. The Contractor shall include the substance of this clause in all subcontracts.

(End of Clause)

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Clause 17-2.2 PATENT RIGHTS -- OWNERSHIP BY BPA (Oct 11)(BPI 17.4.1.1; BPI 17.5.2.8.1)

(a) Ownership.

(1) **Assignment to BPA.** The Contractor shall assign to BPA title throughout the world to each subject invention except to the extent that rights are retained under paragraphs (a)(2) and (c) of this clause.

(2) Greater rights determinations.

(A) The Contractor, or an employee-inventor after consultation with the Contractor, may request greater rights than the nonexclusive license provided in paragraph (c) of this clause. The request for a greater rights must be submitted to the Contracting Officer at the time of the first disclosure of the subject invention pursuant to paragraph (d)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract normally shall be subject to paragraph (b) of this clause, and to the reservations and conditions deemed to be appropriate by the agency.

(B) Upon request, the Contractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and patent number and issue date for any subject invention in any country for which the Contractor has retained title.

(C) Upon request, the Contractor shall furnish the agency an irrevocable power to inspect and make copies of the patent application file.

(b) Minimum rights acquired by BPA.

(1) Regarding each subject invention to which the Contractor retains ownership, the Contractor agrees as follows:

(A) BPA will have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(B) The agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c) and in accordance with the procedures set forth in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of the contract award.

(C) Upon request, the Contractor shall submit periodic reports no more frequently than annually on the utilization, or efforts to obtain utilization, of a subject invention by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and any other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (b)(1)(B) of this clause. To the extent data or information supplied under this section is considered by the Contractor, or its licensees, or assignees to be privileged and confidential and is so marked, the agency, to the extent permitted by law, will not disclose such information to persons outside the Government.

(D) When licensing a subject invention, the Contractor shall—

(i) Ensure that no royalties are charged on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government;

(ii) Refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government;

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(iii) Provide for this refund in any instrument transferring rights in the subject invention to any party.

(E) When transferring rights in a subject invention, the Contractor shall provide for the Government's rights set forth in paragraphs (b)(1)(A) through (b)(1)(E) of this clause.

(2) Nothing contained in paragraph (c) of this clause shall be deemed to grant to the Government rights in any invention other than a subject invention.

(c) Minimum rights to the Contractor.

(1) The Contractor is hereby granted a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Contractor fails to disclose the subject invention within the times specified in paragraph (d)(2) of this clause. The Contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency except when transferred to the successor of that part of the Contractor's business to which the subject invention pertains.

(2) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304-1(f).

(3) When the Government elects not to apply for a patent in any foreign country, the Contractor retains rights in that foreign country to apply for a patent, subject to the Government's rights in paragraph (c)(1) of this clause.

(d) Invention identification, disclosures, and reports.

(1) The Contractor shall establish and maintain active and effective procedures to educate its employees in order to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters. The procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show the procedures for identifying and disclosing subject inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of these procedures for evaluation and for a determination as to their effectiveness.

(2) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale (i.e., sale or offer for sale), public use, or publication of the subject invention known to the Contractor. The disclosure shall identify the contract under which the subject invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale, or public use of the subject invention and whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(3) The Contractor shall furnish the Contracting Officer the following:

(A) Interim reports every 12 months (or a longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that

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period, and stating that all subject inventions have been disclosed (or that there are none) and that the procedures required by paragraph (d)(1) of this clause have been followed.

(B) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were none, and listing all subcontracts at any tier containing a patent rights clause or stating that there were none.

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

(5) Subject to FAR 27.302(i), the Contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(e) Examination of records relating to inventions.

(1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(A) Any inventions are subject inventions;

(B) The Contractor has established and maintains the procedures required by paragraphs (d)(1) and (d)(4) of this clause; and

(C) The Contractor and its inventors have complied with the procedures.

(2) The Contractor shall disclose to the Contracting Officer, for the determination of ownership rights, any unreported invention that the Contracting Officer believes may be a subject invention.

(3) Any examination of records under paragraph (e) of this clause will be subject to appropriate conditions to protect the confidentiality of the information involved.

