

PART II

SECTION H

CONTRACT CLAUSES

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## PART I

### SECTION H - SPECIAL CONTRACT REQUIREMENTS

#### H.1 - LABORATORY FACILITIES

DOE agrees to furnish and make available to the Contractor, for its use in performing the work under this contract, the Laboratory facilities designated as follows:

- (a) The Government-owned or leased land, buildings, utilities, equipment and other facilities situated at the Ernest Orlando Lawrence Berkeley National Laboratory Site at Berkeley, Alameda County, California;
- (b) Government-owned or leased facilities at such other locations as may be approved by DOE for use under this contract; and
- (c) Subject to mutual agreement, other facilities may be used in the performance of the work under this contract.

DOE reserves the right to make part of the above-mentioned land or facilities available to other Government agencies or other users on the basis that the responsibilities and undertakings of the Contractor will not be unreasonably interfered with. Before exercising its right to make any part of the land or facilities available to another agency or user, DOE will confer with the Contractor.

#### H.2 - LONG-RANGE PLANNING, PROGRAM DEVELOPMENT AND BUDGETARY ADMINISTRATION (SEPT 2017)

- (a) Basic Considerations. Throughout the process of planning, and budget development and approval, the Parties recognize the desirability for close consultation, for advising each other of plans or developments on which subsequent action will be required, and for attempting to reach mutual understanding in advance of the time that action needs to be taken.
- (b) Long Range Planning. It is the intent of the Parties to develop a five-year strategic outlook for Ernest Orlando Lawrence Berkeley National Laboratory. Development of this document is the strategic planning process by which the Parties, through mutual consultation, reach agreement on the general types and levels of activity which will be conducted at the Laboratory for the designated period. It also serves as a baseline for placement of work at the Laboratory. The contents of the plan should include: Mission Overview, Funding by Source, Human Resources, Core Capabilities, Science Strategies for the Future, Major

Initiatives, Infrastructure Plans, Mission Readiness and Strategic Partnership Projects (SPP). The Contractor shall submit an annual Laboratory Plan which provides insight into accomplishments against this strategic document. The Contractor is expected to contribute to long range planning conducted by the Office of Science.

- (c) Budgetary Administration. DOE approval of program proposals and budget estimates will be reflected in work authorizations and financial plans developed and issued to the Contractor.

### H.3 - RESERVED

### H.4 - ADVANCE UNDERSTANDINGS REGARDING ADDITIONAL ITEMS OF ALLOWABLE AND UNALLOWABLE COSTS AND OTHER MATTERS

Allowable costs under this Contract shall be determined according to the requirements of Clause I.148 - DEAR 970.5232-2, PAYMENTS AND ADVANCES (PREV. I.102). For purposes of effective Contract implementation, certain items of cost are being specifically identified below as allowable and/or unallowable under this Contract to the extent indicated:

#### I. ITEMS OF ALLOWABLE COSTS:

- (a) Personnel costs in accordance with Section J, Appendix A - ADVANCE UNDERSTANDINGS ON HUMAN RESOURCES, attached to this contract.
- (b) Rentals and leases of land, buildings, and equipment owned by third parties, allowances in lieu of rental, charges associated therewith and costs of alteration, remodeling and restorations where such items are used in the performance of the contract, except that such rentals and leases directly chargeable to the contract shall be subject to such approval by the Contracting Officer as set forth in Section J, Appendix G - PURCHASING SYSTEM REQUIREMENTS.
- (c) Notwithstanding the provisions of FAR cost principle 31.205-44 (e), stipends and payments made to reimburse travel or other expenses of researchers and students who are not employed under this contract but are participating in research, educational or training activities under this contract to the extent such costs are incurred in connection with fellowship, international agreements, or other research, educational or training programs approved by the Contracting Officer.
- (d) Notwithstanding the provisions of FAR cost principle 31.205-44 (e), payments to educational institutions for tuition and fees, or institutional allowances, in

connection with fellowship or other research, educational or training programs for researchers and students who are not employed under this contract.

- (e) Expenditures by the Contractor to reimburse other employers for payments (including, but not limited to, salaries) to or for the benefit of their employees loaned to the Contractor for and engaged in the performance of the Contractor's undertaking hereunder.
- (f) Costs incurred or expenditures made by the Contractor, as directed, approved or ratified by the Contracting Officer and not unallowable under any other provisions of this contract.

## II. ITEMS OF UNALLOWABLE COSTS:

- (a) Premium Pay for wearing radiation-measuring devices for Laboratory and all-tier cost-type subcontract employees.
- (b) In accordance with DEAR 970 home office expenses are unallowable, unless approved by the Contracting Officer (CO). The contractor is allowed to submit a home office expense proposal in accordance with DEAR 970.3102-3-70. Said proposal cannot exceed \$2,500,000 in any fiscal year. Upon Head of Contracting Activity (HCA) and CO approval home office expenses will be allowable.
- (c) Home office expenses are not included in fee.

### H.4A - FACILITIES CAPITAL COST OF MONEY

The request for proposal for this contract did not require a cost proposal in which facilities capital cost of money would apply. Therefore, the Clause I.31, FAR 52.215-17, WAIVER OF FACILITIES CAPITAL COST OF MONEY (PREV. I.116) is included in the contract. However, if during the performance of the contract the Contractor elects to claim facilities capital cost of money as an allowable cost, the Contractor shall submit to the Contracting Officer for approval a proposal for each specific project, including Form CASB-CMF which shows the calculation of the proposed amount (see FAR 31.205-10).

### H.5 - ADMINISTRATION OF SUBCONTRACTS

- (a) The administration of all subcontracts entered into and/or managed by the Contractor, including responsibility for payment hereunder, shall remain with the Contractor unless assigned at the direction of DOE.
- (b) The DOE reserves the right to direct the Contractor to assign to the DOE, or another Contractor, any subcontract awarded under this contract.

- (c) The DOE reserves the right to identify specific work activities in Section C "Description/Specifications/Work Statement" to be removed (de-scoped) from the contract in order to contract directly for the specific work activities. The Department will work with the Contractor to identify the areas of work that can be performed by small businesses in order to maximize direct federal contracts with small businesses. The Contractor agrees to facilitate these actions. This facilitation will include identifying direct contracting opportunities valued at \$5 million or above for small businesses for work presently performed under subcontracts, as well as work performed by Contractor employees. The Contractor shall notify the DOE one-year in advance of the expiration of any of its subcontracts valued at \$5 million or above, or if applicable, one-year prior to the exercise of an option and/or the option notification requirement, if any, contained in the subcontracts. The DOE will review this information and the requirements of the Contractor to determine the appropriateness for small business opportunities. This review may result in the DOE electing to enter in contracts directly with small businesses for these areas of work. The Contracting Officer will give notice to the Contractor not less than 120 calendar days prior to the date for exercising the option and/or the expiration of the subcontract and/or prior to entering into contract for work being performed by Contractor employees. Following award of these direct federal contracts, DOE may assign administration of these contracts to the Contractor. The Contractor agrees to accept assignments from the DOE for the administration of these contracts. The parameters of the Contractor's responsibilities for the small business contracts and/or changes, if any, to this contract will be incorporated via a modification to the contract. The Contractor will accept management and administration responsibilities, if so determined.
- (d) To the extent that DOE removes (de-scopes) work from this contract, any such removed or withdrawn work shall be treated as a change in accordance with the clause of this contract entitled, "Changes". A material change for the purpose of this clause is defined as cumulative changes during a fiscal year that result in a plus or minus 10% change to the Laboratory's budget. To the extent that DOE assigns the administration of a contract to the Contractor, or removes (de- scopes) work, the Parties reserve the right to negotiate an equitable adjustment in the Contractor's annual available performance fee. The negotiation of fee will be in accordance with the contract clause entitled, "Determining Total Available Performance Fee and Fee Earned". The Parties will also negotiate appropriate adjustments to the Contractor's Subcontracting Plan or any other applicable contract terms and conditions impacted by such withdrawal or addition of work scope to recognize the changes to the Contractor's subcontracting base and goals.

#### H.6 - CARE OF LABORATORY ANIMALS (SEP 2017)

- (a) Before undertaking performance of any contract involving the use of laboratory animals, the Contractor shall register with the Secretary of

Agriculture of the United States in accordance with Section 6, Public Law 89-544, Laboratory Animal Welfare Act, August 24, 1966, as amended. The Contractor shall furnish evidence of such registration to the Contracting Officer.

- (b) The Contractor shall acquire animals used in research and development programs from a dealer licensed by the Secretary of Agriculture, or from exempted sources in accordance with the Public Law enumerated in paragraph (a) above.
- (c) In the care of any animals used or intended for use in the performance of this contract, the Contractor shall comply with USDA regulations governing animal care and usage, as well as all other relevant local, State, and Federal regulations concerning animal care and usage. In addition, the Contractor will ensure that research will be conducted in a facility that either: (i) has a current National Institutes of Health (NIH) assurance number for animal care and usage, or (ii) is currently accredited for animal care and usage by an appropriate organization such as the Association for Assessment and Accreditation of Laboratory Animal Care (AAALAC) International, or (iii) has a DOE Assurance Plan Number.

#### H.7 - PRIVACY ACT RECORDS

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a (Public Law 93-579) and implementing DOE Regulations (10 CFR 1008), the Contractor shall maintain the following "Systems of Records" on individuals in order to accomplish the United States Department of Energy functions:

- Personnel Medical Records (DOE-33) (excepting Contractor employees)
- Personnel Radiation Exposure Records (DOE-35)
- Occupational and Industrial Accident Records (DOE-38)
- Personnel Security Clearance Files (DOE-43)
- Employee and Visitor Access Control Records (DOE-51)
- Access Control Records of International Visits, Assignments, and Employment at DOE Facilities and Contractor Sites (DOE-52)

The system of Records DOE-5, Personnel Records of Former Contractor Employees, is not included in the contract because, the Government relies on the protocol in place for Energy Employees Illness Compensation Program Act (EEIOCPA), per Modification 868.

The parenthetical Department of Energy number designations for each system of records refers to the official "System of Records" number published by the United



States Department of Energy in the Federal Register pursuant to the Privacy Act. If DOE requires the Contractor to design, develop, or maintain additional systems of Government-owned records on individuals to accomplish an agency function in accordance with the Privacy Act of 1974 and 10 CFR 1008, the Contracting Officer, or designee, shall so notify the Contractor, in writing, and such Privacy Act system shall be deemed added to the above list whether incorporated by formal contract modification or not. The Parties shall mutually agree to a schedule for implementation of the Privacy Act with respect to each such system.

#### H.8 - ADDITIONAL DEFINITIONS

- (a) CSC means the DOE Office of Science, Consolidated Service Center.
- (b) Contractor means the Offeror as specified in Block 15A of Standard Form 33 for Contract No. DE-AC02-05CH11231.
- (c) The term DOE means the Department of Energy, FERC means the Federal Energy Regulatory Commission, and NNSA means the National Nuclear Security Administration.
- (d) The term DOE Directive means DOE Policies, Orders, Notices, Manuals, Regulations, Technical Standards and related documents, and Guides, including for purposes of this contract those portions of DOE's Accounting and Procedures Handbook applicable to integrated Contractors, issued by DOE. The term does not include temporary written instructions by the Contracting Officer for the purpose of addressing short-term or urgent DOE concerns relating to health, safety, or the environment.
- (e) Head of Agency means: (i) The Secretary; (ii) Deputy Secretary; (iii) Under Secretaries of the Department of Energy and (iv) the Chairman, Federal Energy Regulatory Commission.
- (f) Head of Contracting Activity for the Ernest Orlando Lawrence Berkeley National Laboratory means the Deputy Director of Field Operations.
- (g) Laboratory means the Ernest Orlando Lawrence Berkeley National Laboratory (LBNL) composed of Government-owned buildings and facilities together with the necessary utilities, now existing or hereafter to be acquired, constructed and equipped, most of which are or will be situated on the Government-leased plot or plots of land (hereinafter referred to as the "Laboratory Site") at Berkeley, Alameda County, California.
- (h) The term "someone acting as the Laboratory Director" means the person appointed as Laboratory Director; Deputy Laboratory Director(s) acting in the absence of the Laboratory Director; or a person specified, in writing, to have

authority to act in the absence of the Laboratory Director and Deputy Laboratory Director(s).

- (i) With respect to Clause I.143 - DEAR 970.5227-10, PATENT RIGHTS – MANAGEMENT AND OPERATING CONTRACTS, NONPROFIT ORGANIZATION OR SMALL BUSINESS FIRM CONTRACTOR (PREV. I.97), the term nonprofit organization means –
  - (1) a university or other institution of higher education,
  - (2) an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 as amended and exempt from taxation under section 501(a) and the Internal Revenue Code,
  - (3) any nonprofit scientific or educational organization qualified as a nonprofit by the laws of the State of its organization or incorporation, or
  - (4) a combination of qualifying entities organized for a nonprofit purpose (e.g., partnership, joint venture or limited liability company) each member of which meets the requirements of (1), (2), or (3) above.
- (j) The term Senior Procurement Executive means, for DOE: Department of Energy – Director, Office of Acquisition and Project Management; National Nuclear Security Administration – Administrator for Nuclear Security, NNSA; and Federal Energy Regulatory Commission – Chairman, FERC.
- (k) Successor Plan means any pension or other benefit plan established or maintained pursuant to Clause H.41, PENSION PLAN, paragraph (f) and covering Contractor employees performing work on this Contract.
- (l) The UCRP means the University of California Retirement Plan.
- (m) With respect to Clause H.30, CONTRACTOR ASSURANCE SYSTEM, the following definitions apply:
  - (1) In paragraph (a) the term “Board of Directors” shall mean the “LBNL Contract Assurance Council”.
  - (2) In paragraph (a) the term “throughout the Contractor’s organization” shall mean those portions of the University operations that are subject to contract DE- AC02-05CH11231, alternatively - “the Laboratory”.

#### H.9 - SERVICE CONTRACT ACT OF 1965 (41 U.S.C. 351)

The Service Contract Act of 1965 is not applicable to this contract. However, in accordance with Clause I.159 – DEAR 970.5244-1, CONTRACTOR PURCHASING SYSTEM (PREV. I.114), subcontracts awarded by the Contractor are subject to the Act to the same extent and under the same conditions as contracts awarded by DOE. The Contractor and the Contracting Officer shall develop a procedure whereby DOE will determine if the Service Contract Act is applicable to particular subcontracts.

#### H.10 - WALSH-HEALEY PUBLIC CONTRACTS ACT (41 U.S.C 35)

Except as otherwise may be approved, in writing, by the Contracting Officer, the Contractor agrees to insert the following provision in noncommercial Purchase Orders and subcontracts under this contract. "If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed \$15,000.00 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect."

#### H.11 - PROTECTION OF HUMAN SUBJECTS

Before undertaking the performance of any research involving the use of human subjects, the provisions of 10 CFR 745 and the applicable DOE Order regarding Protection of Human Subjects, must be complied with. This requirement applies to research undertaken with DOE support, strategic partnership projects, and collaborations with other institutions.

#### H.12 - IMPLEMENTATION OF CLAUSE DEAR 952.204-2 – SECURITY

- a) All applicable parts of clause I.104 - DEAR 952.204-2 SECURITY (PREV. I.159) apply to the contract. The parties acknowledge the following circumstances with respect to DEAR 952.204-2:
  - 1) Lawrence Berkeley National Laboratory (LBNL) holds no classified materials or information and does no classified work at any LBNL location.
  - 2) LBNL does possess a minimal amount of Special Nuclear Material (SNM) that is designated Category IV (per DOE O 474.2) and access to this SNM

currently does not require an access authorization (Per DOE Order 472.2 Personnel Security).

- 3) LBNL's SNM is used only in support of unclassified, non-weapons-related research (e.g. nuclear chemistry, radiobiology, nuclear physics, instrument calibration, system performance verification).

If the above circumstances change or new information regarding these circumstances comes to light, then the Contractor must notify the Contracting Officer so that appropriate action can be taken to reserve or include relevant DEAR Clauses as applicable.

#### H.13 - IMPLEMENTATION OF CLAUSE FAR 52.204-9 – PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL

As an unclassified facility, the Laboratory Director and certain staff members each have a personal security clearance to receive information and participate in classified meetings at other facilities. Clause I.15 - FAR 52.204-9, PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (PREV. I.141) will apply only to those LBNL personnel who do hold a personal security clearance and receive the federal credential referenced in this clause.

#### H.14 - STANDARDS OF CONTRACTOR PERFORMANCE EVALUATION

- (a) Use of objective standards of performance, self-assessment and performance evaluation:
  - (1) The Parties agree that the Contractor will utilize a comprehensive performance-based management approach for overall Laboratory management. The performance-based management approach will include the use of objective performance goals and indicators, agreed to in advance of each performance evaluation period, as standards against which the Contractor's overall performance of the scientific and technical mission obligations under this Contract will be assessed. The performance criteria will be limited in number and focus on results to drive improved performance and increased effective and efficient management of the Laboratory.
  - (2) The Parties agree to utilize the process described within Section J, Appendix B - PERFORMANCE EVALUATION AND MEASUREMENT PLAN (PEMP) to evaluate the performance of the Laboratory. The Parties further agree that the evaluation process described in Section J, Appendix B, will be reviewed annually and modified, if necessary, by agreement of the Parties. If agreement of the Parties cannot be reached, the

Contracting Officer has the unilateral right to establish the evaluation process.

