

**TERMS AND CONDITIONS**  
**FERMILAB RESEARCH AND DEVELOPMENT SUBCONTRACT**  
**for educational institutions**  
**(FIXED-PRICE)**

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## **1. DEFINITIONS**

- 1.1** As used throughout this subcontract, the following terms shall have the meanings set forth below:
- (a) The term "Government" shall mean the Government of the United States acting through the United States Department of Energy or its successor.
  - (b) The term "Department" shall mean the United States Department of Energy or any duly authorized representative thereof.
  - (c) The term "Fermilab" shall mean Universities Research Association, Inc. (URA), a not-for-profit corporation organized under the laws of the District of Columbia, or any duly authorized representative thereof.
  - (d) Except as otherwise provided in this subcontract, the term "sub-subcontracts" includes purchase orders under this subcontract.
  - (e) "Manager" shall mean the person in charge of business services for Fermilab or his written designee.
- 1.2** As used in any FL that is a part of this subcontract, the term "outlying areas" shall mean –
- (a) the Commonwealths of Puerto Rico and the Northern Mariana Islands;
  - (b) the Territories of American Samoa, Guam, and the U.S. Virgin Islands; and
  - (c) the minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

## **2. COVENANT AGAINST CONTINGENT FEES**

**2.1** The Subcontractor warrants that no person or agency has been employed or retained to solicit or obtain this subcontract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty Fermilab shall have the right to annul this subcontract without liability or, in its discretion to deduct from the subcontract price or consideration, or otherwise recover, the full amount of the contingent fee.

**2.2** "Bona fide agency," as used in this clause, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

"Bona fide employer," as used in this clause, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract through improper influence.

"Contingent fee," as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

"Improper influence," as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

For purposes of this clause, the term "Government" includes "Fermilab."

## **3. PAYMENTS**

**3.1** Once each month (or at more frequent intervals, if approved by Fermilab), the Subcontractor may submit to the Manager invoices or vouchers in such form and detail and supported by such documents as provided below. Within 30 days after receipt of each invoice or voucher Fermilab shall, subject to the provisions of this subcontract, make payment thereon as approved by Fermilab.

**3.2** At any time prior to final settlement under this subcontract, representatives of Fermilab or its designees will have access to and the right to audit Subcontractor's invoices, vouchers, statement of cost, books and records to determine the correctness and propriety of payments made under this subcontract. Each payment theretofore made shall be subject to adjustment for amounts included in the related invoice or voucher on the basis of such audit. Any payment may be reduced for overpayments, or increased for under payments, on preceding invoices or vouchers.

**3.3** The Subcontractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Subcontractor or any assignee under this subcontract shall be paid by the Subcontractor to Fermilab, to the extent that they are properly allocable to costs for which the Subcontractor has been reimbursed by Fermilab under this subcontract. Reasonable expenses incurred by the Subcontractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by Fermilab.

**3.4 CLAIMS FOR PAYMENTS.** Claims for payments shall be accompanied by such supporting documents and justification as Fermilab shall require.

**3.5 INVOICING.** The Subcontractor shall submit invoices bearing this subcontract number, in duplicate, to Manager, Fermilab, P.O. Box 500, Batavia, Illinois 60510.

## **4. CONVICT LABOR**

**4.1** Except as provided in paragraph 4.2 of this clause, the Subcontractor shall not employ in the performance of this subcontract any person undergoing a sentence of imprisonment imposed by any court of a State, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, or the U.S. Virgin Islands.

**4.2** The Subcontractor is not prohibited from employing persons –

- (a) On parole or probation to work at paid employment during the term of their sentence;
- (b) Who have been pardoned or who have served their terms; or
- (c) Confined for violation of the laws of any of the States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, or the U.S. Virgin Islands who are authorized to work at paid employment in the community under the laws of such jurisdiction, if –
  - (1) The worker is paid or is in an approved work training program on a voluntary basis;
  - (2) Representatives of local union central bodies or similar labor union organizations have been consulted;
  - (3) Such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services;
  - (4) The rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality in which the work is being performed; and
  - (5) The Attorney General of the United States has certified that the work-release laws or regulations of the jurisdiction involved are in conformity with the requirements of Executive Order 11755, as amended by Executive Orders 12608 and 12943.

## **5. FEDERAL, STATE AND LOCAL TAXES**

**5.1** As used in this clause:

- (a) "Contract date" means the date set for bid opening or, if this is a negotiated subcontract or a modification, the effective date of this subcontract or modification.
- (b) "All applicable Federal, State, and local taxes and duties" means all taxes and duties, in effect on the subcontract date, that the taxing authority is imposing and collecting on the transactions or property covered by this subcontract.
- (c) "After-imposed Federal tax" means any new or increased Federal excise tax or duty, or tax that was exempted or excluded on the subcontract date but whose exemption was later revoked or reduced during the subcontract period, on the transactions or property covered by this subcontract that the Subcontractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the subcontract date. It does not include social security tax or other employment taxes.
- (d) "After-relieved Federal tax" means any amount of Federal excise tax or duty, except social security or other employment taxes, that would otherwise have been payable on the transactions or property covered by this subcontract, but which the Subcontractor is not required to pay or bear, or for which the Subcontractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the subcontract date.
- (e) "Local taxes" includes taxes imposed by a possession or territory of the United States, Puerto Rico, or the Northern Mariana Islands, if the subcontract is performed wholly or partly in any of those areas.

**5.2** The subcontract price includes all applicable Federal, State, and local taxes and duties.

**5.3** The subcontract price shall be increased by the amount of any after-imposed Federal tax, provided the Subcontractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the subcontract price, as a contingency reserve or otherwise.

**5.4** The subcontract price shall be decreased by the amount of any after-relieved Federal tax.

**5.5** The subcontract price shall be decreased by the amount of any Federal excise tax or duty, except social security or other employment taxes, that the Subcontractor is required to pay or bear, or does not obtain a refund of, through the Subcontractor's fault, negligence, or failure to follow instructions of Fermilab.

**5.6** No adjustment shall be made in the subcontract price under this clause unless the amount of the adjustment exceeds \$250.

**5.7** The Subcontractor shall promptly notify Fermilab of all matters relating to any Federal excise tax or duty that reasonably may be expected to result in either an increase or decrease in the subcontract price and shall take appropriate action as Fermilab directs.

**5.8** Fermilab shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Subcontractor requests such evidence and a reasonable basis exists to sustain the exemption.

## **6. EQUAL OPPORTUNITY FOR SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA, AND OTHER ELIGIBLE VETERANS**

### **6.1 DEFINITIONS - AS USED IN THIS CLAUSE:**

"All employment openings," means all positions except executive and top management, those positions that will be filled from within the Subcontractor's organization, and positions lasting 3 days or less. This term includes full-time employment, temporary employment of more than 3 days duration, and part-time employment.

"Executive and top management," means any employee—

- (1) Whose primary duty consists of the management of the enterprise in which the individual is employed or of a customarily recognized department or subdivision thereof;
- (2) Who customarily and regularly directs the work of two or more other employees;
- (3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;
- (4) Who customarily and regularly exercises discretionary powers; and
- (5) Who does not devote more than 20 percent or, in the case of an employee of a retail or service establishment, who does not devote more than 40 percent of total hours of work in the work week to activities that are not directly and closely related to the performance of the work described in paragraphs (1) through (4) of this definition. This paragraph (5) does not apply in the case of an employee who is in sole charge of an establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which the individual is employed.

"Other eligible veteran," means any other veteran who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.

"Positions that will be filled from within the Subcontractor's organization," means employment openings for which the Subcontractor will give no consideration to persons outside the Subcontractor's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings the Subcontractor proposes to fill from regularly established "recall" lists. The exception does not apply to a particular opening once an employer decides to consider applicants outside of its organization.

"Qualified special disabled veteran," means a special disabled veteran who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such veteran holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

"Special disabled veteran," means—

- (1) A veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Department of Veterans Affairs for a disability—
  - (i) Rated at 30 percent or more; or
  - (ii) Rated at 10 or 20 percent in the case of a veteran who has been determined under 38 U.S.C. 3106 to have a serious employment handicap (i.e., a significant impairment of the veteran's ability to prepare for, obtain, or retain employment consistent with the veteran's abilities, aptitudes, and interests); or
- (2) A person who was discharged or released from active duty because of a service-connected disability.

"Veteran of the Vietnam era," means a person who—

- (1) Served on active duty for a period of more than 180 days and was discharged or released from active duty with other than a dishonorable discharge, if any part of such active duty occurred –
  - (i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or
  - (ii) Between August 5, 1964, and May 7, 1975, in all other cases; or

- (2) Was discharged or released from active duty for a service-connected disability if any part of the active duty was performed—
  - (i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or
  - (ii) Between August 5, 1964, and May 7, 1975, in all other cases.

## **6.2 GENERAL.**

- (a) The Subcontractor shall not discriminate against the individual because the individual is a special disabled veteran, a veteran of the Vietnam era, or other eligible veteran, regarding any position for which the employee or applicant for employment is qualified. The Subcontractor shall take affirmative action to employ, advance in employment, and otherwise treat qualified special disabled veterans, veterans of the Vietnam era, and other eligible veterans without discrimination based upon their disability or veterans' status in all employment practices such as—
  - (i) Recruitment, advertising, and job application procedures;
  - (ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;
  - (iii) Rate of pay or any other form of compensation and changes in compensation;
  - (iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
  - (v) Leaves of absence, sick leave, or any other leave;
  - (vi) Fringe benefits available by virtue of employment, whether or not administered by the Subcontractor;
  - (vii) Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
  - (viii) Activities sponsored by the Subcontractor including social or recreational programs; and
  - (ix) Any other term, condition, or privilege of employment.
- (b) The Subcontractor shall comply with the rules, regulations, and relevant orders of the Secretary of Labor issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (the Act), as amended (38 U.S.C. 4211 and 4212).

## **6.3 LISTING OPENINGS.**

- (a) The Subcontractor shall immediately list all employment openings that exist at the time of the execution of this subcontract and those which occur during the performance of this subcontract, including those not generated by this subcontract, and including those occurring at an establishment of the Subcontractor other than the one where the subcontract is being performed, but excluding those of independently operated corporate affiliates, at an appropriate local public employment service office of the State wherein the opening occurs. Listing employment openings with the U.S. Department of Labor's America's Job Bank shall satisfy the requirement to list jobs with the local employment service office.
- (b) The Subcontractor shall make the listing of employment openings with the local employment service office at least concurrently with using any other recruitment source or effort and shall involve the normal obligations of placing a bona fide job order, including accepting referrals of veterans and nonveterans. This listing of employment openings does not require hiring any particular job applicant or hiring from any particular group of job applicants and is not intended to relieve the Subcontractor from any requirements of Executive orders or regulations concerning nondiscrimination in employment.
- (c) Whenever the Subcontractor becomes contractually bound to the listing terms of this clause, it shall advise the State public employment agency in each State where it has establishments of the name and location of each hiring location in the State. As long as the Subcontractor is contractually bound to these terms and has so advised the State agency, it need not advise the State agency of subsequent subcontracts. The Subcontractor may advise the State agency when it is no longer bound by this subcontract clause.

**6.4 APPLICABILITY.** This clause does not apply to the listing of employment openings that occur and are filled outside the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands of the United States, and Wake Island.