(f) Withholding of payment.

(This paragraph does not apply to subcontracts.)

(1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding \$50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Office's opinion, the Contractor fails to—

(A) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (d)(1) of this clause;

(B) Disclose any subject invention pursuant to paragraph (d)(2) of this clause;

(C) Deliver acceptable interim reports pursuant to paragraph (d)(3)(A) of this clause;
or

(D) Provide the information regarding subcontracts pursuant to paragraph (d)(3)(B) of this clause.

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(2) The Contracting Officer will withhold the reserve or balance until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Contracting Officer will not make final payment under this contract before the Contractor delivers to the Contracting Officer, as required by this clause, all disclosures of subject inventions, an acceptable final report, and all due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized. The Contracting Officer will not withhold any amount under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment shall not be construed as a waiver of any Government rights.

(g) **Preference for United States industry.** Unless provided otherwise, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the agency upon a showing by the Contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(h) **Subcontracts.** The Contractor shall include the substance of this patent rights clause in all subcontracts.

(End of Clause)

Clause 17-3 RIGHTS IN DATA -- NONCOMMERCIAL SOFTWARE (Oct 11)(BPI 17.5.4.1.1)

(a) Title to Software and all copies and, except as specifically provided herein, to all modifications, alterations and enhancements made under this contract, shall remain with Contractor or its third party licensors. BPA shall have no right, title, or interest in the Software or any copy, or except as specifically provided herein, in any modification, alteration or enhancement made under this contract. All modified, altered or enhanced versions of the Software shall be deemed equivalent to the Software, and shall be subject to the terms and conditions of this license. Contractor grants to BPA a fully paid-up, non-exclusive, irrevocable, world-wide license to use the Software and such modifications internally.

(b) No title or ownership of the Software or any of its parts, nor any applicable intellectual property rights therein such as patents, copyrights and trade secrets, is transferred to BPA.

(c) Unless terminated by Contractor as provided herein, the term of this license shall expire at such time as BPA discontinues use of the applicable Software. Contractor agrees to support the Software for whatever time BPA pays the annual support fee. Contractor agrees to place the Software source code into escrow for the benefit of BPA, as defined in the source code escrow clause herein.

(d) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that Software furnished hereunder infringe a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable

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assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Software, replace or modify the Software to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the Software and accept its return.

(End of Clause)

Clause 17-4 RIGHTS IN DATA -- USE OF EXISTING WORK (Oct 11)(BPI 17.5.4.1.1)

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

(b) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that the Work Product furnished hereunder infringes a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Work Product, replace or modify the Work Product to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the work Product and accept its return.

(End of Clause)

Clause 17-5.1 RIGHTS IN DATA -- CREATION OF NEW WORK (Oct 11)(BPI 17.5.4.1.1)

(a) Except as otherwise provided herein, the Contractor grants to BPA a fully paid-up, non-exclusive, irrevocable, worldwide, perpetual license to copy, prepare derivative works and perform or display publicly, by or on behalf of BPA, for all the material or subject matter produced under this contract, hereinafter referred to as Work Product. Work Product means recorded information, regardless of form or the media on which it is stored, including any other copyrightable products or materials arising from performance under this contract.

(b) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that the Work Product furnished hereunder infringes a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Work Product, replace or modify the Work Product to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the work Product and accept its return. The provisions of this clause do not apply to material furnished to the Contractor by BPA and incorporated in the Work Product to which this clause applies.

(End of Clause)

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Clause 17-5.2 RIGHTS IN DATA -- CREATION OF NEW WORK, RESTRICTED (Oct 11)(BPI 17.5.4.1.1)

(a) Except as otherwise provided herein, the Contractor grants to BPA a fully paid-up, non-exclusive, irrevocable, worldwide, perpetual license to copy, prepare derivative works and perform or display publicly, by or on behalf of BPA, for all the material or subject matter produced under this contract, hereinafter referred to as Work Product. Work Product means data (recorded information, regardless of form or the media on which it is stored) as well as any other copyrightable products or materials arising from performance under this contract.