- (3) The Parties agree that the Contractor will conduct an ongoing self-assessment process as the principal means of determining its compliance with the Contract Statement of Work and performance indicators identified within Section J, Appendix B. To assist the DOE in accomplishing the appropriate level of oversight, the Contractor shall work in partnership and cooperation with DOE and other external organization, as appropriate, in the self-assessment process. This work includes, but is not limited to, the development and execution of self-assessments and the utilization of the results for continuous improvement.
- (4) The Contractor shall provide periodic updates, as requested by the DOE, on the performance against Section J, Appendix B. The Contractor shall provide a formal status briefing at mid-year and year-end. Specific due dates and formats for the above-mentioned briefings shall be agreed to by the Laboratory Director and the DOE Bay Area Site Office Manager.
- (5) DOE, as a part of its responsibility for oversight, evaluation, and information exchange, shall provide an annual programmatic appraisal and other appraisals, and reviews of the Contractor's performance of authorized work in accordance with the terms and conditions of this Contract. The Office of Science, through the Bay Area Site Office Manager, has the lead responsibility for oversight of the programs and activities conducted by the Contractor.
- (6) The Contracting Officer shall annually provide a written assessment of the Laboratory's performance to the Contractor, which shall be based upon the process described in Section J, Appendix B. The Parties acknowledge that the performance levels achieved against the specific performance objectives and measures shall be the primary, but not sole, criteria for determining the Contractor's final performance evaluation and rating. The Contractor's self-assessment results, to include results of any third party reviews which may have been conducted during the evaluation period, will be considered at all levels to assess and evaluate the Contractor's performance. The Contracting Officer may also consider other relevant information not specifically measured by the objectives and measures established within Section J, Appendix B, that is deemed to have an impact (either positive or negative) on the Contractor's performance. Other relevant information that may be used by the Contracting Officer may include, but is not limited to, information gained from peer reviews, operational awareness, outside agency reviews (i.e., Office of Inspector General (OIG), Government Accountability Office (GAO), Defense Contract Audit Agency (DCAA), etc.) conducted throughout the year, annual reviews (if needed), and DOE "for cause" reviews. Contractor

success or failure in meeting performance expectations in a management or operating area may affect the level and/or mix of oversight attributed to a particular functional element.

- (b) Standards of performance measure review:
- (1) The Parties agree to review the PEMP elements (goals, objectives, performance indicators, and expected levels of performance) contained in Section J, Appendix B, annually and to modify them upon the agreement of the Parties; provided, however, that if the Parties cannot reach agreement on all the goals, objectives, performance indicators, and expected levels of performance for the next period, the Contracting Officer shall have the unilateral right to establish reasonable new goals, objectives, performance indicators and expected levels of performance and/or to modify and/or delete existing goals, objectives, performance indicators, and expected levels of performance. It is expected that the goals, objectives, performance indicators, and expected levels of performance will be modified by the Contractor and the DOE as new areas of emphasis or priorities emerge which the Parties may agree warrant recognition in the performance-based integrated management approach.
  - (2) Failure to include an objective or performance indicator in the contract does not eliminate the Contractor's obligation to comply with all applicable terms and conditions as set forth elsewhere within the contract.
  - (3) In the event the Contracting Officer decides to exercise the rights set forth in paragraphs (a)(6) or (b)(1) above, he/she will notify the Contractor, in writing, of the intended decision ten days prior to issuance.

#### H.15 - CAP ON LIABILITY (SEPT 2017)

- (a) The Parties have agreed that the Contractor's liability, for certain obligations it has assumed under this contract, shall be limited as set forth in paragraph (b) below. These limitations or caps shall only apply to obligations the Contractor has assumed pursuant to the following clauses:
- (1) The Section I Clause I.160 entitled "DEAR 970.5245-1 - Property" (PREV. I.115), paragraph (f)(1)(i)(C);
  - (2) The Section I Clause I.144 entitled "DEAR 970.5228-1 - Insurance-- Litigation and Claims" (PREV. I.98), paragraph (f); with respect to prudent business judgment only; and
  - (3) The Section I Clause I.144 entitled "DEAR 970.5228-1 - Insurance-- Litigation and Claims" (PREV. I.98), paragraph (g)(2); except for punitive

damages resulting from the willful misconduct or lack of good faith on the part of the Contractor's managerial personnel as defined in the Section I Clause I.160 entitled "DEAR 970.5245-1 - Property" (PREV. I.115).

- (b) Unless otherwise prohibited by law or regulation, the Contractor shall be liable each fiscal year for an amount not-to-exceed 1.25 times the maximum performance fee available for that fiscal year. The annual cap which will apply shall be based on the fiscal year in which the Contractor's act or failure to act was the proximate cause of the liability assumed by the Contractor. In the event the Contractor's act or failure to act overlaps more than one (1) fiscal year, the limitation will be the annual limitation for the last fiscal year in which the Contractor's act or failure to act occurred. If the Contractor's cumulative obligations for a fiscal year equal the amount of the annual limitation of liability, the Contractor shall have no further responsibility for the costs of the liabilities it has assumed for that fiscal year pursuant to (a)(1) through (3) above.

#### H.16 - INTELLECTUAL AND SCIENTIFIC FREEDOM

- (a) The Parties recognize the importance of fostering an atmosphere at the Laboratory conducive to scientific inquiry and the development of new knowledge and creative and innovative ideas related to important national interests.
- (b) The Parties further recognize that the free exchange of ideas among scientists and engineers at the Laboratory and colleagues at universities, colleges, and other laboratories or scientific facilities is vital to the success of the scientific, engineering, and technical work performed by Laboratory personnel.
- (c) In order to further the goals of the Laboratory and the national interest, it is agreed by the Parties that the scientific and engineering personnel at the Laboratory shall be accorded the rights of publication or other dissemination of research, and participation in open debate and in scientific, educational, or professional meetings or conferences, subject to the limitations included in technology transfer agreements and such other limitations as may be required by the terms of this Contract. Nothing in this clause is intended to alter the obligations of the Parties to protect classified or unclassified controlled nuclear information as provided by law.
- (d) Nothing in Clause I.107 - DEAR 952.204-75, PUBLIC AFFAIRS, or in Clause H.32, LOBBYING RESTRICTION (CONSOLIDATED APPROPRIATIONS ACT

SECTION 501) (PREV. I.64) is intended to limit the rights of the Contractor or its employees to publicize and to accurately state the results of its scientific research.

H.17 - NOTICE REGARDING THE PURCHASE OF AMERICAN-MADE EQUIPMENT AND PRODUCTS - SENSE OF CONGRESS (SEP 2017)

It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this award should be American-made.

H.18 - APPLICATION OF DOE CONTRACTOR REQUIREMENTS DOCUMENTS (SEPT 2017)

- (a) Performance. The Contractor will perform the work of this contract in accordance with each of the Contractor Requirements Documents (CRDs) appended to this contract as Section J, Appendix I entitled "DOE Directives/List B," until such time as the Contracting Officer approves the substitution of an alternative procedure, standard, system of oversight, or assessment mechanism resulting from the process described below.
- (b) Laws and Regulations Excepted. The process described in this clause shall not affect the application of otherwise applicable laws and regulations of the United States, including regulations of the Department of Energy.
- (c) Deviation Processes in Existing Orders. This clause does not preclude the use of deviation processes provided for in existing DOE directives.
- (d) Proposal of Alternative. The Laboratory Director may, at any time during performance of this contract, propose an alternative procedure, standard, system of oversight, or assessment mechanism to the requirements in a listed CRD by submitting to the Contracting Officer a signed proposal describing the nature and scope of the alternative procedure, standard, system of oversight, or assessment mechanism (alternative), the anticipated benefits, including any cost benefits, to be realized by the Contractor in performance under the contract, and a schedule for implementation of the alternate. In addition, the Contractor shall include an assurance signed by the Laboratory Director that the revised alternative is an adequate and efficient means to meet the objectives underlying the CRD. Upon request, the Contractor shall promptly provide the Contracting Officer any additional information that will aid in evaluating the Contractor's proposal.
- (e) Action of the Contracting Officer. The Contracting Officer shall within 60 days:
  - (1) deny application of the proposed alternative;
  - (2) approve the proposed alternative, with conditions or revisions;
  - (3) approve the proposed alternative; or



- (4) provide a date by which a decision will be made (not to exceed an additional 60 days).
- (f) **Implementation and Evaluation of Performance.** Upon approval in accordance with (e)(2) or (e)(3) above, the Contractor shall implement the alternative. In the case of a conditional approval under (e)(2) above, the Contractor shall provide the Contracting Officer with an assurance statement, signed by the Laboratory Director, that the revised alternative is an adequate and efficient means to meet the objectives underlying the CRD. Additionally, the statement shall describe any changes to the schedule for implementation. The Contractor shall then implement the revised alternative. DOE will evaluate performance of the approved alternative from the date scheduled by the Contractor for implementation.
- (g) **Application of Additional or Modified CRDs.** During performance of the contract, the Contracting Officer may notify the Contractor that he or she intends to unilaterally add CRDs not then listed in Section J, Appendix I entitled "DOE Directives/List B" or modifications to listed CRDs. Upon receipt of that notice, the Contractor, within 30 calendar days, may, in accordance with paragraph (d) of this clause, propose an alternative procedure, standard, system of oversight, or assessment mechanism. The resolution of such a proposal shall be in accordance with the process set out in paragraphs (e) and (f) of this clause. If an alternative proposal is not submitted by the Contractor within the 30 calendar day period, or, if made, is denied by the Contracting Officer under paragraph (e), the Contracting Officer may unilaterally add the CRD or modification to Section J, Appendix I entitled "DOE Directives/List B". The Contractor and the Contractor Officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, resulting from the addition of the CRD or modification.
- (h) **Deficiency and Remedial Action.** If, during performance of this contract, the Contracting Officer determines that an alternative procedure, standard, system of oversight, or assessment mechanism adopted through the operation of this clause is not satisfactory, the Contracting Officer may, in his or her sole discretion, determine that corrective action is necessary and require the Contractor to prepare a corrective action plan for the Contracting Officer's approval. If the Contracting Officer is not satisfied with the corrective action taken, the Contracting Officer may direct corrective action to remedy the deficiency, including, if appropriate, the reinstatement of the CRD.

#### H.19 - EXTERNAL REGULATION

The Parties commit to full cooperation with regard to complying with any statutory mandate regarding external regulation of Laboratory facilities, whether by the Nuclear Regulatory Commission, the Occupational Safety and Health Administration, the

Environmental Protection Agency, and/or State and local entities with regulatory oversight authority, and including but not limited to the conduct of pilot programs simulating external regulation, and the application for materials, facilities, or other licenses by or on behalf of the DOE.

H.20 - PAID LEAVE UNDER SECTION 3610 OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT) TO MAINTAIN EMPLOYEES AND SUBCONTRACTORS IN A READY STATE

- (a) The Contractor may submit for reimbursement and the Government (without requiring consideration but precluding additional fee) will treat as allowable (if otherwise allowable per federal regulations) the costs of paid leave (including sick leave) the Contractor or its subcontractors provide to keep employees in a ready state if—
  - (1) The employees: cannot perform work on a site approved by the Federal Government (including a federally-owned or leased facility or site) due to facilities closures or other restrictions; and cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19.
  - (2) The costs are incurred from January 31, 2020 through September 30, 2021.
  - (3) The costs do not reflect any amount exceeding an average of 40 hours per week for paid leave.
- (b) Where other relief provided for by the CARES Act or any other Act would benefit the contractor or the contractor's subcontractors, including, but not limited to, funds available under sections 1102 and 1106 of the CARES Act, the contractor should evaluate the applicability of such benefits in seeking reimbursement under the contract.
- (c) The Contractor must represent in any request for reimbursement—
  - (1) Either it: has not received, has not claimed, and will not claim any other reimbursement, including claims for reimbursement via letter of credit, for federal funds available under the CARES Act for the same purpose, including, but not limited to, funds available under sections 1102 and 1106 of the CARES Act; or if it has received, claimed, or will claim other reimbursement, that reimbursement has been reflected, or will be reflected when known, in requests for reimbursement but in no case reflected later than in its final proposal to determine allowable incurred costs.

- (2) Its request reflects or will reflect as soon as known, all applicable credits, including
  - (i) Tax credits, including credits allowed pursuant to division G of Public Law 116-127; and
  - (ii) Applicable credits allowed under the CARES Act, including applicable credits for loan guarantees.

## H.21 - EMPLOYEE COMPENSATION: PAY AND BENEFITS

### (a) Contractor Employee Compensation System

The Contractor shall implement The Regents of the University of California (University) corporate compensation programs, policies, practices, and procedures to be used in the administration of its compensation system in a manner that benefits DOE's evolving mission needs. The University corporate compensation programs, policies, and practices shall be fully documented, consistently applied, and available for review by the Contracting Officer. The Contractor's Total Compensation System shall meet the tests of allowability established by and in accordance with FAR 31.205-6 and DEAR 970.3102-05-6; "Compensation for Personal Services." Costs incurred in implementing the Total Compensation Program shall be consistent with the Contractor's documented Human Resources Compensation Plan/System as approved by the Contracting Officer. Periodic appraisals of contractor performance with respect to the Contractors' Total Compensation System will be conducted.

- (1) The description of the Contractor Employee Compensation Program should include the following components;
  - a. Philosophy and strategy for all pay delivery programs.
  - b. System for establishing a job worth hierarchy.
  - c. Method for relating internal job worth hierarchy to external market.
  - d. System that links individual and/or group performance to compensation decisions.
  - e. Method for planning and monitoring the expenditure of funds.
  - f. Method for ensuring compliance with applicable laws and regulations.
  - g. System for communicating the programs to employees.

- h. System for internal controls and self-assessment.
- i. System to ensure that reimbursement of compensation, including stipends, for employees who are on joint appointments with a parent or other organization shall be on a pro-rated basis.

(b) Reports and Information

The Contractor shall provide the Contracting Officer with the following reports and information with respect to pay and benefits provided under this Contract:

- (1) An Annual Contractor Salary-Wage Increase Expenditure Report to include, at a minimum, breakouts for merit, promotion, variable pay, special adjustments, and structure movements for each pay structure showing actual against approved amounts.
- (2) A list of the top five most highly compensated contractor employees and their total cash compensation as defined in FAR 31.205-6(p)(1)(i) at the time of Contract award, and at the time of any subsequent change to their total cash compensation. Section 702 of the Bipartisan Budget Act of 2013 (BBA; Pub. L. 113-67, December 26, 2013) establishes a cap on the reimbursement of compensation costs for contractor employees, adjusted annually to reflect the change in the Employment Cost Index for all workers as calculated by the Bureau of Labor Statistics (BLS).
- (3) An Annual Compensation and Benefits Report no later than March 15th of each year.

(c) Pay and Benefit Programs

The Contractor shall maintain pay and benefit programs for its employees; provided, however, that employees scheduled to work fewer than 20 hours per week receive only those benefits allowed by law and by University's corporate benefits program. Employees are eligible for benefits, subject to the terms, conditions, and limitations of each benefit program. University corporate benefit program costs shall be compliant with FAR 31.2 and DEAR 970.31. The Contractor shall notify DOE prospectively of each new or changed University corporate benefit plan that could have a significant impact on costs (i.e., increased costs or savings) under this Contract. Reimbursement for individual compensation is subject to the limits established by 41 U.S.C. 4304(a)(16).

(1) Cash Compensation

- (A) The Contractor shall submit the following, as applicable, to the Contracting Officer for a determination of cost allowability for reimbursement under the Contract:

- (i) Any proposed major compensation program design changes specific to LBNL prior to implementation.
- (ii) Variable pay programs/incentives. If not already authorized under Appendix A of the contract, a justification shall be provided with proposed costs and impacts to budget, if any.
- (iii) A Compensation Increase Plan (CIP). A Contractor that meets the criteria, as set forth below, is not required to submit a CIP request to the Contracting Officer for an advance determination of cost allowability for a Merit Increase fund or Promotion/Adjustment fund unless Departmental policy exists to the contrary (e.g., Secretarial Pay freeze):
  - 1. The Merit Increase fund does not exceed the mean percent increase included in the annual Departmental guidance providing the WorldatWork Salary Budget Survey's salary increase projected for the CIP year. The Promotion/Adjustment fund does not exceed the mean WorldatWork promotional increases projected for the CIP year and communicated through the annual Department CIP guidance.
  - 2. The budget used for both Merit Increase funds and Promotion/Adjustment funds shall be based on the payroll for the end of the previous CIP year.
  - 3. Salary structure adjustments do not exceed the mean WorldatWork structure adjustments projected for the CIP year and communicated through the annual Department CIP guidance.

Please note: No later than the first day of the CIP cycle, Contractors must provide notification to the Contracting Officer of planned increases and position to market data by mutually agreed-upon employment categories.
- (iv) If a Contractor does not meet the criteria included in (iii) above, a CIP must be submitted to the Contracting Officer for an advance determination of cost allowability, unless the Contracting Officer, in accordance with subparagraph (m) obtains an audit of the Contractor's compensation and

benefits system and of its incurred costs from either DCAA, or an independent public accounting firm under the DOE contract for such services. Otherwise, the CIP should include the following components and data:

- (1) Market analysis summary, including a comparison of average pay to market average pay.
- (2) Information regarding surveys used for comparison.
- (3) Aging factors used for escalating survey data and supporting information.
- (4) Projection of escalation in the market and supporting information.
- (5) Information to support proposed structure adjustments, if any.
- (6) Analysis to support special adjustments or promotions that exceed the 1% Promotion/Adjustment fund authorized under Section III, titled Compensation of Appendix A.
- (7) Funding requests for each pay structure to include breakouts of merit, promotions, variable pay, special adjustments, and structure movement for each Employee Group (i.e., S&E, Administrative, Technical, Exempt/Non-Exempt).
  - (a) The proposed plan totals shall be expressed as a percentage of the payroll for the end of the previous CIP year.
  - (b) All pay actions granted under the compensation increase plan are fully charged when they occur regardless of time of year in which the action transpires and whether the employee terminates before year end.
  - (c) Specific payroll groups (e.g., exempt, nonexempt) for which CIP amounts are intended shall be defined by mutual agreement between the Contractor and the Contracting Officer.