## **6.5 POSTINGS.**

- (a) The Subcontractor shall post employment notices in conspicuous places that are available to employees and applicants for employment.
- (b) The employment notices shall –
  - (i) State the rights of applicants and employees as well as the Subcontractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are special disabled veterans, veterans of the Vietnam era, and other eligible veterans; and

- (ii) Be in a form prescribed by the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor (Deputy Assistant Secretary of Labor), and provided by or through Fermilab.
- (c) The Subcontractor shall ensure that applicants or employees who are special disabled veterans are informed of the contents of the notice (e.g., the Subcontractor may have the notice read to a visually disabled veteran, or may lower the posted notice so that it can be read by a person in a wheelchair).
- (d) The Subcontractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement, or other subcontract understanding, that the Subcontractor is bound by the terms of the Act and is committed to take affirmative action to employ, and advance in employment, qualified special disabled veterans, veterans of the Vietnam era, and other eligible veterans.

**6.6 NONCOMPLIANCE.** If the Subcontractor does not comply with the requirements of this clause, Fermilab or the Government may take appropriate actions under the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

**6.7 SUB-SUBCONTRACTS.** The Subcontractor shall insert the terms of this clause in all sub-subcontracts or purchase orders of \$25,000 or more unless exempt by rules, regulations, or orders of the Secretary of Labor. The Subcontractor shall act as specified by the Deputy Assistant Secretary of Labor to enforce the terms, including action for noncompliance.

## **7. NOTICE OF LABOR DISPUTES**

**7.1** If the Subcontractor has knowledge that any actual or potential labor dispute is delaying or threatening to delay the timely performance of this subcontract, the Subcontractor shall immediately give notice, including all relevant information, to Fermilab.

**7.2** The Subcontractor agrees to insert the substance of this clause, including this section 7.2, in any sub-subcontract to which a labor dispute may delay the timely performance of this subcontract; except that each sub-subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the sub-subcontractor shall immediately notify the next higher tier sub-subcontractor or the Subcontractor, as the case may be, of all relevant information concerning the dispute.

## **8. UTILIZATION OF SMALL BUSINESS CONCERNS**

**8.1** It is the policy of the United States, the Department, and Fermilab that small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns shall have the maximum practicable opportunity to participate in performing subcontracts let by Fermilab, including subcontracts and sub-subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals and small business concerns owned and controlled by women.

**8.2** The Subcontractor hereby agrees to carry out this policy in the awarding of sub-subcontracts to the fullest extent consistent with efficient subcontract performance. The Subcontractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the Department as may be necessary to determine the extent of the Subcontractor's compliance with this clause.

### **8.3 DEFINITIONS. AS USED IN THIS SUBCONTRACT:**

“HUBZone small business concern” means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

“Service-disabled veteran-owned small business concern”—

- (1) Means a small business concern –
  - (i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and
  - (ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.
- (2) Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

“Small business concern” means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

“Small disadvantaged business concern” means a small business concern that represents, as part of its offer that –

- (1) It has received certification as a small disadvantaged business concern consistent with 13 CFR part 124, Subpart B;
- (2) No material change in disadvantaged ownership and control has occurred since its certification;
- (3) Where the concern is owned by one or more individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and
- (4) It is identified, on the date of its representation, as a certified small disadvantaged business in the database maintained by the Small Business Administration (PRO-Net).

“Veteran-owned small business concern” means a small business concern –

- (1) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and
- (2) The management and daily business operations of which are controlled by one or more veterans.

“Women-owned small business concern” means a small business concern –

- (1) That is at least 51 percent owned by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and
- (2) Whose management and daily business operations are controlled by one or more women.

**8.4** Subcontractors acting in good faith may rely on written representations by their sub-subcontractors regarding their status as a small business concern, a veteran-owned small business concern, a service-disabled veteran-owned small business concern, a HUBZone small business concern, a small disadvantaged business concern, or a women-owned small business concern.

## **9. ASSIGNMENT**

Neither this subcontract nor any interest therein nor claim thereunder shall be assigned or transferred by the Subcontractor except as express authorized in writing by Fermilab. Fermilab may assign the whole or any part of this subcontract to the Government or its designee and in such event this subcontract shall continue in full force and effect.

## **10. AUDIT AND RECORDS**

**10.1** This clause applies if this subcontract exceeds \$100,000.

**10.2** As used in this clause, "records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

**10.3 EXAMINATION OF COSTS.** If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable subcontract, or any combination of these, the Subcontractor shall maintain and Fermilab, or an authorized representative of Fermilab, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this subcontract. This right of examination shall include inspection at all reasonable times of the Subcontractor's plants, or parts of them, engaged in performing the subcontract.

**10.4 COST OR PRICING DATA.** If the Subcontractor has been required to submit cost or pricing data in connection with any pricing action relating to this subcontract, Fermilab, or an authorized representative of Fermilab, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Subcontractor's records, including computations and projections, related to —

- (1) The proposal for the subcontract, sub-subcontract, or modification;
- (2) The discussions conducted on the proposal(s), including those related to negotiating;
- (3) Pricing of the subcontract, sub-subcontract, or modification; or
- (4) Performance of the subcontract, sub-subcontract or modification.

**10.5 COMPTROLLER GENERAL** – (a) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Subcontractor's directly pertinent records involving transactions related to this subcontract or a sub-subcontract hereunder. (b) This paragraph may not be

construed to require the Subcontractor or sub-subcontractor to create or maintain any record that the Subcontractor or sub-subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

**10.6 REPORTS.** If the Subcontractor is required to furnish cost, funding, or performance reports, Fermilab or an authorized representative of Fermilab shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating (a) the effectiveness of the Subcontractor's policies and procedure to produce data compatible with the objective of these reports and (b) the data reported.

**10.7 AVAILABILITY.** The Subcontractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraph 10.2 through 10.6 of this clause, for examination, audit, or reproduction, until 3 years after final payment under this subcontract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this subcontract. In addition---

- (a) If this subcontract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and
- (b) Records relating to litigation or the settlement of claims arising under or relating to this subcontract shall be made available until such litigation or claims are finally resolved.

**10.8** The Subcontractor shall insert a clause containing all the terms of this clause, including this paragraph 10.8, in all sub-subcontracts under this subcontract that exceed \$100,000, and ---

- (a) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;
- (b) For which cost or pricing data are required; or
- (c) That require the sub-subcontractor to furnish reports as discussed in paragraph 10.6 of this clause.

The clause may be altered only as necessary to identify properly the contracting parties.

## **11. EQUAL OPPORTUNITY**

**11.1** If, during any 12-month period (including the 12 months preceding the award of the subcontract), the Subcontractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of \$10,000, the Subcontractor shall comply with subparagraphs 11.2(a) through (k) below. Upon request, the Subcontractor shall provide information necessary to determine the applicability of this clause.

**11.2** During the performance of this subcontract, the Subcontractor agrees as follows:

- (a) The Subcontractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. However, it shall not be a violation of this clause for the Subcontractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation, in connection with employment opportunities on or near an Indian reservation, as permitted by 41 CFR 60-1.5.
- (b) The Subcontractor shall take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. This shall include, but not be limited to:
  - (i) Employment;
  - (ii) Upgrading;
  - (iii) Demotion;
  - (iv) Transfer;
  - (v) Recruitment or recruitment advertising;
  - (vi) Layoff or termination;
  - (vii) Rates of pay or other forms of compensation; and
  - (viii) Selection for training, including apprenticeship.
- (c) The Subcontractor shall post in conspicuous places available to employees and applicants for employment notices to be provided by Fermilab that explain this clause.
- (d) The Subcontractor shall, in all solicitations or advertisement for employees placed by or on behalf of the Subcontractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.
- (e) The Subcontractor shall send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, the notice, to be provided by Fermilab, advising the labor union or workers representative of the Subcontractor's commitments under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.
- (f) The Subcontractor shall comply with Executive Order No. 11246 as amended, and the rules, regulations, and orders of the Secretary of Labor.

- (g) The Subcontractor shall furnish to Fermilab all information required by Executive Order No. 11246, as amended, and by the rules, regulations, and orders of the Secretary of Labor. Standard Form 100 (EEO-1), or any successor form, as prescribed in 41 CFR part 60-1. Unless the Subcontractor has filed within the 12 months preceding the date of subcontract award, the Subcontractor shall, within 30 days after subcontract award, apply to either the regional Office of Federal Contract Compliance Programs (OFCCP) or the local office of the Equal Employment Opportunity Commission for the necessary forms.
- (h) The Subcontractor shall permit access to its premises, during normal business hours, by Fermilab, the Department or the OFCCP for the purpose of conducting on-site compliance evaluations and complaint investigations. The Subcontractor shall permit Fermilab or the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.
- (i) If the OFCCP determines that the Subcontractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this subcontract may be cancelled, terminated, or suspended, in whole or in part, and the Subcontractor may be declared ineligible for further Fermilab or Government contracts under the procedures authorized in Executive Order No. 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Subcontractor as provided in Executive Order No. 11246, as amended, the rules, regulations, or orders of the Secretary of Labor, or as otherwise provided by law.
- (j) The Subcontractor will include the provisions of paragraph 11.2(a) through (k) in every sub-subcontract or purchase order that is not exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order No. 11246, as amended, so that these terms and conditions will be binding upon each sub-subcontractor or vendor.
- (k) The Subcontractor shall take such action with respect to any sub-subcontract or purchase order as the Government through Fermilab may direct as a means of enforcing these terms and conditions including sanctions for noncompliance; Provided, that if the Subcontractor becomes involved in, or is threatened with litigation with a sub-subcontractor or vendor as a result of such direction, the Subcontractor may request the United States to enter into such litigation to protect the interests of the United States.

**11.3** Notwithstanding any other clause in this subcontract, disputes relative to this clause will be governed by the procedures in 41 C.F.R. 60-1.1.

## **12. APPLICABLE LAW**

To the extent that Federal law does not exist and state law could become applicable to this subcontract, the law of Illinois shall apply.

## **13. AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES**

### **13.1 GENERAL.**

- (a) Regarding any position for which the employee or applicant for employment is qualified, the Subcontractor shall not discriminate against any employee or applicant because of physical or mental disability. The Subcontractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified individuals with disabilities without discrimination based upon their physical or mental disability in all employment practices such as—
  - (i) Recruitment, advertising, and job application procedures;
  - (ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
  - (iii) Rates of pay or any other form of compensation and changes in compensation;
  - (iv) Job assignments, job classifications, organizational structures, position descriptions, line of progression, and seniority lists;
  - (v) Leaves of absence, sick leave, or any other leave;
  - (vi) Fringe benefits available by virtue of employment, whether or not administered by the Subcontractor;
  - (vii) Selection and financial support for training, including apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training.
  - (viii) Activities sponsored by the Subcontractor, including social or recreational programs; and
  - (ix) Any other term, condition, or privilege of employment.
- (b) The Subcontractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor (Secretary) issued under the Rehabilitation Act of 1973 (29 U.S.C. 793) (the Act), as amended.