(b) Contractor agrees that its use of the Work Product shall be restricted as defined by BPA in the statement of work or requirements document. Contractor shall protect the Work Product from disclosure to third parties without BPA's prior written consent, except as reasonably necessary to perform the services under this contract. The obligations under this provision shall survive any termination of this contract. Contractor's obligation to protect the Work Product from disclosure shall terminate upon BPA's disclosure without further restrictions.

(c) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that the Work Product furnished hereunder infringes a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Work Product, replace or modify the Work Product to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the Work Product and accept its return. The provisions of this clause do not apply to material furnished to the Contractor by BPA and incorporated in the Work Product to which this clause applies.

(End of Clause)

Clause 17-6 COMMERCIAL SOFTWARE -- NO CONTRACTOR LICENSE (Oct 11)(BPI 17.2.1.1)

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

(b)

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

(2) The proprietary computer software may be--

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

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

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

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

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- (E) Disclosed to and reproduced for use by BPA support service contractors or their subcontractors, subject to the same restrictions set forth in this purchase order/contract; and
- (3) If the proprietary computer software delivered under this purchase order/contract is published and copyrighted, it is licensed to BPA, without disclosure prohibitions, with the rights set forth in subparagraph (b)(2) of this clause, unless expressly stated otherwise in this purchase order/contract.
- (4) To the extent feasible the Contractor shall affix a Notice substantially as follows to any proprietary computer software delivered under this purchase order/contract; or, if the Contractor does not, BPA has the right to do so: "Notice--Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of BPA regarding its use, reproduction and disclosure are as set forth in BPA Contract (or Purchase Order) No _____."
- (c) If any proprietary computer software is delivered under this contract with the copyright notice of 17 U.S.C. 401, it will be presumed to be published and copyrighted and licensed to the BPA in accordance with subparagraph (b)(3) of this clause, unless a statement substantially as follows accompanies such copyright notice: "Unpublished--rights reserved under the copyright laws of the United States."

(End of Clause)

Clause 17-7.1 INFRINGEMENT INDEMNIFICATION -- SOFTWARE (Oct 11)(BPI 17.5.3.2.1)

- (a) Contractor shall defend and hold BPA harmless from any claim by a third party that the Software infringes any patent, copyright or trade secret of that third party, provided:
- (1) Contractor is promptly notified of the claim;
 - (2) Contractor receives reasonable cooperation from BPA necessary to perform Contractor's obligations hereunder; and
 - (3) Contractor has sole control over the defense and all negotiations for a settlement or compromise.

The foregoing obligation of Contractor does not apply with respect to Software or portions or components thereof:

- (1) not supplied by the Contractor;
 - (2) used in a manner not expressly authorized by this Contract;
 - (3) made in whole or in part in accordance with BPA's specifications;
 - (4) modified by BPA, if the alleged infringement relates to such modification;
 - (5) combined with other products (hardware or software), processes or materials where the alleged infringement would not exist but for such combination; or
 - (6) where BPA continues the allegedly infringing activity after being notified thereof and provided modifications that would have avoided the alleged infringement.
- (b) In the event the Software is held by a court of competent jurisdiction to constitute an infringement and use of the Software is enjoined, Contractor shall do one of the following:
- (1) procure for BPA the right to continue use of the Software;
 - (2) provide a modification to the Software so that its use becomes non-infringing;
 - (3) replace the Software with software which is substantially similar in functionality and performance; or
 - (4) if none of the foregoing alternatives is reasonably available, the Contractor shall refund the full value of the License fees paid by BPA for the infringing Software.

This clause states Contractor's sole liability and BPA's exclusive remedy for infringement claims.

(End of Clause)

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Clause 17-7.2 INFRINGEMENT INDEMNIFICATION -- PATENTS **(Oct 11)(BPI 17.6.4.2.1)**

(a) The Contractor shall indemnify BPA and its officers, agents, and employees against liability, including costs, for infringement of any United States patent arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of BPA of such supplies or construction work.

(b) This indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by BPA of the suit or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense.

