PART I

SECTION H

SPECIAL CONTRACT REQUIREMENTS

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SECTION H

SPECIAL CONTRACT REQUIREMENTS

H.1 No Third Party Beneficiaries

This Contract is for the exclusive benefit and convenience of the parties hereto. Nothing contained herein shall be construed as granting, vesting, creating or conferring any right of action or any other right or benefit upon past, present or future employees of the Contractor, or upon any other third party. This provision is not intended to limit or impair the rights which any person may have under applicable Federal statutes.

H.2 Reserved

H.3 Employee Compensation: Pay and Benefits

(a) *Human Resources Compensation Plan* - The Contractor shall submit by September 30, 2008, a Human Resources Compensation Plan demonstrating how the Contractor will comply with the requirements of this Contract. The *Human Resources Compensation Plan* shall describe the Contractor's policies regarding compensation, pensions -and other benefits, and how these policies will support at reasonable cost the effective recruitment and retention of a highly skilled, motivated, and experienced workforce.

(b) *Total Compensation System* - The Contractor shall develop, implement and maintain formal policies, practices and procedures to be used in the administration of its compensation system including a compensation system Self-Assessment Plan consistent with FAR 31.205-6 and DEAR 97.3102-05-6, *Compensation for Personal Services (Total Compensation System)*. DOE-approved standards (e.g., set forth in an advance understanding or appendix), if any, shall be applied to the Total Compensation System. 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, be fully documented, consistently applied, and acceptable to the Contracting Officer. Costs incurred in implementing the Total Compensation System shall be consistent with the Contractor's documented *Human Resources Compensation Plan* as approved by the Contracting Officer.

(c) *Appraisals of Contractor Performance* - DOE will conduct periodic appraisals of Contractor performance with respect to Total Compensation System implementation. Such appraisals will be conducted through either DOE validation of the Contractor's performance self-assessment of its Total Compensation System or third party expert review

(d) *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:

(I) 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 executives as defined in FAR 31.205-6(p) (2) (ii) and their total cash compensation at the time of Contract award, and at the time of any subsequent change to their total cash compensation

(3) An Annual Report of Contractor Expenditures for Employee Supplemental Compensation through the Department Workforce Information System (WFIS) Compensation and Benefits Module no later than March 1 of each year.

(4) A performance self-assessment of the Total Compensation System implementation and results to include an evaluation of total benefits using the Employee Benefits Value Study and the Employee Benefits Cost Survey Comparison Analysis described in paragraph (f) below.

(e) *Pay and Benefit Programs* - The Contractor shall establish pay and benefit programs for Incumbent Employees and Non-Incumbent Employees as defined in paragraphs (1) and (2) below; provided, however, that employees scheduled to work fewer than 20 hours per week receive only those benefits required by law. Employees are eligible for benefits, subject to the terms, conditions, and limitations of each benefit program.

(1) Incumbent Employees are the employees who are Regular Employees of the National Renewable Energy Laboratory Division of Midwest Research Institute as of September 30, 2008.

(i) *Pay* - Subject to Section H.2 above, the Contractor shall provide equivalent pay to Incumbent Employees as compared to pay provided by Midwest Research Institute for at least the first year of the term of the Contract

(ii) *Pension and Other Benefits* - The Contractor shall provide a total package of benefits to' Incumbent Employees comparable to that provided by Midwest Research Institute. Comparability of the total benefit package shall be determined by the Contracting Officer in his/her sole discretion.

(iii) Incumbent Employees shall remain in their existing pension plans (or comparable successor plans if continuation of the existing plans is not practicable) pursuant to pension plan eligibility requirements and applicable law. DOE shall remain the sponsor of NREL's existing pension plan and Contractor shall continue to perform, or have performed on its behalf, those functions previously performed by either Midwest Research Institute ("MRI") or the National Renewable Energy Laboratory Division of MRI. The Contractor shall become a sponsor of the other benefit plans (or comparable successor plans); including other post-retirement benefit (PRB) plans, as applicable, for Incumbent Employees and retired plan participants, with responsibility for management and administration of the plans subject to sub-subparagraphs (iv) and (v) below. The Contractor shall be responsible for maintaining the qualified status of those 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, including service credits and leave balances for those MRI employees previously assigned to NREL and who become Contractor employees as of October 1, 2008.

(iv) Contractor and MRI shall determine all assets and liabilities associated with the MRI and NREL Division pension plans, effective as of Midnight, September 30, 2008 for all Incumbent Employees and MRI employees; such determination shall be based on whether said employees become an employee of Contractor or become, or remain, an employee of MRI, whether assigned to NREL or not, effective as of October 1, 2008. This Determination shall be calculated as soon as practicable, after October 1, 2008, and the result shall be communicated to the Contracting Officer for approval. The Parties agree to work together in good faith to resolve any issues associated with this Determination so that Contracting Officer approval can be obtained in sufficient time to allow Contractor and MRI to transfer the necessary assets, by January 31, 2009 (or such later date established in writing by the Contracting Officer), associated with post-retirement liabilities being assumed by each of them based on whether or not the individuals involved become Contractor employees or remain or become MRI employees.

(v) Contractor's management and administration responsibilities for its post – retirement pension and other benefit plans shall be performed on a bi-furcated basis, with Alliance remaining directly responsible for excersing its management and fiduciary responsibilities for these plans and day-to-day management and administration responsibilities being provided by MRI to Contractor under an Administrative Work Authorization approved by the Contracting Officer.

(2) Non-Incumbent Employees are new hires, i.e., employees other than Incumbent Employees who are hired by the Contractor after September 30, 2008. All Non-Incumbent Employees shall receive a total pay and benefits package that provides for market based retirement and medical benefit plans that are competitive with the industry from which the Contractor recruits its employees and in accordance with Contract requirements.

(3) Cash Compensation

(i) The Contractor shall submit the following to the Contracting Officer for a determination of cost allowability for reimbursement under the Contract:

(A) Any additional compensation system self-assessment data requested by the Contracting Officer that may be needed to validate and approve the total compensation system.

(B) Any proposed major compensation program design changes prior to implementation.

(C) An Annual Compensation Increase Plan.

(D) Individual compensation actions for the Key Personnel, including initial and proposed changes to base salary and/or payments under an Executive Incentive Compensation Plan

(E) Any proposed establishment of an incentive compensation plan (variable pay plan/pay-at-risk).

(ii) The Contracting Officer's approval of individual compensation actions will be required only for the Laboratory Director and those other first- tier reports to the aforementioned position, as identified by the Contracting Officer.

(iii) Severance Pay is not payable to an employee under this Contract if the employee:

(A) Voluntarily separates, resigns or retires from employment;

(B) Is offered employment with a successor/replacement contractor; .

(C) Is offered employment with a parent or affiliated company; or

(D) Is discharged for cause.

(iv) 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.

(f) *Pension and Other Benefit Programs*

(1) No presumption of allowability will exist when the Contractor implements a new benefit plan or makes changes to existing benefit plans for either Incumbent Employees or Non-Incumbent Employees until the Contracting Officer makes a determination of cost allowability for reimbursement for new or changed benefit plans.

(2) Cost reimbursement for Incumbent Employee and Non-Incumbent Employee pension and other benefit programs sponsored by the Contractor will be based on the Contracting Officer's approval of Contractor actions pursuant to an approved *Employee Benefits Value Study* and an *Employee Benefits Cost Survey Comparison* as described below.

(3) Unless otherwise stated, or as directed by the Contracting Officer, the Contractor shall submit the studies required in paragraphs (i) and (ii) below. The studies shall be used by the Contractor as part of its performance self assessment described in paragraph (d) (4) above and in calculating the cost of benefits under existing benefit plans. In addition, the Contractor shall submit updated studies to the Contracting Officer for approval prior to the adoption of any change to a pension or other benefit plan.

(i) An *Employee Benefits Value Study* (Ben-Val), every two years each for Incumbent and Non-Incumbent Employees benefits, which is an actuarial study of the relative value (RV) of the benefits programs offered by the Contractor to Incumbent and Non-Incumbent Employees measured against the RV of benefit programs offered by comparator companies approved by the Contracting Officer. To the extent that the value studies do not address post retirement benefits other than pensions, the Contractor shall provide a separate cost and plan design data comparison for the post retirement benefits other than pensions using external benchmarks derived from nationally recognized and Contracting Officer approved survey sources; and

(ii) *An Employee Benefits Cost Study Comparison*, annually each for Incumbent and Non-Incumbent Employees that analyzes the Contractor's employee benefits cost for Incumbent and Non-Incumbent Employees on a per capita basis per full time equivalent employee and as a percent of payroll and compares it with the cost reported by the U.S. Chamber of Commerce Annual Employee Benefits Cost Surveyor other Contracting Officer approved broad based national survey.

(4) When the net benefit value exceeds the comparator group by more than five percent, the Contractor shall submit a corrective action plan to the Contracting Officer.

(5) When the average total benefit per capita cost or total benefit cost as a percent of payroll exceeds the comparator group by more than five percent, when and if required by the Contracting Officer, the Contractor shall submit an analysis of the specific plan costs that are above the per capita cost range or total benefit cost as a percent of payroll and a corrective action plan to achieve conformance with a Contracting Officer directed per capita cost range or total benefit cost as a percent of payroll.

(6) Within two years of Contracting Officer approval of the Contractor's corrective action plan, the Contractor shall align employee benefit programs with the benefit value and per capita cost range as approved by the Contracting Officer

(7) The Contractor shall submit the Report of Contractor Expenditures for Supplementary Compensation for the previous calendar year via the DOE Workforce Information System (WFIS) Compensation and Benefits Module no later than March 1 of the current calendar year.

(8) The Contractor may not terminate any benefit plan during the term of the Contract without the prior approval of the Contracting Officer in writing.

(9) Cost reimbursement for PRBs if any is contingent on DOE approved service eligibility requirements for PRB that shall be based on a minimum period of continuous employment service 5 years under a DOE cost reimbursement contract(s) immediately prior to retirement. Unless required by Federal or State law, advance funding of PRBs is not allowable.

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

(1) For cost allocability and reimbursement purposes, any defined benefit (DB) or defined contribution (DC) pension plans established and/or implemented by the Contractor shall be maintained consistent with the requirements of the IRC and ERISA.

(2) Contractor policies, practices, and procedures used in the administration of pension plans shall be consistent with applicable laws and regulations.

(3) Except as provided in sub-subparagraph (e)(1)(iii) above, employees working for the Contractor shall only accrue credit for service under this Contract after October 1, 2008

(4) The pension plan, sponsored by DOE and maintained by the Contractor, consistent with sub-subparagraph (e)(1)(v) above, for which DOE reimburses costs, shall be maintained as a separate pension plan distinct from any other

pension plan which provides credit for service not performed under a DOE cost-reimbursement contract.

(5) For each pension plan or portion of a pension plan for which DOE reimburses costs, the Contractor shall provide the Contracting Officer with the following information within nine months of the last day of the current pension plan year:

(i) Copies of IRS forms 5500 with schedules; and

(ii) Copies of all forms in the 5300 series that document the establishment, amendment, termination, spin-off, or merger of a plan.

(6) Prior to the adoption of any changes to its pension plan, the Contractor shall submit the information required below, as applicable, to the Contracting Officer for approval or disapproval and a determination as to whether the costs to be incurred are consistent with the Contractor's documented Human Resources Compensation. Plan and are deemed allowable pursuant to FAR 31.205-6, as supplemented by DEAR 970.3102-05-6.

