

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		1. CONTRACT ID CODE	PAGE OF PAGES 1 3
2. AMENDMENT/MODIFICATION NO. 116	3. EFFECTIVE DATE See Block 16C	4. REQUISITION/PURCHASE REQ. NO. 10EE001010	5. PROJECT NO. (If applicable)
6. ISSUED BY Golden Field Office U.S. Department of Energy Golden Field Office 1617 Cole Blvd. Golden CO 80401-3393	CODE 03601	7. ADMINISTERED BY (If other than Item 6) Golden Field Office U.S. Department of Energy Golden Field Office 1617 Cole Blvd. Golden CO 80401-3393	CODE 03601
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) ALLIANCE FOR SUSTAINABLE ENERGY, LLC Attn: JAMES L. SPIGARELLI 1617 COLE BLVD GOLDEN CO 804013393		(x) 9A. AMENDMENT OF SOLICITATION NO.	9B. DATED (SEE ITEM 11)
CODE 805948051 FACILITY CODE		X 10A. MODIFICATION OF CONTRACT/ORDER NO. DE-AC36-08GO28308	10B. DATED (SEE ITEM 11) 07/29/2008

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers is extended, is not extended.
 Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

See Schedule

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
X	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: Clause I.149 970.5243-1 Changes (Dec 2000)
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor is not, is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

DUNS Number: 805948051
 Subj to Retent: N
 LIST OF CHANGES:
 Total Amount for this Modification: \$0.00
 New Total Amount for this Version: \$0.00
 New Total Amount for this Award: \$946,236,593.71
 CHANGES FOR LINE ITEM NUMBER: 10000

NEW DELIVERY LOCATION RECORD:

Quantity: 0
 Amount: \$0.00
 Continued ...

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print) <i>D. S. GLOVER</i>	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print) Jean M. Siekerka
15B. CONTRACTOR/OFFICER <i>[Signature]</i> (Signature of person authorized to sign)	15C. DATE SIGNED 11/23/09
16B. UNITED STATES OF AMERICA <i>[Signature]</i> (Signature of Contracting Officer)	16C. DATE SIGNED 11/19/2009

CONTINUATION SHEET

REFERENCE NO. OF DOCUMENT BEING CONTINUED
DE-AC36-08GO28308/116

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NAME OF OFFEROR OR CONTRACTOR
ALLIANCE FOR SUSTAINABLE ENERGY, LLC

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)
	<p>Days after award: Unassigned</p> <p>Shipping Address: Golden Field Office U.S. Department of Energy Golden Field Office 1617 Cole Blvd. Golden CO 80401-3393</p> <p>Mark For Address: Golden Field Office U.S. Department of Energy Golden Field Office 1617 Cole Blvd. Golden CO 80401-3393</p> <p>NEW ACCOUNTING CODE ADDED: Account code: NREL OPERATING (EE) Fund 05450 Appr Year 2010 Allottee 31 Reporting Entity 200003 Quantity: 0 Amount: \$0.00 Percent: 0 Subject To Funding: N Payment Address: OR for Golden U.S. Department of Energy Oak Ridge Financial Service Center P.O. Box 4517 Oak Ridge TN 37831</p> <p>1. Section B.3, Transition Cost, Estimated Costs and Maximum Available Fee is revised, 2. The FY 2010 Commercialization Plan dated September 1,2009 is hereby incorporated as Attachment O of the Contract, 3. Clause H.36 Use of Force by Protective Force Personnel is added, 4. Clause H.37 Privately Funded Technology Transfer is added, 5. Section J, Attachment F Operating and Administrative Requirements (List B) has been revised for administrative corrections, and 6. All other terms and conditions of the contract remain unchanged. Delivery Location Code: 03601 Golden Field Office U.S. Department of Energy Continued ...</p>				