### **13.2 POSTINGS.**

- (a) The Subcontractor agrees to post employment notices stating (1) the Subcontractor's obligation under the law to take affirmative action to employ and advance in employment qualified individuals with disabilities and (2) the rights of applicants and employees.
- (b) These notices shall be posted in conspicuous places that are available to employees and applicants for employment. The Subcontractor shall ensure that applicants and employees with disabilities are informed of the contents of the notice (e.g., the Subcontractor may have the notice read to visually disabled individual, or may lower the posted notice so that it may be read by a person in a wheelchair). The notices shall be in a form prescribed by the Deputy Assistant Secretary for Federal Contract Compliance of the U.S. Department of Labor (Deputy Assistant Secretary), and shall be provided by or through Fermilab.
- (c) The Subcontractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Subcontractor is bound by the terms of Section 503 of the Act and is committed to take affirmative action to employ, and advance in employment, qualified individuals with physical or mental disabilities.

**13.3 NONCOMPLIANCE.** If the Subcontractor does not comply with the requirements of this clause, appropriate actions may be taken under the rules, regulations, and relevant orders of the Secretary issued pursuant to the Act.

**13.4 SUB-SUBCONTRACTS.** The Subcontractor shall include the terms of this clause in every sub-subcontract or purchase order in excess of \$10,000 unless exempted by rules, regulations, or orders of the Secretary. The Subcontractor shall act as specified by the Deputy Assistant Secretary to enforce the terms, including action for noncompliance.

## **14. MODIFICATION PROPOSALS — PRICE BREAKDOWN**

**14.1** The Subcontractor, in connection with any proposal he makes for a subcontract modification, shall furnish a price breakdown, itemized as required by Fermilab. Unless otherwise directed, the breakdown shall be in sufficient detail to permit an analysis of all material, labor, equipment, sub-subcontract, and overhead costs, as well as profit, and shall cover all work involved in the modification, whether such work was deleted, added or changed. Any amount claimed for sub-subcontracts shall be supported by a similar price breakdown. In addition, if the proposal includes a time extension, a justification therefor shall also be furnished. The justification shall be furnished by the date specified by Fermilab.

**14.2** When costs are a factor in any determination of a subcontract price adjustment under any clause of this subcontract, such costs shall be in accordance with the contract cost principles and procedures in Subpart 31.3 of the Federal Acquisition Regulation (48 C.F.R. 31.3) in effect on the date of this subcontract.

## **15. SUB-SUBCONTRACTS FOR COMMERCIAL ITEMS**

### **15.1 DEFINITIONS. AS USED IN THIS CLAUSE:**

“Commercial item” has the meaning contained in the clause at Federal Acquisition Regulation (FAR) 52.202-1, Definitions.

“Sub-subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Subcontractor or sub-subcontractor at any tier.

**15.2** To the maximum extent practicable, the Subcontractor shall incorporate, and shall require its sub-subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under this subcontract.

**15.3** Except to the extent required elsewhere in this subcontract or where necessary to establish the reasonableness of prices under FAR Subpart 15, the Subcontractor is not required to include any provisions other than clauses 6, 11, and 13 of this subcontract in any sub-subcontract at any tier for commercial items or nondevelopmental items that would be incorporated as components of items to be supplied under this subcontract.

**15.4** The Subcontractor shall include the terms of this clause, including this paragraph 15.4, in all sub-subcontracts awarded under this subcontract.

## **16. EMPLOYMENT REPORTS ON SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA, AND OTHER ELIGIBLE VETERANS**

**16.1** Unless the Subcontractor is a State or local government agency, the Subcontractor shall report at least annually, as required by the Secretary of Labor, on –

- (a) The number of special disabled veterans, the number of veterans of the Vietnam era, and other eligible veterans in the workforce of the Subcontractor by job category and hiring location; and
- (b) The total number of new employees hired during the period covered by the report, and of the total, the number of special disabled veterans, the number of veterans of the Vietnam era, and the number of other eligible veterans; and
- (c) The maximum number and the minimum number of employees of the Subcontractor during the period covered by the report.

**16.2** The Subcontractor shall report the above items by completing the Form VETS-100, entitled "Federal Contractor Veterans Employment Report (VETS-100 Report)."

**16.3** The Subcontractor shall submit VETS-100 Reports no later than September 30 of each year beginning September 30, 1988.

**16.4** The employment activity report required by paragraph 16.1(b) of this clause shall reflect total hires during the most recent 12-month period as of the ending date selected for the employment profile report required by paragraph 16.1(a) of this clause. Subcontractors may select an ending date --

- (a) As of the end of any pay period between July 1 and August 31 of the year the report is due; or
- (b) As of December 31, if the Subcontractor has prior written approval from the Equal Employment Opportunity Commission to do so for purposes of submitting the Employer Information Report EEO-1 (Standard Form 100).

**16.5** The Subcontractor shall base the count of veterans reported according to paragraph 16.1 of this clause on voluntary disclosure. Each Subcontractor subject to the reporting requirements at 38 U.S.C. 4212 shall invite all special disabled veterans, veterans of the Vietnam era, and other eligible veterans who wish to benefit under the affirmative action program at 38 U.S.C. 4212 to identify themselves to the Subcontractor. The invitation shall state that --

- (a) The information is voluntarily provided;
- (b) The information will be kept confidential;
- (c) Disclosure or refusal to provide the information will not subject the applicant or employee to any adverse treatment; and
- (d) The information will be use only in accordance with the regulations promulgated under 38 U.S.C. 4212.

**16.6** The Subcontractor shall insert the terms of this clause in all sub-subcontracts or purchase orders of \$25,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor.

## **17. FERMILAB-FURNISHED PROPERTY**

### **17.1 FERMILAB PROPERTY.**

- (a) Fermilab shall deliver to the Subcontractor, for use in connection with and under the terms of this subcontract, the Fermilab-furnished property described elsewhere in the subcontract together with any related data and information that the Subcontractor may request and is reasonably required for the intended use of the property (hereinafter referred to as "Fermilab-furnished property").
- (b) The delivery or performance dates for this subcontract are based upon the expectation that Fermilab-furnished property suitable for use (except for property furnished "as is") will be delivered to the Subcontractor at the times stated elsewhere in the subcontract or, if not so stated, in sufficient time to enable the Subcontractor to meet the subcontract's delivery or performance dates.
- (c) If Fermilab-furnished property is received by the Subcontractor in a condition not suitable for the intended use, the Subcontractor shall, upon receipt of it, notify Fermilab, detailing the facts, and, as directed by Fermilab and at Fermilab expense, either repair, modify, return, or otherwise dispose of the property. After completing the directed action and upon written request of the Subcontractor, Fermilab shall make an equitable adjustment as provided in paragraph 17.8 of this clause.
- (d) If Fermilab-furnished property is not delivered to the Subcontractor by the required time, Fermilab shall, upon the Subcontractor's timely written request, make a determination of the delay, if any, caused the Subcontractor and shall make an equitable adjustment in accordance with paragraph 17.8 of this clause.

## **17.2 CHANGES IN FERMILAB-FURNISHED PROPERTY.**

- (a) Fermilab may, by written notice--
  - (1) Decrease the Fermilab-furnished property provided or to be provided under this subcontract, or
  - (2) Substitute other Fermilab-furnished property for the property to be provided by Fermilab, or to be acquired by the Subcontractor for Fermilab, under this subcontract. The Subcontractor shall promptly take such action as Fermilab may direct regarding the removal, shipment, or disposal of the property covered by such notice.
- (b) Upon the Subcontractor's written request, Fermilab shall make an equitable adjustment to the subcontract in accordance with paragraph 17.8 of this clause, if Fermilab has agreed in the subcontract to make the property available for performing this subcontract and there is any--
  - (1) Decrease or substitution in this property pursuant to subparagraph 17.2(a) above; or
  - (2) Withdrawal of authority to use this property, if provided under any other contract or lease.

## **17.3 TITLE IN GOVERNMENT PROPERTY.**

- (a) The Government shall retain title to all Fermilab-furnished property.
- (b) All Fermilab-furnished property and all property acquired by the Subcontractor, title to which vests in the Government under this paragraph (collectively referred to as "Fermilab property"), are subject to the provisions of this clause. However, special tooling accountable to this subcontract is subject to the special tooling clause and is not subject to the provisions of this clause. Title to Fermilab-furnished property shall not be affected by its incorporation into or attachment to any property not owned by Fermilab, nor shall Fermilab-furnished property become a fixture or lose its identity as personal property by being attached to any real property.
- (c) Title to each item of facilities, special test equipment, and special tooling (other than that subject to a special tooling clause) acquired by the Subcontractor for Fermilab under this subcontract shall pass to and vest in the Government when its use in performing this subcontract commences or when Fermilab has paid for it, whichever is earlier, whether or not title previously vested in the Government.
- (d) If this subcontract contains a provision directing the Subcontractor to purchase material for which Fermilab will reimburse the Subcontractor as a direct item of cost under this subcontract--
  - (1) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such material; and
  - (2) Title to all other material shall pass to and vest in the Government upon--
    - (i) Issuance of the material for use in subcontract performance;
    - (ii) Commencement of processing of the material or its use in subcontract performance; or
    - (iii) Reimbursement of the cost of the material by Fermilab, whichever occurs first.

**17.4 USE OF FERMILAB-FURNISHED PROPERTY.** The Fermilab-furnished property shall be used only for performing this subcontract, unless otherwise provided in this subcontract or approved by Fermilab.

## **17.5 PROPERTY ADMINISTRATION.**

- (a) The Subcontractor shall be responsible and accountable for all Fermilab-furnished property provided under this subcontract and shall comply with Federal Acquisition Regulation (FAR) Subpart 45.5, as in effect on the date of this subcontract.
- (b) The Subcontractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of Fermilab-furnished property in accordance with sound industrial practice and the applicable provisions of Subpart 45.5 of the FAR.
- (c) If damage occurs to Fermilab-furnished property, the risk of which has been assumed by Fermilab under this subcontract, Fermilab shall replace the items or the Subcontractor shall make such repairs as Fermilab directs. However, if the Subcontractor cannot effect such repairs within the time required, the Subcontractor shall dispose of the property as directed by Fermilab. When any property for which Fermilab is responsible is replaced or repaired, Fermilab shall make an equitable adjustment in accordance with paragraph 17.8 of this clause.
- (d) The Subcontractor represents that the subcontract price does not include any amount for repairs or replacement for which Fermilab is responsible. Repair or replacement of property for which the Subcontractor is responsible shall be accomplished by the Subcontractor at its own expense.

**17.6 ACCESS.** Fermilab and all its designees shall have access at all reasonable times to the premises in which any Fermilab-furnished property is located for the purpose of inspecting the Fermilab-furnished property.

**17.7 RISK OF LOSS.** Unless otherwise provided in this subcontract, the Subcontractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, Fermilab-furnished property upon its delivery to the Subcontractor or upon passage of title to the Government under paragraph 17.3 of this clause. However, the Subcontractor is not responsible for reasonable wear and tear to Fermilab-furnished property or for Fermilab-furnished property properly consumed in performing this subcontract.