(i) For proposed changes to pension plans and pension plan funding, an analysis of the impact of any proposed changes on actuarial accrued liabilities and an analysis of relative benefit value; and,

(ii) The Contractor shall obtain the advance written approval of the Contracting Officer for any non-statutory pension plan changes that may increase costs or liabilities, and any proposed special programs (including, but not limited to, plan-loan features, employee contribution refunds, or ancillary benefits) and shall provide DOE with an analysis of the impact of special programs on the actuarial accrued liabilities of the pension plan, and on relative benefit value, if applicable.

(iii) The Contractor shall not terminate any pension plan without at least 60 days notice to and the approval of the Contracting Officer prior to the scheduled date of plan termination.

H.4 Post Contract Responsibilities for Pension and Other Benefit Programs

(a) If this Contract expires or terminates and DOE has awarded a contract under which the new contractor becomes a sponsor and assumes responsibility for management and administration of the pension or other benefit plans covering active or retired contractor employees with respect to service at the National Renewable Energy Laboratory (collectively, the "Plans"), the Contractor shall cooperate with both DOE (to the extent DOE retains sponsorship of the pension plan) and the new contractor in order to transfer to the new contractor its responsibility for sponsorship (excluding the pension plan), management and administration of the Plans consistent with direction from the Contracting Officer.

(b) If this Contract expires or terminates and DOE has not awarded a contract to a new contractor under which the new contractor becomes a sponsor and assumes responsibility for management and administration of the Plans, or if the Contracting Officer determines that the scope of work under the Contract has been completed (any one such event may be deemed by the Contracting Officer to be "Contract Completion" for purposes of this clause), whichever is earlier, and notwithstanding any other obligations and requirements concerning expiration or termination under

any other clause of this Contract, the following actions shall occur regarding the Contractor's obligations regarding the Plans at the time of Contract Completion.

(1) Subject to subparagraph (2) below, and notwithstanding any legal obligations independent of the Contract the Contractor may have regarding responsibilities for sponsorship, management, and administration of the Plans, the Contractor shall remain the sponsor of the Plans, in accordance with applicable legal requirements. Notwithstanding the foregoing, Contractor has no responsibility to sponsor the pension plan since DOE is the sponsor of said plan.

(2) The parties shall exercise their best efforts to reach agreement on the Contractor's responsibilities for sponsorship (excluding the pension plan), management and administration of the Plans prior to or at the time of Contract Completion. However, if the parties have not reached agreement on the Contractor's responsibilities for sponsorship (excluding the pension plan), management and administration of the Plans prior to or at the time of Contract Completion, unless and until such agreement is reached, the Contractor shall comply with written direction from the Contracting Officer regarding the Contractor's responsibilities for continued provision of pension and welfare benefits under the Plans, including but not limited to continued sponsorship of the Plans, (excluding the pension plan) in accordance with applicable legal requirements. To the extent that the Contractor incurs costs in implementing direction from the Contracting Officer, the Contractor's costs (including those benefit administration costs incurred on its behalf by MRI) will be reimbursed pursuant to applicable Contract provisions.

H.5 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 prior to negotiations of any collective bargaining agreement or revision thereto and shall consult with and obtain the approval of the Contracting Officer regarding appropriate economic bargaining parameters, including those for pension and medical benefit costs, prior to the Contractor entering into the collective bargaining process. During the 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 pension or other benefit plans.

(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, labor arbitrations, and settlement agreements and will furnish such additional information as may be required from time to time by the Contracting Officer.

H.6 Environment, Safety, and Health Stop Work Order

(a) Notwithstanding the Clause I.103, *Technical Direction* and Clause F.3, *FAR 52.242-15 Stop-Work Order (Alternate 1),* and in addition to the Contracting Officer's stop-work authority in Clause I.119, *Integration of Environment, Safety, and Health into Work Planning and Execution* paragraph (g), Contracting Officer Representatives (CORs) are authorized to issue a Stop-Work Order when, in the judgment of the COR, a clear and present danger exists to the workers, environment or members of the public. Clear and present danger is a condition or hazard which could cause death or serious harm to workers, members of the public, or the environment, immediately or before such condition or hazard can be eliminated through normal procedures.

(b) ES&H Stop-Work Orders under this clause may be initiated verbally by CORs. The Contractor is obligated to immediately comply with the COR verbal and/or written direction to Stop Work under this paragraph. Any verbal direction to the Contractor shall be followed in writing from the COR initiating the Stop-Work Order through the Contracting Officer as soon as reasonably possible. Work may not be restarted by the Contractor without written approval from the Contracting Officer.

(c) The Contractor shall make no claim for an extension of time or for compensation or damages by reason of, or in connection with, such work stoppage.

H.7 Costs Associated With Whistleblower Action

(a) Costs Associated with Whistleblower Actions

(1) Definitions for purposes of this paragraph:

Covered contractors and subcontractors mean those contractors and subcontractors with contracts exceeding $5,000,000.

Employee Whistleblower action means an action filed by an employee in federal or state court for redress of a retaliatory act by a contractor and any administrative procedure initiated by an employee under 29 CFR Part 24, 48 CFR Subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239

Retaliatory act means a discharge, demotion, reduction in pay, coercion, restraint, threat, intimidation or other similar negative action taken against an employee by a contractor as a result of an employee's activity protected as a whistleblower activity by a Federal or state statute or regulation.

Settlement and award costs mean defense costs and costs arising from judicial orders, negotiated agreements, arbitration, or an order from a Federal agency or board and includes compensatory damages, underpayment for work performed, and reimbursement for a complainant employee's legal counsel.

(2) For costs associated with employees whistleblower actions where a retaliatory act is alleged against a covered contractor or subcontractor, the Contracting Officer:

(i) May authorize reimbursement of costs on a provisional basis, in appropriate cases;

(ii) Must consult with the Office of General Counsel, whistleblower cost point of contact, who will consult with other Headquarters points of contact as appropriate, before making a final allowability determination; and

(iii) Must determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action.

(3) Covered contractors and subcontractors must segregate legal costs, including costs of in-house counsel, incurred in the defense of an employee whistleblower action so that the costs are separately identifiable.

(4) If a Contracting Officer provisionally disallows costs associated with an employee whistleblower action for a covered contractor or subcontractor, funds advanced by the Department may not be used to finance costs connected with the defense, settlement and award of an employee whistleblower action.

(5) Contractor defense, settlement and award costs incurred in connection with the defense of suits brought by employees under section 2 of the Major Fraud Act of 1988 are excluded from coverage of this section.

H.8 Separate Corporate Entity and Performance Guarantee

(a) The work performed under this Contract by the Contractor shall be conducted by a separate corporate entity from its parent organization(s). The separate corporate entity must be set up solely to perform this Contract and shall be totally responsible for all Contract activities.

(b) The Contractor's parent organizations shall guarantee the Contractor's performance as evidenced by the Performance Guarantee(s) incorporated in the contract in Section J, Attachment H. If the Contractor is a joint venture, limited liability company, or other similar entity where more than one organization is involved, the parents shall assume joint and severable liability for the performance of the contract.

(c) In the event any of the signatories to the performance guarantee enters into proceedings related to bankruptcy, whether voluntary or involuntary, the Contractor agrees to furnish written notification of the bankruptcy to the Contracting Officer.

H.9 Responsible Corporate Official

Notwithstanding the provisions of clause H.8, Separate Corporate Entity and Performance Guarantee, the Government may contact, as necessary, the single responsible corporate official identified below, who is at a level above the Contractor and who is accountable for the performance of the Contractor, regarding Contractor performance issues. Should the responsible corporate official change during the period of the Contract, the Contractor shall promptly notify the Government of the change in the individual contact.

Name: Dr. Ronald D. Townsend
(Offeror Complete)

Position: Chair, Board of Directors

Company: Alliance for Sustainable Energy, LLC

Address: 15013 Denver West Parkway
PO Box 4011
Golden, CO 80402-0000

H.10 Alternative Disputes Resolution

It is the Government's policy to try to resolve all contractual issues by mutual agreement at the Contracting Officer's level, without litigation. Both parties hereby agree to explore all reasonable avenues for a negotiated settlement in order to avoid disputes. When all possibilities for negotiation have failed, the parties will endeavor to move the potential dispute to Alternative Dispute Resolution (ADR). Either party is required to provide a written explanation to the other party for rejecting a request for ADR proceedings, citing the specific reasons that ADR procedures are inappropriate for resolution of the dispute. If the parties are unable to satisfactorily resolve the dispute using ADR or cannot agree on its application, they resume the formal process authorized in Section I.67, *Disputes*.

H.11 Allocation Of Responsibility And Liability For Contractor And U.S. Department Of Energy (Doe) Environmental Compliance Activities

In this Clause:

"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, or compliance agreements, consent orders, permits, and licenses; and

"Party" means either the Contractor or DOE.

Responsibility and liability for fines or penalties arising from or related to violations of environmental requirements shall be borne by the party causing the violation regardless of which party:

The cognizant regulatory authority fines or penalizes;

Signs permit applications (including situations where DOE signs defective or non-conforming permit applications or other environmental submittals prepared by or under the direction of the Contractor), 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.

Consequently, if the Contractor causes a violation:

All fines and penalties arising from or related to violations of environmental requirements are unallowable costs. If DOE pays a fine or penalty for a violation that the Contractor caused, the amount of the fine or penalty shall be due from the Contractor, and DOE may immediately offset that amount against payments to which the Contractor is otherwise entitled for allowable costs and fee, or any other funds otherwise owed by the Government to the Contractor; and

In accordance with subsection (e) of the Section I Clause entitled, *DEAR 952.231-71, Insurance-Litigation and Claims*, costs of challenging or defending actions brought against the Contractor for violations of environmental requirements are specifically disallowed. However, if the Contracting Officer provides prior written authorization to challenge or defend against the action, the Contractor shall proceed in accordance with *DEAR 952.231-71, Insurance-Litigation and Claims*. If the Contractor proceeds with the action without the prior written authorization of the Contracting Officer, the costs of the challenge or defense may be allowable if there is no settlement, conviction, or finding of liability.

H.12 Long-Range Planning, Program Development and Budgetary Administration

(a) *Basic considération*s – 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) *Strategic planning* – The Contractor shall develop a Five-Year Strategic Plan (FYSP) which will be updated annually. Development of the FYSP is a component of 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 period covered by the plan. The NREL FYSP, approved by the Contracting Officer, provides guidance to the Contractor for long-range planning

of Laboratory programs, site and facility development, and for budget preparation. It also serves as a baseline for placement of work at the Laboratory.

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

H.13 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 use a comprehensive performance-based management approach for overall Laboratory management. The performance-based management approach will include the use of performance goals, and objective and subjective performance objectives, measures, and targets approved in advance of each performance evaluation period, as standards against which the Contractor's overall performance of the research, development, demonstration and deployment mission obligations under this Contract will be assessed. All performance measures and planned performance targets will be linked to the Five-Year Strategic Plan and other controlling documents. The performance goals, objectives, measures, and targets are contained in Part III, Section J, Attachment J - *Performance Evaluation and Measurement Plan* (PEMP).