CONTINUATION SHEET	REFERENCE NO. OF DOCUMENT BEING CONTINUED	PAGE	OF
	DE-AC36-08GO28308/116	3	3

NAME OF OFFEROR OR CONTRACTOR
 ALLIANCE FOR SUSTAINABLE ENERGY, LLC

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)
10000	Golden Field Office 1617 Cole Blvd. Golden CO 80401-3393 Mark For: Golden Field Office U.S. Department of Energy Golden Field Office 1617 Cole Blvd. Golden CO 80401-3393 FOB: Destination Period of Performance: 07/29/2008 to 09/30/2013 Change Item 10000 to read as follows (amount shown is the total amount): Administrative Actions Obligated Amount: \$0.00 Delivery: 09/30/2013 Amount: \$0.00 Accounting Info: NREL OPERATING (EE) Fund: 05450 Appr Year: 2009 Allottee: 31 Report Entity: 200003 Object Class: 25400 Program: 1004171 Project: 0000000 WFO: 0000000 Local Use: 0000000 Funded: \$0.00 Amount: \$0.00 Accounting Info: NREL OPERATING (EE) Fund: 05450 Appr Year: 2010 Allottee: 31 Report Entity: 200003 Object Class: 25400 Program: 1004171 Project: 0000000 WFO: 0000000 Local Use: 0000000 Funded: \$0.00				0.00

Contract: DE-AC36-08GO28308

Modification 116

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This Modification incorporates the following significant changes to contract DE-AC36-08GO28308:

A. Section B.3, Transition Cost, Estimated Costs and Maximum Available Fee

is deleted and replaced with the following:

B.3 Transition Cost, Estimated Costs and Maximum Available Fee

(a) Transition Activities

The Total Estimated Cost for the Transition Term of the contract is:

<u>Transition Term of the Contract</u>	<u>Total Estimated Cost</u>
July 29, 2008 – September 30, 2008	\$1,500,044

(b) This is a performance-based cost plus award fee contract. There is no base fee for this contract.

(c) Performance Fees and Other Incentives

(1) Transition activities shall be performed in accordance with Clause H.24, *Activities During Contract Transition*, on a cost-reimbursement basis. No fee shall be paid for these activities.

(2) In implementation of Clause I.114, *Total Available Fee: Base Fee Amount and Performance Fee Amount*, the Parties have agreed that the maximum available award fee that may be earned by the Contractor in accordance with the provisions of Section J, Attachment J, *Performance Evaluation and Measurement Plan*, for the performance of the work under this contract commencing October 1, 2008 are as follows:

Total Available Fee – Research and Development		
Period	Fee Base	Total Available Fee
October 1, 2008 through September 30, 2009	\$312,000,000	\$6,160,000
October 1, 2009 through September 30, 2010	\$312,000,000	\$6,160,000
October 1, 2010 through September 30, 2011	\$312,000,000	\$6,160,000
October 1, 2011 through September 30, 2012	\$312,000,000	\$6,160,000
October 1, 2012 through September 30, 2013	\$312,000,000	\$6,160,000

Total Available Fee – Construction Management Contracts Base Period		
Period	Fee Base	Total Available Fee
October 1, 2008 through September 30, 2009	\$41,587,000	\$1,012,055
October 1, 2009 through September 30, 2010	\$127,444,000	\$2,270,140
October 1, 2010 through September 30, 2011	\$157,424,000	\$2,633,224
October 1, 2011 through September 30, 2012	\$19,985,000	\$ 581,184
October 1, 2012 through September 30, 2013	\$14,792,000	\$ 465,920

Total Available Fee – Research and Development Option Period		
Period	Fee Base	Total Available Fee
October 1, 2013 through September 30, 2014	\$220,000,000	\$5,420,000
October 1, 2014 through September 30, 2015	\$220,000,000	\$5,420,000

October 1, 2015 through September 30, 2016	\$220,000,000	\$5,420,000
October 1, 2016 through September 30, 2017	\$220,000,000	\$5,420,000
October 1, 2017 through September 30, 2018	\$220,000,000	\$5,420,000

(3) Available fee will not be adjusted at the end of a performance period to reconcile actual costs to initially estimated costs. Fee is subject to adjustment under the provisions of Clause I.149, *Changes*, other contract provisions, or DEAR 970-1504-1-3 (c) (5). Notwithstanding the foregoing, the construction management fee(s) set forth in subparagraph (c)(2) will be adjusted for additional construction projects when they are authorized. The maximum possible adjustment to fee will be developed using the construction management fee schedule set forth in DEAR 915.404-4-71-5(f). The maximum possible fee will be calculated by adding the total estimated cost of the construction project, spread over those fiscal years for which costs is expected to be incurred, to the fee base previously established for construction management contracts for the years affected. Actual construction management fee available will be established through negotiation of the parties.