Further, this indemnity shall not apply to—

- (1) An infringement resulting from compliance with specific written instructions of the CO directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor;
- (2) An infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance; or
- (3) A claimed infringement that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(End of Clause)

Clause 17-8 SOURCE CODE ESCROW -- THIRD PARTY AGENT **(Oct 11)(BPI 17.6.5.1.1; BPI 17.5.3.3.1)**

(a) The Contractor shall provide reasonable access to its software source code and all relevant software documentation to BPA in accordance with the third party escrow agreement as attached to this contract. The intent of this requirement is to provide security to BPA in its ability to maintain and develop the software in the event that the Contractor is unable or unwilling to perform its obligations under this contract and for the purpose of auditing the internal functionality of the source code.

(b) The Contractor shall notify BPA immediately upon the occurrence of any of the triggering events as identified in section (e) below. If Contractor is unable to provide BPA with reasonable written assurances of its ability to provide continued support within thirty (30) days of any notification of a triggering event Contractor will hereby grant to BPA a license to use the applicable Source Code(s) for the product(s) as may be reasonably required for the purpose of BPA's continued use and maintenance of the product(s). BPA shall use the source code for the sole purpose of supporting and maintaining the licensed software for its internal use only.

(c) In order to ensure compliance with the foregoing, the Contractor shall deposit in escrow with an escrow agent, and update as necessary, a copy of the source code and related documentation which correspond to the most current version of each product in use by BPA. The Contractor shall provide to BPA a tripartite escrow agreement to be signed by all parties naming BPA as the beneficiary of the escrow agreement. All expenses associated with the agreement will be borne by the Contractor. The escrow agent shall be an institution or entity that routinely engages in the practice of holding software source code for the benefit of third parties licensed to use the related object code or software programs. The escrow agent and all source code materials shall be located in the United States. The escrow agent shall be financially and operationally independent

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of the Contractor, including the Contractor's parent company, subcontractors, subsidiaries and affiliates.

(d) Within thirty (30) calendar days from the Contractor's first delivery of software to BPA, or within thirty (30) calendar days from the delivery of changed, updated, or upgraded software to BPA, the Contractor shall deliver to the escrow agent one copy of the related source code material. Contractor agrees to deliver a copy of its build process and documentation, including materials and equipment lists, for verification purposes to BPA prior to depositing source code documentation with the escrow agent.

(e) Under the escrow agreement, the escrow agent will release the source code for the licensed software upon the occurrence of the conditions set forth in the agreement and as identified herein. BPA or its agent shall have reasonable periodic access for inspection and verification of the escrowed source code materials. In addition to any triggering events identified in the third party escrow agreement, upon the occurrence of the following "Triggering Events" the escrow agent shall release the source code and all related materials to BPA:

- (1) Decision by the Contractor or its successor in interest to discontinue maintenance of the licensed software;
- (2) The filing of a bankruptcy petition by or against the Contractor that is not dismissed within 60 days of its filing;
- (3) Appointment of a receiver, trustee, or custodian of all or a substantial portion of Contractor's assets which is not dismissed within 60 days of such appointment;
- (4) An assignment for the benefit of creditors by the Contractor of all or a substantial portion of the Contractor's assets which is not revoked within 60 days of its creation; or
- (5) Receipt by the escrow agent of a notice or final order to release the source code to BPA issued by either a trustee in bankruptcy appointed for Contractor, or a court having lawful jurisdiction.

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

- (1) Evidence satisfactory to the escrow agent in writing that BPA has previously notified the Contractor of such Triggering Event and the contractor did not object to the release of the source code;
- (2) A written demand that the source code be released and delivered to BPA;
- (3) A written commitment that BPA will use the source code only as permitted under the terms of the escrow agreement; and
- (4) Specific delivery instructions.

(End of Clause)

Clause 17-9 SOURCE CODE ESCROW -- BPA AS AGENT **(Oct 11)(BPI 17.6.5.2.1; BPI 17.5.3.3.1)**

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

(b) The Contractor shall notify BPA immediately upon the occurrence of any of the triggering events as identified in section (d) below. If Contractor is unable to provide BPA with reasonable written assurances of its ability to provide continued support within thirty (30) days of any notification of a triggering event, Contractor hereby grants to BPA a license to use the applicable source code(s) for the product(s) as may be reasonably required for the purpose of BPA's

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continued use and maintenance of the product(s). BPA shall use the source code for the sole purpose of supporting and maintaining the licensed software for its internal use only.