(2) The Parties agree to use the process in the PEMP to evaluate the performance of the Laboratory. The Parties further agree that the evaluation process described in Attachment J 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 primary means of determining its compliance with the Contract Statement of Work and performance metrics identified within Part III, Section J, Attachment J. To assist the DOE in accomplishing the appropriate level of oversight, the Contractor shall work in partnership and cooperation with DOE and other external organizations, 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. The Contractor will inform the Contracting Officer of planned assessments and provide the Contracting Officer copies of these assessments upon completion. The Contractor will also provide the Contracting Officer copies of any corrective action plans developed in response to these assessments.

(4) The Contractor shall provide periodic updates, as requested by the DOE, on the performance against the Part III, Section J, Attachment J. The Contractor shall provide a formal status briefing at mid-year and year-end, and a formal self-evaluation report to the DOE at year-end. Specific due dates and formats for the above-mentioned briefings and reports shall be determined by the Contracting Officer. In addition, the year-end report must provide:

(i) An overall summary of performance for each performance goal;

(ii) Rating for each performance objective and measure supporting the performance goal, against the agreed to performance target;

(iii) A summary of key strengths and opportunities for improvement for each performance objective and measure.

(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.

(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 Part III, Section J, Attachment J. 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 that 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 Attachment J 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., OIG, GAO, DCAA, etc.) conducted throughout the year, annual reviews (if needed), and DOE "for cause" reviews. Contractor success in meeting or exceeding performance expectations in a particular management or operations functional area may result in less frequent or no review of the functional area. Conversely, marginal performance or "for cause" situations may result in more frequent reviews.

(b) Standards of performance measure review:

(1) The Parties agree to review the PEMP elements (goals, objectives, measures, and targets) contained in Part III, Section J, Attachment J 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, indicators and metrics/milestones, for the next period, the Contracting Officer shall have the unilateral right to establish reasonable new goals, objectives, measures and targets, and/or to modify and/or delete existing goals, objectives, measures and targets. It is expected that the goals, objectives, measures and targets, will be modified by the Contractor and the DOE Contracting Officer 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 a goal, objective, measure, or target in the contract Part III, Section J, Attachment J 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.14 Strengthening Federal Environmental, Energy, and Transportation Management, Executive Order 13423

The contractor shall assist DOE through direct participation and other support in achieving DOE's energy efficiency goals and objectives in electricity, water, and thermal consumption, conservation, savings, including goals and objectives contained in Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management. The Contractor shall maintain and update, as appropriate, its Site Plan (as required elsewhere in the contract) to include detailed plans and milestones for achieving site-specific energy efficiency goals and objectives. With respect to this paragraph, the Plan shall consider all potential sources of funds, in the following order: 1) the maximum use of private sector, third-party financing applied on a life-cycle cost effective basis, particularly from Energy Savings Performance Contracts and Utility Energy Services Contracts; and 2) only after third-party financing options are evaluated, in the event energy efficiency and water conservation improvements cannot be effectively incorporated into a private sector financing arrangement that is in the best interests of the Government, then DOE funding and funding from overhead accounts can be used.

H.15 Cost Recovery

If, at any time during the performance of the Contract, the Contracting Officer disallows a cost(s) in accordance with FAR 42.8, the Contractor must repay the amount owed within 15 days of the Contracting Officer's final written determination disallowing the cost(s). (In accordance with the clause at FAR52.242-1, this determination will occur approximately 120 days after initial notice to the Contractor of disallowance.) If the Contractor fails to repay the disallowed amount within the allotted time, the Contracting Officer may offset fee payments to recover the amount owed.

H.16 Lobbying Restriction (Energy And Water Act) (2007)

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.17 Conditional Payment of Fee Process

If the Fee Determining Official (FDO) or designee determines that Contractor's performance does not meet the minimum requirements identified in paragraphs (a) through (d) of Clause I.115, *Conditional Payment of Fee, Profit, and Other Incentives – Facility Management Contracts (Alternate 1*), the FDO or designee may make a unilateral decision to reduce the evaluation period's otherwise earned fee. If the FDO or designee elects to exercise this authority, the FDO or designee shall issue, through the Contracting Officer, a preliminary notice that includes rationale for such action and identifies specific deficiencies in the Contractor's performance. Upon notification, the Contractor shall have 14-days to provide the FDO or designee information it believes is relevant to the situation for FDO or designee consideration. The FDO or designee shall issue a final determination after the 14-day period has elapsed.

H.18 Application of DOE Contractor Requirements Documents

(a) *Performanc*e – 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, Attachment F (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 Order*s – The clause does not preclude the use of deviation processes provided for in existing DOE Directives.

(d) *Proposal of Alternative* – The Director of the National Renewable Energy Laboratory 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 official 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 Office* – The Contracting Officer shall within sixty (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 sixty (60) days).

(f) *Implementation and Evaluation of Performance* – Upon approval in accordance with (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 Contractor's designated official, 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 Attachment F List B or modifications to listed CRDs. Upon receipt of that notice, the Contractor, within thirty (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 proposal shall be in accordance with the process set out in paragraph (e) and (f). If an alternative proposal is not submitted by the Contractor within the thirty (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 Attachment F. The Contractor and Contracting 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, at 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 the reinstatement of the CRD.

H.19 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.150, *DEAR 970.5244-1 – Contractor Purchasing System*, 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.20 Walsh-Healy Public Contracts Act

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 $10,000.00 and is otherwise subject to the Walsh-Healy 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 there under 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.21 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 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.22 Electronic Subcontracting Reporting System

The requirement for the submittal of the Standard Form SF 294, Subcontracting Reports for Individual Contracts, and SF 295, Summary Subcontract Reports, as provided in FAR 52.219-9(j) is to be accomplished by the electronic submittal of data under the Electronic Subcontract Reporting System (eSRS).

The contractor or subcontractor shall provide such information that will allow applicable lower tier subcontractors to fully comply with the statutory requirements of FAR 19.702.

H.23 Compliance with Internet Protocol Version 6 (IPv6) in Acquiring Information Technology

This contract involves the acquisition of Information Technology (IT) that uses Internet Protocol (IP) technology. The Contractor agrees that: (1) all deliverables that involve IT that uses IP (products, services, software, etc.) will comply with IPv6 standards and interoperate with both IPv6 and IPv4 systems and products; and (2) it has IPv6 technical support for development and implementation and fielded product management available.

Should the Contractor find that the statement of work or specifications of this contract do not conform to the IPv6 standard, it must notify the Contracting Officer of such nonconformance and act in accordance with instructions of the Contracting Officer.

H.24 Activities During Contract Transition (Special)

(a) The Contractor will commence Transition Activities as soon as possible after the award of the contract and complete the following activities within sixty (60) days after contract award, except as otherwise authorized by the Contracting Officer. After completion of these activities and such other Transition Activities as may be authorized by the Contracting Officer, the Contractor shall advise the Contracting Officer that it is ready to assume full responsibility for the Laboratory. Upon receipt of written notification from the Contracting Officer that the Transition Activities are considered complete, the Contractor shall assume full responsibility for the Laboratory, effective 12:01 A.M., the next day.

(1) *Mission Activities* – Complete the activities that will allow the Contractor to assume control of NREL's science, technology, and commercialization programs and facilities.

(2) *Business Systems* – Complete the activities that will allow the Contractor to assume control of NREL's business management systems.

(3) *Assignment of Existing Agreement* – Complete the activities that will allow the contractor to assume full responsibility for existing regulatory (e.g., environmental permits) and commercial agreements (e.g., RDD&D subcontracts, personnel and service subcontracts, purchase orders, etc.) to be assigned to the Contractor by the Midwest Research Institute, Inc. (MRI), or otherwise taken over by Contractor.

(4) *Joint Reconciliation Property Inventory* – Initiate and complete the planning for a joint reconciliation property inventory with the MRI, Inc., see I.151, Clause *DEAR 970.5245-1 Property,* Subsection (i)(2)(ii) in accordance with overall guidance provided by the Contracting Officer.

(5) *Litigation Management* – Contractor shall consult with the MRI, Inc. and DOE to determine whether Contractor should assume some level of management of any litigation resulting from laboratory operations predating the effective date of this contract. The decision should be based on consideration of cost efficiency, named parties, relevance of retrospective insurance, and DOE litigation management guidelines.

(6) *M&O Contract Financial Close-Out* – Contractor shall cooperate with DOE and the incumbent contractor in the close-out of the existing M&O contract, and will support all close-out activities.

(7) *Human Resources*

(i) The Contractor will transition the workforce without break in service as operations cease under Contract DE-AC36-99GO10337.

(ii) The Contractor will conduct work force planning, documented in the form of a plan, to be submitted to the Contracting Officer for review and approval at the end of the Transition Period. The Plan will identify the status of critical-skills and the strategy for the recruitment and/or retention of those skills, and specifically address the issues set forth below.

(A) If the Contractor intends to use "Joint Appointees" with educational institutions; how said "Joint Appointees" will be used; terms to be used; and a description of the reimbursement process to be negotiated with the educational institutions.

(B) Incentive compensation strategy for "Key Personnel," other management personnel, and other employees, as appropriate, that meets the criteria of the DOE Acquisition Guide, Chapter 70.5, which can be located on the internet at http://www.management.energy.gov/policy_guidance/Acquisition_Guide.htm

(C) The following will be specifically addressed under the *Human Resources Compensation Plan*, required to be submitted within 60 days after award, pursuant to Clause H.3:

1) The framework for the pension and health/welfare benefits applicable to the transferring workforce, with an assessment of the benefit value relative to those provided by the Midwest Research Institute, Inc. for NREL employees; and

2) A framework of the total compensation package applicable to new hires under the contract.

(b) Except as provided in paragraph (c) below, or as otherwise specifically agreed to by the Contractor and the Contracting Officer, all of the provisions of this contract shall apply to the Contractor's performance of Transition Activities.

(c) The following contract articles or portions thereof as noted below do not apply to the Contractor's Transition Activities:

(1) Clause C.4 , *Scope of Work*;

(2) Clause H.11, *Contractor Acceptance of Notices of Violations or Alleged Violations, Fines, and Penalties*;

(3) Clause H.12, *Long-Range Planning, Program Development and Budgetary Administration*;

(4) Clause H.13, *Standards of Contractor Performance Evaluation*;

(5) Clause I.114, *Total Available Fee: Base Fee Amount and Performance Fee Amount*;

(6) Clause I.115, *Conditional Payment of Fee, Profit, and Other Incentives – Facility Management Contracts*;

(7) Clause I.116, *Work For Others Program (Non-DOE Funded Work);*

(8) Clause I.142, *Work for Others Funding Authorization*;

(d) Contractor agrees to perform the activities set forth in paragraph (a) above, including relocation of Contractor's "Key Personnel," as described in its Cost Proposal, at the allowable estimated cost in B.3 (a).

H.25 Special Financial Institution Account Agreement

(a) DOE shall make arrangements to execute a new Special Financial Institution Account Agreement (which shall be effective through September 30, 2009) with the U.S. Bank and provide said Agreement to the Contractor for its execution. Said Agreement having been executed by DOE, Contractor and U.S. Bank was incorporated by reference through Modification M004.
(b) Contractor agrees to procure, in accordance with DOE requirements, a new Special Financial Institution Account Agreement in sufficient time to have said Agreement in place and effective as of October 1, 2009**.**

H.26 Organizational Conflicts Of Interest, Management Plan and Implementation Program

The Contractor's Organizational Conflicts of Interest Management Plan and Implementation Program (OCI Plan) are incorporated herein. The Contractor will consistently follow the Contractor's Organizational Conflicts of Interest Management Plan and Implementation Program. Changes to the Contractor's OCI Plan must be

specifically approved by the Contracting Officer and may be proposed by either the Government or the Contractor. The Contractor agrees to negotiate with the Contracting Officer as to which changes are made. Such changes will be applied prospectively and not retrospectively to this Contract.