- (d) The Contracting Officer may adjust the CIP amount after approval based on major changes in factors that significantly affect the plan amount (for example, in the event of a major reduction in force or significant ramp-up).
- (8) A discussion of the impact of budget and business constraints on the CIP amount.
- (9) Comparison of pay to relevant factors other than market average pay.
- (10) Discussion of recruitment/retention issues (e.g., turnover and hiring) relevant to the proposed increase amounts.
- (v) The Contractor may make, without CO approval, minor shifts of merit funds between Merit and Promotion/Adjustment funds after approval of the CIP or if criteria under (c)(1)(A)(iii) was met, in order to meet the compensation requirements of its organization, subject to the following guidelines:
  - 1. Minor shift is defined as up to 25% of the specific fund from which funds are being transferred, the contractor may, with CO approval, shift additional funds in justified instances.
  - 2. Contractors will notify the Contracting Officer that funds have been shifted.
- (vi) Individual compensation actions for the top contractor official (e.g., laboratory director/plant manager or equivalent) and Key Personnel not included in the CIP. For those Key Personnel included in the CIP, DOE will approve salaries upon the initial contract award and when Key Personnel are replaced during the life of the contract. DOE will have access to all individual salary reimbursements. This access is provided for transparency; DOE will not approve individual salary actions (except as previously stated).
- (B) The Contracting Officer's approval of individual compensation actions will be required only for the top contractor official (e.g., laboratory director/plant manager or equivalent) and Key Personnel as stated in (c)(1)(A)(iii) above. The base salary reimbursement level for the top contractor official establishes the maximum

allowable salary reimbursement under the contract. The contractor shall not be reimbursed for the top contractor official's incentive compensation. The base salary reimbursement level for the top contractor official establishes the maximum allowable salary reimbursement under the contract when compared to subordinate compensation, which would include base salary and any potential incentive compensation under an incentive compensation agreement. Unusual circumstances may require a deviation for an individual on a case-by-case basis. Any such deviations must be approved by the Contracting Officer.

- (C) Severance Pay is not payable to an employee under this Contract if the employee:
  - (i) Voluntarily separates, resigns, or retires from employment, (unless associated with a workforce restructuring action in accordance with Appendix A, Section entitled Reductions in Contractor Employment)
  - (ii) Is offered employment with a successor/replacement Contractor,
  - (iii) Is offered employment with a parent or affiliated company, or
  - (iv) Is discharged for cause.
- (D) Service Credit for purposes of determining severance pay does not include any period of prior service for which severance pay has been previously paid through a DOE cost-reimbursement contract.

(d) Pension and Other Benefit Programs

- (1) No presumption of allowability will exist when the Contractor implements a new laboratory specific benefit plan or makes changes to existing benefit plans that increase costs or are contrary to Departmental policy or written instruction until the Contracting Officer makes a determination of cost allowability for reimbursement for new or changed laboratory specific benefit plans. Changes shall be in accordance with and pursuant to the terms and conditions of the contract. Advance notification, rather than approval, is required for lab-specific changes that do not increase costs and are not contrary to Departmental policy or written instruction.
- (2) The Contractor shall provide a justification to the Contracting Officer for approval of new or revised laboratory specific benefit plan changes that addresses:



- (A) the effect of the plan changes on the Contract net benefit value or percent of payroll benefit costs,
  - (B) provides the dollar estimate of savings or costs, and
  - (C) provides the basis of determining the estimated savings or cost.
- (3) The Contractor shall submit advance notification of benefit changes that result in increases to the Department's long-term pension and Post Retirement Benefits (PRB) actuarial liabilities that are reported in the Department's financial statement, other than administrative or compliance changes. Examples of benefits changes that increase the Department's long-term liabilities include defined benefit pension plan changes and postretirement benefits other than pensions. Any changes made by the Contractor shall be in accordance with and pursuant to the terms and conditions of the contract. For pensions advance notification will include the cost impact analysis; projected contribution changes; and the actuarial assumptions and methods used to calculate the cost impact.
- (4) The Contractor may not terminate any lab-specific benefit plan during the term of the Contract without the prior approval of the Contracting Officer in writing. Reimbursement of PRBs is contingent on the following DOE approved service eligibility requirements: for retiring LBNL employees, having worked not less than 5 years under a DOE cost reimbursement contract with the Contractor, and for The Regents of the University of California (UC) campus/medical center/UCOP retirees, having worked less than 5 years at a UC campus/medical center/UCOP whose vesting service credit is based on service at LBNL or other DOE cost reimbursement contract with UC. This subparagraph (B) is effective June 1, 2018. Unless required by Federal or State law, advance funding of PRBs is not allowable.
- (5) Each Contractor sponsoring a Defined Benefit pension plan and/or postretirement benefit plan will participate in the annual plan management process which includes written responses to a questionnaire regarding plan management, providing forecasted estimates of future reimbursements in connection with the plan(s) and participating in a conference call to discuss the Contractor submission (see (f)(6) below for Pension Management Plan requirements).
- (6) Each Contractor will respond to quarterly data calls issued through iBenefits, or its successor system.

(e) Establishment and Maintenance of Pension Plans for which DOE Reimburses Costs

- (1) Employees working for the Contractor shall only accrue additional credit for service under this Contract after the date of Contract award.
- (2) Except for Commingled Plans in existence as of the effective date of the Contract, any pension plan maintained by the Contractor for which DOE reimburses costs, shall be maintained as a separate pension plan distinct from any other pension plan that provides credit for service not performed under a DOE cost-reimbursement contract. When deemed appropriate by the Contracting Officer, Commingled Plans shall be converted to separate plans at the time of new contract award in accordance with H.41(f).

(f) Basic Requirements

The Contractor shall adhere to the requirements set forth below in the establishment and administration of pension plans that are reimbursed by DOE pursuant to this cost reimbursement contract for management and operation of DOE facilities contracts. Pension Plans include Defined Benefit and Defined Contribution plans.

- (1) The Contractor shall become a sponsor of the existing pension and other benefit plans (or comparable successor plans), including other PRB plans, as applicable, with responsibility for management and administration of the plans. The Contractor shall carry over the length of service credit and leave balances accrued as of the date of the Contractor's assumption of Contract performance.
- (2) The Contractor must submit the annual financial report of the retirement system that includes the report of the independent auditors to the Contracting Officer.

While there is no requirement to submit a full scope audit for defined contribution plans, contractors are responsible for maintaining adequate controls for ensuring that defined contribution plan assets are correctly recorded and allocated to plan participants.

- (3) For existing Commingled Plans, the Contractor shall maintain and provide annual separate accounting of DOE liabilities and assets as for a Separate Plan in accordance with H.41(b)(5).
- (4) For existing Commingled Plans, the Contractor shall be liable for any shortfall (i.e., any decrease in assets or increase in liabilities) as accounted for in H.41(b)(5) and caused by UC actions unrelated to the UCRP LBNL segment (e.g., actions solely for the UCRP campus and

medical center segment such as adoption of a gain sharing benefit that gives away excess funds based on favorable investment returns, or takes out money to pay PRB benefits, or increases pension benefits for an early retirement window, or adopts a deferred retirement option plan, etc.).

- (5) The Contractor shall comply with the requirements of ERISA if applicable to the pension plan and any other applicable laws.
- (6) The Pension Management Plan (PMP) shall include a discussion of the Contractor's plans for management and administration of all pension plans consistent with the terms of the Contract. The PMP shall be submitted in the iBenefits system, or its successor system no later than January 31st of each applicable year. A full description of the necessary reporting will be provided in the annual management plan data request. Within sixty (60) days after the date of the submission, appropriate Contractor representatives shall participate in a conference call to discuss the Contractor's PMP submission and any other current plan issues or concerns.

(g) Changes to Pension and PRB Plans

Prior to the adoption of any changes to a pension or PRB plan other than administrative or compliance changes, the Contractor shall submit the information required below to the Contracting Officer.

- (1) For proposed changes to pension plans and pension plan funding, the Contractor shall provide the following to the Contracting Officer:
  - (A) a copy of the current plan document (as conformed to show all prior plan amendments), with the proposed new amendment indicated in redline/strikeout, if and when the plan document is updated;
  - (B) an analysis of the impact of any proposed changes on actuarial accrued liabilities and costs thirty days prior to adoption;
  - (C) in circumstances where the Contracting Officer indicates that it is necessary, a legal explanation of the proposed changes from the counsel used by the plan for purposes of compliance with all legal requirements applicable to private sector defined benefit pension plans;
  - (D) the Summary Plan Description when it is updated;

- (E) any such additional information as requested by the Contracting Officer.
- (2) Contractors shall provide advance notification and submit new PRB plans and changes to plan design or funding methodology with justification as applicable [see (d)(1) above]. The justification must:
  - (A) demonstrate the effect of the plan changes on the contract net benefit value or percent of payroll benefit costs,
  - (B) provide the dollar estimate of savings or costs, and
  - (C) provide the basis of determining the estimated savings or cost including the actuarial assumptions and methods used.
- (h) Terminating Operations

When operations at a designated DOE facility are terminated and no further work is to occur under the prime contract, the following apply:

  - (1) No further benefits for service shall accrue. Pensions shall be addressed in accordance with H.41 Pension Plan.
  - (2) Upon notification from the Contracting Officer that the prime contract is to be competed, the Contractor shall submit an evaluation of the costs of benefits and an actuarial analysis of relative benefit value. The evaluation shall consist of an Employee Benefits Value Study for each benefit tier using no less than 15 comparators, and an Employee Benefits Cost Study Comparison for each benefit tier that analyzes benefit costs for employees as a percent of payroll and compares it with the cost as a percent of payroll, including geographic factor adjustments, reported by the U.S. Department of Labor's Bureau of Labor Statistics or other Contracting Officer approved broad based national survey.
- (i) Terminating Plans
  - (1) DOE contractors shall not terminate any pension plan (Commingled or site specific) without notifying the Department at least 60 days prior to the scheduled date of plan termination.
- (j) Special Pension Programs

The contractor shall advise DOE and receive prior approval of the estimated cost of each early-out program and window benefit that impacts the Laboratory.

Contractors must advise DOE of each disability program, plan-loan feature, employee contribution refund, asset reversion, or incidental benefit.

(k) Alternate Contractor Human Resource Requirements

(1) Alternatively, the Contracting Officer may obtain an audit of the Contractor's compensation and benefits system and of its incurred costs from either DCAA or from DOE's independent public accounting firm (under contract with DOE); if the Contracting Officer does, the Contractor will not be required to submit the:

(A) Compensation Increase Plan

(l) Definitions

- (1) Commingled Plans. Cover employees from the Contractor's private operations and its DOE contract work.
- (2) Current Liability. The sum of all plan liabilities to employees and their beneficiaries. Current liability includes only benefits accrued to the date of valuation. This liability is commonly expressed as a present value.
- (3) Defined Benefit Pension Plan. Provides a specific benefit at retirement that is determined pursuant to the formula in the pension plan document.
- (4) Defined Contribution Savings Plan. Provides benefits to each participant based on the amount held in the participant's account. Funds in the account may be comprised of employer contributions, employee contributions, investment returns on behalf of that plan participant and/or other amounts credited to the participant's account.
- (5) Designated Contract. For purposes of this clause, a contract (other than a prime cost reimbursement contract for management and operation of a DOE facility) for which the Head of the Departmental Contracting Activity determines that advance pension understandings are necessary or where there is a continuing Departmental obligation to the pension plan.
- (6) Pension Fund. The portfolio of investments and cash provided by employer and employee contributions and investment returns. A pension fund exists to defray pension plan benefit outlays and (at the option of the plan sponsor) the administrative expenses of the plan.

- (7) Separate Accounting. Account records established and maintained within a commingled plan for assets and liabilities attributable to DOE contract service. NOTE: The assets so represented are not for the exclusive benefit of any one group of plan participants.
- (8) Separate Plan. Must satisfy IRC Sec. 414(I) definition of a single plan, designate assets for the exclusive benefit of employees under DOE contract, exist under a separate plan document (having its own Department of Labor plan number) that is distinct from corporate plan documents and identify the Contractor as the plan sponsor.
- (9) Spun-off Plan. A new plan which satisfies IRC Reg. 1.414 (I)-1 requirements for a single plan, and which is created by separating assets and liabilities from a larger original plan. The funding level of each individual participant's benefits shall be no less than before the event, when calculated on a "plan termination basis."

#### H.22 - CONTRACTOR ACCEPTANCE OF NOTICES OF VIOLATIONS OR ALLEGED VIOLATIONS, FINES, AND PENALTIES

- (a) The Contractor shall accept, in its own name, service of notices of violations or alleged violations (NOVs/NOAVs) issued by Federal or State regulators to the Contractor resulting from the Contractor's performance of work under this contract, without regard to liability. The allowability of the costs associated with fines and penalties shall be subject to the other provisions of this contract.
- (b) The Contractor shall notify DOE promptly when it receives service from the regulators of NOVs/NOAVs and fines and penalties.

#### H.23 - ALLOCATION OF RESPONSIBILITIES FOR CONTRACTOR ENVIRONMENTAL COMPLIANCE ACTIVITIES

- (a) The Parties commit to full cooperation with regard to acquiring any necessary permits or licenses required by environmental, safety and health (ES&H) laws, codes, ordinances, and regulations of the United States, states or territories, municipalities or other political subdivisions, and which are applicable to the performance of work under this contract. It is recognized that certain ES&H permits will be obtained jointly as co-permittees, and other permits will be obtained by either party as the sole permittee. The Contractor, unless otherwise directed by the Contracting Officer, shall procure all necessary non-ES&H permits or licenses.

- (b) This clause allocates the responsibilities of DOE and the Contractor, referred to collectively as the “Parties”, for implementing the environmental requirements at facilities within the scope of the contract. In this Clause, the term environmental requirements means requirements imposed by applicable Federal, State, and local environmental laws and regulations, including, without limitation, statutes, ordinances, regulations, court orders, consent decrees, administrative orders, compliance agreements, permits, and licenses.
- (c) (i) Liability and responsibility for civil fines or penalties arising from or related to violations of environmental requirements shall be borne by the party causing the violation irrespective of the fact that the cognizant regulatory authority may assess any such fine or penalty upon either party or both Parties without regard to the allocation of responsibility or liability under this contract. This contractual allocation of liability for any such fine or penalty is effective regardless of which party signs permit applications, manifests, reports, or other required documents, is a permittee, or is the named subject of an enforcement action or assessment of a fine or penalty. The allowability of the costs associated with fines and penalties assessed against the Contractor shall be subject to the other provisions of this contract.
- (ii) In the event that the Contractor is deemed to be the primary party causing the violation, and the costs of fines and penalties proposed by the regulatory agency to be assessed against the Government (or the Government and Contractor jointly) are determined by the Government to be presumptively unallowable if allocated against the Contractor, then the Contractor shall be afforded the opportunity to participate in negotiations to settle or mitigate the penalties with the regulatory authority. If the Contractor is the sole party of the enforcement action, the Contractor shall take the lead role in the negotiations and the Government shall participate and have final authority to approve or reject any settlement involving costs charged to the contract.
- (d) DOE agrees that if bonds, insurance, or administrative fees are required as a condition for permits obtained by the Contractor under this contract, and the Contractor has been directed by the Contracting Officer to obtain such permits after the Contractor has notified the Contracting Officer of the costs of complying with such conditions, such costs shall be allowable. In the event such costs are determined by DOE to be excessive or unreasonable, DOE shall provide the regulatory agency with the acceptable form of financial responsibility. Under no circumstances shall the Contractor be required to provide any corporate resources or corporate guarantees to satisfy such regulatory requirements.

#### H.24 - WORKERS' COMPENSATION INSURANCE

- (a) Workers compensation loss income benefit payments, when supplemented by other programs (such as salary continuation, short-term disability) are to be administered according to UC Policy.
- (b) Contractors approve all workers compensation settlement claims up to \$100,000. Settlement claims above the \$100,000 require Contracting Officer approval.
- (c) Contractors shall provide copies to the Contracting Officer of all renewal policies for workers compensation. The Contractor shall furnish reports as may be required from time to time by the CO.

#### H.25 - LABOR RELATIONS

- (a) The Contractor shall respect the right of employees to organize and to form, join, or assist labor organizations, to bargain collectively through their chosen labor representatives, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of these activities.
- (b) The Contractor shall meet with the Contracting Officer or designee(s) for the purpose of reviewing the Contractor's bargaining objectives that impact LBNL prior to negotiations of any collective bargaining agreement or revision thereto. For LBNL-specific collective bargaining process, the contractor shall consult with and obtain the approval of the Contracting Officer regarding appropriate economic bargaining parameters prior to the Contractor entering into the LBNL-specific collective bargaining process. During the LBNL-specific collective bargaining process, the Contractor shall notify the Contracting Officer before submitting or agreeing to any collective bargaining proposal which can be calculated to affect allowable costs under this contract or which could involve other items of special interest to the Government. During the collective bargaining process, the Contractor shall obtain the approval of the Contracting Officer before proposing or agreeing to changes in any LBNL-specific pension or other benefit plans. For the purposes of this paragraph, "LBNL-specific collective bargaining process" shall refer to any bargaining process LBNL may undertake separate from the University of California as a whole.
- (c) The Contractor will seek to maintain harmonious bargaining relationships that reflect a judicious expenditure of public funds, equitable resolution of disputes and effective and efficient bargaining relationships consistent with the requirements of FAR, Subpart 22.1 and DEAR, Subpart 970.2201 and all applicable Federal and State Labor Relations laws.



- (d) The Contractor will notify the Contracting Officer or designee in a timely fashion of all labor relations issues and matters of local interest including organizing initiatives, unfair labor practice, work stoppages, picketing and labor arbitrations and settlement agreements and will furnish such additional information as may be required from time to time by the Contracting Officer.
- (e) The Contractor shall provide electronic access to copies of collective bargaining agreements to the Contracting Officer as they are ratified or modified.