**17.8** **EQUITABLE ADJUSTMENT.** When this clause specifies an equitable adjustment, it shall be made to any affected subcontract provision in accordance with the procedures of the Changes clause. When appropriate, Fermilab may initiate an equitable adjustment in favor of Fermilab. The right to an equitable adjustment shall be the Subcontractor's exclusive remedy. Fermilab shall not be liable to suit for breach of subcontract for--

- (a) Any delay in delivery of Fermilab-furnished property;
- (b) Delivery of Fermilab-furnished property in a condition not suitable for its intended use;
- (c) A decrease in or substitution of Fermilab-furnished property; or
- (d) Failure to repair or replace Fermilab-furnished property for which Fermilab is responsible.

**17.9** **FINAL ACCOUNTING AND DISPOSITION OF FERMILAB-FURNISHED PROPERTY.** Upon completing this subcontract, or at such earlier dates as may be fixed by Fermilab, the Subcontractor shall submit, in a form acceptable to Fermilab, inventory schedules covering all items of Fermilab-furnished property (including any resulting scrap) not consumed in performing this subcontract or delivered to Fermilab. The Subcontractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the Fermilab-furnished property as may be directed or authorized by Fermilab. The net proceeds of any such disposal shall be credited to the subcontract price or shall be paid to Fermilab as it directs.

**17.10** **ABANDONMENT AND RESTORATION OF SUBCONTRACTOR'S PREMISES.** Unless otherwise provided herein, Fermilab--

- (a) May abandon any Fermilab-furnished property in place, at which time all obligations of Fermilab regarding such abandoned property shall cease; and
- (b) Has no obligation to restore or rehabilitate the Subcontractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if Fermilab-furnished property is withdrawn or is unsuitable for the intended use, or if other Fermilab-furnished property is substituted, then the equitable adjustment under paragraph 17.8 of this clause may properly include restoration and rehabilitation costs.

**17.11** **COMMUNICATIONS.** All communications under this clause shall be in writing.

## **18. INDEPENDENT CONTRACTOR**

In all respects pertaining to this subcontract, the Subcontractor is and shall act as an independent Subcontractor and the Subcontractor shall not be or act as the agent, employee, or servant of Fermilab or the Government. Without limiting the generality of the foregoing it is understood and agreed:

- (a) That all persons employed by the Subcontractor in the performance of this agreement shall be employees of the Subcontractor and not employees of Fermilab or the Government; and
- (b) That the Subcontractor shall not enter into any contract with a third party which purports to obligate or bind Fermilab or the Government.

## **19. CERTIFIED COST OR PRICING DATA**

- 19.1**
- (a) The Subcontractor shall require under the situations described in (b) below, unless exempted under the exceptions set forth in (c) below, each sub-subcontractor under this subcontract to submit cost or pricing data and to certify that, to the best of his knowledge and belief, such cost or pricing data are accurate, complete, and current.
  - (b) Except as provided in (c) below, certified cost or pricing data shall be submitted prior to--
    - (i) the award of each sub-subcontract, the price of which is expected to exceed \$550,000 and
    - (ii) the negotiation of the price of each change or modification to a sub-subcontract under this subcontract for which the price adjustment is expected to exceed \$550,000.
  - (c) Certified cost or pricing data need not be furnished pursuant to this paragraph (c) where:
    - (i) the Subcontractor has not been required to furnish cost or pricing data; or
    - (ii) the price adjustment is based on adequate price competition, the acquisition of commercial items, or the prices are set by law or regulation, and the Subcontractor states in writing the basis for applying this exception.
  - (d) In submitting the cost or pricing data, the sub-subcontractor shall use the format set forth in paragraph 19.2 below and shall certify that the data are accurate, complete, and current. Such certificate and data (actual or identified, as provided in the certificate prescribed below) shall be submitted by sub-subcontractors to the next higher-tier sub-subcontractor, or the Subcontractor, as applicable, for retention.

**19.2** The certificates required by this clause shall follow the format set forth below:

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15.401 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to Fermilab in support of \_\_\_\_\_\* are accurate, complete, and current as of \_\_\_\_\_\*\*. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreement.

FIRM \_\_\_\_\_  
SIGNATURE \_\_\_\_\_  
NAME \_\_\_\_\_  
TITLE \_\_\_\_\_  
DATE OF EXECUTION\*\*\* \_\_\_\_\_

- \* *Identify the proposal, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No.).*
- \*\* *Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.*
- \*\*\* *Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the price was agreed to.*

**19.3** For purposes of verifying that certified cost or pricing data submitted in conjunction with the negotiation of this subcontract or any subcontract change or other modification which involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed \$550,000 were accurate, complete, and current, Fermilab, the Department or any of its authorized representatives shall until the expiration of three (3) years from the date of final payment under this subcontract, have the right to examine those books, records, documents, papers, and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

**19.4** Whenever the price of any change or other modification to this subcontract involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed \$550,000, the Subcontractor agrees to furnish Fermilab certified cost or pricing data, using the format set forth in paragraph 19.2 above unless the price is based on adequate price competition, the acquisition of commercial items, or prices set by law or regulation.

**19.5** The requirement for submission of certified cost or pricing data with respect to any change or other modification does not apply to any sub-subcontract change or other modification, at any tier, where the subcontract is firm fixed-price or fixed-price with escalation unless such change or other modification results from a change or modification to the subcontract, nor does it apply to a sub-subcontract change or modification, at any tier, where the subcontract is not firm fixed-price or fixed-price with escalation, unless the price for such change or other modification becomes reimbursable under the subcontract.

**19.6** The Subcontractor agrees to insert paragraph 19.3 without change and the substance of paragraphs 19.1, 19.2, 19.4, 19.5, and 19.6 of this clause in each sub-subcontract hereunder in excess of \$550,000 and in each sub-subcontract of \$550,000 or less at the time of making a change or other modification thereto which involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed \$550,000.

**19.7** If Fermilab determines that any price, including profit or fee, negotiated in connection with this subcontract or any cost reimbursable under this subcontract was increased by any significant sums because the Subcontractor, or any sub-subcontractor pursuant to this clause or any sub-subcontract clause herein required, furnished incomplete or inaccurate cost or pricing data or data not current as certified in the Subcontractor's certificate of current cost or pricing data, then such price or cost shall be reduced accordingly and the subcontract shall be modified in writing to reflect such reduction.

**20. RESTRICTIONS ON SUB-SUBCONTRACTOR SALES TO THE GOVERNMENT** (applicable only if this subcontract exceeds \$100,000)

**20.1** Except as provided in paragraph 20.2 below, the Subcontractor shall not enter into any agreement with an actual or prospective sub-subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such sub-subcontractors directly to the Government of any item or process (including computer software) made or furnished by the sub-subcontractor under this subcontract or under any follow-on production subcontract.

**20.2** The prohibition in paragraph 20.1 above does not preclude the Subcontractor from asserting rights that are otherwise authorized by law or regulation.

**20.3** The Subcontractor agrees to incorporate the substance of this clause, including this paragraph 20.3, in all sub-subcontracts that exceed \$100,000.

**21. ANTI-KICKBACK PROCEDURES** (applicable only if this subcontract exceeds \$100,000)

**21.1** Definitions: As used in this clause--

- (a) "Kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime Contractor, prime Contractor employee, Subcontractor, or Subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.
- (b) "Person" means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.
- (c) "Prime Contract" means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.
- (d) "Prime Contractor" means a person who has entered into a prime contract with the United States.
- (e) "Prime Contractor employee" means any officer, partner, employee, or agent of a prime Contractor.
- (f) "Subcontract" means a contract or contractual action entered into by a prime Contractor or Subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.
- (g) "Subcontractor"
  - (1) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or subcontract entered into in connection with such prime contract, and
  - (2) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier Subcontractor.
- (h) "Subcontractor employee" means any officer, partner, employee, or agent of a Subcontractor.

**21.2** The Anti-Kickback Act of 1986 (41 U.S.C. 51-58) (the Act) prohibits any person from--

- (a) providing or attempting to provide or offering to provide any kickback;
- (b) soliciting, accepting, or attempting to accept any kickback; or
- (c) including, directly or indirectly, the amount of any kickback in the contract price charged by a prime Contractor to the United States or in the contract price charged by a Subcontractor to a prime Contractor or higher tier Subcontractor.

- 21.3**
- (a) The Subcontractor shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in paragraph 21.2 of this clause in its own operations and direct business relationships.
  - (b) When the Subcontractor has reasonable grounds to believe that a violation described in paragraph 21.2 of this clause may have occurred, the Subcontractor shall promptly report in writing the possible violation. Such reports shall be made to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice.
  - (c) The Subcontractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph 21.2 of this clause.
  - (d) Fermilab may--
    - (1) Offset the amount of the kickback against any monies owed by Fermilab under this subcontract and/or
    - (2) Direct that the Subcontractor withhold from sums owed the sub-subcontractor under the prime contract the amount of the kickback. Fermilab may direct that monies withheld under subdivision 21.3(d)(1) of this clause be paid over to Fermilab unless Fermilab has already offset those monies

under subdivision 21.3(d)(2) of this clause. In either case, the Subcontractor shall notify Fermilab when the monies are withheld.

- (e) The Subcontractor agrees to incorporate the substance of this clause, including this subparagraph 21.3(e), but excepting subparagraph 21.3(a), in all sub-subcontracts that exceed \$100,000.

## **22. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT — OVERTIME COMPENSATION** (applicable only if this subcontract exceeds \$100,000)

**22.1** This subcontract, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333) (the Act), is subject to the following terms and all other applicable provisions and exceptions of the Act and the regulations of the Secretary of Labor.

**22.2 OVERTIME REQUIREMENTS.** No Subcontractor or sub-subcontractor employing laborers or mechanics (see Federal Acquisition Regulation 22.300) shall require or permit them to work over 40 hours in any workweek unless they are paid at least 1 and ½ times the basic rate of pay for each hour worked over 40 hours.

**22.3 VIOLATION; LIABILITY FOR UNPAID WAGES; LIQUIDATED DAMAGES.** The responsible Subcontractor and sub-subcontractor are liable for unpaid wages if they violate the terms in paragraph 22.2 of this clause. In addition, the Subcontractor and sub-subcontractor are liable for liquidated damages payable to the Government. Liquidated damages will be assessed at the rate of \$10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the Contract Work Hours and Safety Standards Act.

**22.4 WITHHOLDING FOR UNPAID WAGES AND LIQUIDATED DAMAGES.** Sufficient funds required to satisfy any Subcontractor or sub-subcontractor liabilities for unpaid wages and liquidated damages will be withheld from payments due under the subcontract. If amounts withheld under the subcontract are insufficient to satisfy Subcontractor or sub-subcontractor liabilities, payments from other Federal or Federally assisted subcontracts held by the same Subcontractor that are subject to the Contract Work Hours and Safety Standards Act maybe withheld.

### **22.5 PAYROLLS AND BASIC RECORDS.**

- (a) The Subcontractor and its sub-subcontractors shall maintain payrolls and basic payroll records for all laborers and mechanics working on the subcontract during the subcontract and shall make them available to Fermilab and the Government until 3 years after subcontract completion. The records shall contain the name and address of each employee, social security number, labor classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. The records need not duplicate those required for construction work by Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Davis-Bacon Act.
- (b) The Subcontractor and its sub-subcontractors shall allow authorized representatives of Fermilab, DOE or the Department of Labor to inspect, copy, or transcribe records maintained under paragraph 22.5(a) of this clause. The Subcontractor or sub-subcontractor also shall allow authorized representatives of Fermilab, DOE or Department of Labor to interview employees in the workplace during working hours.