H.27 Counterintelligence Implementation

Consistent with Clause I.109, 970.5204-1, *Counterintelligence* of this Contract, the Contractor shall take all reasonable precautions in the work under this Contract to protect DOE programs, facilities, technology, personnel, unclassified sensitive information and classified matter from foreign intelligence threats and activities conducted for governmental or industrial purposes. To meet these requirements the Contractor will comply with DOE 475.1 Counterintelligence Program. All other provisions of Clause I.109, 970.5204-1 *Counterintelligence* shall be implemented.

H.28 Employee Concerns Program

The Contractor shall submit an implementation plan to the Contracting Officer for approval within 90 days of contract award that describes an Employee Concerns Program (ECP) that implements all programmatic requirements in DOE Order 442.1A, and DOE Guide 442.1-1, Employee Concerns Program, and all superseding versions. Guidance for preparation of an ECP Plan is provided in Section L, Enclosure I.

H.29 DEAR 952.219-70 DOE Mentor-Protégé Program (May 2000)

The Department of Energy has established a Mentor-Protégé Program to encourage its prime contractors to assist firms certified under section 8(a) of the Small Business Act by SBA, other small disadvantaged businesses, women-owned 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. The contractor's performance as a Mentor may be evaluated as part of the award fee plan. Mentor and Protégé firms will develop and submit "lessons learned" evaluations to DOE at the conclusion of the contract. Any DOE contractor that is interested in becoming a Mentor should refer to the applicable regulations at 48 CFR 919.70 and should contact DOE's Office of Small and Disadvantaged Business Utilization.

H.30 Incurrence of Relocation Costs Prior to the Initiation of M&O Activities

Relocation costs for non-key personnel that would be properly charged to the contract upon initiation of M&O activities may be incurred by the Contractor after the initiation of Transition Activities. These costs will be considered allowable and allocable under the contract if they comply with all Federal laws, regulations, DOE Orders and would have been considered allowable and allocable if incurred after beginning the M&O activities. These costs shall not be invoiced or paid prior to DOE concurrence that M&O activities may begin. These costs shall be accumulated and recorded separately to allow for DOE review.

H.31 Exemption of Management and Operation Contractual Obligations for Real Property Encumbered by Government's Easement Outgrant

(a) On October 29, 2007 the Government granted to SunE SRI NREL, LLC (Grantee) an Easement Outgrant for the Installation and Operation of a Solar Electric Generating System at NREL.

(b) Such Easement Outgrant transferred rights and responsibilities to Grantee for the management and operation of that certain real property located on and adjacent to NREL, generally described as a tract of land in the Southwest Quarter (SW ¼) of Section Thirty Six, Township Three South, Range Seventy West of the 6th Principal Meridian, Jefferson County, Colorado, and more particularly described in Exhibit A of the October 29, 2007 Easement Outgrant for Installation and Operation of a Solar Electric Generating System at NREL (hereafter "Mesa Top Solar Electric Generating System Easement Property").

(c) Pursuant to such Easement, Grantee is obligated to manage and operate such Mesa Top Solar Electric Generating System Easement Property in accordance with the highest safety, health, environmental, and operational standards, including but not limited to: (i) environment, safety, and health management; (ii) site access, access control, and security; (iii) management and disposal of fuels, hazardous or toxic materials, and wastes; (iv) property protection; (v) insurance against risks and liabilities with Contractor and the Government identified as additional insured; and (vi) to the extent arising out of Grantee's negligence or willful misconduct, indemnification of Contractor and the Government from and against any and all losses incurred to the extent arising from or out of any claim for personal injury, including death, or loss or damage to property or any claim for infringement of patents or improper use of other proprietary rights.

(d) Consistent with the transfer of management and operation rights and responsibilities by the Government to the Grantee under such Easement, the Contractor is exempt from obligations for any and all contractual management and operation rights and responsibilities for the Mesa Top Solar Electric Generating System Easement Property.

H.32 Reserved

H.33 Provisional Payment of Fee

(a) The Contractor may draw up to one-twelfth (1/12) of 90% of the available fee for the fiscal year on the first day of each month, unless otherwise directed in writing by the Contracting Officer. The draw-down of fee is not to be construed as an evaluation of performance under clause DEAR 970.5215-1, "Total Available Fee: Base Fee Amount and Performance Fee Amount."

(b) Should DOE's evaluation of Contractor performance at the end of the fiscal year yield an earned fee less than the amount already drawn down by the Contractor, the Contractor agrees to repay the difference with interest calculated in accordance with DEAR 970.5215-1, Total Available Fee: Base Fee Amount and Performance Fee Amount.

H.34 Temporary Laboratory Closures at NREL

(a) From time to time it may become necessary to temporarily close the laboratory or a portion there of for imminent safety or security reasons. When such a condition exists, the NREL Laboratory Director or his designee shall immediately inform the Golden Field Office (GFO) Manager or her designee of his decision to close the Laboratory or portion thereof and provide her with the rational and need for such closure.

(b) There may be other conditions in which a laboratory closure is appropriate and needed. In such cases, the Laboratory Director or his designee will contact the GFO Manager or her designee stating the need and rationale for the closure. With the concurrence of the GFO Manager, the Laboratory Director shall be authorized to make such closure.

H.35 Special provisions relating to work funded under American Recovery and Reinvestment Act of 2009 (APR 2009)

Preamble:

Work performed under this contract will be funded, in whole or in part, with funds appropriated by the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, (Recovery Act or Act). The Recovery Act's purposes are to stimulate the economy and to create and retain jobs. The Act gives preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds made available by it for activities that can be initiated not later than June 17, 2009.

Contractors should begin planning activities for their first tier subcontractors, including obtaining a DUNS number (or updating the existing DUNS record), and registering with the Central Contractor Registration (CCR).

Be advised that Recovery Act funds can be used in conjunction with other funding as necessary to complete projects, but tracking and reporting must be separate to meet the reporting requirements of the Recovery Act and related Guidance. For projects funded by sources other than the Recovery Act, Contractors should plan to keep separate records for Recovery Act funds and to ensure those records comply with the requirements of the Act.

The Government has not fully developed the implementing instructions of the Recovery Act, particularly concerning the how and where for the new reporting requirements. The Contractor will be provided these details as they become available. The Contractor must comply with all requirements of the Act. If the contractor believes there is any inconsistency between ARRA requirements and current contract requirements, the issues will be referred to the Contracting Officer for reconciliation.

Be advised that special provisions may apply to projects funded by the Act relating to:

- Reporting, tracking and segregation of incurred costs;
- Reporting on job creation and preservation;
- Publication of information on the Internet;
- Protecting whistleblowers; and
- Requiring prompt referral of evidence of a false claim to the Inspector General.

Definitions:

For purposes of this clause, "Covered Funds" means funds expended or obligated from appropriations under the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5. Covered Funds will have special accounting codes and will be identified as Recovery Act funds in the contract and/or modification using Recovery Act funds. Covered Funds must be reimbursed by September 30, 2015.

Non-Federal employer means any employer with respect to Covered Funds – the contractor or subcontractor, as the case may be, if the contractor or subcontractor is an employer; and any professional membership organization, certification of other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving Covered Funds; or with respect to Covered Funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor receiving the funds and any contractor or subcontractor of the State or local government; and does not mean any department, agency, or other entity of the federal government.

A. Flow Down Provision

This clause must be included in every first-tier subcontract.

B. Segregation and Payment of Costs

Contractor must segregate the obligations and expenditures related to funding under the Recovery Act. Financial and accounting systems should be revised as necessary to segregate, track and maintain these funds apart and separate from other revenue streams. No part of the funds from the Recovery Act shall be commingled with any other funds or used for a purpose other than that of making payments for costs allowable for Recovery Act projects. Where Recovery Act funds are authorized to be used in conjunction with other funding to complete projects, tracking and reporting must be separate from the original funding source to meet the reporting requirements of the Recovery Act and OMB Guidance.

Invoices must clearly indicate the portion of the requested payment that is for work funded by the Recovery Act.

Note: For contractors currently using drawdown on a letter of credit, the current procedure remains in effect and is used for Recovery Act activity in lieu of invoicing.

C. Prohibition on Use of Funds

None of the funds provided under this agreement derived from the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, may be for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.

D. Wage Rates

All laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan numbered 14 of 1950 (64 Stat. 1267, 5 U.S.C. App.) and section 3145 of title 40 United States Code. See http://www.dol.gov/esa/whd/contracts/dbra.htm .

E. Publication

Information about this agreement will be published on the Internet and linked to the website www.recovery.gov , maintained by the Accountability and Transparency Board (the Board). The Board may exclude posting contractual or other information on the website on a case-by-case basis when necessary to protect national security or to protect information that is not subject to disclosure under sections 552 and 552a of title 5, United States Code.

F. Registration requirements

Contractor shall ensure that all first-tier subcontractors have a DUNS number and are registered in the Central Contractor Registration (CCR) no later than the date the first report is due under FAR 52.204-11 American Recovery and Reinvestment Act – Reporting Requirements.

G. Utilization of Small Business

Contractor shall to the maximum extent practicable give a preference to small business in the award of subcontracts for projects funded by Recovery Act dollars.

H.36 Use of Force by Protective Force Personnel

(a) Subject to the or ratification, in writing, of the Contracting Officer, reasonable litigation and other legal expenses (including reasonable counsel fees and the premium for bail bond) if incurred in accordance with the clause of the contract entitled " Insurance – Litigation and Claims" and the DOE approved legal management procedures (including cost guidelines) as such procedures may be revised from time to time and if not otherwise made unallowable in this contract including FAR 31.205-47(f)(7):

(1) Necessary to defend adequately any member of the Contractor's internal guard force against whom a civil or criminal action is brought, where such action is based on lawful act or acts of the guard undertaken by him in the general course of his duties for the purpose of accomplishing and fulfilling the official duties of his employment; or

DOE and the Contractor have further agreed to the following in connection with the interpretation and administration of the foregoing provision:

Any request for approval/ratification must include a determination by the Contractor that: (i) the guard's action giving rise to the civil or criminal action reasonably appear to have been performed within the scope of his employment, and (ii) that it is in the best interest of the Government/Laboratory to pay for the guard's litigation expenses. DOE and the Contractor further agree that interpreting the term "lawful", due consideration shall be given to whether a member of the Contractor's internal guard force acted in good faith and reasonably believed that action to be in the general scope of his employment to accomplish official duties and, in addition, in criminal actions, had no reasonable cause to believe that his conduct was unlawful. In the event the Contractor is legally obligated to defend the guard, the termination of any civil action or proceeding by judgment or settlement shall not in and of itself create a presumption that any such guard did not act in good faith for a purpose where he reasonably believed to be within his scope of employment and official duties. Similarly, the termination of any criminal action or proceeding of conviction or upon a plea of nolo contendere, or its equivalent, shall create a rebuttable presumption that such guard did not have reasonable cause to believe that his or her conduct was lawful.

Finally, in connection with any federal criminal proceeding against a member of the Contractor's internal guard force, the Contractor recognizes that Contracting Officer approval of the allowability of litigation expenses will be further predicated on the Contracting Officer determining that such reimbursement is in the best interests of the United States.