#### H.26 - ADDITIONAL LABOR REQUIREMENTS

The Contractor shall conduct payroll and job-site audits and conduct investigations of complaints as authorized by DOE on all Davis Bacon Act activity, including any subcontracts, as may be necessary to determine compliance with the Davis-Bacon Act. Where violations are found, the Contractor shall report them to the DOE Contracting Officer. The Contracting Officer may require that the Contractor assist in the determination of the amount of restitution and withholding of funds from a subcontractor so that sufficient funds are withheld to provide restitution for back wages due for workers inappropriately classified and paid, fringe benefits owed, overtime payments due, and liquidated damages assessed.

The Contractor shall notify the Contracting Officer of any complaints and significant labor standards violations whether caused by the Contractor or subcontractors. The Contractor shall assist DOE and or/the Department of Labor in the investigation of any alleged violations or disputes involving labor standards. The Contractor shall furnish a Davis-Bacon Semi-Annual Enforcement Report to DOE by April 21 and October 21 each year.

#### H.27 - CONTRACTOR-FUNDED INSTITUTIONAL SUPPORTING RESEARCH AND DEVELOPMENT

Contractor Supported Research (CSR) is research and development work conducted at Lawrence Berkeley National Laboratory supported with funding from the Contractor intended to assist the Laboratory in performing its mission for DOE or to create new capabilities at the Laboratory consistent with the overall needs of DOE. CSR may include, but is not limited to, funds from the Berkeley Lab Foundation (BLF), the UC Fee, or other sources of UC funding.

In addition to and separate from the Parties' rights and obligations under Clause I.128, DEAR 970.5217-1, Strategic Partnership Projects Program (Non-DOE Funded Work) (PREV. I.134), the Contractor may, with the approval of the Contracting Officer, conduct CSR at the Laboratory at an annual amount of not more than 2 percent of the total DOE funds received or such higher level as determined by mutual agreement between the

Laboratory Director and the Head of Field Element. All proposed CSR will be reviewed and approved by the DOE Contracting Officer based on the following criteria:

- (a) all funds received pursuant to this Clause will comply with applicable safeguards and procedural requirements issued by the DOE Site Office Contracting Officer,
- (b) such research is conducted on a non-interference basis with any DOE-directed and funded work of the Laboratory,
- (c) the research is intended to enhance the capabilities of the Laboratory to continue to perform its mission or to create new capabilities at the Laboratory consistent with the overall needs of DOE,
- (d) the funds are expended under the same terms and conditions that apply to government funds provided under this contract,
- (e) the Laboratory will not use its access to the Laboratory facilities under this program to compete with the private sector,
- (f) the Laboratory will not use any funds pursuant to this program to augment any federally funded research,
- (g) the Laboratory will not pursue any projects under this program that include facilities or equipment that would create more than a nominal future burden on DOE resources to maintain and/or operate, and
- (h) the Laboratory will ensure that the projects under this program are not Strategic Partnership Projects subject to clause I.128 (PREV. I.134).

The Contractor will report annually on the breakdown of sources of funding provided for these CSR activities. The report will be due to the DOE Contracting Officer 60 days after completion of the Fiscal\_Year. For cost accounting standards purposes such approved research shall be treated as institutional research and development of the Laboratory.

#### H.28 - DOE Mentor-Protégé Program (SEP 2017)

The Department of Energy has established a Mentor-Protégé Program to encourage its prime contractors to assist small businesses, firms certified under section 8(a) of the Small Business Act by SBA, other small disadvantaged businesses, women-owned small businesses, certified HUBZone small businesses, Historically Black Colleges and Universities and Minority Institutions, other minority institutions of higher learning and small business concerns owned and controlled by service disabled veterans in enhancing their business abilities. Consistent with the provisions set forth in DEAR 919.70, the Contractor shall mentor at least one (1) active Protégé company at all times

during the performance of this contract . Mentor and Protégé firms will develop and submit “lessons learned” evaluations to the DOE CO and the OSDDBU at the conclusion of the Mentor Protégé Agreement.

#### H.29 - PERFORMANCE BASED MANAGEMENT AND OVERSIGHT

- (a) Performance-based management shall be the key enabling mechanism for establishing the DOE-Contractor expectations on oversight and accountability. DOE expectations (outside of individual program performance and requirements of laws and regulations) and performance targets shall be established through the Performance Evaluation and Measurement Plan (PEMP) pursuant to the clause entitled “Standards of Contractor Performance Evaluation”. This PEMP shall establish the expected strategic results in the areas of mission accomplishment, stewardship and operational excellence. Mission performance goals shall be established by agreement with each major customer of the Laboratory, and customer evaluation will be the primary means of evaluating mission performance. Stewardship and operational goals shall be established by agreement with DOE. Contractor self-assessment, third party certification, and Contractor and DOE independent oversight, as appropriate, shall be the primary means for assessing stewardship and operational performance. Routine DOE oversight of Contractor performance will be conducted at the systems level.
- (b) The performance-based management system shall be the primary vehicle for addressing issues associated with performance expectations. In the event of a substantive performance shortfall in any area, the appropriate improvement expectations and targets will be incorporated into the PEMP and tracked through self-assessment and independent oversight, as appropriate.
- (c) Compliance with applicable Federal, State and local laws and regulations, and permits and licenses, shall be primarily determined by the cognizant regulatory agency and DOE will primarily rely upon the determination of the external regulators in assessing Contract compliance. DOE oversight will be achieved through periodic assessments at the management system level, including review of Contractor self-assessments and assessments by independent third parties.

#### H.30 - CONTRACTOR ASSURANCE SYSTEM (SEP 2017)

- (a) The Contractor shall develop a contractor assurance system that is executed by the Contractor's Board of Directors (or equivalent corporate oversight entity) and implemented throughout the Contractor's organization. This system provides reasonable assurance that the objectives of the contractor management systems are being accomplished and that the systems and controls will be effective and efficient. The contractor assurance system, at a minimum, shall include the following key attributes:

- (1) A comprehensive description of the assurance system with processes, key activities, and accountabilities clearly identified.
- (2) A method for verifying/ensuring effective assurance system processes. Third party audits, peer reviews, independent assessments, and external certification (such as VPP and ISO 9001 or ISO 14001) may be used.
- (3) Timely notification to the Contracting Officer of significant assurance system changes prior to the changes.
- (4) Rigorous, risk-based, credible self-assessments, and feedback and improvement activities, including utilization of nationally recognized experts, and other independent reviews to assess and improve the Contractor's work process and to carry out independent risk and vulnerability studies.
- (5) Identification and correction of negative performance/compliance trends before they become significant issues.
- (6) Integration of the assurance system with other management systems including Integrated Safety Management.
- (7) Metrics and targets to assess performance, including benchmarking of key functional areas with other DOE contractors, industry and research institutions. Assure development of metrics and targets that result in efficient and cost effective performance.
- (8) Continuous feedback and performance improvement.
- (9) An implementation plan (if needed) that considers and mitigates risks.
- (10) Timely and appropriate communication to the Contracting Officer, including electronic access, of assurance related information.

The initial contractor assurance system description shall be approved by the Contracting Officer.

- (b) The Government may revise its level and/or mix of oversight of this contract when the Contracting Officer determines that the assurance system is or is not operating effectively.

H.31 - PROHIBITION ON FUNDING FOR CERTAIN NONDISCLOSURE AGREEMENTS (OCT 2014)

The Contractor agrees that:

- a) No cost associated with implementation or enforcement of nondisclosure policies, forms or agreements shall be allowable under this contract if such policies, forms or agreements do not contain the following provisions: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to
  - (1) classified information,
  - (2) communications to Congress,
  - (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or
  - (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”
- b) The limitation above shall not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.
- c) Notwithstanding the provisions of paragraph (a), a nondisclosure or confidentiality policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure or confidentiality forms shall also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.

H.32 - LOBBYING RESTRICTION (CONSOLIDATED APPROPRIATIONS ACT SECTION 501) (AL-2021-02)

The Contractor agrees that none of the funds obligated on this award shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. § 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.

H.33 - DEFINITION OF UNUSUALLY HAZARDOUS OR NUCLEAR RISK FOR FAR CLAUSE 52.250-1 INDEMNIFICATION UNDER PUBLIC LAW 85-804

- (a) The term "a risk defined in this contract as unusually hazardous or nuclear" as used in FAR Clause 52.250-1 means the risk of legal liability to third parties (including legal costs as defined in paragraph jj. of Section 11 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2014jj., notwithstanding the fact that the claim or suit may not arise under section 170 of said Act) arising from actions or inactions in the course of the following performed by the Contractor under this contract:
- (1) Participation in tasks or activities by the Contractor or its subcontractors on or after March 13, 2020 through June 30, 2020 that is directed or authorized by the U.S. Department of Energy or the U.S. Department of Energy National Nuclear Security Administration, including work for others, as an element of activities taken now and through June 30, 2020 in response to COVID-19, including but not limited to efforts to test for the presence of COVID-19, to provide equipment and resources to address COVID-19, and to develop treatments and vaccines for COVID-19, to the extent the task or activity is not exempt from liability under the Public Readiness and Emergency Preparedness Act (PREP Act) or other law, or the exemption under the PREP Act or other law is limited in scope or amount which is not sufficient to provide complete protection against the liability to which the contractor is exposed.
- (b) The unusually hazardous or nuclear risks described above are indemnified only to the extent that they are not covered by the Price-Anderson Act (section 170d. of the Atomic Energy Act of 1954, as amended, (42 U.S.C. Section 2210d.) or where the indemnification provided by the Price-Anderson Act is limited by the restriction on public liability imposed by section 170e. of the Atomic Energy Act of 1954, as amended, (42 U.S.C. Section 2210e.) to an amount which is not sufficient to provide complete indemnification for the legal liability to which the contractor is exposed.

#### H.34 - EPIDEMIOLOGICAL STUDIES OF WORKERS AT THE SITE

- (a) The Contractor shall cooperate in the conduct of epidemiological studies of workers at the contract site to include health related programs and projects, or public health activities required by law, performed by personnel, Contractor personnel, grantees and cooperative agreement participants of the Department of Health and Human Services (HHS), pursuant to a Memorandum of Understanding between DOE and HHS, or those performed by the DOE Office of Environment, Safety and Health, its Contractors, grantees, participants in cooperative agreements, and collaborating researchers. The conduct of these studies requires access by researchers to personal information about workers including historical and current data on work assignments and duties, medical history, and exposure to radiation, toxins, and other occupational hazards.

Access to Contractor-owned records containing personal information is governed by the Section I clause entitled, "Access to and Ownership of Records". The studies may also require access by researchers to workers for personal interviews during normal work hours. The Contractor understands that its cooperation in such studies is an integral part of addressing the health and safety of workers at the site and that it may be reimbursed for reasonable costs associated with assisting the various agencies. The Contractor shall identify a point of contact for coordinating this work and for assuring that responses are timely, and shall submit to the Contracting Officer for approval procedures for liaison with external researchers carrying out such work.

- (b) Nothing in this clause shall relieve personnel performing epidemiological studies at the site from observing applicable federal and state laws, regulations and directives governing the conduct of human subjects research, access to classified information, and the privacy of personal information; and it is acknowledged that the Contractor, as the custodian and/or owner of records maintained at the site, has certain contractual and other legal obligations to ensure compliance with such laws, regulations and directives.

#### H.35 - WORKER HEALTH AND SAFETY

The Contractor must follow the variance to 10 CFR part 851, Worker Safety and Health Program, approved by DOE in August of 2019. The approved variance allows the Contractor to follow applicable California Department of Labor Codes such as California Occupational Safety and Health Administration's (Cal-OSHA) safety and health regulations in Title 8, including an Injury and Illness Prevention Program (IIPP), in lieu of specified provisions in 10 CFR part 851, Subparts B and C, and Appendix A. DOE retains enforcement authority per 10 CFR part 851, subpart A. The contractor shall incorporate the substance of this clause in subcontracts, at any tier, that have responsibilities for performing on-site work.

### H.36 - SPECIAL HAZARDS

- (a) The performance of the Contractor's operations hereunder may, in extraordinary circumstances, subject workers to special hazards for which workers' compensation laws, other statutes, the Contractor's welfare plan and policies, or the worker's private insurance may not provide adequate financial protection to the worker in the event of disability, or to the worker's estate in the event of death.
- (b) Definitions.
  - (1) Worker as used in this clause shall mean any person who is or has been employed by the Contractor or any subcontractor, or who is or has been engaged as a consultant or borrowed personnel by the Contractor or any subcontractor.
  - (2) Within the course and scope of employment as used in this clause shall mean that the worker was performing duties as assigned, in conformance with the direction of the Contractor or a subcontractor or an agreement with the Contractor, and in furtherance of the work under this contract.
- (c) The Contractor is authorized to pay to a worker, or in the event of the worker's death, the worker's estate, a sum in an amount which the Contractor determines appropriate, not to exceed the worker's annual salary, whenever—
  - (1) The Contractor believes that a worker has become disabled or has died as a result of any special hazard listed in paragraph (d) below to which the worker has been exposed within the course and scope of employment;
  - (2) The Contractor believes that Workers' compensation laws, other statutes, the Contractor's welfare plan and policies, or the worker's private insurance does not provide adequate financial protection under the particular circumstances of the worker's disability or death; and
  - (3) The Contracting Officer approves the payment.
- (d) The special hazards referred to in paragraphs (a) and (c) above are:
  - (1) Exposure to radiant energy or emitted particles from radioactive materials or from high voltage sources or machines, including ingestion, inhalation or other bodily uptake of radioactive materials.
  - (2) Exposure to toxic materials comprising polonium, uranium, plutonium, fluorine, barium, cadmium, beryllium, any compounds of these, phosgene,



or any other material in use in the course of authorized work which may be shown to have toxic effects.

- (3) Work assignments not specifically covered in this clause and of such a nature as will invalidate the worker's personal insurance otherwise applicable to the injury or death and in effect at the time of performance of the assigned duties.
  - (4) Exposure to hazards incident to flights in military aircraft in the course of which necessary experimental work is conducted. Where a release of liability has been signed, such release will in no way bar the worker from receiving any payment under this clause.
  - (5) Exposure in the course of employment incident to flights in chartered or military aircraft or transportation on military vessels. Where a release of liability has been signed, such release will in no way bar the worker from receiving any payment under this clause.
  - (6) Exposure peculiar to and as the result of work assignment required to be conducted outside the continental United States.
  - (7) Such other exposures not now known but which may later be discovered and which by the nature thereof are similar to the exposure or hazards set forth above. Such other exposures as may from time to time be agreed upon in writing by the Contractor and the Contracting Officer as a basis for payment.
- (e) The total sum authorized to be paid under this clause to a worker or a worker's estate shall not exceed the worker's annual salary even where (1) a payment has been made to a worker on account of a disability and who thereafter dies as a result of the disabling injury or (2) a worker is disabled by one injury compensable under this clause and dies of a separate injury compensable under this clause. The Contractor assumes no obligation hereunder to make any payment from the Contractor's own funds. A release may be required from the payee if the Contracting Officer and the Contractor deem it necessary or appropriate.
- (f) Whenever there is an injury or death which is compensable in accordance with paragraph (c) above, the Contractor may also, with Contracting Officer approval, pay for the cost of transportation (including hotel, subsistence and other incidental expenses) of the spouse and one or more of next of kin of such injured or dead worker from their respective homes to the place where such injured or dead worker shall be situated and their return.

### H.37 - DEFENSE AND INDEMNIFICATION OF EMPLOYEES

- (a) The Parties recognize that, under applicable State law, the Contractor could be required to defend and indemnify its officers and employees from and against civil actions and other claims which arise out of the performance of work under this Contract. Except for defense costs made unallowable by Section I clause entitled Payments and Advances, or the Major Fraud Act (41 U.S.C. §256(k)), the costs and expenses, including judgments, resulting from the defense and indemnification of employees from and against such civil actions and claims shall be allowable costs under this contract if incurred pursuant to the terms of Section I clause entitled Insurance—Litigation and Claims.
- (b) Costs and expenses, including judgments, resulting from the defense and indemnification of employees from civil fraud actions filed in federal court by the Government will be unallowable where the employee pleads nolo contendere or the action results in a judgment against the defendant.
- (c) Where in accordance with applicable State law, the Contractor determines it must defend an employee in a criminal action, DOE will consider in good faith, on a case-by-case basis, whether the Contractor has such an obligation. If DOE concurs, the costs and expenses, including judgments, resulting from the defense and indemnification of employees shall be allowable.
- (d) The Contractor shall immediately furnish the Contracting Officer written notice of any such claim or civil action filed against any employee of the Contractor arising out of the work under this contract together with copies of all pleadings filed. The Contractor shall furnish to the Contracting Officer a written determination by the Contractor's counsel that the defense or indemnity of the employee is required by the provisions of applicable State law, that the employee was acting within the course and scope of employment at the time of the acts or omissions which gave rise to the claim or civil action, and that any exclusions set forth under applicable State law for fraud, corruption, or malice on the part of the employee does not apply. A copy of any letter asserting a reservation of rights under applicable State law with respect to the defense or indemnification of such employee shall also be provided to the Contracting Officer. The costs associated with the settlement of any such claim or civil action shall not be treated as an allowable cost unless approved in writing by the Contracting Officer.

### H.38 - REAL PROPERTY ASSET MANAGEMENT

- (a) The Contractor shall comply with Departmental requirements and guidance involving the acquisition, management, maintenance, disposition, or disposal of real property assets to ensure that real property assets are available, utilized, and in a suitable condition to accomplish DOE's missions in a safe, secure, sustainable, and cost-effective manner. Contractors shall meet these functional requirements through tailoring of their business processes and management

practices, and use of standard industry practices and standards as applicable. The contractor shall flow down these requirements to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(b) Contractor shall:

- (1) Submit all real estate actions to acquire, utilize, and dispose of real property assets to DOE for review and approval and maintain complete and current real estate records.
- (2) Perform physical condition and functional utilization assessments on each real property assets at least once every five-year period or at another risk-based interval as approved by SC-1 based on industry leading practices, voluntary consensus standards, and customary commercial practices.
- (3) Establish a maintenance management program including: a computerized maintenance management system (CMMS); a condition assessment system; a master equipment list; maintenance service levels; a method to determine for each asset the minimum acceptable level of condition; methods for categorizing deficiencies as either deferred maintenance and repair (DM) or repair needs; management of the DM backlog; a method to prioritize maintenance work; and a mechanism to track direct and indirect funded expenditures for maintenance, repair, and renovation at the asset level.
- (4) Maintain Facilities Information Management System (FIMS) data and records for all lands, buildings, trailers, and other structures and facilities. FIMS data must be current and verified annually.