**22.6 SUB-SUBCONTRACTS.** The Subcontractor shall insert the provisions set forth in paragraphs 22.2 through 22.5 of this clause in sub-subcontracts exceeding \$100,000 and require sub-subcontractors to include these provisions in any lower tier sub-subcontracts. The Subcontractor shall be responsible for compliance by any sub-subcontractor or lower tier sub-subcontractor with the provisions set forth in paragraphs 22.2 through 22.5 of this clause.

## **23. PREFERENCE FOR U.S. FLAG AIR CARRIERS**

**23.1** "International air transportation," as used in this clause, means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

"United States," as used in this clause, means the 50 States, the District of Columbia, and outlying areas (see paragraph 1.2).

"U.S. Flag air carrier," as used in this clause, means an air carrier holding a certificate under 49 U.S.C. Chapter 411.

**23.2** Section 5 of the International Air Transportation Fare Competitive Practices Act of 1974 (49 U.S.C. 40118) (Fly America Act) requires that all Federal agencies and Government contractors and Subcontractors use U.S. flag air carriers for U.S. Government-financed international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available. It requires the Comptroller General of the United

States, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, to disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U.S. flag air carrier is available to provide such services.

**23.3** If available, the Subcontractor, in performing work under this subcontract, shall use U.S.-flag carriers for international air transportation of personnel (and their personal effects) and property.

**23.4** In the event that the Subcontractor selects a carrier other than a U.S. flag air carrier for international air transportation, the Subcontractor shall include a statement on vouchers involving such transportation essentially as follows:

STATEMENT OF UNAVAILABILITY OF  
U.S. FLAG AIR CARRIERS

International air transportation of persons (and their personal effects) or property by U.S. flag air carrier was not available or it was necessary to use foreign-flag carrier service for the following reasons (see section 47.403 of the Federal Acquisition Regulation):

(State reasons)\_\_\_\_\_

(End of Statement)

**23.5** The Subcontractor shall include the substance of this paragraph, including this subparagraph 23.5, in each sub-subcontract or purchase order under this subcontract that may involve international air transportation.

## **24. PREFERENCE FOR PRIVATELY OWNED U.S. FLAG COMMERCIAL VESSELS**

**24.1** Except as provided in paragraph 24.5 of this clause, the Cargo Preference Act of 1954 (46 U.S.C. Appx 1241(b)) requires that Federal departments and agencies shall transport in privately owned U.S. flag commercial vessels at least 50 percent of the gross tonnage of equipment, materials, or commodities that may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo liners, and tankers). Such transportation shall be accomplished when any equipment, materials, or commodities, located within or outside the United States, that may be transported by ocean vessel are--

- (a) Acquired for a U.S. Government agency account;
- (b) Furnished to, or for the account of, any foreign nation without provision for reimbursement;
- (c) Furnished for the account of a foreign nation in connection with which the United States advances funds or credits, or guarantees the convertibility of foreign currencies; or
- (d) Acquired with advance of funds, loans, or guaranties made by or on behalf of the United States.

**24.2** The Subcontractor shall use privately owned U.S.-flag commercial vessels to ship at least 50 percent of the gross tonnage involved under this subcontract (computed separately for dry bulk carriers, dry cargo liners, and tankers) whenever shipping any equipment, materials, or commodities under the conditions set forth in paragraph 24.1 above, to the extent that such vessels are available at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels.

- 24.3**
- (a) The Subcontractor shall submit one legible copy of a rated on-board ocean bill of lading for each shipment to both (i) Fermilab and (ii) the Office of Cargo Preference, Maritime Administration (MAR-590), 400 Seventh Street, SW, Washington, D.C. 20590. Sub-subcontractor bills of lading shall be submitted through Fermilab.
  - (b) The Subcontractor shall furnish these bill of lading copies (i) within 20 working days of the date of loading for shipments originating in the United States or (ii) within 30 working days for shipments originating outside the United States. Each bill of lading copy shall contain the following information:
    - (A) Sponsoring U.S. Government agency;
    - (B) Name of vessel;
    - (C) Vessel flag of registry;
    - (D) Date of loading;
    - (E) Port of loading;
    - (F) Port of final discharge;
    - (G) Description of commodity;
    - (H) Gross weight in pounds and cubic feet if available; and
    - (I) Total ocean freight revenue in U.S. dollars.

**24.4** The Subcontractor shall insert the substance of this clause, including this paragraph 24.4, in all sub-subcontracts or purchase orders under this subcontract, except those described in paragraph 24.5(d).

- 24.5** The requirement in paragraph 24.1 does not apply to:
- (a) Cargoes carried in vessels of the Panama Canal Commission or as required or authorized by law or treaty;
  - (b) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353);
  - (c) Shipments of classified supplies when the classification prohibits the use of non-Government vessels; and
  - (d) Sub-subcontracts or purchase orders for the acquisition of commercial items unless -
    - (1) This subcontract is -
      - (A) A subcontract or agreement for ocean transportation services; or
      - (B) A construction subcontract; or
    - (2) The supplies being transported are -
      - (A) Items the Subcontractor is reselling or distributing to the Government without adding value. (Generally, the Subcontractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or
      - (B) Shipped in direct support of U.S. military -
        - (i) Contingency operations;
        - (ii) Exercises; or
        - (iii) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

**24.6** Guidance regarding fair and reasonable rates for privately owned U.S.-flag commercial vessels may be obtained from the Office of Costs and Rates, Maritime Administration, 400 Seventh Street, SW, Washington, D.C. 20590, Phone: 202-366-4610.

## **25. PROTECTING FERMILAB AND THE GOVERNMENT'S INTEREST WHEN SUB-SUBCONTRACTING WITH SUB-SUBCONTRACTORS DEBARRED, SUSPENDED, OR PROPOSED FOR DEBARMENT**

**25.1** The Government suspends or debar Contractors to protect the interests of the Government and Fermilab. Subcontractors shall not enter into any sub-subcontract in excess of \$25,000 with a sub-subcontractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so.

**25.2** The Subcontractor shall require each proposed first-tier sub-subcontractor whose sub-subcontract will exceed \$25,000, to disclose to the Subcontractor, in writing, whether as of the time of the award of the sub-subcontract, the sub-subcontractor, or its principal is or is not debarred, suspended, or proposed for debarment by the Federal Government.

**25.3** A corporate office or designee of the Subcontractor shall notify Fermilab in writing before entering into a sub-subcontract with a party that is debarred, suspended, or proposed for debarment (see FAR 9.404 for information on the List of Parties Excluded from Procurement and Nonprocurement Programs). The notice must include the following:

- (a) The name of the sub-subcontractor;
- (b) The Subcontractor's knowledge of the reasons for the sub-subcontractor being on the list of Parties Excluded from Procurement and Nonprocurement Programs;
- (c) The compelling reason(s) for doing business with the sub-subcontractor notwithstanding its inclusion on the list of Parties Excluded from Procurement and Nonprocurement Programs; and
- (d) The systems and procedures the Subcontractor has established to ensure that is fully protecting Fermilab and the Government's interests when dealing with such sub-subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

## **26. CONTROLLED SUBSTANCES (DRUG-FREE WORKPLACE)**

(This clause applies only to work that is performed at the Fermilab site.)

**26.1** Employees of the Subcontractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while on the Fermilab site. A "controlled substance" means a controlled substance identified in Schedules I through V of Section 202 of the Federal Controlled Substances Act (21 U.S.C. 812) and as further defined in Federal regulations at 21 C.F.R. 1308.11 - 1308.15.

**26.2** The Subcontractor shall notify its employees working at Fermilab of this prohibition and of the disciplinary action that will be taken against employees violating the prohibition, and the Subcontractor shall enforce this drug-free workplace policy, as well as implement other personnel assistance programs, as appropriate, to help ensure a drug-free workplace at Fermilab. Subcontractor employees shall be required to notify the Subcontractor of any criminal drug statute conviction for a violation that occurred in the Fermilab workplace within five (5) days of such a conviction, and the Subcontractor shall, in turn, notify Fermilab within five (5) days of receiving the employee's notice.

## **27. PATENT RIGHTS — RETENTION BY THE SUBCONTRACTOR** (Short Form)

### **27.1 DEFINITIONS.**

- (a) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).
- (b) "Made" when used in relation to any invention means the conception of first actual reduction to practice of such invention.
- (c) "Nonprofit organization" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.
- (d) "Practical application" means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public or reasonable terms.
- (e) "Small business firm" means a small business concern as defined at section 2 of P.L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 C.F.R. 121.3-8 and 13 C.F.R. 121.3-12, respectively, will be used.
- (f) "Subject invention" means any invention of the Subcontractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.
- (g) "Agency licensing regulations" and "agency regulations concerning the licensing of Government-owned inventions" mean the Department of Energy patent licensing regulations at 10 C.F.R. Part 781.

**27.2 ALLOCATION OF PRINCIPAL RIGHTS.** The Subcontractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Subcontractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

### **27.3 INVENTION DISCLOSURE, ELECTION TO TITLE, AND FILING OF PATENT APPLICATION BY SUBCONTRACTOR.**

- (a) The Subcontractor will disclose each subject invention to the Department of Energy (DOE) within 2 months after the inventor disclosed it in writing to Subcontractor personnel responsible for patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the Subcontractor under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the DOE, the Subcontractor will promptly notify that agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor.
- (b) The Subcontractor will elect in writing whether or not to retain title to any such invention by notifying DOE within 2 years of disclosure to DOE. However, in any case where publication, on sale or public use has initiated the 1-year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by DOE to a date that is no more than 60 days prior to the end of the statutory period.
- (c) The Subcontractor will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Subcontractor will file patent applications in additional countries or international patent offices

within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

- (d) Requests for extension of the time for disclosure, election, and filing under subparagraphs 27.3(a), (b), and (c) of this clause may, at the discretion of the agency, be granted.

**27.4 CONDITIONS WHEN THE GOVERNMENT MAY OBTAIN TITLE.** The Subcontractor will convey to the Federal agency, upon written request, title to any subject invention--

- (a) If the Subcontractor fails to disclose or elect title to the subject invention within the times specified in paragraph 27.3 of this clause, or elects not to retain title; provided, that DOE may only request title within 60 days after learning of the failure of the Subcontractor to disclose or elect within the specified.
- (b) In those countries in which the Subcontractor fails to file patent applications within the times specified in paragraph 27.3 of this clause; provided, however, that if the Subcontractor has filed a patent application in a country after the times specified in paragraph 27.3 of this clause, but prior to its receipt of the written request of the Federal agency, the Subcontractor shall continue to retain title in that country.
- (c) In any country in which the Subcontractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

**27.5 MINIMUM RIGHTS TO SUBCONTRACTOR AND PROTECTION OF THE SUBCONTRACTOR RIGHT TO FILE.**

- (a) The Subcontractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Subcontractor fails to disclose the invention within the times specified in paragraph 27.3 of this clause. The Subcontractor's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the Subcontractor is a party and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the Federal agency, except when transferred to the successor of that part of the Subcontractor's business to which the invention pertains.
- (b) The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 C.F.R. Part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Subcontractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.
- (c) Before revocation or modification of the license, DOE will furnish the Subcontractor a written notice of its intention to revoke or modify the license, and the Subcontractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Subcontractor) after the notice to show cause why the license should not be revoked or modified. The Subcontractor has the right to appeal, in accordance with applicable regulations in 37 C.F.R. Part 404 and agency regulations concerning the licensing of Government owned inventions, any decision concerning the revocation or modification of the license.