H.37 Privately-Funded Technology Transfer

(a) Contractor's Commitment

(1) For the Contractor's privately-funded technology transfer (PFTT) effort during the 5-year Base Period of this Contract, the Contractor shall commit on behalf of itself and others, a minimum of one million seven hundred fifty thousand ($1,750,000) of private (i.e., non-Federal) monies for expenses including but not limited to those related to patenting, marketing, licensing, technology maturation and development of Subject Inventions prior to the Contract expiration date of October 1, 2013.

(2) The Contractor shall indicate whether a Subject Invention will be pursued under its PFTT program within six (6) months after the Subject Invention is reported to DOE by the Contractor, unless an extension is otherwise agreed to in writing by the DOE field Patent Counsel. The Contractor is free to elect any or all Subject Invention(s) into the PFTT program or to remove Subject Inventions at its discretion subject to the provisions of the M&O contract and this clause. DOE may choose whether to accept title or transfer to the GFTT program, if offered by the Contractor, to Subject Inventions or software that are removed from the PFTT program. In addition:

i. Subject Inventions (including continuations, requests for continued examination, divisional applications, continuations in part, reissue applications and foreign counterparts) reported to DOE by the Contractor during the six (6) month period before Alliance assumed management and operating responsibilities (i.e., October 1, 2008) of Prime Contract No. DE-AC36-08GO28308 up to the effective date of this Modification will be eligible for election as described in subparagraph (2) above and commercialization pursuant to the PFTT program. Election into Contractor's PFTT Program pursuant to this paragraph (i) shall end six (6) months after the effective date of this Modification

ii. Subject Inventions (including continuations, requests for continued examination, divisional applications, continuations in part, reissue applications and foreign counterparts) reported to DOE prior to April 1, 2008, or not elected into Contractor's PFTT Program pursuant to (i) above, which are not included in an executed license, assignment or other commercialization agreement (hereinafter "Agreement"), may be added to the PFTT program at any time provided that Contractor complies with all of the conditions set forth in this Paragraph (a), provided further that the Contractor reimburses the Government or the Laboratory overhead account, at the discretion of the Contracting Officer, for such Subject Inventions. Such reimbursement shall be $1,000 per Subject Invention that has not been filed in the U.S. or any foreign Patent Office, $2,000 for a provisional application, $15,000 per issued U.S. patent and $8,000 per issued foreign counterpart issued patent. The reimbursement for pending U.S. and foreign patent applications shall be reduced by a factor of 30% of the scheduled reimbursement of their respective U.S. and foreign counterpart issued patents. No refund of fees paid will be made for Subject Inventions added to the PFTT program by the Contractor should those inventions be

eliminated from the program at a later date. In addition , if the Contractor has previously taken credit for third party contributions against Contractor's commitment of $1.75 million with respect to Subject Inventions subsequently returned to the GFTT program, Contractor shall eliminate such contribution from its commitment calculation.

iii. Any Subject Invention (including continuations, requests for continued examination, divisional applications, continuations in part, reissue applications and foreign counterparts) included in an Agreement may be added to the PFTT program at any time provided that it does not interfere with the GFTT program and the Contractor commits to a maturation/development investment in such Subject Invention equal to the amount of Federal funds previously expended on the documented external patenting costs of the Subject Invention, and provided further that Contractor complies with all of the conditions set forth in this subparagraph (2). In the absence of substantiating cost documentation the commitment shall be as earlier set forth in subparagraph (a)(2)(ii), above.

iv. For every Subject Invention that the Contractor adds to the PFTT program the Contractor must notify the Contracting Officer and provide a concise statement of its strategy and proposed milestones for commercialization of the invention for information purposes only. The Contractor will summarize its PFTT program and provide semi-annual status updates, including milestones, for each Subject Invention (excluding any proprietary and/or business confidential information) elected into the program against its commercialization strategy in the NREL Commercialization Plan.

v. For every Subject Invention that the Contractor wishes to add to the PFTT program pursuant to (ii) or (iii) above, it will provide a justification as to why the Subject Invention should be permitted to be added to the PFTT program (e.g., bundling IP will facilitate commercialization; new technology combined with older, shelved technology will allow the older technology to be commercialized; inclusion in PFTT will not adversely affect the GFTT program, DOE mission, or NREL as an institution, etc.). Additions of Subject Inventions to the Contractor's PFTT program pursuant to (ii) or (iii) above shall be subject to the DOE Contracting Officer's approval, in concurrence with the DOE Field Patent Counsel.

(b) Transfer of Patent Rights to a Successor Contractor

As consideration for the Contractor's commitment to expend private monies in its privately-funded technology transfer (PFTT) effort under this Contract, including but not limited to expenses related to patenting, marketing, licensing, technology maturation, and development of Subject Inventions, the Parties agree that at the termination or expiration of this Contract, the following terms and conditions shall apply to Subject Inventions that were elected to be pursued

under the Contractor's privately-funded technology transfer program, and to the licenses and royalties generated therefrom:

(1) If Contractor has in place an Agreement (as defined in paragraph (a) above), at the time it receives notice from DOE that the Department expects to terminate or allow this Contract to expire, title to such Subject Inventions (and/or software to which DOE has approved assertion of statutory copyright) and the distribution of gross income from royalties, equity, or any other consideration received or to be received under such agreement shall remain as prior to such notice of Contract termination or expiration and shall continue for the duration of such agreement. Administration of agreements related to such Subject Inventions shall remain with the Contractor. If the Contracting Officer finds that Contractor has not substantially complied with each of the commitments under this clause relating to each individual Subject Invention at the time of such notice, upon request, title to such Subject Invention shall be transferred to the Successor Contractor, or such other entity designated by the Government. For the purpose of clarification and in the event the Contractor receives notice from DOE that DOE expects to terminate this Contract before the end of the Base Period, then effective as of the date of such termination, the Parties agree that said termination shall end Contractor's commitment to fund PFTT and any of such private (i.e., non-Federal) monies that have not been expended under such PFTT program shall remain the property of the Contractor.

(2) If Contractor has not executed an Agreement to a Subject Invention, upon request, title to such Subject Invention shall be transferred to the Successor Contractor, or to such other entity designated by the Government, unless Contractor can demonstrate that it has expended at least twenty thousand dollars ($20,000) of private monies in its privately-funded technology transfer program toward commercialization (to include patenting costs, including payments to DOE under paragraphs (a)(2)(ii) or (iii), licensing, technology maturation, marketing and/or development, etc.) of such Subject Invention, and the Contractor has fulfilled all of the commitments under the intellectual property provisions of this Contract relating to such Subject Inventions. In the event Contractor retains title to a Subject Invention under this paragraph, the distribution of royalties, fees, equity or other consideration from an agreement shall be as set forth in paragraphs (e) and (f) below.

(3) If Contractor retains title to Subject Inventions under subparagraphs (1) or (2) above, and executes an Agreement (as defined in paragraph (a) above) to such Subject Inventions after the termination or expiration of this Contract, the distribution of royalties, fees, equity or other consideration from such Agreement shall be as set forth in paragraphs (e) and (f) below.

(4) The Contractor and the Government shall enter into negotiations prior to such termination or expiration with respect to retention of the title to Subject Inventions. Such negotiations shall consider the equities of the Parties with respect to each Subject Invention and shall take into consideration the presence of private investment, DOE's need for continued operation of the Facility, potential commercial use, assumption of patent related liabilities,

effective technology transfer, and the need to market the technology. Such negotiations shall not change the disposition of title provided for in subparagraphs (1) and (2) above if the Contractor has fulfilled its obligations under either subparagraph (1) or (2) above unless mutually agreed by the Contractor and DOE.

(5) For any Subject Invention to which the Contractor maintains title or administration of an Agreement under subparagraphs (a)(1)-(2) above, the Contractor agrees that, to the extent it is able to do so in view of prior licenses or assignments, it will negotiate in good faith to enable the Successor Contractor to practice such Subject Invention under any CRADAs, Work For Others agreements, licenses or other appropriate agreements, in order to fulfill the missions and programs of the Facility, including the technology transfer mission. It is the intention of the Contractor to enable the Successor Contractor to continue operation of the Facility and fulfill the missions of the Laboratory. In any event, the Successor Contractor retains the nonexclusive royalty-free right to practice the Subject Invention on behalf of the U.S. Government.

(6) If at any time the Contracting Officer believes that Contractor has not substantially complied with any commitment under this clause regarding any Subject Inventions, the Contracting Officer shall provide written notice to the Contractor of any such non-compliance and the Contractor shall have a reasonable opportunity to either demonstrate that it is in fact in compliance or cure any such non-compliance.

(7) The provisions of paragraphs (b)(1), (2), (3), and (5) above survive expiration or termination of the Contract.

(c) Costs

(1) Except as otherwise specified in the clause of this Contract entitled, "Technology Transfer Mission," as allowable costs for conducting activities pursuant to provisions of that clause, no costs are allowable as direct or indirect costs for the preparation, filing, or prosecution of patent applications or the payment of maintenance fees or licensing and marketing costs after the Contractor elects to pursue commercialization of a Subject Invention under its privately-funded technology transfer program pursuant to paragraph (a) above.

(2) If an extension of time for election of a Subject Invention for privately funded technology transfer is approved in accordance with paragraph (a) above, Contractor shall reimburse the Laboratory and the Department of Energy for costs in the form of a one-time flat fee of $1,000 with respect to such Subject Invention during the time period of the extension as reasonable reimbursement for such costs under the circumstances. Such fee is deemed to include, among other things, all patent costs which are incurred under the Contract for all Subject Inventions elected to be treated under privately-funded technology transfer, regardless of when such costs are incurred, and is in addition to the fee set forth in (a)(2)(ii).

(3) In the case of the Contractor's PFTT program, the Contractor shall annually report and certify that all costs incurred, including those for patenting, marketing, technology maturation, and development and licensing after the Contractor elects to treat a Subject Invention as PFTT, have been and will be paid solely from private monies supporting the Contractor's PFTT program, and do not include the use of any Federal funds. Private monies may include industry funding for CRADAs, WFOs and other forms of technology partnership agreements. However, the Contractor shall not have to report and/or certify normal and customary infrastructure-related costs (e.g., the use of the IP Manager database or other databases, Technology Portal, legal files, computers, phones, office space, NREL website, etc.) and incidental costs of effort equivalent to less than 15 minutes provided Contractor pays DOE a yearly fee of $10,000 (as remuneration for such costs) at the beginning of each applicable fiscal year, or other appropriate prorated amount for a lesser period of such fiscal year.

(4) Within 90 days after the end of each Contract year, including after termination of the Contract, the Contractor shall submit a report covering the previous Contract year which:

(i) lists the Subject Inventions elected and/or patent applications filed under its PFTT program;

(ii) certifies the total amount of private monies expended during the Contract year, including those expenses related to patenting, marketing, technology maturation, development and licensing of Subject Inventions; and

(iii) certifies the amount of gross income received from its PFTT program during the Contract year; and

(iv) contains the status summary of its PFTT program required under paragraph (a)(2)(iv) above.

(d) Liability of the Government

(1) Subject to subparagraph (4) below and paragraph (c)(3) above, all costs, including litigation costs, associated with and attributed to Contractor's privately-funded technology transfer program are unallowable regardless of the stage of technology development or background intellectual property existing at the time the Subject Invention is chosen for management with the privately-funded technology transfer program, and notwithstanding the inclusion of publicly funded intellectual property in the Contractor's privately-funded technology transfer program activities.