H.39 - RESERVED

H.40 - RESERVED

H.40A - LEASE AND OCCUPANCY BY DOE OF REAL PROPERTY OR FACILITIES OWNED BY THE CONTRACTOR

- (a) Campus building space and equipment. The Contractor shall provide building space and equipment as set forth in Section J, Appendix D - LEASE AND OCCUPANCY AGREEMENTS, CAMPUS BUILDINGS, SPACE AND EQUIPMENT.

- (b) Disposition of premises altered or constructed.
- (1) The Contractor and DOE have developed mutually satisfactory arrangements for the lease and occupancy of real property of the Contractor upon which structures and other improvements financed by the Government may be constructed or altered. These lease and occupancy agreements are identified in Section J, Appendix D to this contract. These arrangements also cover the disposition of such structures and improvements. The basic terms and conditions applicable to arrangements for property of the Contractor known as the Wilson Tract, Plots "O" and "M" and the regular Contractor campus (herein deemed to include the Bailey Tract and two sections of state Contractor Tract) are set forth in Section J, Appendix D. It is understood that, except as provided in Section J, Appendix D, DOE shall have no obligation to restore the premises with respect to such structures and improvements.
  - (2) It is understood that with respect to construction and alterations financed by the Government to Contractor owned buildings and structures under this contract, the Contractor, after termination or by mutual agreement at any time prior thereto, shall elect whether (i) to retain the benefit of such construction or alteration, in which case the Contractor shall return to or credit the Government with the portion of the reimbursement by the Government for its expenditures therefore determined by negotiation between the Contractor and DOE to be fair and proper, or (ii) to have such premises restored to substantially the same condition as prior to such alteration or construction, in which case the Contractor shall retain all such reimbursement and the Government shall pay the net cost of such restoration; provided that as to any such alteration or construction commenced after October 1, 1962, the Government shall be under no obligation to restore or bear costs of restoration except as otherwise agreed upon.
- (c) Responsibility for environmental restoration and remedial work. Upon termination or expiration of this contract or any lease or occupancy agreements identified in Section J, Appendix D, DOE shall be responsible for complying with applicable laws, regulations, and DOE directives requiring investigation, monitoring, cleanup, containment, restoration, removal, or other remedial activity with respect to any hazardous substances present in the soil, ground water, or buildings as a result of activities conducted during the term of this contract or any prior contract modifications or during the term of any said lease or occupancy agreements.

#### H.41 - PENSION PLAN

- (a) The following stipulations apply, as appropriate, only to the University of California Retirement Plan (UCRP), "DC Supplemental Benefit" and "DC Plan

Benefit” (as such DC plans are defined in the minutes of the Board of Regents, dated March 24, 2016), which covers University of California employees working under contracts at DOE-owned and Contractor-operated facilities. UC offers its employees three plans as follows: UCRP and DC Supplemental and DC Plan Benefit plans, collectively referred to as the “Pension Plans.”

(b) Basic requirements.

- (1) DOE shall be notified prospectively of each change to the Pension Plans that could have a significant impact on current or future Departmental funding or liabilities; including either:
  - (i) Any change to a benefit, right or feature of a Pension Plan or any change to a funding method or assumption, or
  - (ii) Any change that requires the approval of the Regents of the University of California.
- (2) Prospective notice will be provided to the DOE for each newly adopted Pension Plan change requiring prospective notice as described in subparagraph (b)(1)(i) or (ii) above, including any changes to non-DOE-reimbursed segments of commingled pension plans.
- (3) For purposes of this clause, prospective notice shall mean written notice, including a copy of the proposed change, at least thirty (30) days in advance of approval of each change to the Pension Plans by the Regents of the University as trustees of the Pension Plan.
- (4) The Pension Plans shall be subjected to a limited-scope audit annually that is no less comprehensive than the limited scope audit set forth in ERISA Section 103. The UCRP shall be submitted to a full-scope audit by an outside independent auditor every three years. The Contractor shall provide audit reports to DOE within nine months after the last day of the current plan year to which the audit applies.
- (5) The Contractor shall maintain a separate annual accounting of UCRP liabilities and assets attributable to the Laboratory. Market value of assets on an accrual basis at the beginning of a plan year shall equal the assets at market value on an accrual basis at the end of the prior year based on the separate annual accounting of the prior plan year. The procedures for annual accounting of contributions for each plan year (July 1 through June 30) are that the Contractor will provide an annual accounting of assets associated with DOE-funded employer contributions and employee contributions under Contract No. DE-AC02-05CH11231, as follows:
  - (i) Market value of assets at the beginning of a plan year for UCRP;

- (ii) (A) Employer contributions made during a plan year, less the employer contributions transferred to the Social Security Administration on behalf of contract employee members of UCRP who elected Social Security coverage in 1976 or 1977 with any employer contribution toward the UCRP unfunded liability attributable to employees who elect the DC Plan Benefit separately identified; and
- (B) Employee contributions made during a plan year, less the employee contributions transferred to the Social Security Administration on behalf of contract employee members of UCRP who elected Social Security coverage in 1976 or 1977.
- (iii) The dollar amount of investment income from applying the rate of return on the accrual-basis market value of UCRP assets to subparagraphs (b)(5)(i), (ii), (iv) and (v);
- (iv) Benefits disbursed on account of Contract employees during the UCRP plan year, including return of accumulated employee contributions;
- (v) UCRP administrative expenses paid from the trust shall be allocated to the Laboratory in the same proportion that the market value of assets assigned to the Laboratory segment bears to the market value of the total asset fund as of the beginning of the plan year. However, there may be situations agreed to by the DOE where specific expenses would directly be charged to the Laboratory in addition to the proportionate share of expenses; and
- (vi)  $UCRP \text{ market value of assets at the end of the plan year} = (b)(5)(i) + (ii) + (iii) - (iv) - (v)$ . The annual accounting shall include the market value of such assets as of June 30, 1991, and as of the end of each plan year thereafter.
- (vii) The annual accounting shall include the following for the DC Supplemental Benefit and the DC Plan Benefit:
  - (A) Employer contributions made to fund the DC Supplemental Benefit.
  - (B) Employer contribution made to fund the DC Plan Benefit.

- (C) Dollar amount of investment income/earnings from the DC Supplemental Benefit and dollar amount of investment income/earnings from the DC Plan Benefit.
  - (D) Administrative expenses, if any.
- (6) Contract Service means work performed within the scope of work under this contract or predecessor contract.
- (7) Contract service assets means the accrual basis market value given by the accounting which is referred to in subparagraph (b)(5).
- (8) Disaffiliation means the cessation of the contractual relationship between the Contractor and the Department of Energy with respect to LBNL.
- (9) All plan provisions of the Pension Plans are applicable to all eligible employees of the Contractor, including those employed at the Laboratory, except as noted below. For partial Plan Years 2016 (10/1/2015-6/30/2016) and full Plan Years 2017 through 2020 (7/1/2016-6/30/2020), the employer contribution rate for the LBNL Segment of UCRP (also referenced in this Clause as the "DOE Segment" or the "Laboratory Segment"), which forms the basis (as described below) for the additional employer contributions toward the UCRP unfunded liability attributable to employees who elect the DC Plan Benefit, is calculated as set forth in the minutes of the Board of Regents, dated September 17, 2015. If the funded ratio of the LBNL Segment for any Plan Year during this five-year period does not exceed the corresponding funded ratio of the Campus and Medical Centers of UCRP, the LBNL Segment employer contribution rate, including the additional employer contributions to the UCRP unfunded liability attributable to employees who elect the DC Plan Benefit, will revert to the respective Campus and Medical Centers Segment employer contribution rates applicable to that Plan Year. For purposes of assessing the liabilities of the DOE Segment of the UCRP as described in paragraphs (e), (f), and (g), the DOE will have no liabilities to the Plan beyond that associated with Laboratory employees who are members of the Plan for work under this contract.
- (10) The additional employer contribution associated with the DC Plan Benefit is the rate that is determined by subtracting the employer contribution rate for the "DC Plan Benefit" (which is the same for all employees) from the LBNL employer contribution rate for the DOE or Laboratory Segment as calculated above. This additional employer contribution goes toward the DOE/Laboratory segment's UCRP unfunded liability and only applies if the segment has such an unfunded actuarial accrued liability, based on

actuarial value of assets as of the valuation date in which the segment UCRP employer contribution rate was determined.

- (11) Employer contributions on behalf of members in the UCRP 2016 Tier are subject to a Covered Compensation limit consistent with the limit established annually in accordance with the Public Employees' Pension Reform Act of 2013 (PEPRA), as referenced in the minutes of the Board of Regents, dated March 24, 2016  
<http://regents.universityofcalifornia.edu/minutes-index/index.html>.
  - (12) The DOE will be given prospective notice of any changes in administration costs of five percent or more, and the reason for any such changes. Changes in administration costs resulting directly from normal inflation in administration costs or per specific DOE requests do not require notice.
  - (13) If and when the UCRP funded status (measured by dividing the actuarial value of assets by the entry age liability of UCRP), reaches 150 percent, the President of the University will initiate a review of the surplus situation and provide to DOE a copy of the Contractor's recommendations to bring the fund into conformity with the long-term needs of the Plan. Any recommendations by the Contractor for the disposition of the Plan assets in connection with a Plan termination or spin-off will be consistent with the then applicable federal and state laws relating to qualified pension plans and ensure equitable distribution of excess Plan assets to DOE and the University-reimbursed Plan segments as provided in this clause.
  - (14) The DOE will pay costs for any special retirement and/or actuarial analysis that it requests during the period of the contract.
  - (15) DOE has the right to take any action it deems appropriate and consistent with applicable law with reference to the pension plan.
  - (16) The Contractor shall provide notice to the Contracting Officer of UCRP participants transferring from non-LBNL operations to LBNL operations, and vice-versa, on a quarterly basis with such information and as directed by the Contracting Officer.
- (c) Funding requirements.
- (1) Contributions to the UCRP will be based on the actuarial valuation for the Plan and will be approved by the Contractor's Plan Trustees (The Regents of the University of California).
  - (2) DOE agrees to continue to fund for the Contract term(s), as extended, the employer cost of the Pension Plans for Contract employees at contribution rates established from time to time by the Contractor in accordance with



(b)(9), above, subject to the following restriction: The DOE funded contribution to UCRP shall not exceed the full funding limit as defined in the Internal Revenue Code, Section 431.

- (3) The DOE funding policy is intended to be congruent with the basic objectives of the cost accounting standards (CAS) and will generally result in funding consistent with the CAS. If this policy causes a temporary, technical inconsistency with the CAS, the Contractor shall immediately notify the cognizant Contracting Officer and CH's Chief Financial Officer.

Contractors have recourse to the cost principles found at FAR 31.203, 31.205-6, and 31.205-10 and shall avoid penalties on that basis.

- (4) If members of the Laboratory managed by the Contractor for DOE transfer from the Contractor's private operations to the Laboratory, or vice versa, appropriate annual adjustments shall be made to the UCRP pension fund or segments' assets and liabilities.
- (d) Reporting requirements for designated contracts. The following reports shall be submitted within nine months of the last day of the current plan year to DOE for the Laboratory.
- (1) Any annual actuarial valuation report which includes information in the annual separate actuarial valuations for the Laboratory managed by the Contractor for DOE which DOE may reasonably request. DOE shall pay the cost of all separate valuations. At a minimum, these reports for UCRP shall include: an itemized cashflow; the aggregate covered compensation; a distribution of active members by age, service, and salary; separate amount, and time expired since retirement or separation; a brief description of each amortization base, if any, and its date, original amount, and annual payment; an itemization of the changes in the numbers of actives, retirees and terminated vested members during the plan year; the rate of interest currently credited to employee contributions; a statement of the Accounting Standard Codification (ASC) 960 liabilities; a statement of the current liability under Internal Revenue Code Section 431; a development of the total actuarial gain or loss; a statement of actuarial assumptions and methods; calculation of the assets of each Laboratory; calculation of the actuarial asset value; calculation of contribution requirements; and a statement of the changes, if any, in benefits, assumptions or methods since the last report.
  - (2) A copy of the Financial Accounting Standards Board Statement ASC 715 report prepared each year for the UCRP to satisfy the expense-reporting requirement of the Office of Management and Budget.

- (3) In order to report the funded status (surplus or deficit) of the Laboratory's portion of UCRP to the DOE, the Contractor will measure the liabilities using the Entry Age Normal actuarial method and the Actuarial Value of Assets as defined in the valuation report indicated in subparagraph (d)(1) above.
  - (4) Forms 5300. Copies of all forms in the 5300 series submitted to the IRS that document the establishment, amendment, termination, spin-off, or merger of a plan submitted to the IRS.
  - (5) Copy of Private Letter Ruling, if any, related to permission for a participant with a DC Plan Benefit to elect to change to the UCRP 2016 Tier at a later date.
- (e) Terminating operations. When operations at a DOE Laboratory are terminated and no further work is to occur under this contract, the following rules shall apply:
- (1) No further benefits for service shall accrue after the Contract termination date, or such earlier date as agreed to by the DOE and the Contractor.
  - (2) The Contractor shall return the DOE portion of the UCRP assets [as defined herein below] by means of a (1) spin-off and termination of the spun-off plan and reversion pursuant to IRC Section 414(l) and ERISA Section 4044, (2) spin off and plan merger pursuant to IRC 414(l), or (3) otherwise transferred at DOE's direction at DOE's sole discretion subject to applicable law. In the case of (2) above, the merger shall be a merger of all DOE assets and all DOE liabilities with another DOE Contractor's DOE-site pension plan.
  - (3) Procedures with respect to the spin-off and reversion.
    - (i) For purposes of spin-off, all Contract Service active liabilities for the Laboratory's UCRP members and all Contract Service inactive liabilities for the Laboratory's UCRP members shall be valued using the UCRP plan provisions, actuarial assumptions, and actuarial cost methods that were used to prepare that UCRP actuarial off and Contract Service to date of spin-off. For purposes of this subparagraph (e)(3), the aforementioned valuation of the Contract Service inactive liabilities shall be known as "B". The UCRP shall retain full and exclusive responsibility for the Contract Service inactive liabilities. For this purpose, "inactive" shall refer to those vested UCRP members who have earned Contract Service and who do not become participants in the spun-off plan.
    - (ii) Assets transferring to the plan that is spun off shall equal A-B for which A is the value of assets on the effective date of spin-off that is

provided by the formula in subparagraph (b)(5) and B is as defined in subparagraph (e)(3)(i), above. Any delay in transfer of assets shall augment the amount A-B by interest on that amount in accordance with the clause of this contract entitled "Interest", as of the effective date of spin-off. The sponsor of the spun-off plan shall have full and exclusive responsibility for the Contract Service active liabilities.

- (iii) The Parties agree that any disposition of Contract Service assets or transfer of liabilities upon a spin-off shall be consistent with the then applicable federal and state laws relating to qualified pension plans and shall be subject to obtaining such rulings and/or approvals from cognizant federal and state agencies as may be required by law or deemed prudent by the Contractor or DOE.
  - (A) When a Spin-off Plan has been established, UCRP shall retain the liabilities associated with pensioners, members receiving UCRP disability income, terminated vested participants, survivors, contract employees who are retained by the Contractor, and anyone else who is not an active employee under the Spin-off Plan.
  - (B) Under a Spin-off Plan acceptable to the DOE in its sole discretion and which fulfills all of the Contractor's fiduciary responsibilities under applicable law, and which further assumes UCRP liabilities for transferred contract employees, the Contractor agrees to transfer to the trustees of the Spin-off Plan an amount equal to the Contract service assets to be transferred as determined above. Such amount shall be transferred as investment holdings of the UCRP, plus any necessary United States Currency, or, by mutual agreement of the Parties, the total amount may be transferred as United States Currency. Agreement by the DOE and Contractor will not be unreasonably withheld.
    - 1. If the asset transfer to the Spin-off Plan is made in the form of investment holdings, such holdings shall include cash, equity securities, and fixed income securities, but shall exclude any investment holding (and earnings thereon) acquired from the effective date of the spin-off. Such assets shall be allocated on a pro-rated basis, with proration for fixed income assets based on rating and sector classification. The pro-rata allocation shall be the ratio of (A) to (B) where, (A) is the Contract service assets referred to in subparagraph (e)(3)(ii) above; and (B) is the total

assets of the Retirement Fund of UCRP at market value as of the effective date of disaffiliation. If transfer of assets cannot be accomplished on the effective date of disaffiliation, assets shall be converted on that date to U.S. Currency and interest shall be credited on those assets as provided in subparagraph (e)(3)(ii) above.

2. The Contractor will transfer assets at a rate at least sufficient to meet the cashflow requirement of transferred employees who go into benefit status under the Spin-off Plan.

- (iv) Subsequent to a termination of the Spin-off Plan, the Contractor shall return the remaining assets (less any tax or other liabilities imposed upon the Contractor because of the receipt of such assets) to DOE.

The Contractor shall not terminate any DOE-reimbursed benefit plan without the DOE's approval. It is the intention of the DOE not to entertain any enhancements in these programs after the Contractor announces the intention not to renew the contract.