**27.6 SUBCONTRACTOR ACTION TO PROTECT THE GOVERNMENT'S INTEREST.**

- (a) The Subcontractor agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Subcontractor elects to retain title, and (ii) convey title to DOE when requested under paragraph 27.4 of this clause and to enable the government to obtain patent protection throughout the world in that subject invention.
- (b) The Subcontractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Subcontractor each subject invention made under subcontract in order that the Subcontractor can comply with the disclosure provisions of paragraph 27.3 of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph 27.3(a) of this clause. The Subcontractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.
- (c) The Subcontractor will notify DOE of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in

any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

- (d) The Subcontractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the subcontract) to a prime contractor of the United States Department of Energy. The Government has certain rights in the invention."

## **27.7 SUB-SUBCONTRACTS.**

- (a) The Subcontractor will include this clause, suitably modified to identify the parties, in all sub-subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The sub-subcontractor will retain all rights provided for the Subcontractor in this clause, and the Subcontractor will not, as part of the consideration for awarding the sub-subcontract, obtain rights in the sub-subcontractor's subject inventions.
- (b) The Subcontractor shall include in all other sub-subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights clause at 48 C.F.R. 952.227-13.
- (c) In the case of sub-subcontracts, at any tier, DOE, sub-subcontractor, and the Subcontractor agree that the mutual obligations of the parties created by this clause constitute a contract between the sub-subcontractor and DOE with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph 27.10 of this clause.

**27.8 REPORTING ON UTILIZATION OF SUBJECT INVENTIONS.** The Subcontractor agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Subcontractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received, by the Subcontractor, and such other data and information as DOE may reasonably specify. The Subcontractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by that agency in accordance with paragraph 27.10 of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Subcontractor.

**27.9 PREFERENCE FOR UNITED STATES INDUSTRY.** Notwithstanding any other provision of this clause, the Subcontractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Subcontractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

**27.10 MARCH-IN RIGHTS.** The Subcontractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 C.F.R. 401.6 and any supplemental regulations of the agency to require the Subcontractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Subcontractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that--

- (a) Such action is necessary because the Subcontractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
- (b) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Subcontractor, assignee, or their licensees;
- (c) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Subcontractor, assignee, or licensees; or
- (d) Such action is necessary because the agreement required by paragraph 27.9 of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

**27.11 SPECIAL PROVISIONS FOR SUBCONTRACTS WITH NONPROFIT ORGANIZATIONS.** If the Subcontractor is a nonprofit organization, it agrees that--

- (a) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Subcontractor;

- (b) The Subcontractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 C.F.R. 401.10;
- (c) The balance of any royalties or income earned by the Subcontractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and
- (d) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Subcontractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Subcontractor is also satisfied that the small business firm has capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Subcontractor. However, the Subcontractor agrees that the Secretary of Commerce may review the Subcontractor's licensing program and decisions regarding small business applicants, and the Subcontractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Subcontractor could take reasonable steps to more effectively implement the requirements of this subparagraph 27.11(d).

## **27.12 COMMUNICATIONS.**

- (a) The Subcontractor shall direct any notification, disclosure, or request to DOE provided for in this clause to the DOE patent counsel assisting the DOE contracting activity (DOE Chicago Operations Office; Argonne, IL 60439), with a copy of the communication to Fermilab.
- (b) Each exercise of discretion or decision provided for in this clause, except subparagraph 27.11(d), is reserved for the DOE Patent Counsel and is not a claim or dispute and is not subject to the Contract Disputes Act of 1978.
- (c) Upon request of the DOE Patent Counsel or Fermilab, the Subcontractor shall provide any or all of the following:
  - (1) a copy of the patent application, filing date, serial number and title, patent number, and issue date for any subject invention in any country in which the Subcontractor has applied for a patent;
  - (2) a report, not more often than annually, summarizing all subject inventions which were disclosed to DOE individually during the reporting period specified; or
  - (3) a report, prior to closeout of the subcontract, listing all subject inventions or stating that there were none.

## **28. FACILITIES LICENSE**

In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this subcontract, the Subcontractor agrees to and does hereby grant to the Government an irrevocable, non-exclusive paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Subcontractor, which are owned or controlled by the Subcontractor at any time through completion of this subcontract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or to have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

## **29. RIGHTS IN DATA – GENERAL**

### **29.1 DEFINITIONS.**

- (1) "Computer databases," as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.
- (2) "Computer software," as used in this clause, means:
  - (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and
  - (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.
- (3) "Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. For the purposes of this

clause, the term does not include data incidental to the administration of this subcontract, such as financial, administrative cost and pricing, or management information.

- (4) "Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.
- (5) "Limited rights data," as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.
- (6) "Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software.
- (7) "Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.
- (8) "Technical data," as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.
- (9) "Unlimited rights," as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

## **29.2 ALLOCATION OF RIGHTS.**

- (1) Except as provided in paragraph 29.3 below regarding copyright, the Government shall have unlimited rights in:
  - (i) Data first produced in the performance of this subcontract;
  - (ii) Form, fit, and function data delivered under this subcontract;
  - (iii) Data delivered under this subcontract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair items, components, or processes delivered or furnished for use under this subcontract; and
  - (iv) All other data delivered under this subcontract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph 29.7 below.
- (2) The Subcontractor shall have the right to:
  - (i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this subcontract (except Restricted Data in category C-24, 10 C.F.R. Part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology), unless provided otherwise in paragraph 29.4 below;
  - (ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph 29.7 below;
  - (iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs 29.5 and 29.6 below; and
  - (iv) Establish claim to copyright subsisting in data first produced in the performance of this subcontract to the extent provided in subparagraph 29.3(1) below.

## **29.3 COPYRIGHT.**

- (1) Data first produced in the performance of this subcontract. Unless provided otherwise in subparagraph 29.4 below, the Subcontractor may establish, without prior approval of the DOE via URA, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this subcontract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, express written permission of DOE via URA is required to establish claim to copyright subsisting in all other data first produced in the performance of this subcontract. When claim to copyright is made, the Subcontractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including subcontract number DE-AC02-76CH03000) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Subcontractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the

Subcontractor grants to the Government and others acting in its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

- (2) Data not first produced in the performance of this subcontract. The Subcontractor shall not, without prior written permission of the DOE via URA, incorporate in data delivered under this subcontract any data not first produced in the performance of this subcontract and which contains the copyright notice of 17 U.S.C. 401 and 402, unless the Subcontractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above; provided, however, that if such data are computer software, the Government shall acquire a copyright license if included in this subcontract or as otherwise may be provided in a collateral agreement incorporated in or made part of this subcontract.
- (3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph 29.3, and to include such notices on all reproductions of the data.

#### **29.4 RELEASE, PUBLICATION AND USE OF DATA.**

- (1) The Subcontractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this subcontract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided below in this paragraph or expressly set forth in this subcontract.
- (2) The Subcontractor agrees that to the extent it receives or is given access to data necessary for the performance of this subcontract which contain restrictive markings, the Subcontractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the DOE via URA.
- (3) The Subcontractor agrees not to assert copyright in computer software first produced in the performance of this subcontract without prior written permission of the DOE and URA. When such permission is granted, the DOE through URA shall specify appropriate terms, conditions, and submission requirements to assure utilization, dissemination, and commercialization of the data. The Subcontractor, when requested, shall promptly deliver to DOE through URA a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled.

#### **29.5 UNAUTHORIZED MARKING OF DATA.**

- (1) Notwithstanding any other provisions of this subcontract concerning inspection or acceptance, if any data delivered under this subcontract are marked with restrictive notices and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this subcontract, URA may at any time either return the data to the Subcontractor, or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.
  - (i) URA shall make written inquiry to the Subcontractor affording the Subcontractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;
  - (ii) If the Subcontractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by URA for good cause shown), URA shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.
  - (iii) If the Subcontractor provides written justification to substantiate the propriety of the markings within the period set in subdivision (i) above, URA shall consider such written justification and determine whether or not the markings are to be canceled or ignored. If URA determines that the markings are authorized, the Subcontractor shall be so notified in writing. If URA determines that the markings are not authorized, URA shall furnish the Subcontractor a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Subcontractor files suit in a court of competent jurisdiction within 90 days of receipt of the URA's decision. URA shall continue to abide by the markings under this subdivision (iii) until final resolution of the matter either by the URA's determination becoming final (in which instance URA shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.
- (2) Except to the extent that an action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Subcontractor is not precluded by this paragraph 29.5 from bringing a claim, as applicable, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this subcontract.

#### **29.6 OMITTED OR INCORRECT MARKINGS.**

- (1) Data delivered to URA without either the limited rights or restricted rights notice as authorized by paragraph 29.7 below, or the copyright notice required by paragraph 29.3 above, shall be deemed to have been furnished with unlimited rights, and URA assumes no liability for disclosure, use, or

reproduction of such data. However, to the extent the data has otherwise not been disclosed without restriction, the Subcontractor may request, within 6 months (or a longer time approved by URA for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Subcontractor's expense, and URA may agree to do so if the Subcontractor:

- (i) Identifies the data to which the omitted notice is to be applied;
  - (ii) Demonstrates that the omission of the notice was inadvertent;
  - (iii) Establishes that the use of the proposed notice is authorized; and
  - (iv) Acknowledges that neither URA nor the Government has any liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.
- (2) The DOE, through URA, may also:
- (i) permit correction at the Subcontractor's expense of incorrect notices if the Subcontractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or
  - (ii) correct any incorrect notices.

## **29.7 PROTECTION OF LIMITED RIGHTS DATA AND RESTRICTED COMPUTER SOFTWARE.**

- (1) When data other than that listed in subparagraphs 29.2(1)(i), (ii), and (iii) above are specified to be delivered under this subcontract and qualify as either limited rights data or restricted computer software, if the Subcontractor desires to continue protection of such data, the Subcontractor shall withhold such data and not furnish them under this subcontract. As a condition to this withholding, the Subcontractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer data base for delivery is to be treated as limited rights data and not restricted computer software.

**29.8 SUBCONTRACTING.** The Subcontractor has the responsibility to obtain from its lower-tier Subcontractors all data and rights therein necessary to fulfill the Subcontractor's obligations under this subcontract. If a lower-tier Subcontractor refuses to accept terms affording such rights, the Subcontractor shall promptly bring such refusal to the attention of the DOE via URA and not proceed with subcontract award without further authorization.

**29.9 RELATIONSHIP TO PATENTS.** Nothing contained in this clause shall imply a license to the Government or URA under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

**29.10** The Subcontractor agrees, except as may be otherwise specified in this subcontract for specific data items listed as not subject to this paragraph, that the DOE or URA or an authorized representative may, up to three years after acceptance of all items to be delivered under this subcontract, inspect at the Subcontractor's facility any data withheld pursuant to paragraph 29.7(1) above, for purposes of verifying the Subcontractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Subcontractor whose data are to be inspected demonstrates to the DOE or URA that there would be a possible conflict of interest if the inspection were made by a particular representative, the DOE or URA as the case may be shall designate an alternate inspector.