(2) The Contractor shall not include in any license agreement or assignment with respect to any Subject Invention under this clause any guarantee or requirement that would obligate the Government to pay any costs or create any liability on behalf of the Government.

(3) The Contractor shall include in all licensing agreements or any assignment of title with respect to any Subject Invention under this clause the following clauses unless otherwise approved or directed by the Contracting Officer following consultation with DOE field Patent Counsel:

(i.) "This agreement is entered into by the Alliance for Sustainable Energy, LLC (Alliance) in its private capacity. It is understood and agreed that the U.S. Government is not a party to this agreement and in no manner whatsoever shall be liable for nor assume any responsibility or obligation for any claim, cost or damages arising out of or resulting from the agreement or the subject matter licensed/assigned."

(ii.) "Nothing in this Agreement shall be deemed to be a representation or warranty by Alliance or the U.S. Government of the validity of the patents or the accuracy, safety, or usefulness for any purpose, of any TECHNICAL INFORMATION, techniques, or practices at any time made available by Alliance. Neither the U.S. Government nor Alliance nor any Member of Alliance shall have any liability whatsoever to LICENSEE or any other person for or on account of any injury, loss, or damage of any kind or nature sustained by, or any damage assessed or asserted against, or any other liability incurred by or imposed upon LICENSEE or any other person, arising out of or in connection with or resulting from:

(A) The production, use, or sale of any apparatus or product, or the practice of the INVENTIONS;

(B) The use of any TECHNICAL INFORMATION, techniques, or Practices disclosed by Alliance; or

(C) Any advertising or other promotion activities with respect to any of the foregoing, and LICENSEE shall hold the U.S. Government, Alliance, and any member company of Alliance harmless in the event the U.S. Government, Alliance, or any Member of Alliance is held liable. Alliance represents that it has the right to grant all of the rights granted herein, except as to such rights as the Government of the United States of America may have or may assert."

(4) If the Contractor desires to defend or initiate litigation to resolve an infringement claim or lawsuit which involves Subject Inventions under both the PFTT and the GFTT programs (e.g., if such inventions are bundled together), the Contractor shall seek approval to initiate such litigation from the Contracting Officer through the DOE field Patent Counsel, and if such approval is granted the parties may share litigation expenses and any settlement, subject to negotiation. In such instances, sharing of expenses and settlement monies will be negotiated by the parties and is subject to the approval of the Contracting Officer, who will consult with the DOE field Patent Counsel. If Contracting Officer approval is not granted the Government shall not share in any judgment or settlement, if any, associated with either the defense or initiation of litigation.

(e) Privately-Funded Technology Transfer - Distribution of Gross Income

If the Contractor engages in a privately-funded technology transfer program under the clause of this Contract entitled "Patent Rights - Management and Operating Contracts, Nonprofit Organization or Small Business Firm Contractor" such that private funds are utilized for technology transfer after the Contractor elects to pursue privately-funded commercialization of the Subject Invention or private funds are utilized for technology transfer of copyrighted software where DOE has approved assertion of statutory copyright by the Contractor and has approved the pursuing of commercialization under the privately funded technology transfer program, gross income from such privately-funded technology transfer program shall be distributed as follows:

(1) Basic Distribution

For the purposes of clarification "gross income" equals all revenue received by Contractor minus the inventor's share less any payments (royalties, fees, etc.) to third parties by virtue of license agreements or inter-institutional agreements with third parties (e.g., joint university or other collaboration with for-profit company) which obligates Contractor to royalty sharing with those third parties. Except as provided in (2) below, sixty-five percent (65%) of gross income shall be retained and may be used as the Contractor deems appropriate, whether at the Facility or not, consistent with 35 USC §200 *et seq*. The remaining thirty-five (35%) will be used at the Facility consistent with 35 USC §200 *et seq*. The amount of gross income shall be calculated on an annual basis consistent with the Contractor's accepted accounting practices.

(2) Adjustment of Distribution

(i) Until such time as the Contractor recovers its commitment of $1.75 million on an ongoing basis, the Contractor's share of gross income shall be ninety percent (90%). Thereafter the Basic Distribution set forth in subparagraph (e)(1) above shall apply unless otherwise adjusted under (ii) or (iii) below.

(ii) **I**n the event the cumulative gross income under the Contractor's privately-funded technology transfer program exceeds one million seven hundred fifty thousand dollars ($1.75 million) during the Base Period of the Contract, the Contractor's share of the gross income shall increase in accordance with the following rubric from that point forward (all figures in cumulative gross income dollars):

In excess of $1.75 million, up to and including $4 million	65% of cumulative gross income up to $1.75 million; plus 70% of cumulative gross income in excess of $1.75 million, up to and including $4 million cumulative gross income

In excess of $4 million, up to and including $8 million	75% of cumulative gross income in excess of $4 million, up to and including $8 million cumulative gross income
In excess of $8 million	80% of income in excess of $8 million cumulative gross income

(1) The Contractor shall be entitled to receive the greater distribution of (i) or (ii) above during the Base Period.

For Contract periods beyond the Base Period, the highest last rate under the Base Period determined under (1) or (2)(ii) above will apply, with additional incentive rates subject to negotiation.

(4) The foregoing distributions shall also apply to equity interests received from third parties pursuant to paragraph (f).

(5) If this distribution of income structure is determined by the Parties to be detrimental to attracting investors and growing the laboratory's technology commercialization program, the parties agree to negotiate a new structure more favorable to the investment community at the time such determination is made.

(f) Equity Plan

It is the intent of the Government and the Contractor that the Contractor shall, in its discretion, take reasonable and prudent actions from both a commercial and stewardship of the Facility's technology transfer perspective related to the ownership of equity received from third parties under this Contract. The Contractor shall submit to the Contracting Officer a plan which shall set forth principles for the Contractor's acquisition, retention and disposition of equity received from third parties as consideration for licenses or assignments granted to such third party.
Such plan shall consider, at a minimum,

(1) With respect to PFTT, the manner in which the Contractor shall acquire such equity in a third party and a description of how the Contractor shall apportion capital contributions to such third party between the related value of Contractor contributions and the value of contributions representing a license under a Subject Invention;

(2) Where IP bundling has resulted in the use of both privately and publically funded technology transfer, a discussion regarding the recoupment of cost related to licensing, marketing and development;

(3) the manner in which the Contractor shall hold such equity, given that the Government has an undivided interest in that portion of such equity representing the value of contributions resulting from a license to such Subject Invention;

(4) the manner in which the Contractor shall dispose of such equity, giving due consideration to the potential for a conflict of interest between the interests of the Government and the Contractor in accordance with the Contractor's DOE-approved Conflict of Interest Management and Implementation Plan, and

(5) the manner in which Contractor's inventors are compensated.

(6) mitigation of any conflicts of interest.

(g) In its privately-funded technology transfer program, the Contractor shall be substantially guided by the U.S. Competitiveness and Fairness of Opportunity as set forth herein. For the purpose of clarification and to facilitate technology transfer, the Contractor, in its capacity as operator of the Laboratory, shall be permitted to enter into either traditional CRADA/WFO agreements or and any other subsequently developed or authorized DOE agreement.

(h) The Contractor shall establish procedures implementing its privately-funded technology transfer program including the Contractor's criteria for selecting technologies for the privately-funded technology transfer program. Such implementing procedures shall be provided to the Contracting Office for review and approval as soon as possible (estimated forty-five (45) days) after execution of the Contract modification authorizing privately-funded technology transfer. The Contracting Officer shall have the equivalent period of time that it took for the Contractor to submit, but no less than thirty (30) days thereafter, to approve or require specific changes to such procedures and if the Contracting Officer does not act within the period established above for approval, said procedures shall be deemed approved.

(i) In the case of the Contractor's privately-funded technology transfer program, the Contractor shall certify as part of the report required under subparagraph (c) (4) above, that subject to paragraph (c)(3) above all costs of its PFTT Program, including but not limited to licensing, marketing, technology maturation and development incurred after the Contractor elects to treat a subject invention as PFTT have been and will be paid solely from the Contractor's privately-funded technology transfer program.

(j) To the extent the Department determines that the Laboratory's mission or function is being negatively impacted by the PFTT Program, DOE retains the right to require the Contractor's privately-funded technology transfer program to be administered solely by a nonlaboratory employee(s) who shall not utilize any laboratory facilities without the written approval of the Contracting Officer.

(k) When requesting approval from DOE to assert statutory copyright pursuant to the clause entitled "Rights in Data—Technology Transfer" (Clause I.125 of this Contract), the Contractor may request that commercialization of such software proceed under the PFTT program (i.e., the provisions of this Clause H.37). If permission to assert copyright (consistent with the requirements of the Copyright Act of 1976, as amended and 17 U.S.C. § 302(c)) and trademark rights (consistent with the requirements of the Trademark Act of 1946 ("Lanham Act")

as amended and 15 U.S.C. § 1058) is approved by DOE, subject to subparagraph (e)(3) above, no costs of such commercialization thereafter shall be allowable, and the proceeds of such commercialization shall be treated in accordance with subparagraph (e)(1) above as if such proceeds had resulted from the commercialization of a Subject Invention. Further, any software may be added to the PFTT program at any time, provided that the Contractor secures or has secured such authorization to assert statutory copyright. For every piece of copyrighted software that the Contractor adds to the PFTT Program, the Contractor must notify the Contracting Officer and provide a concise statement of its strategy and proposed milestones for information purposes only. If software earlier added to the PFTT Program is later determined by the Contractor and DOE to be required or identified for inclusion in DOE mission work, or other Government work, using GFTT funds or other Government funding, the character of any enhanced or otherwise derivative software (Enhanced Software) resulting from such work shall be deemed to be GFTT, not PFTT. Enhanced Software may also be added to the PFTT Program based upon the requirements set forth in this paragraph for software. Upon termination or expiration of the Contract, such software, or Enhanced Software, will be treated as if such software, or Enhanced Software were a Subject Invention elected under the Contractor's PFTT program. Disposition of title to such software, or Enhanced Software, will be governed by the provisions of subparagraphs (b)(1)-(b)(5) above, except that the $20,000 expenditure requirement for Subject Inventions set forth in subparagraph (b)(2) is not applicable to such software or Enhanced Software. The Contractor shall comply with the obligations set forth in the Rights in Data—Technology Transfer" (Clause I.125 of this Contract) related to computer software or data. However, the Contractor shall not be required to furnish an abstract suitable for publication or the source or object code for such software (or Enhanced Software) program to the Energy Science and Technology Software Center or provide an abstract of the data or copy of such data to the Office of Scientific and Technical Information.

(l) (1) Except as provided in (2) below, all records associated with Contractor's PFTT program shall be treated as Contractor-owned records under the provisions of paragraph (b) of Clause I.111. and shall not be subject to any other provisions of Clause I.111.

(2) DOE may inspect and copy any of Contractor's financial records which demonstrate: (i) the unallowable costs associated with Contractor's PFTT Program, and (ii) revenue derived from said Program. DOE acknowledges that Contractor asserts that any and all such records are privileged or confidential commercial and/or financial information which is exempt from release under the Freedom of Information Act pursuant to exemption (b)(4).

(m) If DOE extends the Contractor's Contract pursuant to Clause I.25, to Extend the Term of the Contract, the Parties agree Alliance's PFTT program shall remain in effect, for all Subject Inventions, software or Enhanced Software whether previously or subsequently elected into Contractor's PFTT Program subject to Alliance's fulfillment of all obligations under this Clause H. 37, for the period of October 1, 2013 through September 30, 2018. The Contracting Officer shall determine whether obligations under this Clause have been fulfilled as part of

the Contractor's annual performance assessment and at other times as deemed necessary by the Contracting Officer.