- (v) If operations at the DOE Laboratory are terminated and no further work is to occur under the Contract, similar rules will apply to the DC Plan Benefit and DC Supplemental Benefit of the affected employees and assets associated with such benefits, including any associated employee contributions will be transferred to a qualified plan of a successor contractor.

- (f) Contract termination and selection of a successor contractor. Should another contractor, including any contractual entity that includes the University of California, replace the Contractor, the following become requirements for UCRP:

- (1) Liabilities for present and future benefits of Contract employees in the event there is a successor plan. The liabilities as of the effective date of disaffiliation for members shall be calculated by using the UCRP provisions, actuarial assumptions, and actuarial cost methods as then in effect. Only persons employed by the successor contractor shall be covered by the successor pension plan.

- (2) Contract service assets in the event there is a successor pension plan.

- (i) For purposes of disaffiliation as used in subparagraphs (e) and (f) herein, all Contract Service active liabilities for the Laboratory's UCRP members and all Contract Service inactive liabilities for the Laboratory's UCRP members shall be valued using the UCRP plan

provisions, actuarial assumptions, and actuarial cost methods that were used to prepare that UCRP actuarial valuation which is most recent as of the effective date of disaffiliation and Contract Service to date of disaffiliation. For purposes of subparagraph (f)(2), the aforementioned valuation of the Contract Service inactive liabilities shall be known as B. The UCRP shall retain full and exclusive responsibility for the Contract Service inactive liabilities. For purposes of subparagraph (f)(2), "inactive" shall refer to those vested UCRP members who have earned Contract Service and who do not become participants in a plan sponsored by the successor Contractor.

- (ii) Assets transferring to the plan that is spun off shall equal A-B for which A is the value of assets on the date of disaffiliation that is provided by the formula in subparagraph (b)(5) and B is as defined in subparagraph (f)(2)(i), above. Any delay in transfer of assets shall augment the amount A-B by interest on that amount in accordance with the clause of this contract entitled "Interest", as of the effective date of disaffiliation. The successor Contractor shall have full and exclusive responsibility for the Contract Service active liabilities.
  - (iii) Notwithstanding the provisions of this paragraph (f), the Parties further agree to consider the desirability of covering pensioners, survivors, UCRP disability recipients, and terminated vested and nonvested members under a successor plan.
  - (iv) The DC Plan Benefit and DC Supplemental Benefit including any associated employee contributions will be transferred to a qualified plan of the successor contractor at the same time in order to maintain continuity of benefit structures.
- (3) Disposition of contract service assets and liabilities. The Parties agree that any disposition of contract service assets or transfer of liabilities upon Contract termination shall be consistent with the then applicable federal and state laws relating to qualified pension plans and shall be subject to obtaining such rulings and/or approvals from cognizant Federal and State agencies as may be required by law or deemed prudent by the Contractor or DOE.
- (i) Retention of assets and liabilities. When a successor pension plan has been established by a successor Contractor, UCRP shall retain the liabilities associated with pensioners, survivors, UCRP disability recipients, and terminated vested and nonvested members and active members who are retained by the Contractor as determined in subparagraph (f)(1) above.

(ii) Transfer of assets and liabilities to successor pension plan. Under a successor pension plan acceptable to the DOE and which fulfills all of the Contractor's fiduciary responsibilities under applicable law, and which further assumes UCRP liabilities for transferred Contract employees, the Contractor agrees to transfer to the trustees of such successor plan an amount equal to the contract service assets as determined in subparagraph (f)(2) above. Such amount shall be transferred as investment holdings of the UCRP, plus any necessary United States Currency, or, by mutual agreement of the Parties, the total amount may be transferred as United States Currency. Agreement by the DOE and Contractor will not be unreasonably withheld.

(A) If the asset transfer to the successor Contractor's trust is made in the form of investment holdings, such holdings shall include cash, equity securities and fixed income securities, but shall exclude investment holdings (and earnings thereon) acquired after the effective date of disaffiliation. Such assets shall be allocated on a pro-rated basis, with proration for fixed income assets based on rating and sector classification. The pro-rata allocation shall be the ratio of (A) to (B) where, (A) is the contract service assets referred to in subparagraph (f)(2) above and (B) is the total assets of the Retirement Fund of UCRP at market value as of the effective date of disaffiliation. If transfer of assets cannot be accomplished on the effective date of disaffiliation, assets shall be converted on that date to U.S. Currency and interest then shall be credited on those assets as provided in (f)(2)(ii).

(B) The Contractor will transfer assets at a rate at least sufficient to meet the cashflow requirement of transferred employees who go into benefit status under the successor plan.

(C) If the transfer is made as United States Currency, the transfer shall be increased to include interest on the amount at the rate specified in the clause of this contract entitled "Interest".

(g) UCRP plan termination.

(1) In the unlikely event of termination of the entire UCRP, the Contractor shall not terminate any pension plan (commingled or site-specific) without notifying the Department at least 60 days prior to the scheduled date of plan termination, or if earlier, 60 days before plan members are notified of

the plan termination.

- (2) The Contractor may satisfy plan liabilities to all plan members by the purchase of annuities through competitive bidding on the open annuity market or through the payment of lump sums. Any competitive annuity bid process must include at least five bidders, if possible, who satisfy the criteria listed in the United States Department of Labor Interpretive Bulletin 95-1. The final selection of insurance company(ies) shall be based upon a review of the bids of the qualifying companies, along with a prudent assessment of the quality of the annuity providers. The Contractor may also satisfy plan liabilities to plan members through lump sum distributions. Lump sum distributions shall be calculated in accordance with the terms of the UCRP.
  - (3) Notwithstanding the provisions in subparagraph (g)(2), if the DOE has a dispute with the Contractor's selection of an annuity provider(s) or the assumptions or methods for determining the lump sum distributions, the DOE may negotiate with the Contractor an alternative that would resolve its concerns.
  - (4) DOE-reimbursed assets which are in excess of the DOE liability shall revert to DOE with interest. Interest shall accrue from the effective date of plan termination at the rate specified in the clause of this contract entitled "Interest".
- (h) Financial requirement.
- (1) Funds to be paid or transferred to any party as a result of settlements relating to pension plan termination under paragraph (g) above shall accrue interest from the effective date of termination until the date of payment or transfer.
  - (2) Special programs. Any UCRP retirement system programs proposal that is Laboratory specific and that would increase the cost of the Contract beyond that approved by the Contractor for Contractor employees, reduce plan surplus, or increase plan liabilities shall require advance approval by the Contracting Officer and the Contractor.
- (i) Post-Contract Responsibilities for Pension and Benefit Plans.

If this contract expires or terminates without a follow-on contract, notwithstanding any other obligations and requirements concerning expiration or termination under any other clause of this contract, including but not limited to the clause of the contract entitled "Termination", the following actions shall occur:

- (1) The Contractor shall continue as plan sponsor of all existing and follow-on pension and welfare benefit plans covering site personnel with responsibility for management and administration of the plans, as directed by DOE, at DOE's sole discretion.
- (2) During the final 12 months of this contract if the parties have not reached agreement on these matters, the Contracting Officer shall provide written direction regarding the provision of post-contract pension and welfare benefits.
- (3) Notwithstanding termination for convenience or default, the contract may be extended as appropriate for purposes deemed necessary by the Contracting Officer, including, but not limited to, obligating funds to pay the Contractor for costs incurred for the Contractor's existing and, if applicable, follow-on, site pension and welfare benefit plans. Such costs shall continue to be allowable in accordance with applicable laws and regulations
- (4) DOE-approved pension and welfare plan contributions and plan administration costs, and pension plan asset management costs, will continue to be allowable and fully reimbursed under this contract, unless other arrangements have been approved by the Contracting Officer.

#### H.42 - RESERVED

#### H.43 - SPECIAL FINANCIAL INSTITUTION ACCOUNT AGREEMENT

DOE shall make arrangements with the Contractor to execute a Special Financial Institution Account Agreement (Section J, Appendix C - SPECIAL FINANCIAL INSTITUTION ACCOUNT AGREEMENT FOR USE WITH THE PAYMENTS CLEARED FINANCING ARRANGEMENT, to the Contract), in accordance with DOE requirements and provide said Agreement to the Contractor for its execution. Upon execution by the Contractor, said Agreement shall supersede the existing Section J, Appendix C attached to this Contract and shall be substituted therefore without any further action of the Parties.

#### H.44 - AGREEMENTS AND COMMITMENTS

- (a) The resources proposed by the Contractor and accepted by the Government are incorporated into the contract as set forth below:

None



The Contractor shall provide the above described resources in the amount, manner, and schedule as specified in Contractor's response to Provision L.8(d) of RFP No. DE-RP02-04CH11231. If the Contractor fails to provide any or all of these resources or to make progress toward providing these resources, the Government may exercise any of its rights and remedies under the contract, including those contained in the provision of the Section I clause entitled,

"Conditional Payment of Fee, Profit, and Other Incentives – Facility Management Contracts, Alternate I."

- (b) Any costs incurred by the Contractor in providing any of these resources are expressly unallowable under the contract.

#### H.45 - RESERVED

#### H.46 - EPAct DATA PROTECTION (APR 2022)

##### (a) Rights to Protected Data

- (1) In addition to the data rights set forth in 48 CFR § 970.5227-2 - Rights in data-technology transfer, for work authorized under the Energy Policy Act of 2005 (EPAct 2005) or the Energy Policy Act of 1992 (EPAct 1992), the Contractor may, with the concurrence of DOE, claim and mark as EPAct Protected Data, any data first produced in the performance of such work that would have been treated as a trade secret if developed at private expense. Any such claimed "EPAct Protected Data" will be clearly marked with the following Protected Rights Notice, and will be treated in accordance with such Notice, subject to the provisions of paragraph (b) of this clause.

##### **Protected Rights Notice**

These protected data were produced under [INSERT WORK IDENTIFIER] with the U.S. Department of Energy and may not be published, disseminated, or disclosed to others outside the Government until [INSERT PERIOD OF PROTECTION END] (Note: The period of protection of such data is fully negotiable, but cannot exceed the applicable statutorily authorized maximum), unless express written authorization is obtained from the Contractor. Upon expiration of the period of protection set forth in this Notice, the Government shall have unlimited rights in this data. This Notice shall be marked on any reproduction of this data, in whole or in part.

(End of notice)

- (2) Any such marked Protected Data may be disclosed under obligations of confidentiality for the following purposes:
  - (i) For evaluation purposes under the restriction that the "Protected Data" be retained in confidence and not be further disclosed; or
  - (ii) To subcontractors or other team members performing work under the Government's program in which this data was produced, for information or use in connection with the work performed under their activity, and under the restriction that the Protected Data be retained in confidence and not be further disclosed.
  
- (3) The obligations of confidentiality and restrictions on publication and dissemination shall end for any Protected Data:
  - (i) At the end of the protected period;
  - (ii) If the data becomes publicly known or available from other sources without a breach of the obligation of confidentiality with respect to the Protected Data;
  - (iii) If the same data is independently developed by someone who did not have access to the Protected Data and such data is made available without obligations of confidentiality; or
  - (iv) If the Contractor disseminates or authorizes another to disseminate such data without obligations of confidentiality.
  
- (4) However, the Contractor shall not claim or mark as EPACT Protected Data, any lists of data identified by the funding program to be provided with unlimited rights. The Contractor agrees that notwithstanding the lists of types of data, nothing precludes the Government from seeking delivery of additional data in accordance with the requirements of the Contractor's contract, or from making publicly available unlimited rights data, nor does the lists of data constitute any admission by the Government that technical data not on the list is EPACT Protected Data.
  
- (5) When a Cooperative Research and Development Agreement (CRADA) is used with an EPAct Awardee, the CRADA Protected Information clause may be modified to incorporate the Protected Rights Notice of this clause. When a Strategic Partnership Project (SPP) is used with an EPAct Awardee, the Rights in Technical Data clause may be modified to incorporate the Protected Rights Notice of this clause.
  
- (6) The Government's sole obligation with respect to any EPACT Protected Data shall be as set forth in this clause.

(b) Unauthorized or Omitted Marking of Data

- (1) Notwithstanding any other provisions concerning inspection or acceptance, if any data developed is authorized by EPCRA 1992 or 2005 bears any restrictive or limiting markings not authorized by this clause, the Contracting Officer has the right to remove, cancel, correct, or ignore any markings not authorized by this clause on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond within 60 days or fails to substantiate the propriety of the markings. In either case, DOE will notify the Contractor of the action taken.
- (2) The Government assumes no liability for the disclosure, use or reproduction of any data provided to the Government by the Contractor that lacks any protected rights notice or other restrictive or limiting markings authorized by the Contractor's prime contract with DOE.

H.47 - Contractor's Obligations Concerning U.S. Manufacturing Requirements of a Determination of Exceptional Circumstances (DEC) (APR 2022)

(a) Applicability

This clause is applicable to work performed by the Contractor subject to a Determination of Exceptional Circumstance (DEC) under 35 U.S.C. 202(a) (ii) and in accordance with 37 CFR Part 401.3(e) having U.S. manufacturing requirements.

(b) U.S. Manufacturing Requirements for Subject Inventions

- (1) In addition to the U.S. Preference provision in Patent Rights clause (48 CFR 970.5227-10 including any modifications) and the U.S. Industrial Competitiveness provision in the Technology Transfer Mission clause (48 CFR 970.5227-3 including any modifications) in the Contractor's prime contract with DOE, the Contractor agrees to comply with the manufacturing requirements of all applicable DEC's, including any remedies for breach of the applicable manufacturing requirements.
- (2) The Contractor is required to comply with requirements of applicable DEC's including, but not limited to, any U.S. Manufacturing Plans or Commercialization Plans. If the Contractor fails to comply with an applicable DEC or any related/required U.S. Manufacturing or Commercialization Plans, the Contractor is subject to any enforcement provisions of the applicable DEC, including, but not limited to forfeiture of rights to subject inventions.

- (3) Request for a waiver of any U.S. manufacturing requirements, including the U.S. Preference provision in the Patent Rights clause (48 CFR 970.5227-10 including any modifications), the U.S. Industrial Competitiveness provision in the Technology Transfer Mission clause (48 CFR 970.5227-3 including any modifications), and any applicable U.S. Manufacturing or Commercialization Plan must be approved by the funding program in addition to the Contracting Officer. Such waiver requests must be accompanied by substantial evidence that it is not commercially feasible to comply with the U.S. manufacturing requirement and provide commitments that benefit the U.S. economy. These conditions shall be binding on any subsequent assignee, sublicensee, or any entity acquiring rights to any elected subject inventions.

#### H.48 - INFORMATION TECHNOLOGY ACQUISITIONS

Prior to use under this contract, all information technology acquisitions shall include the appropriate information technology security policies and requirements, including use of common security configurations available from the National Institute of Standards and Technology's website at <http://checklists.nist.gov> commensurate with the mission of the contract and conducive to the research and development efforts of the laboratory. This requirement shall be included in all subcontracts which are for information technology acquisitions; and the Laboratory CIO shall annually certify to the Contracting Officer that this requirement is being incorporated into information technology acquisitions.

#### H.49 - CONFERENCE MANAGEMENT

The Contractor agrees that:

- (a) The Contractor shall ensure that Contractor-sponsored conferences reflect the DOE's commitment to fiscal responsibility, appropriate stewardship of taxpayer funds and support the mission of DOE as well as other sponsors of work. In addition, the contractor will ensure conferences do not include any activities that create the appearance of taxpayer funds being used in a questionable manner.
- (b) Determination of a Conference.
  - 1) Definition. "Conference" is defined in the Federal Travel Regulation as, "[a] meeting, retreat, seminar, symposium, or event that involves attendee travel." The term 'conference' also applies to training activities that are considered to be conferences under 5 C.F.R 410.404. However, this definition is only a starting point.
  - 2) Additional Indicia of Conferences. Conferences subject to this guidance are also often referred to by names other than "conference." Other

common terms used include conventions, expositions, symposiums, seminars, workshops, or exhibitions. They typically involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participations. Indications of a formal conference often include but are not limited to registration, registration fees, a published substantive agenda, and scheduled speakers, or discussion panels. Individual events may qualify as conferences without meeting all of the indicia listed above, but will generally meet some of them. Please note that some training events may qualify as conferences for the purposes of this guidance, particularly if they take place in a hotel or conference center.

- 3) Local Conferences. Events within the local duty location that do not require advance travel authorization may also qualify as a conference for the purposes of this guidance if the event exhibits other key indicia of a conference, especially the payment of a registration, exhibitor, sponsor, or conference fee.
- 4) Exemptions. For the purposes of this guidance, the exemptions below apply and these types of activities should not be considered to be conferences even if the event meets the general definition of conference in section 1 above. Even where an event is considered exempt for this guidance, organizations are expected to continue to apply strict scrutiny to DOE's participation to ensure the best use of government funds and adherence with not only all applicable laws and policy, but the underlying spirit or principles, include ensuring that only personnel attend events that have a mission-essential need to do so, that expenses be kept to a minimum, and that participation in any associated social events be limited and restrained to the greatest degree practicable to avoid the appearance of impropriety. Exemptions from this guidance should be granted sparingly and only when events fully meet the definition and intent of the criteria below:
  - i) Meetings necessary to carry out statutory oversight functions. This exemption would include activities such as investigations, inspections, audits, or non-conference planning site visits.
  - ii) Meetings to consider internal agency business matters held in Federal facilities. This exemption would include activities such as meetings that take place as part of an organization's regular course of business, do not exhibit indicia of a formal conference as outlined above, and take place in a Federal facility.
  - iii) Bi-lateral and multi-lateral international cooperation engagements that do not exhibit indicia of a formal conference as outlined above that are focused on diplomatic relations.