**29.11 SUBCONTRACTOR LICENSING.** Except as may be otherwise specified in this subcontract as data not subject to this paragraph, the Subcontractor agrees that upon written application by DOE or URA, it will grant to the Government, URA and responsible third parties, for purposes of practicing a subject of this subcontract, a nonexclusive license in any limited rights data or restricted computer software on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the Subcontractor shall not be obligated to license any such data if the Subcontractor demonstrates to the satisfaction of the Secretary of Energy through URA:

- (1) such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this subcontract;
- (2) such data, in the form of results obtained by their use, are being supplied by the Subcontractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the Subcontractor or its licensees have take effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or
- (3) such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the subcontract results.

## **30. AUTHORIZATION AND CONSENT**

**30.1** The Government authorizes and consents to all use and manufacture, in performing this subcontract or any lower-tier sub-subcontract, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government or Fermilab under this subcontract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Subcontractor or any lower-tier sub-subcontract with (i) specifications or written provisions forming a part of this subcontract or (ii) specific written instructions given by Fermilab or the Department Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this subcontract or any lower-tier sub-subcontract hereunder, and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

**30.2** The Subcontractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all lower-tier sub-subcontracts for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services) expected to exceed the simplified acquisition threshold at Federal Acquisition Regulation (FAR) 2.101; however, omission of this clause from any lower-tier sub-subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

## **31. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT**

**31.1** The Subcontractor shall report to the Department Contracting Officer through Fermilab promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this subcontract of which the Subcontractor has knowledge.

**31.2** In the event of any claim or suit against Fermilab or the Government on account of any patent or copyright infringement arising out of the performance of this subcontract or out of the use of any supplies furnished or work or services performed under this subcontract, the Subcontractor shall furnish to Fermilab or the Government, when requested by Fermilab or the Department Contracting Officer, all evidence and information in possession of the Subcontractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Subcontractor has agreed to indemnify the Government or Fermilab.

**31.3** The Subcontractor agrees to include, and require inclusion of, this clause in all lower-tier sub-subcontracts for supplies or services (including construction and architect-engineer sub-subcontracts and those for material, supplies, models, samples, or design or testing services) expected to exceed the simplified acquisition threshold at FAR 2.101.

## **32. REFUND OF ROYALTIES**

**32.1** This clause applies only if the subcontract price includes certain amounts for royalties payable by the Subcontractor or lower-tier sub-subcontractors or both.

**32.2** The term "royalties" as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this subcontract or any lower-tier subcontract hereunder. The term also includes any costs or charges associated with the access to, use of, or other right pertaining to data that is represented to be proprietary and is related to the performance of this contract or the copying of such data or data that is copyrighted.

**32.3** The Subcontractor shall furnish to Fermilab or the DOE Contracting Officer, before final payment under this subcontract, a statement of royalties paid or required to be paid in connection with performing this subcontract and lower-tier sub-subcontracts hereunder together with the reasons.

**32.4** The Subcontractor will be compensated for royalties reported under paragraph 32.3 of this clause, only to the extent that such royalties were included in the subcontract price and are determined by Fermilab or the DOE Contracting Officer to be properly chargeable to the Government and allocable to the subcontract. To the extent that any royalties that are included in the subcontract price are not, in fact, paid by the Subcontractor or are determined by Fermilab or the DOE Contracting Officer not to be properly chargeable to the Government and allocable to the subcontract, the subcontract price shall be reduced. Repayment or credit to Fermilab or the Government shall be made

as Fermilab or the DOE Contracting Officer directs. The approval by Fermilab or DOE of any individual payments or royalties shall not prevent the Government from contesting at any time the enforceability, validity, scope of, or title to, any patent or the proprietary nature of data pursuant to which a royalty or other payment is to be or has been made.

**32.5** If, at any time within 3 years after final payment under this subcontract, the Subcontractor for any reason is relieved in whole or in part from the payment of the royalties included in the final subcontract price as adjusted pursuant to paragraph 32.4 of this clause, the Subcontractor shall promptly notify Fermilab or the DOE Contracting Officer of that fact and shall reimburse Fermilab or the Government in a corresponding amount.

**32.6** The substance of this clause, including this paragraph 32.6, shall be included in any sub-subcontract in which the amount of royalties reported during negotiation of the sub-subcontract exceeds \$250.

## **32A. ADDITIONAL DATA REQUIREMENTS**

**32A.1** In addition to the data (as defined in clause 29, Rights in Data – General, or other equivalent included in this subcontract) specified elsewhere in this subcontract to be delivered, the DOE Contracting Officer, through Fermilab, may, at any time during subcontract performance or within a period of 3 years after acceptance of all items to be delivered under this subcontract, order any data first produced or specifically used in the performance of this subcontract.

**32A.2** The Rights in Data — General clause or other equivalent included in this subcontract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Subcontractor to deliver any data the withholding of which is authorized by the Rights in Data – General or other equivalent clause of this subcontract, or data which are specifically identified in this subcontract as not subject to this clause.

**32A.3** When data are to be delivered under this clause, the Subcontractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

**32A.4** The DOE Contracting Officer, through Fermilab, may release the Subcontractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in paragraph 32A.1 of this clause.

## **32B. RIGHTS TO PROPOSAL DATA (TECHNICAL)**

**32B.1** Except for data contained on pages \_\_\_\_\_, it is agreed that as a condition of award of this subcontract, and notwithstanding the conditions of any notice appearing thereon, the Government shall have unlimited rights (as defined in the “Rights in Data — General” clause contained in this subcontract) in and to the technical data contained in the proposal dated \_\_\_\_\_, upon which this subcontract is based.

## **33. WORKMANSHIP AND SAFETY**

All work under this subcontract shall be performed in a skillful, safe, and workmanlike manner.

## **34. TERMINATION FOR THE CONVENIENCE OF FERMILAB**

**34.1** Fermilab may terminate performance of work under this subcontract in whole or, from time to time, in part if Fermilab determines that a termination is in Fermilab's interest. Fermilab shall terminate by delivering to the Subcontractor a Notice of Termination specifying the extent of termination and the effective date.

**34.2** After receipt of a Notice of Termination and except as directed by Fermilab, the Subcontractor shall immediately proceed with the following obligations:

- (a) Stop work as specified in the Notice;
- (b) Place no further sub-subcontracts (including purchase orders), except as necessary to complete the continued portion of the subcontract;
- (c) Terminate all applicable sub-subcontracts and cancel or divert applicable commitments covering personal services that extend beyond the effective date of termination;

- (d) Assign to the U.S. Government, as directed by Fermilab, all right, title, and interest of the Subcontractor under the sub-subcontracts terminated, in which case Fermilab and the U.S. Government shall have the right to settle or pay any termination settlement proposal arising out of those terminations;
- (e) With approval or ratification to the extent required by Fermilab, settle all outstanding liabilities and termination settlement proposals arising from the termination of sub-subcontracts;
- (f) Transfer title (if not already transferred) and, as directed by Fermilab, deliver to the U.S. Government via Fermilab any information and items that, if the subcontract had been completed, would have been required to be furnished, including (1) materials or equipment produced, in process, or acquired for the work terminated and (2) completed or partially completed plans, drawings, and information;
- (g) Complete performance of the work not terminated;
- (h) Take any action that may be necessary, or that Fermilab may direct, for the protection and preservation of property related to this subcontract that is in the possession of the Subcontractor and in which the U.S. Government has or may acquire an interest; and
- (i) Use its best efforts to sell, as directed or authorized by Fermilab, termination inventory other than that retained by the U.S. Government under subparagraph (f) above. (NOTE: The Subcontractor is not required to extend credit to any purchaser and may acquire the property under conditions prescribed by, and at prices approved by, Fermilab. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by Fermilab under this subcontract, credited to the price or cost of the work, or paid in any other manner directed by Fermilab.)

**34.3** After termination, the Subcontractor shall submit a final termination settlement proposal to Fermilab in the form and with the certification prescribed by Fermilab. The Subcontractor shall submit the proposal promptly but no later than 1 year from the effective date of termination unless extended in writing by Fermilab upon written request of the Subcontractor within this 1-year period. If the Subcontractor fails to submit the termination settlement proposal within the time allowed, Fermilab may determine, on the basis of information available, the amount, if any, due the Subcontractor because of the termination and shall pay the amount determined.

**34.4** Subject to paragraph 34.3 above, the Subcontractor and Fermilab may agree upon the whole or any part of the amount to be paid because of the termination. This amount may include reasonable cancellation charges incurred by the Subcontractor and any reasonable loss on outstanding commitments for personal services that the Subcontractor is unable to cancel; provided, that the Subcontractor exercised reasonable diligence in diverting such commitments to other operations. The subcontract shall be amended and the Subcontractor paid the agreed amount.

**34.5** The cost principles and procedures in Subpart 31.3 of the Federal Acquisition Regulation (FAR), in effect on the date of the subcontract, shall govern all costs claimed, agreed to, or determined under this clause; however, if the Subcontractor is not an educational institution, and is a non-profit organization under Office of Management and Budget (OMB) Circular A-122, "Cost Principles for Nonprofit Organizations," July 8, 1980, those cost principles shall apply; provided, that if the Subcontractor is a non-profit institution listed in Attachment C of OMB Circular A-122, the cost principles at FAR 31.2 for commercial organizations shall apply to such Subcontractor.

## **35. PERMITS**

Except as otherwise directed by Fermilab, the Subcontractor shall, without any additional expense to Fermilab, be responsible for obtaining any necessary licenses and permits and for complying with any applicable Federal, State and local laws, codes or regulations, or with directives and procedures issued by Fermilab in connection with the prosecution of work.

## **36. HAZARDOUS WASTE DISPOSAL**

The Subcontractor shall comply with all applicable Federal, state and local laws and regulations governing the transport, storage, treatment, and disposal of regulated waste materials included in or generated during the performance of this subcontract.

## **37. ENVIRONMENT, SAFETY AND HEALTH**

The Subcontractor shall take all reasonable precautions in the performance of work under this subcontract to protect the environment and the safety and health of employees and members of the public. The Subcontractor shall comply with all applicable environmental, safety and health laws, regulations and other requirements, including reporting requirements. In the event that the Subcontractor fails to comply with said laws, regulations or requirements, Fermilab may without prejudice to any other legal or contractual rights, issue an order stopping all or part of the work. Thereafter, a start order for resumption of the work may be issued at Fermilab's discretion. The Subcontractor shall

make no claim for an extension of time or for compensation or damages by reason of, or in connection with, such work stoppage.

## **38. BUY AMERICAN ACT – SUPPLIES**

### **38.1 DEFINITIONS.** As used in this clause –

“Component” means any item supplied to Fermilab as part of an end item or of another component.

“Cost of components” means –

- (1) For components purchased by the Subcontractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (2) For components manufactured by the Subcontractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Domestic end product” means –

- (1) An unmanufactured end product mined or produced in the United States; or
- (2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

“End product” means supplies delivered under a line item of a Fermilab subcontract.

“Foreign end product” means an end product other than a domestic end product.

“United States” means the 50 States, the District of Columbia, and outlying areas (see paragraph 1.2).