H.38 Contractor's Obligations Regarding Data Furnished Under DOE Cooperative Agreement Number DE-FC36-04GO14285

The Contractor agrees that it will treat any data furnished to it under DOE Cooperative Agreement Number DE-FC36-04GO14285 according to any restrictive legend contained thereon, including limited rights data, restricted computer software, or other technical business or financial data in the form of recorded information including commercially valuable data and information as defined in 10 C.F.R. 1004.3(e) (4) (Dec. 12, 1994), as long as the data and restrictive legend comply with the NREL Hydrogen Secure Data Center Procedures.

H.39 Applicability Of I.158 52.234-4 Earned Value Management System (Jul 2006)

In applying Clause I.158 FAR 52.234-4 Earned Value Management System (Jul 2006) the dollar thresholds at which the contractor must utilize a certified Earned Value Management System are provided in DOE O413.3.

H.40 DOE Access to Contractor's Leased Premises

(a) Conditions of Access. The parties agree that from time to time the Contractor shall assist DOE by accommodating access to all or a portion of Contractor's leased premises by DOE personnel and its contractors (if any). Such access: (1) shall be reimbursed by DOE to the Contractor; (2) shall be funded by DOE during such access; (3) shall be assigned to a successor contractor in the event of termination or conclusion of Contractor's management and operating contract; and (4) shall be administered in accordance with an ancillary Access License between the parties.

(b) Cost Reimbursement. The parties agree that the following costs shall be prorated and reimbursed by DOE for any portion of the Contractor's leased premises accessed by DOE personnel and its contractors.

DOE shall reimburse the Contractor for the following:

(1) all costs under the Contractor's lease attributable to DOE's access, when such costs are incurred by the Contractor;
(2) costs for DOE's alterations to Contractor's leased premises attributable to DOE's access, when such costs are incurred by the Contractor;
(3) facility costs attributable to DOE's access, including but not limited to maintenance, security and badging (if any), personal property management, sustainability, and janitorial;
(4) costs for services specifically requested by DOE and attributable to DOE's access, including but not limited to security systems and infrastructure;
(5) costs for facilities/alterations administration and lease administration attributable to DOE's access and alterations; and
(6) any applicable indirect costs in accordance with the Contractor's Cost Accounting Disclosure Statement.

(c) Funding commitments. Subject to the availability of funds, prior to each fiscal year in which the DOE intends to access a portion or all of the Contractor's leased premises, the DOE Contracting Officer shall annually confirm in writing DOE's commitment to reimburse the Contractor for that year's costs attributable to DOE's access to Contractor's leased premises. In the event that the DOE terminates its access to Contractor's leased premises prior to termination of Contractor's management and operating contract, the Contractor's lease costs shall revert to an allowable cost in accordance with the terms of Contractor's management and operating contract.

(d) Assignment to successor contractor. In the event that the Contractor's management and operating contract is terminated for convenience or cause or naturally concludes and DOE continues to require access to the facilities, the DOE shall direct its successor contractor to assume the Contractor's lease, and the ancillary Access License (collectively, the "Lease") under which the Contractor accommodates DOE's access to all or a portion of Contractor's leased premises. Upon assignment to and assumption of the Contractor's Lease obligations by the successor contractor, the Contractor shall be relieved of all responsibility of the entire Lease and the successor contractor shall assume exclusive responsibility for performance of the Lease obligations. DOE shall reimburse Contractor's costs attributable to processing the transfer of the entire Lease to its successor contractor in accordance with the terms of Contractor's management and operating contract. In the event the contract is terminated for convenience or cause or naturally concludes and DOE no longer requires access to the facilities, the Contractor's Lease costs shall revert to an allowable cost in accordance with the terms of Contractor's management and operating contract.

(e) Access License. The parties agree to negotiate in good faith, execute, and annually review an ancillary Access License setting forth the procedures and practices under which DOE shall access Contractor's leased premises. At any time during the term of DOE's access to Contractor's leased premises, either party may propose revisions to the Access License to accommodate changed circumstances. The parties agree to negotiate in good faith such proposed revisions with reasonable promptness.

H.41 Contractor's Obligations Regarding Data Furnished by Grantees Under DOE Funding Opportunity Announcement DE-FOA-0000058

The Contractor agrees that it will treat any data furnished to it by grantees under the Smart Grid Investment Grant Program, DOE Funding Opportunity Announcement Number DE-FOA-0000058, according to any restrictive legend contained thereon, including limited rights data, restricted computer software, or other technical business or financial data in the form of recorded information, including commercially valuable data and information as defined in 10 C.F.R. 1004.3(e)(4)(Dec. 12, 1994), as long as the data and restrictive legend comply with the NREL Smart Grid Data Procedures.

H.42 Non-Federal Agreement for Commercializing Technology (Pilot)

This Clause implements a PILOT program for a new technology transfer mechanism, Agreements for Commercialization of Technology (ACT). In accordance with the requirements specified in this Clause, the Contractor may conduct privately-sponsored research at the Contractor's risk for third parties. In performing ACT work, the Contractor may use staff and other resources associated with this Contract for the purposes of conducting research and furthering the technology transfer mission of the Department, on the condition that such use does not interfere with Contractor's activities conducted as authorized by other parts of this Contract. The resources that may be used include Government-owned or leased facilities, equipment, or other property that is either in Contractor's custody or available to the Contractor under this Contract (unless specifically excluded by the Contracting Officer). For Contractor's activities conducted under authority of this Clause, the 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 Laboratory. In exchange for accepting such risks, or for other private consideration provided by the Contractor, the Contractor is authorized to negotiate separate agreements (ACT agreements) with the sponsoring third parties. Under ACT agreements, the Contractor may charge those parties additional compensation beyond the direct costs of the work at the Laboratory. Any statement of work involving Federal funds or falling within the scope of a Federally-funded contract or award (other than this Contract) shall not be eligible for an ACT transaction.

DOE and the Contractor recognize that implementation of ACT under this Clause is a PILOT program authorized by the Department and that during the PILOT either party may suggest changes to the program based on the experiences gained. Furthermore, the Contractor recognizes that the Department may decide to end the PILOT at any time and that termination of the PILOT by the Department will be in accordance with Paragraph 12, below.

1. *Authority to Perform work under this Clause*. Pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.) and other applicable authorities, the Contractor may perform work for non-federal entities, in accordance with the requirements of this Clause.

2. *Contractor's Implementation*. The Contractor must draft, implement, and maintain formal policies, practices, and procedures in accordance with this Clause, which must be approved by the Contracting Officer, and such approval shall not be unreasonably withheld.

3. *Conditions for Participation in ACT.* The 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 Clause if the work does not interfere with or adversely affect projects and programs the Contractor conducts on behalf of the Government under this Contract, and complies with FFRDC requirements applicable to the Facility. If the Government determines that an activity conducted under this Clause interferes with the Department's work under the Contract, or that termination/stay/suspension of work under an ACT agreement is in the best interest of the Government, the 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 Facility's mission by providing a written

notice excluding said property from the Contractor's activities under this Clause. Any cost incurred as a result of Contracting Officer decisions identified in this subparagraph shall be borne by the Contractor. The Contracting Officer shall provide to the Contractor in writing its decision, identifying the issues and reasons for the decisions. The 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 Clause, must perform all ACT activities in accordance with the standards, policies, and procedures that apply to performance under this Contract, including but not limited to environmental, safety and health, security, safeguards and classification procedures, and human and animal research regulations;

d. Contractor must utilize its standard Laboratory subcontracting procedures for any work subcontracted by the Laboratory under the Contract. Otherwise, the Contractor may subcontract ACT work scope that is not performed under the Contract using commercially reasonable subcontracting practices and terms. Costs for performing such subcontracting activities outside the scope of the Contract are not reimbursable under the Contract;

e. Must make available to DOE a summary of project information for each active ACT project, consisting of: total estimated costs; project title and description; project point of contact; and, estimated start and completion dates;

f. Is responsible for addressing the following items in ACT agreements as appropriate, as they are in non-federal WFO agreements: disposition of property acquired under the agreement, export control, notice of intellectual property infringement, and a statement that the Government and/or Contractor shall have the right to perform similar services in the Statement of Work for other Parties as otherwise authorized by this Contract subject to applicable data restrictions;

g. Must include a standard legal disclaimer notice on all publications generated under ACT activities. Each DOE contractor has its own pre-approved publications statement, and this should be used; and

h. 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 CONTRACTOR] ACTING IN A PRIVATE CAPACITY AND [THE OTHER IDENTIFIED PARTY(IES)]. 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 Contractor is hereby authorized to negotiate terms and conditions between the Contractor and third parties when entering into ACT agreements. The 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 Contractor due to such terms and conditions.

b. The 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 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 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 Contractor offered the option to use CRADA and WFO alternatives (see Paragraph 7a) sufficiently that the private parties are aware of the relative costs and other differences between the ACT agreement and the CRADA and WFO 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; applicable ES&H and NEPA documentation; a statement of consideration, summarizing the risk and/or

consideration offered the private 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 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 Contractor, Contractor's parent, member, subsidiary, or other entity in which the Contractor, Contractor's parent, member or subsidiary has an equity interest, is a party to the ACT Agreement, the 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 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 Contractor under subparagraph b. of this Paragraph within ten (10) business days of receiving the Package and provide the 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 missions of the Facility; (2) will not adversely impact programs assigned to the Facility; (3) will not place the Facility 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 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 Contractor in writing including the reasons for the rejection. Upon receipt of the Contracting Officer's written rejection, the Contractor agrees to not further pursue the work described in the package or incur additional costs under the Contract for the work described in the Package.

i. The Contractor may request a preliminary determination that the proposed scope of work is consistent with the Facility mission 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 Contractor may begin work under the ACT Agreement at the Contractor's risk pending final approval of the complete Package. The Contractor must submit a complete Package, as identified in subparagraph 4b 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 Contractor, as no Federal funds will be used to fund any work conducted under this Clause.

ii. If the Contractor, Contractor's parent, member, subsidiary, or other entity in which the Contractor, 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 Contractor shall be responsible for providing adequate advance payment for ACT work conducted under this Clause consistent with procedures defined in the Department's Financial Management Handbook. The Contractor shall be solely responsible for collecting payments from third parties for any work conducted under this 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 Contractor's work under this Clause, the Contractor is entirely at risk and the Government shall have no risk.

6. *Costs.* All direct costs associated with Contractor's work conducted under this 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 Contract shall also be applied to work conducted under this 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 Clause by a unilateral administrative modification to the contract.

a. Work conducted under this Clause shall be excluded from Contract award fee calculations and such fee shall not be allocable to work conducted under this Clause.

b. No Federal funds will be used to fund work conducted under this Clause.