(c) Within thirty (30) calendar days from the Contractor's first delivery to BPA of the licensed software, or within thirty (30) calendar days from the delivery of any changed, updated, or upgraded licensed software, the Contractor shall deliver to BPA one copy of the corresponding source code materials including a copy of its build process and documentation, including materials and equipment lists for verification purposes.

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

- (1) Decision by the Contractor or its successor in interest to discontinue maintenance of the licensed software;
- (2) The filing of a bankruptcy petition by or against the Contractor that is not dismissed within 60 days of its filing;
- (3) Appointment of a receiver, trustee, or custodian of all or a substantial portion of Contractor's assets, which is not dismissed within 60 days of such appointment;
- (4) An assignment for the benefit of creditors by the Contractor of all or a substantial portion of the Contractor's assets which is not revoked within 60 days of its creation; or
- (5) BPA receives a notice or final order to release the source code, issued by either (1) a trustee in bankruptcy appointed for Contractor, or (2) a court having lawful jurisdiction.

(End of Clause)

Clause 17-10 COMMERCIAL SOFTWARE -- CONTRACTOR LICENSE **(Oct 11)(BPI 17.2.1.1)**

Contractor grants a license to BPA to utilize its commercial software in compliance with the attached software license agreement. BPA shall comply with the terms of the software license agreement, or modified software agreement as appropriate.

(End of Clause)

Clause 17-11 (Reserved)

Clause 17-12 MODIFICATIONS TO COMMERCIAL SOFTWARE **(Oct 11)(BPI 17.2.5.1; BPI 17.4.1.1)**

Contractor shall retain the rights to modifications to its commercial software made at BPA's expense; however, Contractor grants to BPA a fully paid-up, nonexclusive, irrevocable, world-wide license to use such modifications, provided BPA is licensed for use of the commercial software.

(End of Clause)

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Clause 17-13 PATENT AND COPYRIGHT INFRINGEMENT NOTICE (Oct 11)(BPI 17.6.4.3.1.1)

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

(b) In the event of any claim or suit against BPA on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the Contractor shall furnish to BPA, when requested by the CO, all evidence and information in the Contractor's possession pertaining to such claim or suit. **Such evidence and information shall be furnished at the expense of BPA except where the Contractor has agreed to indemnify BPA.**

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

(End of Clause)

Clause 17-14 SOFTWARE WARRANTY (Oct 11)(BPI 17.2.10.1)

Contractor warrants that its product shall perform substantially in accordance with applicable technical documentation as published and provided to BPA. Contractor warrants that its products, as delivered to BPA, contain any no mal-ware or viruses developed by Contractor to disable, or erase software, hardware, or data or to perform any similar function. Additionally, no portion of Contractor's software or material prepared for BPA should contain any copyrighted or similarly protected material, other than such material that Contractor has been provided a license or other evidence from such owner of the ability to do so. Contractor warrants that its media upon which it delivers its product to BPA, if any, will be free of defects in materials and workmanship under normal use. Contractor agrees to replace defective media.

Contractor shall use its commercially reasonable efforts to correct or provide a workaround for reproducible product errors that cause a breach of this warranty, or if Contractor is unable to make its product operate as warranted within a reasonable time considering the severity of the error and its impact on BPA, BPA shall be entitled to return the product to contractor and recover fees paid for the license. Contractor shall not be liable under this warranty to the extent that any defect or error in its product is either caused by or contributed to by improper installation of its product unless such installation is performed by Contractor or BPA's use of the product contrary to applicable technical documentation.

(End of Clause)

Clause 17-15 HARDWARE AND IT EQUIPMENT WARRANTY (Oct 11)(BPI 17.3.7.1)

Contractor warrants that its products, as delivered to BPA, contain any no mal-ware or viruses developed by Contractor to disable, or erase software, hardware, or data or to perform any similar function. Additionally, no portion of Contractor's software or material prepared for BPA should contain any copyrighted or similarly protected material, other than such material that Contractor has been provided a license or other evidence from such owner of the ability to do so.