- B. The FY2010 Commercialization Plan dated September 1 2009 is hereby incorporated as Attachment O of the Contract.
- C. Clause H.36 Use of Force by Protective Force Personnel is added as follows:

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.

D. Clause H.37 Privately Funded Technology Transfer is added as follows:

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) In 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

(2) 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. Upon termination or expiration of the Contract, such software will be treated as if such software were a Subject Invention

elected under the Contractor's PFTT program. Disposition of title to such 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. 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 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, 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.

- D. Administrative corrections have been made to Section J, Attachment F OPERATING AND ADMINISTRATIVE REQUIREMENTS (LIST B) and are reflected below.

SECTION J – LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS

**OPERATING AND ADMINISTRATIVE REQUIREMENTS (LIST B)
Prime Contract No. DE-AC36-08GO28308**

The operating and administrative requirements, including the Contractor Requirements Documents of DOE directives listed below are applicable in whole or in part in accordance with clauses H-18 Application of DOE Contractor Requirements Documents and 970.5204-2, Laws, Regulations, and DOE Directives (DEC 2000). The concurrence analysis documenting applicability for each requirement below is maintained in the DOE Master File as well as any assurances as required by Clause H-18, are made a part of this Contract by reference and are managed through a formal change control process.

Operating and Administrative Requirements	Applicability
DOE O 110.3A CRD Conference Management Approved: 01/25/07	CRD applicable in whole
DOE O 130.1 CRD Budget Formulation Approved: 09/29/95	CRD applicable in whole
DOE O 142.3 CRD Unclassified Foreign Visits and Assignments Program Approved: 06/18/04	CRD applicable in whole
DOE O 151.1C CRD Comprehensive Emergency Management System Approved: 11/02/05	CRD applicable in whole
DOE O 200.1A Information Technology Management Approved: 12/23/2008	CRD applicable in whole
DOE N 203.1 CRD Software Quality Assurance Approved: 10/02/00	CRD applicable in whole
DOE O 205.1A CRD Department of Energy Cyber Security Management Approved: 12/04/06	CRD applicable in whole
DOE M 205.1-6 CRD Media Sanitization Manual Approved: 12/23/2008	CRD applicable in whole
DOE N 206.3 CRD Personal Identity Verification Approved: 11/22/05 (DOE N 251.67 extends DOE N 206.3 until 03/22/07)	CRD applicable in part

Operating and Administrative Requirements	Applicability
DOE N 206.5 CRD Response and Notification Procedures for Data Breaches Involving Personally Identifiable Information Approved: 10/09/07	CRD applicable in whole
DOE O 210.2 CRD Corporate Operating Experience Program Approved: 06/12/06	CRD applicable in whole
DOE O 221.1A CRD Reporting Fraud, Waste, and Abuse to the Office of Inspector General Approved: 04/19/08	CRD applicable in whole
DOE O 221.2 CRD Cooperation with the Office of Inspector General Approved: 03/22/01	CRD applicable in whole
DOE O 225.1A CRD Accident Investigations Approved: 11/26/97	CRD applicable in whole
DOE O 226.1A CRD Implementation of Department of Energy Oversight Policy Approved: 07/31/07	CRD applicable in whole
DOE M 231.1-1A CRD Change 2 Environment, Safety and Health Reporting Manual Approved: 03/19/04 Change 2: 06/12/07	CRD applicable in whole
DOE M 231.1-2 CRD Occurrence Reporting and Processing of Operations Information Approved: 08/19/03	CRD applicable in whole
DOE O 241.1A CRD Scientific and Technical Information Management Approved: 04/09/01	CRD applicable in whole
DOE O 243.1 CRD Records Management Program Approved: 02/03/06	CRD applicable in whole
DOE O 243.2 CRD Vital Records Approved: 02/02/06	CRD applicable in whole
DOE O 251.1B CRD Departmental Directives Program Approved: 08/16/06	CRD Applicable in whole
DOE O 350.1 CRD(s) Change 1 Contractor Human Resource Management Programs Approved: 09/30/96 Change 1: 05/08/98	CRD applicable in whole