7. *Organizational Conflict of Interest.* Contractor shall conduct work under this Clause in a manner that minimizes the appearance of conflicts of interest and avoids or neutralizes actual conflicts of interest with Contractor's functions under this Contract. Accordingly, Contractor shall develop a Master Organizational Conflict of Interest Mitigation Plan (OCI Plan). The Master OCI Plan should address OCI issues that arise as a result of the Contractor taking a financial interest in ACT projects, especially in those cases where the Contractor retains rights in ACT IP. Such Master OCI Plan shall be provided to the Contracting Officer for review and approval as soon as practicable after execution of the Contract modification incorporating this Clause into the Contact. In addition to those elements expressly stated in the Master OCI Plan, the Department may condition any ACT transaction on such other mitigating conditions it determines are appropriate. The Master 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 WFO agreements and CRADAs in addition to ACT. The certification at a minimum shall briefly describe WFO agreements, CRADAs and ACT, and will include the relative disposition of IP rights and the costs (including any additional compensation to the Contractor under ACT) under each agreement for the scope of work being proposed for the Laboratory.

b. *Priority of Work*. The Contractor shall not give work under ACT any special attention or priority over other work at the Laboratory. Work under ACT shall be approved by the Contracting Officer and assigned the same priority relative to other work at the Laboratory that it would normally have if performed under a non-Federal WFO agreement. The Contracting Officer has discretion to determine the agency's priority of work, considering the Contractor's input.

c. *Participation by Contractor-related Entity*: Where the Contractor, Contractor's parent, member, subsidiary, or other entity in which the Contractor, Contractor's parent, member or subsidiary has an equity interest, is a party to the ACT Agreement, the Contractor shall include as necessary an addendum to the Master OCI Plan to address special circumstances not fully anticipated in the Master OCI Plan.

d. *Right of Inquiry for ACT IP Designation.* DOE Patent Counsel may inquire into Contractor's designation of any invention or data as arising under an ACT transaction. Contractor is responsible for curing any defect identified in such inquiry, and if 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 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 – Management and Operating Contracts, Nonprofit Organization or Small Business Firm Contractor] clause of this Contract.

b. In reporting ACT inventions, the 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 ACT Protected Information shall also be marked to identify the ACT agreement under which the data was generated.

d. The 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 Contractor receives ownership or license rights to ACT IP, the Contractor may elect to commercialize the ACT IP consistent with the Technology Transfer Mission clause of this Contract.

f. As an alternative to subparagraph e., the Contractor may elect to retain private ownership of the ACT IP and commercialize the IP using its private funds, where no costs for developing, patenting, and marketing will be allowable under this Contract. The Contractor will share royalties collected on ACT IP with inventors in accordance with paragraph (h) of the Technology Transfer Mission clause of this Contract.

g. 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. Except as provided in this paragraph 8, licensing of ACT Subject Inventions the Contractor retains in its private capacity will not be subject to the Technology Transfer Mission clause of this Contract.

9. *Contractor Liability and Indemnification.*

a. General Indemnity.

(i) The 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, 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 Contractor, and not directly resulting from the fault or negligence of the Government, the Department, or persons (other than the 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 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 Facility as part of the Statement of Work; and (3) the specific activities performed under the ACT transaction are normally performed by the DOE Contractor at the Facility.

(iii) Notwithstanding the provisions in a (i) and a (ii) above, the 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 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 Program for the Facility. Above the applicable liability limit, 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 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 Facility. Such indemnity shall not apply to a claimed infringement that is settled without the consent of the Contractor unless required by a court of competent jurisdiction.

c. Product Liability Indemnity.

(i) Except for any liability resulting from any negligent acts or omissions of the Government, the 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 Contractor, their assignees, or licensees, which was derived from the work performed under ACT transactions. In respect to this clause, neither the Government nor the 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 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 Contractor. No settlement for which the Contractor would be responsible shall be made without the Contractor's consent, unless required by final decree of a court of competent jurisdiction.

(ii) Where Contractor assigns the responsibility for indemnifying the Government under subsection c (i) above to other ACT Participants, DOE agrees to seek such indemnification from the Contractor only to the extent not satisfied after reasonable efforts to obtain indemnification from those other ACT Participants.

d. Claims and liabilities resulting from Contractor's performance of work under an ACT transaction authorized pursuant to this Clause shall not be subject to the Contract clause entitled

"Insurance - Litigation and Claims." In no event shall the Contractor be reimbursed under the 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 Contractor's performance under this clause.

e. 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 Contractor executes under authority of this Clause. The Contractor agrees if the Contractor does include such a guarantee or requirement, it will have no effect on the Government, that is, the Contractor will be responsible for any costs or liability due to such a guarantee or requirement.

10. *ACT Records.* All records associated with Contractor's activities conducted under authority of this Clause shall be treated as Contractor-owned records under the provisions of the Access to and Ownership of Records clause of this Contract.

11. *Reports and Abstracts*. The Contractor shall produce the following deliverables for each ACT Agreement:

a. An initial abstract suitable for public release at the time the ACT transaction is approved by DOE;

b. A non-proprietary final report, upon completion or termination of the Agreement, to include a list of subject inventions; and

c. Where pursuant to the ACT Class Waiver, the Government reserves the right to use generated data after the particular project expires, computer software in source and executable object code format as defined within the statement of work or elsewhere within the Agreement.

12. *Termination of ACT Authority.* The PILOT Program implemented by this Clause will terminate on October 31, 2017, unless renewed by the Contracting Officer. The Government may provide the Contractor with written notice to terminate Contractor's authority to conduct work under this Clause at any time. If the Contractor's authority to conduct work under this Clause has expired or been terminated, the Contractor may be permitted, subject to any other provisions of this Clause, to complete any work that was DOE approved work at the time Contractor's authority to conduct work under this Clause was terminated by the Government.

13. *Successor Contractor.*

a. To minimize the potential for negative Government programmatic impact and to facilitate seamless transition of work to a successor contractor of the Facility, ACT Agreement(s) executed under

this Clause and any contractual instruments associated therewith may be novated to the successor contractor with the mutual consent of the Contractor, the successor contractor, and the parties to the affected ACT Agreement(s). If the ACT Agreement(s) cannot be novated, then the Contractor as a private sponsor shall be permitted to enter into a Non-Federal Work for Others agreement with the successor contractor that will enable completion of the statement of work. Such agreements shall be entered into pursuant to DOE WFO policies. DOE shall make good faith efforts to incorporate the terms of the applicable ACT Agreement.

b. The Contractor may retain private ownership of any individual piece of ACT IP that it obtained during the term of the Contract if the Contractor demonstrates:

i. the ACT IP was successfully commercialized or deployed in the commercial marketplace using private funds; or

ii. the Contractor expended at least $20,000 (USD) of private funds for patenting, marketing, licensing, or maturing the ACT IP.

c. If the Contractor has not satisfied the criteria of Subparagraph b. to this Paragraph, then the Contractor and Contracting Officer, with input from the DOE Patent Counsel providing oversight to the Facility shall, prior to expiration or termination of the Contract, enter into negotiations to determine an equitable distribution of rights in the affected ACT IP. Such negotiations shall consider the equities of the parties with respect to each piece of intellectual property including, at a minimum, the private expenditures made by the Contractor for patenting, marketing, licensing, and maturing the ACT IP up to the date of Contract expiration or termination; which party is best positioned to appropriately commercialize the ACT IP; and any other equities that may apply under the circumstances.

14. *Minimum Reporting Requirements for ACT Activities.* During the ACT PILOT, the 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, the number of private sector entities engaged through ACT that had not previously engaged the Laboratory and the number that had not previously engaged any DOE/NNSA laboratory, 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 Contractor shall obtain from each entity engaged in ACT the entity's reason(s) for selecting ACT for laboratory engagement. Also during the PILOT, the Contractor shall report the above-identified data semiannually to DOE 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 Contract. Such records shall be made available in accordance with the clauses of this Contract pertaining to inspection, audit and examination of records.

H.43 – Privacy Act Records

(a) 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:

(1) Employee and Visitor Access Control Records (DOE-51)

(2) Access Control Records of International Visits, Assignments, and Employment at DOE Facilities and Contractor Sites (DOE-52)

(3) Access Authorization for ADP Equipment (DOE-53)

(b) 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.

(c) 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 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.44- CONFERENCE SPENDING CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT, 2013 FOR MANAGEMENT AND OPERATING CONTRACTS (MAY 2013)

The Contractor agrees that:

(a) No cost associated with conference activities shall be allowable under this contract unless the conference is directly and programmatically related to the purpose of the contract and the specific work authorization/order/task directing the conference activities.

(b) The Contractor shall follow the most current guidance issued by DOE concerning reporting of conference related activities and spending.

(c) While a conference may be approved by DOE based on estimated cost and attendance to ensure federal funds are used for purposes that are appropriate, cost effective, and important to the core mission, only the Contracting Officer has authority to determine if the costs incurred by the Contractor are allowable, allocable, and reasonable.

(d) The Contractor and its employees, its sponsors, hosts and attendees shall aggressively seek to limit costs associated with a conference. Conference expenditures shall be kept to the minimum necessary to carry out the Department's mission and consistent with applicable portions of the Federal Travel Regulation, and 48 CFR chapter 1, the Federal Acquisition Regulation.

(e) The Contractor shall ensure its conference attendees conduct themselves with the highest level of professionalism and ethical behavior consistent with that expected of DOE employees.

(f) The Contracting Officer will ensure conference activities are included in the Contractor's annual audit plan.

H.45 Conference Management

(a) Definitions

(1) General 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. What constitutes a conference for the purpose of this guidance is a fact based determination based on an evaluation of the criteria established in these definitions.

(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. Indicia 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 paragraph1 above. Even where an event is considered exempt from 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, including 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).

(b) The contractor shall ensure that contractor-sponsored conferences reflect the DOE/NNSA's commitment to fiscal responsibility, appropriate stewardship of taxpayer funds and support the mission of DOE/NNSA 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.

(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 a 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 its 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 contactor 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)
(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 provide 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/NNSA. This process must at a minimum:

(1) Track all conference expenses.

(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 a contractor does so, its expenditures for the conference may be deemed unallowable.

H.46 Management and Operating Contractor (M&O) Subcontract Reporting (Sep 2015)

(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 cost.

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

"Transaction" means any awarded contract, agreement, order, or modification, etc. (other than one involving an employer-employee relationship) entered into by a DOE M&O prime contractor calling for supplies and services (including construction) required solely for performance of the prime contract.

(b) Limited Interim Reporting.

(1) The Contractor shall report no less than the twenty highest dollar value first-tier small business subcontract transactions under the contract by December 1 for the previous fiscal year until the Contractor business systems can report the required data as set forth in paragraph (c) below. Classified subcontracts shall be excluded from the reporting requirement and shall not be counted towards the total number of transactions of the reporting requirement.

(2) Transactions with a corporation, company, or subdivision that is an affiliate of the Contractor are not included in these reports.

(3) The Contractor shall provide the data on first-tier small business subcontract transactions under the contracts, as described in the *MOSRC Guide* via the Microsoft Excel spreadsheet co-located at https://max.gov in the MOSRC Collaboration Center. The spreadsheet will be submitted to HQProcurementSystems@hq.doe.gov.

(c) *Full Reporting.* The Contractor shall update their business systems and processes to collect and report data to MOSRC in compliance with the MOSRC Guide. The Contractor shall report data in MOSRC for FY17 (and each year thereafter) first-tier small business subcontracting transactions under the contract. Classified subcontracts shall be excluded from the reporting requirements. All Contractor systems shall be updated in order to provide the first FY17 report in November 2016 for October 2016 transactions.

(d) *Pilot M&Os.* Oak Ridge National Laboratory, the National Security Campus at the Kansas City Plant, and the National Renewable Energy

Laboratory shall have their business systems updated in order to provide the first FY 16 report in April 2016 for March 2016 transactions.