Contractor shall use its commercially reasonable efforts to correct or provide a workaround for reproducible product errors that cause a breach of this warranty, or if Contractor is unable to make its product operate as warranted within a reasonable time considering the severity of the

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error and its impact on BPA, BPA shall be entitled to return the product to contractor and recover fees paid for the license. Contractor shall not be liable under this warranty to the extent that any defect or error in its product is either caused by or contributed to by improper installation of its product unless such installation is performed by Contractor or BPA's use of the product contrary to applicable technical documentation.

(End of Clause)

Clause 17-16 IT SERVICE WARRANTY **(Oct 11)(BPI 17.2.1.1)**

Contractor warrants that any services performed under this agreement or provision shall be performed in a competent and workmanlike manner in conformity with generally acceptable industry standards for the services provided hereunder. Contractor shall re-perform the services at no cost to BPA or if Contractor is unable to perform services as warranted, BPA shall be entitled to recover the value of the fees paid to Contractor for the nonconforming services.

(End of Clause)

Clause 17-17 (Reserved)

Clause 17-18 (Reserved)

Clause 17-19 SURVIVAL OF PERPETUAL SOFTWARE LICENSE **(Oct 11)(BPI 17.2.1.1; BPI 17.2.12.1; BPI 17.5.3.3.1)**

Notwithstanding any expiration of the BPA contract, any perpetual software use licenses granted to BPA by Contractor shall survive the expiration of the contract.

(End of Clause)

Clause 17-20 INFORMATION ASSURANCE **(Oct 11)(BPI 17.6.1.4.1)**

(a) In performance of this contract, the contractor shall protect all data and information systems under its management and control at all times commensurate with the risk and magnitude of harm that could result to Federal security interests and BPA's missions and programs resulting from a loss or unauthorized disclosure of confidentiality, availability, and integrity of these information or systems.

(b) The contractor shall maintain an information security and/or data security plan or program consistent with industry standards such as National Institute of Standards and Technology (NIST), as required by the E-Government Act (Public Law 107-347) of 2002, Title III Federal Information Security Management Act (FISMA).

(c) The BPA Chief Information Officer (CIO), or representatives, shall have the right to examine, audit, and reproduce any of the contractor's pertinent information security and/or data security plan or program.

(d) The contractor shall adhere to any additional information security requirements identified in the statement of work.

(e) The contractor, at its sole expense, shall address and correct any deficiencies and/or noncompliance with the terms of the contract as identified by BPA.

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(End of Clause)

Clause 17-21 NONDISCLOSURE FOR RFO/RFQ (Oct 11)(BPI 17.6.2.1.1)

(a) During the term of this Request for Offer (RFO) or Request for Quote (RFQ), Contractor may disclose sensitive or confidential ("Information"), to BPA. Information shall mean any information that is owned or controlled by Contractor and not generally available to the public, including but not limited to performance, sales, financial, contractual and marketing information, and ideas, technical data and concepts. It also includes information of third parties in possession of Contractor that Contractor is obligated to maintain in confidence. Information may be in intangible form, such as unrecorded knowledge, ideas or concepts or information communicated orally or by visual observation, or may be embodied in tangible form, such as a document. The term "document" includes written memoranda, drawings, training materials, specifications, notebook entries, photographs, graphic representations, firmware, computer information or software, information communicated by other electronic or magnetic media, or models. All such Information disclosed in written or tangible form shall be marked in a prominent location to indicate that it is the confidential information of the Contractor. Information which is disclosed verbally or visually shall be followed within ten (10) days by a written description of the Information disclosed and sent to BPA.