**38.2** The Buy American Act (41 U.S.C. 10a – 10d) provides a preference for domestic end products for supplies acquired for use in the United States.

**38.3** For a list of foreign articles that Fermilab will treat as domestic for this subcontract, see FAR 25.104.

**38.4** The Subcontractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled “Buy American Act Certificate.”

## **39. INSPECTION OF RESEARCH AND DEVELOPMENT**

Fermilab has the right to inspect and evaluate the work performed under this subcontract, and the premises where work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If Fermilab performs inspection or evaluation on the premises of the Subcontractor or a sub-subcontractor, the Subcontractor shall furnish and shall require sub-subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

## **40. PRICING OF ADJUSTMENTS**

When costs are a factor in any determination of a price adjustment pursuant to the "Changes" clause or any other provision of this subcontract, such costs shall be in accordance with the cost principles and procedures in Federal Acquisition Regulation (FAR) Subpart 31 and Department of Energy Acquisition Regulations (DEAR) Subpart 931.

## **41. CHANGES**

**41.1** Fermilab may at any time, by written order, and without notice to sureties, make changes within the general scope of this subcontract in any one or more of the following: (1) drawings, designs, or specifications; (2) method of shipment or packing; and (3) place of inspection, delivery, or acceptance.

**41.2** If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this subcontract, whether or not changed by the order, Fermilab shall make an equitable adjustment in the subcontract price, the delivery schedule, or both, and shall modify the subcontract.

**41.3** The Subcontractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if Fermilab decides that the facts justify it, Fermilab may receive and act upon a proposal submitted before final payment under the subcontract.

**41.4** If the Subcontractor's proposal includes the cost of property made obsolete or excess by the change, Fermilab shall have the right to prescribe the manner of disposition of the property.

**41.5** Failure to agree with any adjustment shall not excuse the Subcontractor from proceeding with the subcontract as changed.

## **42. INSURANCE**

In the event that the Subcontractor's employees perform work under this subcontract on the Fermilab site, it shall be the responsibility of the Subcontractor to (a) maintain Workmen's Compensation coverage for such employees in amounts required by the applicable state law while they are working at Fermilab, and (b) assure that vehicles which may be brought onto the Fermilab site by such employees are covered by automobile liability insurance in amounts no less than the minimums set forth in FAR 28.307-2(c) (i.e., \$200,000 per person, \$500,000 per occurrence for bodily injury, and \$20,000 per occurrence for property damage). The requirement or individual limits set forth in (b) may be reduced or waived (e.g., where the Subcontractor operates under a self-insurance program acceptable to Fermilab), but only with the prior approval of the Fermilab manager.

## **43. LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS** (applicable only if this subcontract exceeds \$100,000)

### **43.1 DEFINITIONS.**

"Agency," as used in this clause, means executive agency as defined in FAR 2.101.

"Covered Federal action," as used in this clause, means any of the following Federal actions:

- (1) The awarding of any Federal subcontract.
- (2) The making of any Federal grant.
- (3) The making of any Federal loan.
- (4) The entering into any cooperative agreement.
- (5) The extension, continuation, renewal, amendment, or modification of any Federal subcontract, grant, loan, or cooperative agreement.

"Indian tribe" and "tribal organization" as used in this clause, have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B) and include Alaskan Natives.

"Influencing or attempting to influence," as used in this clause, means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

"Local government," as used in this clause, means a unit of government in a State and, if charged, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

"Officer or employee of an agency," as used in this clause, included the following individuals who are employed by an agency:

- (1) An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.
- (2) A member of the uniformed services, as defined in subsection 101(3), Title 37, United States Code.
- (3) A special Government employee, as defined in section 202, Title 18, United States Code.
- (4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, Appendix 2.

"Person," as used in this clause, means an individual, corporation, company, association, authority, firm, partnership, society, State and local government, regardless of whether such entity is operated for profit, or not for

profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

"Reasonable compensation," as used in this clause, means with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

"Reasonable payment," as used in this clause, means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

"Recipient," as used in this clause, includes the Subcontractor and all sub-subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

"Regularly employed," as used in this clause, means, with respect to an officer or employee of a person requesting or receiving a Federal subcontract, an officer or employee who is employed by such person for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such subcontract. An officer or employee who is employed by such person for less than 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

"State," as used in this clause, means a State of the United States, the District of Columbia, or an outlying area of the United States (see paragraph 1.2), an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

## **43.2 PROHIBITIONS.**

- (a) Section 1352 of Title 31, United States Code, among other things, prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions:
  - (1) The awarding of any Federal subcontract;
  - (2) The making of any Federal grant;
  - (3) The making of any Federal loan,
  - (4) The entering into of any cooperative agreement; or
  - (5) The modification of any Federal subcontract, grant, loan, or cooperative agreement.
- (b) The Act also requires Subcontractors to furnish a disclosure if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, or an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal subcontract, grant, loan, or cooperative agreement.
- (c) The prohibitions of the Act do not apply under the following conditions:
  - (1) Agency and legislative liaison by own employees.
    - (A) The prohibitions on the use of appropriated funds, in subparagraph 43.2(a) of this clause, does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if the payment is for agency and legislative liaison activities nor directly related to a covered Federal action.
    - (B) For purposes of subdivision 43.2(c)(1)(A) of this clause, providing any information specifically requested by an agency or Congress is permitted at any time.
    - (C) The following agency and legislative liaison activities are permitted at any time where they are not related to a specific solicitation for any covered Federal action:
      - (i) Discussing with an agency the qualities and characteristics (including individual demonstrations) of the person's products or services, conditions or terms of sale, and service capabilities;
      - (ii) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.
    - (D) The following agency and legislative liaison activities are permitted where they are prior to formal solicitation of any covered Federal action:

- (i) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;
  - (ii) Technical discussions regarding the preparation of any unsolicited proposal prior to its official submission; and
  - (iii) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub.L. 95-507, and subsequent amendments.
- (E) Only those services expressly authorized by subdivision 43.2(c)(1)(A) of this clause are permitted under this clause.
- (2) Professional and technical services.
- (A) The prohibition on the use of appropriated funds, in subparagraph 43.2(a) of this clause, does not apply in the case of -
- (i) A payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action.
  - (ii) Any reasonable payment to a person other than an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.
- (B) For purposes of subdivision 43.2(c)(2)(A) of this clause, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a subcontract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provided advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission, or negotiation of a covered Federal action.
- (C) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.
- (D) Only those services expressly authorized by subdivisions 43.2(c)(2)(A)(i) and (ii) of this clause are permitted under this clause.
- (E) The reporting requirements of FAR 3.803(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

### **43.3 DISCLOSURE.**

- (a) The Subcontractor who requests or receives from Fermilab a Federal subcontract shall file with Fermilab a disclosure form, OMB standard form LLL, Disclosure of Lobbying Activities, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered

Federal action), which would be prohibited under subparagraph 43.2(a) of this clause, if paid for with appropriated funds.

- (b) The Subcontractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under subparagraph 43.3(a) of this clause. An event that materially affects the accuracy of the information reported includes -
  - (1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or
  - (2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or
  - (3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.
- (c) The Subcontractor shall require the submittal of a certification, and if required, a disclosure form by any person which requests or received any sub-subcontract exceeding \$100,000 under the Federal subcontract.
- (d) All sub-subcontractor disclosure forms (but not certifications) shall be forwarded from tier to tier until received by Fermilab. Fermilab shall submit all disclosures to the Department of Energy at the end of the calendar quarter in which the disclosure form is submitted by the sub-subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding Subcontractor.

**43.4 AGREEMENT.** The Subcontractor agrees not to make any payment prohibited by the clause.

**43.5 PENALTIES.**

- (a) Any person who makes an expenditure prohibited under paragraph 43.2 of this clause or who fails to file or amend the disclosure form to be filed or amended by paragraph 43.3 of this clause shall be subject to civil penalties as provided for by 31 U.S.C. 1352. An imposition of a civil penalty does not prevent Fermilab or the Federal Government from seeking any other remedy that may be applicable.
- (b) Subcontractors may rely without liability on the representation made by their sub-subcontractors in the certification and disclosure form.

**43.6 COST ALLOWABILITY.** Nothing in this clause makes allowable or reasonable any cost which would otherwise be unallowable or unreasonable. Conversely, costs made specifically unallowable by the requirements in this clause will not be made allowable under any other provision.

**44. RESTRICTIONS ON CERTAIN FOREIGN PURCHASES**

**44.1** Unless advance written approval of Fermilab is obtained, the Subcontractor shall not acquire, for use in the performance of this subcontract, any supplies or services originating from sources within, or that were located in or transported from or through, countries whose products are banned from importation into the United States under regulations of the Office of Foreign Assets Control, Department of the Treasury. Those countries include Cuba, Iran, Iraq, Libya, North Korea, Sudan, the territory of Afghanistan controlled by the Taliban, and Serbia (excluding the territory of Kosovo).

**44.2** The Subcontractor shall not acquire for use in the performance of this subcontract any supplies or services from entities controlled by the Government of Iraq.

**44.3** The Subcontractor agrees to insert the provisions of this clause, including this paragraph 44.3, in all sub-subcontracts hereunder.

**45. PROHIBITION OF SEGREGATED FACILITIES**

**45.1** "Segregated facilities," as used in this clause, means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees, that are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, sex, or national origin

because of written or oral policies or employee custom. The term does not include separate or single-user rest rooms or necessary dressing or sleeping areas provided to assure privacy between the sexes.

**45.2** The Subcontractor agrees that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained. The Subcontractor agrees that a breach of this clause is a violation of the Equal Opportunity clause in this subcontract.

**45.3** The Subcontractor shall include this clause in every sub-subcontract and purchase order that includes the Equal Opportunity clause (see clause 11).

## **46. SENSITIVE FOREIGN NATIONS CONTROLS**

**46.1** In connection with any activities in the performance of this subcontract, the Subcontractor agrees to comply with any "Sensitive Foreign Nations Controls" requirements that may be attached to this subcontract, relating to those countries, which may from time to time, be identified to the Subcontractor by written notice as sensitive foreign nations. The Subcontractor shall have the right to terminate its performance under this subcontract upon at least 60 days' prior written notice to Fermilab if the Subcontractor determines that it is unable, without substantially interfering with its policies or without adversely impacting its performance to continue performance of the work under this subcontract as a result of such notification. If the Subcontractor elects to terminate performance, the provisions of this subcontract regarding termination for convenience of Fermilab shall apply.

**46.2** The provisions of this clause shall be included in any sub-subcontracts.

## **47. DISPLACED EMPLOYEE HIRING PREFERENCE**

(applicable only if this subcontract exceeds \$500,000)

**47.1** Definition: "Eligible employee" means a current or former employee of a contractor or subcontractor employed at a Department of Energy Defense Nuclear Facility (1) whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause), (2) who has also met the eligibility criteria contained in the Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, and (3) who is qualified for a particular job vacancy with the Department or one of its contractors or subcontractors with respect to work under a prime contract with the Department at the time the particular position is available.

**47.2** Consistent with Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, the Subcontractor agrees that it will provide a preference in hiring to an eligible employee to the extent practicable for work performed under this subcontract.

**47.3** The requirements of this clause shall be included in sub-subcontracts at any tier (except for sub-subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed \$500,000.