- iv) Formal classroom training which does not exhibit indicia of a formal conference as outlined above.
  - v) Meetings such as Advisory Committee and Federal Advisory Committee meetings, Solicitation/Funding Opportunity Announcement Review Board meetings, peer review/objective review panel meetings, evaluation panel/board meetings, and program kick-off and review meetings (including those for grants and contracts).
- (c) Contractor-sponsored conferences include those events that meet the conference definition and either or both of the following:
- 1) The Contractor provides funding to plan, promote, or implement an event, except in instances where the Contractor:
    - i) covers participation costs in a conference for specified individuals (e.g., students, retirees, speakers, etc.) in a total amount not to exceed \$10,000 (by individual contractor for a specific conference); or
    - ii) purchases goods or services from the conference planners (e.g., attendee registration fees, renting booth space).
  - 2) The Contractor authorizes use of the official seal, or other seals/logos/trademarks to promote a conference. Exceptions include non-M&O contractors who use their seal to promote a conference that is unrelated to their DOE contract(s) (e.g., if a DOE IT contractor were to host a general conference on cyber security).
- (d) Attending a conference, giving a speech or serving as an honorary chairperson does not connote sponsorship.
- (e) The Contractor will provide information on conferences they plan to sponsor with expected costs exceeding \$100,000 in the Department's Conference Management Tool, including:
- 1) Conference title, description, and date;
  - 2) Location and venue;
  - 3) Description of any unusual expenses (e.g., promotional items);
  - 4) Description of contracting procedures used (e.g., competition for space/support);

- 5) Costs for space, food/beverages, audio visual, travel/per diem, registration costs, recovered costs (e.g., through exhibit fees); and
  - 6) Number of attendees.
- (f) The Contractor will not expend funds on the proposed Contractor-sponsored conferences with expenditures estimated to exceed \$100,000 until notified of approval by the Contracting Officer.
- (g) For DOE-sponsored conferences, the Contractor will not expend funds on the proposed conference until notified by the Contracting Officer.
- 1) DOE-sponsored conferences include events that meet the definition of a conference and where the Department provides funding to plan, promote, or implement the conference and/or authorizes use of the official DOE seal, or other seals/logos/ trademarks to promote a conference. Exceptions include instances where DOE:
    - i) covers participation costs in a conference for specified individuals (e.g., students, retirees, speakers, etc.) in a total amount not to exceed \$10,000 (by individual contractor for a specific conference); or
    - ii) purchases goods or services from the conference planners (e.g., attendee registration fees, renting booth space); or providing funding to the conference planners through Federal grants.
  - 2) Attending a conference, giving a speech, or serving as an honorary chairperson does not connote sponsorship.
  - 3) The Contractor will provide cost and attendance information on their participation in all DOE-sponsored conference in the DOE Conference Management Tool.
- h) For non-Contractor sponsored conferences, the Contractor shall develop and implement a process to ensure costs related to conferences are allowable, allocable, reasonable, and further the mission of DOE. This process must at a minimum:
- 1) Track all conference expenses; and
  - 2) Require the Laboratory Director (or equivalent) or Chief Operating Officer approve a single conference with net costs to the contractor of \$100,000 or greater.

- i) Contractors are not required to enter information on non-sponsored conferences in DOE's Conference Management Tool.
- j) Once funds have been expended on a non-sponsored conference, contractors may not authorize the use of their trademarks/logos for the conference, provide the conference planners with more than \$10,000 for specified individuals to participate in the conference, or provide any other sponsorship funding for the conference. If the Contractor does so, its expenditures for the conference may be deemed unallowable.

#### H.50 - RISK MANAGEMENT AND INSURANCE PROGRAMS (DEC 2014)

Contractor officials shall ensure that the requirements set forth below are applied in the establishment and administration of DOE-funded prime cost reimbursement contracts for management and operation of DOE facilities and other designated long-lived onsite contracts for which the contractor has established separate operating business units.

##### 1. BASIC REQUIREMENTS

- a. Maintain commercial insurance or a self-insured program, (i.e., any insurance policy or coverage that protects the contractor from the risk of legal liability for adverse actions associated with its operation, including malpractice, injury, or negligence) as required by the terms of the contract. Types of insurance include automobile, general liability, and other third party liability insurance. Other forms of coverage must be justified as necessary in the operation of the Department facility and/or the performance of the contract, and approved by the DOE.
- b. Contractors shall not purchase insurance to cover public liability for nuclear incidents without DOE authorization (See DEAR 970.5070, INDEMNIFICATION, and DEAR 950.70, NUCLEAR INDEMNIFICATION OF DOE CONTRACTORS).
- c. Demonstrate that insurance programs and costs comply with the cost limitations and exclusions at FAR 28.307, INSURANCE UNDER COST REIMBURSEMENT CONTRACTS, FAR 31.205-19, INSURANCE AND INDEMNIFICATION, DEAR 952.231-71 INSURANCE-LITIGATION AND CLAIMS, and Clause I.144 – DEAR 970.5228-1, INSURANCE-LITIGATION AND CLAIMS (PREV. I.98).
- d. Demonstrate that the insurance program is being conducted in the government's best interest and at reasonable cost.



- e. The contractor shall submit copies of all insurance policies or insurance arrangements to the Contracting Officer no later than 30 days after the purchase date.
- f. When purchasing commercial insurance, the contractor shall use a competitive process to ensure costs are reasonable.
- g. Ensure self-insurance programs include the following elements:
  - (1) Compliance with criteria set forth in FAR 28.308, Self-Insurance. Approval of self-insurance is predicated upon submission of verifiable proof that the self-insurance charge does not exceed the cost of purchased insurance. This includes hybrid plans (i.e., commercially purchased insurance with self-insured retention (SIR) such as large deductible, matching deductible, retrospective rating cash flow plans, and other plans where insurance reserves are under the control of the insured). The SIR components of such plans are self-insurance and are subject to the approval and submission requirements of FAR 28.308, as applicable.
  - (2) Demonstration of full compliance with applicable state and federal regulations and related professional administration necessary for participation in alternative insurance programs.
  - (3) Safeguards to ensure third party claims and claims settlements are processed in accordance with approved procedures.
  - (4) Accounting of self-insurance charges.
  - (5) Accrual of self-insurance reserve. The Contracting Officer's approval is required and predicated upon the following:
    - (a) The claims reserve shall be held in a special fund or interest bearing account.
    - (b) Submission of a formal written statement to the Contracting Officer stating that use of the reserve is exclusively for the payment of insurance claims and losses, and that DOE shall receive its equitable share of any excess funds or reserve.
    - (c) Annual accounting and justification as to the reasonableness of the claims reserve submitted for Contracting Officer's review.

- (d) Claim reserves, not payable within the year the loss occurred, are discounted to present value based on the prevailing Treasury rate.
    - h. Separately identify and account for interest cost on a Letter of Credit used to guarantee self-insured retention, as an unallowable cost and omitted from charges to the DOE contract.
    - i. Comply with the Contracting Officer's written direction for ensuring the continuation of insurance coverage and settlement of incurred and/or open claims and payments of premiums owed or owing to the insurer for prior DOE contractors.
- 2. PLAN EXPERIENCE REPORTING. The Contractor shall:
  - a. provide the Contracting Officer with annual experience reports for each type of insurance (e.g., automobile and general liability), listing the following for each category:
    - (1) The amount paid for each claim.
    - (2) The amount reserved for each claim.
    - (3) The direct expenses related to each claim.
    - (4) A summary for the year showing total number of claims.
    - (5) A total amount for claims paid.
    - (6) A total amount reserved for claims.
    - (7) The total amount of direct expenses.
  - b. provide the Contracting Officer with an annual report of insurance costs and/or self-insurance charges. When applicable, separately identify total policy expenses (e.g., commissions, premiums, and costs for claims servicing) and major claims during the year, including those expected to become major claims (e.g., those claims valued at \$100,000 or greater).
  - c. provide additional claim financial experience data as may be requested on a case-by-case basis.
- 3. TERMINATING OPERATIONS. The Contractor shall:
  - a. ensure protection of the government's interest through proper recording of cancellation credits due to policy terminations and/or experience rating.

- b. identify and provide continuing insurance policy administration and management requirements to a successor, other DOE contractor, or as specified by the Contracting Officer.
  - c. reach agreement with DOE on the handling and settlement of self insurance claims incurred but not reported at the time of contract termination; otherwise, the contractor shall retain this liability.
4. SUCCESSOR CONTRACTOR OR INSURANCE POLICY CANCELLATION. The Contractor shall:
- a. obtain the written approval of the Contracting Officer for any change in program direction; and
  - b. ensure insurance coverage replacement is maintained as required and/or approved by the Contracting Officer.

H.51 - MANAGEMENT AND OPERATING CONTRACTOR (M&O) SUBCONTRACT REPORTING (NOV 2017)

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

"First-tier subcontract" means a subcontract awarded directly by the Contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that would benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs.

"Management and Operating Contractor Subcontract Reporting Capability (MOSRC)" means a DOE system and associated processes to collect key information about Management and Operating Contractor first-tier subcontracts for reporting to the Small Business Administration.

"Transaction" means any contract, order, other agreement or modification thereof (other than one involving an employer-employee relationship) entered into by the Contractor acquiring supplies or services (including construction) required solely for performance of the prime contract.

- (b) Reporting. The Contractor shall collect and report data via MOSRC necessary for DOE to meet its agency reporting requirements, as determined by the Small Business Administration, in accordance with the most recent reporting instructions at <https://energy.gov/management/downloads/mosrc-reporting-instructions>. The Contractor shall report first-tier subcontract data in MOSRC.

Classified subcontracts shall not be reported. Subcontracts with Controlled Unclassified Information marking shall not be reported if restricted by its category. Contact your Contracting Officer if uncertain of information reporting requirements. The MOSRC reporting requirement does not replace any other reporting requirements (e.g. the Electronic Subcontracting Reporting System or the FFATA Subcontracting Reporting System).

#### H.52 - MULTIFACTOR AUTHENTICATION FOR CONTRACTOR INFORMATION SYSTEMS (JUN 2016)

The Contractor shall take actions to achieve multifactor authentication (MFA) for standard and privileged user accounts of all classified and unclassified networks by September 30, 2016. Any delays that are due to DOE's failure to provide adequate Government Furnished Equipment in a timely manner will be taken into account in assessing the accomplishment of this requirements.

#### H.53 - AGREEMENTS FOR COMMERCIALIZING TECHNOLOGY (APR 2018)

This H-clause authorizes the use of the mechanism: Agreements for Commercializing Technology (ACT). In accordance with the requirements specified in this H-clause, the M&O Contractor may conduct third party-sponsored research at the M&O Contractor's risk. While the Department believes ACT has the potential to greatly assist in the commercialization of technologies, it also specifically recognizes that ACT can be used for other engagements with outside entities that are not necessary aimed at commercialization (e.g., technical assistance, training, studies), but which facilitate access to DOE facilities. In performing ACT work, the M&O Contractor may use staff and other resources associated with this M&O contract for the purposes of conducting technical services<sup>1</sup>, training, studies, performing research and development, and/or furthering the technology transfer mission of the Department, only when such work does not interfere with DOE-funded activities conducted as authorized by other parts of this M&O contract. The resources that may be used include Government- owned or leased facilities, equipment, or other property that is either in the M&O Contractor's custody or available to the M&O Contractor under this M&O contract (unless specifically excluded by the Contracting Officer). For M&O Contractor activities conducted under authority of this H-clause, the M&O Contractor shall provide full-cost recovery, assume indemnification and liability as provided in paragraph 9 below, and may assume other risks normally borne by private parties sponsoring research at the DOE national laboratories and production plants. In exchange for accepting such risks, or for other private consideration provided by the M&O Contractor, the M&O Contractor is authorized to negotiate separate ACT agreements with the sponsoring third parties.

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<sup>1</sup> Services that are routinely performed for DOE and multiple sponsors with little to no variance in the scope of work e.g., calibration services.

Under ACT agreements, the M&O Contractor may charge those parties additional compensation beyond the full costs of the work at the facility.

The following applies to all work conducted under the ACT mechanism regardless of the source of funding:

1. Authority to Perform work under this H-clause. Pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.) and other applicable authorities, the M&O Contractor may perform work for non-Federal entities, in accordance with the requirements of this H-clause.
2. M&O Contractor's Implementation. For ACT work conducted under the contract, the M&O Contractor must draft, implement, and maintain formal policies, practices, and procedures in accordance with this H-clause, which must be approved by the Contracting Officer, and such approval shall not be unreasonably withheld.
3. Conditions for Participation in ACT. The M&O Contractor:
  - a. Must not perform ACT activities that would place it in direct competition with the private sector;
  - b. May only conduct work under this H-clause if the work does not interfere with or adversely affect projects and programs the M&O Contractor conducts on behalf of the DOE under this contract, and complies with the terms and conditions of the prime contract. If the Government determines that an activity conducted under this H-clause interferes with the Department's work under the M&O contract, or that termination/stay/suspension of work under an ACT agreement is in the best interest of the Government, the M&O Contractor must stop the interfering ACT work immediately to the extent necessary to resolve the interference. At any time, the Contracting Officer may require the use of specified Government-owned or leased property and facilities for the exclusive use of the DOE mission by providing a written notice excluding said property from the M&O Contractor's activities under this H-clause. Any cost incurred as a result of Contracting Officer decisions identified in this subparagraph shall be borne by the M&O Contractor. The Contracting Officer shall provide to the M&O Contractor in writing its decision, identifying the issues and reasons for the decisions. The M&O Contractor shall be provided with a reasonable opportunity to address and resolve the issues identified by the Contracting Officer;
  - c. Except as otherwise excluded in this H-clause, must perform all ACT activities in accordance with the standards, policies, and procedures that apply to performance under this M&O contract, including but not limited to environmental, safety and health, security, safeguards and classification

procedures, and human and animal research regulations;

- d. Must maintain and provide when requested by the DOE Contracting Officer, a summary of project information for each active ACT project, consisting of: sponsor name; total estimated costs; project title and description; project point of contact; and estimated start and completion dates;
- e. Is responsible for addressing the following items in ACT agreements as appropriate: disposition of property acquired under the agreement; export control; notice of intellectual property infringement; and a statement that the Government and/or the M&O Contractor shall have the right to perform similar services in the Statement of Work for other Parties as otherwise authorized by this M&O contract subject to applicable data restrictions;
- f. Must include a standard legal disclaimer notice on all publications generated under ACT activities. Each DOE M&O Contractor has its own pre-approved publications statement, and this should be included; and
- g. Must insert the following disclaimer in each agreement under ACT, which must be conspicuous (e.g. bold type, all capital letters, or large font) in all Agreements under ACT so as to meet the standards of due notice.

**DISCLAIMER**

**THIS AGREEMENT IS SOLELY BETWEEN [INSERT NAME OF THE M&O CONTRACTOR] AND [THE OTHER IDENTIFIED PARTY]. THE UNITED STATES GOVERNMENT IS NOT A PARTY TO THIS AGREEMENT, THIS AGREEMENT DOES NOT CREATE ANY OBLIGATIONS OR LIABILITY ON BEHALF OF THE GOVERNMENT AND THE GOVERNMENT MAKES NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT; THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. THE GOVERNMENT SHALL NOT BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS AGREEMENT. THIS DISCLAIMER DOES NOT AFFECT ANY RIGHTS**

THE GOVERNMENT MAY HAVE AGAINST THIRD PARTIES ARISING FROM WORK CONDUCTED IN CONNECTION WITH THIS AGREEMENT.

4. Contracting Authority.
  - a. Subject to DOE approval as described in this paragraph, the M&O Contractor is hereby authorized to negotiate terms and conditions between the M&O Contractor and third parties when entering into ACT agreements. The M&O Contractor will have no authority to bind the Government in any way with such terms and conditions. The Government will have no obligation to the M&O Contractor due to such terms and conditions.
  - b. The M&O Contractor shall submit an ACT proposal package (Package) to the Contracting Officer for approval prior to beginning work under an ACT agreement.
    - i. A complete Package will include at a minimum: the identity of the parties to the ACT agreement; the principal place of performance; any foreign ownership or control of the ACT agreement parties; a Statement of Work; an estimate of costs incurred under the M&O contract; an anticipated schedule; identification of key Government equipment and facilities that will be used under the ACT agreement; a list of expected deliverables; identification of the Intellectual Property (IP) lead and proposed selection of IP rights, as defined in DOE Class Waiver W(C)-2011-013; a signed certification by the private party(ies) that the M&O Contractor offered the option to use CRADA and SPP alternatives (see paragraph 7a) sufficiently such that the private parties are aware of the relative costs and other differences between the ACT agreement and the CRADA and SPP alternatives; source of funds, including a statement that no Federal funds, including pass-through funds received as a subcontractor or partner, are being utilized to fund the agreement except as authorized under the FedACT pilot (see paragraph 14 below); applicable ES&H and NEPA documentation; a statement of consideration, summarizing the risk and/or consideration offered the ACT participants in exchange for charging beyond full cost recovery or for other compensation provided by the participants; and when multiple third parties are parties to the ACT agreement, or as otherwise requested by the Contracting Officer, an IP Management Plan that sets forth the proposed disposition of IP rights, and income and royalty sharing, among the parties to an ACT agreement.