(b) BPA shall hold Contractor's Information in confidence and shall take all reasonable steps to prevent any unauthorized possession, use, copying, transfer or disclosure of such Information. BPA shall give such Information at least such protection as BPA gives its own information and data of the same general type, but in no event less than reasonable protection. BPA shall not use or make copies of the Contractor's Information for any purpose other than for the purposes of this RFO/RFQ. BPA shall not disclose the Contractor's Information to any person other than those of BPA's employees, agents, consultants, contractors and subcontractors who have a verifiable need to know in connection with this contract or as required pursuant to the Freedom of Information Act (FOIA). BPA shall, by written contract, require each person to whom, or entity to which, it discloses Contractor's Information to give such Information at least such protection as BPA itself is required to give such Information under provision. BPA's confidentiality obligations hereunder shall not apply to any portion of the Disclosing Party's Information which:

- (1) has become a matter of public knowledge other than through an act or omission of the BPA;
- (2) has been made known to BPA by a third party in accordance with such third party's legal rights without any restriction on disclosure;
- (3) was in the possession of BPA prior to the disclosure of such Information by the Contractor and was not acquired directly or indirectly from the other party or any person or entity in a relationship of trust and confidence with the other party with respect to such Information;
- (4) BPA is required by law to disclose, or is subject to FOIA;
- (5) has been independently developed by BPA from information not defined as "Information" in this contract; or
- (6) is subject to disclosure pursuant to the Freedom of Information Act (FOIA).

(c) BPA shall return or destroy at the Contractor's direction, all Information (including all copies thereof) to the Contractor promptly upon the earlier of either the termination of this RFO/RFQ or the Contractor's written request.

(End of Clause)

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Clause 17-22 NONDISCLOSURE DURING CONTRACT PERFORMANCE (Oct 11)(BPI 17.6.2.1.1)

(a) During the term of this contract, Contractor may disclose sensitive, confidential or for official use only information ("Information"), to BPA. Information shall mean any information that is owned or controlled by Contractor and not generally available to the public, including but not limited to performance, sales, financial, contractual and marketing information, and ideas, technical data and concepts. It also includes information of third parties in possession of Contractor that Contractor is obligated to maintain in confidence. Information may be in intangible form, such as unrecorded knowledge, ideas or concepts or information communicated orally or by visual observation, or may be embodied in tangible form, such as a document. The term "document" includes written memoranda, drawings, training materials, specifications, notebook entries, photographs, graphic representations, firmware, computer information or software, information communicated by other electronic or magnetic media, or models. All such Information disclosed in written or tangible form shall be marked in a prominent location to indicate that it is the confidential information of the Contractor. Information which is disclosed verbally or visually shall be followed within ten (10) days by a written description of the Information disclosed and sent to BPA.

(b) BPA shall hold Contractor's Information in confidence and shall take all reasonable steps to prevent any unauthorized possession, use, copying, transfer or disclosure of such Information. BPA shall give such Information at least such protection as BPA gives its own information and data of the same general type, but in no event less than reasonable protection. BPA shall not use or make copies of the Contractor's Information for any purpose other than as contemplated by the terms of this contract. BPA shall not disclose the Contractor's Information to any person other than those of BPA's employees, agents, consultants, contractors and subcontractors who have a verifiable need to know in connection with this contract or as required pursuant to the Freedom of Information Act (FOIA). BPA shall, by written contract, require each person to whom, or entity to which, it discloses Contractor's Information to give such Information at least such protection as BPA itself is required to give such Information under this contract. BPA's confidentiality obligations hereunder shall not apply to any portion of Contractor's Information which:

- (1) has become a matter of public knowledge other than through an act or omission of the BPA;
- (2) has been made known to BPA by a third party in accordance with such third party's legal rights without any restriction on disclosure;
- (3) was in the possession of BPA prior to the disclosure of such Information by the Contractor and was not acquired directly or indirectly from the other party or any person or entity in a relationship of trust and confidence with the other party with respect to such Information;
- (4) BPA is required by law to disclose, or is subject to FOIA;
- (5) has been independently developed by BPA from information not defined as "Information" in this contract; or
- (6) is subject to disclosure pursuant to the Freedom of Information Act (FOIA).

(c) BPA shall return or destroy at the Contractor's direction, all Information (including all copies thereof) to the Contractor promptly upon the earliest of any termination of this contract or the Contractor's written request.

(End of Clause)

Clause 17-23 (Reserved)
Clause 17-24 (Reserved)
Clause 17-25 (Reserved)