Operating and Administrative Requirements	Applicability
DOE O 350.2A CRD Use of Management and Operating or Other Facility Management Contractor Employees for Services to DOE in the Washington, D.C., Area Approved: 10/29/03	CRD applicable in whole
DOE O 412.1 CRD Work Authorization System Approved: 04/20/99	CRD applicable in whole
DOE O 413.1A CRD Management Control Program Approved: 04/18/02	CRD applicable in whole
DOE O 413.2B CRD Laboratory Directed Research and Development Approved: 04/19/06	CRD applicable in whole
DOE O 413.3A CRD Program and Project Management for the Acquisition of Capital Assets Approved: 07/28/06	CRD applicable in whole
DOE O 414.1C CRD Quality Assurance Approved: 06/17/05	CRD applicable in part
DOE O 430.1B CRD Real Property Asset Management Approved: 09/24/03	CRD applicable in whole
DOE O 430.2A CRD Departmental Energy and Utilities Management Approved: 04/15/02	CRD applicable in whole
DOE O 442.1A CRD Employee Concerns Program Approved: 06/06/01	CRD applicable in whole
DOE O 450.1A CRD Environmental Protection Program Approved: 6/04/08	CRD applicable in whole
DOE M 450.4-1 CRD Integrated Safety Management System Manual Approved: 11/01/06	CRD applicable in whole
DOE N 456.1 A CRD Safe Handling of Unbound Engineered Nanoparticles Approved: 1/05/09	CRD applicable in whole part
DOE O 470.2B CRD Independent Oversight and Performance Assurance Program Approved: 10/31/02	CRD applicable in whole
DOE M 470.4-1 CRD Change 1 Safeguards and Security Program Planning and Management Approved: 08/26/05 Change 1: 03/07/06	CRD applicable in part

Operating and Administrative Requirements	Applicability
DOE M 470.4-2 CRD Change 1 Physical Protection Approved: 08/26/05 Change 1: 03/07/06	CRD applicable in part
DOE M 470.4-3 CRD Change 1 Protective Force Approved: 08/26/05 Change 1: 03/07/06	CRD applicable in part
DOE M 470.4-4 CRD Information Security Approved: 08/26/05	CRD applicable in part
DOE M 470.4-5 CRD Personnel Security Approved: 08/26/05	CRD applicable in part
DOE O 471.3 CRD Identifying and Protecting Official Use Only Information Approved: 04/09/03	CRD applicable in whole
DOE M 471.3-1 CRD Manual for Identifying and Protecting Official Use Only Information Approved: 04/09/03	CRD applicable in whole
DOE O 475.1 CRD Counterintelligence Program Approved: 12/10/04	CRD applicable in whole
DOE O 482.1 CRD DOE Facilities Technology Partnering Programs Approved: 01/12/01	CRD applicable in whole
DOE O 483.1 CRD DOE Cooperative Research and Development Agreements Approved: 01/12/01	CRD applicable in whole
DOE O 484.1 CRD Reimbursable Work for the Department of Homeland Security Approved: 08/17/06	CRD applicable in whole
DOE O 522.1 CRD Pricing of Departmental Materials and Services Approved: 11/03/04	CRD applicable in whole
DOE O 534.1B CRD Accounting Approved: 01/06/03	CRD applicable in whole
DOE O 551.1B CRD Official Foreign Travel Approved: 08/19/03	CRD applicable in whole
DOE O 580.1 CRD Department of Energy Personal Property Management Program Approved: 12/07/05	CRD applicable in whole

F. All other terms and conditions of the contract remain the same.