- ii. If the M&O Contractor, the M&O Contractor's parent, member, subsidiary, or other entity in which the M&O Contractor, the M&O Contractor's parent, member or subsidiary has an equity interest, is a party to the ACT agreement, the M&O Contractor shall include as necessary a project-specific addendum to the Master OCI Plan in the Package to address special circumstances not fully anticipated in the prior approved Master OCI Plan (see paragraph 7).
  - iii. If the ACT agreement includes a foreign entity as a party or the statement of work includes the use of human subjects, animal subjects, classified or sensitive subject matter or describes a work scope involving high risks or hazards including environmental issues, the M&O Contractor shall include additional information as necessary or as requested by the Contracting Officer.
- c. The Contracting Officer shall use reasonable best efforts to review each complete Package submitted by the M&O Contractor under subparagraph 4.b. of this H-clause within ten (10) business days of receiving the Package and provide the M&O Contractor with approval or non-approval of the Package. The review of the complete Package by the Contracting Officer shall include a determination that the proposed work: (1) is consistent with or complementary to DOE missions and the contract statement of work; (2) will not adversely impact programs under the contract scope of work; (3) will not place the contractor in direct competition with the domestic private sector; and (4) will not create a detrimental future burden on DOE resources.
- d. Except as conditionally allowed under subparagraph i. below, the Contracting Officer must approve the Package before the M&O Contractor may begin work under the proposed ACT agreement. If the Contracting Officer rejects the Package then the Contracting Officer must provide said rejection to the M&O Contractor in writing including the reasons for the rejection. Upon receipt of the Contracting Officer's written rejection, the M&O Contractor agrees to not further pursue the work described in the package or incur additional costs under the M&O contract for the work described in the Package.
- i. The M&O Contractor may request a preliminary determination that the proposed scope of work is consistent with the contract statement of work and the Contracting Officer will use his/her best efforts to provide such a determination within three (3) business days. Upon such a determination from the Contracting Officer, the M&O Contractor may begin work under the ACT agreement at the M&O Contractor's risk pending final approval of the complete Package. The M&O Contractor must submit a complete Package, as identified in subparagraph 4.b. above, within (10) business days



of the preliminary determination. All costs associated with the performance of work under a preliminary determination are the responsibility of the M&O Contractor, as no Federal funds will be used to fund any work conducted under this H-clause.

- ii. If the M&O Contractor, the M&O Contractor's parent, member, subsidiary, or other entity in which the M&O Contractor, the M&O Contractor's parent, member or subsidiary has an equity interest, is a party sponsoring work in connection with the ACT agreement, work may not commence until approval of the complete Package by the Contracting Officer.
5. Advance Payment for ACT Projects. The M&O Contractor shall be responsible for providing adequate advance payment for ACT work conducted under this H-clause consistent with procedures defined in the Department's Financial Management Handbook. The M&O Contractor shall be solely responsible for collecting payments from third parties for any work conducted under this H-clause and such collections shall be independent of providing advance payment. For such payments and for any costs, obligations, or liabilities arising due to the M&O Contractor's work under this H-clause, the M&O Contractor is entirely at risk and the Government shall have no risk.
6. Costs. All direct costs associated with the M&O Contractor's work conducted under this H-clause shall be directly charged to separate and identifiable accounts in accordance with the requirements of the Department's Financial Management Handbook. An allocable portion of indirect costs normally applied to equivalent work under this M&O contract shall also be applied to work conducted under this H-clause in accordance with the requirements of the Financial Management Handbook. As required by the Financial Management Handbook, changes to the Handbook will be incorporated into this H-clause by a unilateral administrative modification to the contract. In addition, all work must be performed at full costs which would include Federal Administrative Charge (FAC).
- a. Work conducted under this H-clause shall be excluded from the M&O contract award fee calculations and such fee shall not be allocable to work conducted under this H-clause.
  - b. Federal funds will not be used to fund work conducted under this H-clause except as authorized under the FedACT pilot (see paragraph 14 below).
7. Organizational Conflict of Interest. The M&O Contractor shall conduct work under this H-clause in a manner that minimizes the appearance of conflicts of interest and avoids or mitigates actual conflicts of interest with the M&O Contractor's functions under this M&O contract. Accordingly, the M&O Contractor shall develop an Organizational Conflict of Interest Mitigation Plan (OCI Plan). The

OCI Plan should address OCI issues that arise as a result of the M&O Contractor taking a financial interest in ACT projects, especially in those cases where the M&O Contractor retains rights in ACT IP. Said OCI Plan shall be provided to the Contracting Officer for review and approval as soon as practicable after execution of the M&O contract modification incorporating this H-clause into the M&O contract. Unless provided otherwise by the Contracting Officer, no work on ACT agreements may commence before Contracting Officer approval of the OCI Plan. In addition to those elements expressly stated in the OCI Plan, the Department may condition any ACT transaction on such other mitigating conditions it determines are appropriate. The OCI Plan shall, at a minimum, include elements that address the following:

- a. Full Disclosure. Before work can begin under an ACT transaction, all parties to ACT agreements must sign a DOE-approved certification that they have been fully informed about the availability of SPP agreements and CRADAs in addition to ACT. The certification at a minimum shall briefly describe SPP agreements, CRADAs and ACT, and will include the relative disposition of IP rights and the costs (including identification of any additional costs e.g. insurance, and other compensation to the M&O Contractor under ACT) for each type of agreement for the scope of work being proposed.
- b. Priority of Work. The M&O Contractor shall not give work under ACT any special attention or priority over other work under the DOE M&O contract. Work under ACT shall be approved by the Contracting Officer and assigned the same priority relative to other work under the DOE M&O contract that it would normally have if performed under a non-Federal SPP agreement. The Contracting Officer has discretion to determine the agency's priority of work, considering the M&O Contractor's input.
- c. Participation by Contractor-related Entity: Where the M&O Contractor, the M&O Contractor's parent, member, subsidiary, or other entity in which the M&O Contractor, the M&O Contractor's parent, member or subsidiary has an equity interest, is a party to the ACT agreement, the M&O Contractor shall include as necessary an addendum to the OCI Plan to address special circumstances not fully anticipated in the OCI Plan.
- d. Right of Inquiry for ACT IP Designation. DOE Patent Counsel may inquire into the M&O Contractor's designation of any invention or data as arising under an ACT transaction. The M&O Contractor is responsible for curing any defect identified in such inquiry, and if the M&O Contractor cannot adequately justify the designation or cure the defect, then the parties to the ACT agreement may receive modified rights in the IP to the degree necessary to resolve the issues identified by the inquiry.

8. Intellectual Property. Disposition of intellectual property (IP) arising from work conducted under this H-clause shall be governed by Class Waiver W(C)-2011-013 (ACT Class Waiver) which is incorporated herein by reference.
- a. All Contractor ACT inventions shall be reported to DOE pursuant to the requirements of the [cite Patent Rights –M&O contract, Nonprofit Organization or Small Business Firm Contractor] clause of this M&O contract.
  - b. In reporting ACT inventions, the M&O Contractor shall identify the ACT agreement under which the invention was made and specify the rights reserved by the Government pursuant to the ACT Class Waiver.
  - c. All technical data identified by the ACT client as Protected ACT Information shall also be marked to identify the ACT agreement under which the data was generated.
  - d. The M&O Contractor shall ensure that all rights and obligations concerning ACT IP, including the appropriate IP provisions authorized in the ACT Class Waiver, are clearly provided in ACT agreements, and that all parties granted any rights in ACT IP are informed of the terms of the waived rights, including the rights reserved by the Government.
  - e. Where the M&O Contractor receives ownership or license rights to ACT IP, the M&O Contractor may elect to commercialize the ACT IP consistent with the Technology Transfer Mission clause of this M&O contract.
  - f. As an alternative to subparagraph e., if the M&O Contractor has an authorized Private Funded Technology Transfer (PFTT) program, the M&O Contractor may elect to retain private ownership of the ACT IP and commercialize the IP under its applicable PFTT clause, using its private funds, where no costs for developing, patenting, and marketing will be allowable under this M&O contract. The M&O Contractor will share royalties collected on ACT IP with inventors in accordance with paragraph (h) of the Technology Transfer Mission clause of this M&O contract.
  - g. For ACT projects in which the terms of the Agreement provide that the Government reserves the right to use generated data after the particular project expires, the M&O Contractor must provide to OSTI computer software produced under the Agreement in both source and executable object code format.
  - h. Where terms and conditions governing Data and Subject Inventions under this Contract are inconsistent with the terms of the ACT Class Waiver, the ACT Class Waiver will control.

9. Contractor Liability and Indemnification.

a. General Indemnity.

- (i) The M&O Contractor agrees to indemnify and hold harmless the Government, the Department, and persons acting on their behalf from all liability, including costs and expenses incurred, to any person, including the ACT participants, for injury to or death of persons or other living things or injury to or destruction of property arising out of the performance of an ACT transaction by the Government, the Department, the M&O Contractor, or persons acting on their behalf, or arising out of the use of the services performed, materials supplied, or information given hereunder by any person including the M&O Contractor, and not directly resulting from the fault or negligence of the Government, the Department, or persons (other than the M&O Contractor) acting on their behalf.
- (ii) Subject to Contracting Officer approval, the General Indemnity set forth in (i) above may be modified or waived where: (1) ACT participants are not providing material or equipment to the M&O Contractor to be used in the performance of the Statement of Work under the ACT transaction; and (2) ACT participants are not sending their employees to the M&O facilities as part of the Statement of Work; and (3) the specific activities performed under the ACT transaction are normally performed by the DOE M&O Contractor under the DOE contract.
- (iii) Notwithstanding the provisions in a (i) and a (ii) above, the M&O Contractor shall indemnify and hold harmless the Government, the Department, and persons acting on their behalf for loss, damage, or destruction of Government property resulting from the fault or negligence of the M&O Contractor. Such indemnification shall be subject to a liability limit of \$2,000,000 (two million dollars) per year, or such greater liability limit approved by the cognizant DOE/NNSA Contracting Officer under the DOE contract. Above the applicable liability limit, the M&O Contractor's responsibility to the Government for such loss, damage or destruction, shall be as set forth in the "Property" clause of this contract.

- b. Intellectual Property Indemnity. The M&O Contractor shall indemnify the Government, its agents, and employees against liability, including costs, for infringement of any United States patent, copyright, or other intellectual property arising out of any acts required or directed to be performed under the Statement of Work under an ACT transaction to the extent such acts are not already performed at the M&O contract facilities. Such indemnity shall not apply to a claimed infringement that is settled without the consent

of the M&O Contractor unless required by a court of competent jurisdiction.

c. Product Liability Indemnity.

Except for any liability resulting from any negligent acts or omissions of the Government, the M&O Contractor agrees to indemnify the Government for all damages, costs, and expenses, including attorney's fees, arising from personal injury or property damage occurring as a result of the making, using, or selling of a product, process, or service by or on behalf of the ACT participants or the M&O Contractor, their assignees, or licensees, which was derived from the work performed under ACT transactions. With respect to this H-clause, neither the Government nor the M&O Contractor shall be considered assignees or licensees as a result of reserved Government rights in ACT IP. The indemnity set forth in this paragraph shall apply only if the M&O Contractor shall have been informed as soon and as completely as practical by the Government of the action alleging such claim and shall have been given an opportunity, to the maximum extent afforded by applicable laws, rules, or regulations, to participate in and control its defense, and the Government shall have provided all reasonably available information and reasonable assistance requested by the M&O Contractor. No settlement for which the M&O Contractor would be responsible shall be made without the M&O Contractor's consent, unless required by final decree of a court of competent jurisdiction.

(i) Where the M&O Contractor assigns the responsibility for indemnifying the Government under subparagraph c(i) above to other ACT participants, the M&O Contractor agrees to seek such indemnification from the other ACT participants.

d. Claims and Liabilities. Claims and liabilities resulting from the M&O Contractor's performance of work under an ACT transaction authorized pursuant to this H-clause shall not be subject to the M&O contract clause entitled "Insurance - Litigation and Claims." In no event shall the M&O Contractor be reimbursed under the M&O contract for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, and judgment and settlements) incurred as a result of third party claims related to the M&O Contractor's performance under this H-clause.

e. Government Obligations. The M&O Contractor shall not include any guarantee or requirement that will obligate the Government to pay or incur any costs or create any liability on behalf of the Government in any ACT agreement or commitment the M&O Contractor executes under authority of this H-clause. The M&O Contractor agrees if the Contractor does include such a guarantee or requirement, it will have no effect on the

Government, such that, the M&O Contractor will be responsible for any costs or liability due to such a guarantee or requirement.

- f. Insurance. Any cost of insurance to cover risks of the M&O Contractor associated with ACT agreements is unallowable under this contract.
10. ACT Records. All records associated with the M&O Contractor's activities conducted under the authority of this H-clause, with the exception of information required under paragraphs 3e, 4.b.i, and 13 shall be treated as M&O Contractor-owned records under the provisions of the Access to and Ownership of Records clause of this M&O contract. The Government or its designees shall use such records in accordance with applicable Federal laws (including the Privacy Act), as appropriate.
11. Termination. The Government or the M&O Contractor may terminate ACT authority under this contract by providing written notification of termination to the other party (Contracting Officer or the M&O Contractor) as appropriate, no less than 60 days prior to the requested termination date. In such cases, the M&O Contractor shall provide DOE a comprehensive list of active ACT projects. DOE anticipates work commitments under these agreements will be completed regardless of termination. All costs associated with early termination of any ACT agreements prior to the completion shall be the responsibility of the M&O Contractor.
12. Successor M&O Contractor. To minimize the potential for negative Government programmatic impact and to facilitate seamless transition of work to a successor M&O Contractor, ACT agreement(s) executed under this H-clause and any contractual instruments associated therewith may be novated to the successor M&O Contractor with the mutual consent of the M&O Contractor, the successor M&O Contractor, and the parties to the affected ACT agreement(s). If the ACT agreement(s) cannot be novated, then the M&O Contractor as a private sponsor shall be permitted to enter into a Non-Federal SPP agreement with the successor M&O Contractor that will enable completion of the statement of work. Such agreements shall be entered into pursuant to DOE SPP policies. DOE shall make good faith efforts to incorporate the terms of the applicable ACT agreement.
13. Minimum Reporting requirements. The M&O Contractor shall maintain records of its activities related to ACT in a manner and to the extent satisfactory to DOE and specifically including, but not limited to the number of ACT agreements, the amount of funds reimbursed to DOE for work under ACT and aggregate funding received beyond costs in the performance of ACT, the number of third party entities engaged through ACT that had not previously sponsored projects under the M&O contract and the number that had not previously sponsored projects under any DOE/NNSA M&O contract, the amount of funds reimbursed to DOE by newly engaged entities, the number of parties and types of entities engaged in each individual ACT agreement, and the number of invention disclosures,

licenses and start-ups arising from ACT. The M&O Contractor shall establish performance metric(s) to measure the time required to negotiate ACT agreements in a manner consistent with the time required to negotiate CRADAs and SPPs. The M&O Contractor shall obtain from each entity engaged in ACT the entity's reason(s) for selecting ACT for performance of work under the M&O contract. Also, the M&O Contractor shall report the above identified data annually to the DOE Contracting Officer and in such a format which will serve to adequately inform DOE of the Contractor's activities under ACT while protecting any data not subject to disclosure under this M&O contract. Such records shall be made available in accordance with the clauses of this M&O contract pertaining to inspection, audit and examination of records.

14. FedACT Pilot. Under this paragraph the DOE is authorizing a 3-year pilot program for Federally funded ACT (FedACT). FedACT contracts are ACT agreements between the M&O Contractor and a non-Federal third party partner, where a portion of the project funding originates from a Federal agency (i.e., Federal appropriations). In most cases, the industry partner's original source of funds will have been as a result of a contract or financial assistance award from the Federal agency. Any agreement that includes Federal funds must be performed under the FedACT pilot. Federal funds used to support a FedACT project must solely be used to carry out the purposes of the Federal award. FedACT does not include agreements directly funded from another Federal agency. DOE and the M&O Contractor recognize that FedACT is a new mechanism and subject to modifications as more data and experience are realized. During the FedACT pilot either party may suggest changes to the program based on the experiences gained. Furthermore, the M&O Contractor recognizes that the Department may decide to end the FedACT pilot at any time and that termination of the FedACT pilot by the Department will be in accordance with this paragraph. During the FedACT pilot the M&O Contractor is permitted to negotiate and execute such agreements, subject to DOE approval, as described in paragraph 4 above and as set forth herein. The following additional requirements apply:
  - a. The M&O Contractor agrees, prior to executing such agreements, to submit to DOE for approval a modified ACT procedure for implementing the execution of FedACT.
  - b. If the M&O Contractor is charging the third party additional compensation beyond the full costs of the work performed under the M&O contract, the ACT agreement will not be approved unless DOE or the M&O Contractor obtains a written certification from the Federal agency funding the third party that such additional compensation using Federal funds is permissible under the Federal award. In order to maximize the transparency of the transaction to the funding agency, the written certification shall be in the form of a standard template approved by DOE. Such template shall include at a minimum:

- i. The amount of and explanation for the cost difference between performing the work as an ACT agreement as compared with an SPP or CRADA; and
  - ii. A detailed description of the risk and/or consideration offered the participant by the M&O Contractor in exchange for charging beyond full cost recovery. This information shall also be included in the statement of consideration contained in the ACT proposal package submitted to the Contracting Officer.
- c. The M&O Contractor may not agree to any terms and conditions of the Federal award that conflict with this M&O contract.
  - d. Notwithstanding any other provision in this H-clause, rights to ACT inventions and copyrights arising from work conducted under this paragraph made by the M&O Contractor shall be governed by the terms of the Patent and Data Rights clauses of this M&O Contract, as well as any applicable PFTT clause. The ACT Class Waiver does not apply to any ACT agreement funded with Federal funds.
  - e. DOE's approval to negotiate and execute a FedACT agreement under this paragraph is for the sole purpose of evaluating and considering the M&O Contractor and DOE's processes and procedures for implementing such FedACT agreements and does not in any way provide the Contractor authority beyond the scope of this paragraph or imply that permanent authority shall be forthcoming.
  - f. Advance payment requirements in Section 5 equally apply to FedACT agreements.
  - g. All work must be performed at full costs which includes a Federal Administrative Charge (FAC).
  - h. Termination. The FedACT Pilot implemented by this H-clause will terminate three years from the date AL 2018-06 is issued, unless renewed by the Contracting Officer. The Government may provide the M&O Contractor with written notice to terminate the M&O Contractor's authority to conduct FedACT work under this H-clause at any time. If the Contractor's authority to conduct FedACT work under this H-clause has expired or been terminated, the M&O Contractor will be permitted, subject to any other provisions of this H-clause, to complete any FedACT work that had been approved by DOE prior to this H-clause being terminated by the Government.