U.S. Department of Energy
Washington, D.C.

ORDER

DOE O 481.1E

Approved: 12-20-2018

SUBJECT: STRATEGIC PARTNERSHIP PROJECTS [FORMERLY KNOWN AS WORK FOR OTHERS (NON-DEPARTMENT OF ENERGY FUNDED WORK)]

1. OBJECTIVES. Strategic Partnership Projects (SPP) [formerly known as "Work for Others" (WFO)] is work performed for non-Department of Energy (DOE) entities by DOE/National Nuclear Security Administration (NNSA) personnel and/or their respective DOE/NNSA Site/Facility Management Contractor personnel or the use of DOE/NNSA facilities for work that is not directly funded by DOE/NNSA appropriations. SPP have the following objectives (DOE recognizes that individual projects may not meet all of the objectives).

   a. Provide assistance to Federal agencies and non-Federal entities in accomplishing goals that may be otherwise unattainable and to avoid duplication of effort at Federal facilities.

   b. Provide access to DOE/NNSA highly specialized or unique facilities, services, or technical expertise to non-DOE/non-NNSA entities when private sector facilities are inadequate.

   c. Increase research and development interactions between DOE/NNSA facilities and industry to provide opportunities for transferring technology originating at DOE/NNSA facilities to industry for further development or commercialization.

   d. Assist in maintaining core competencies and enhancing the science and technology base at DOE/NNSA facilities.

2. CANCELLATION. DOE O 481.1D, *Work for Others (Non-Department of Energy Funded Work)*, dated 12-05-16; and DOE M 481.1-1A, *Reimbursable Work for Non-Federal Sponsors Process Manual*, dated 09-28-01, are canceled.

3. APPLICABILITY.

   a. DOE Organizations, Including National Nuclear Security Administration (NNSA). Except for the exclusions in paragraph 3.c., the provisions of this Order apply to all DOE Organizations authorizing work under a SPP agreement as provided by law or contract and as implemented by the appropriate DOE/NNSA Responsible Contracting Officer (RCO) or authorized designee.

   b. DOE Contractors. This Order does not apply to contractors.

   c. Exclusions. This Order does not apply to the following:

      (1) Services, products, or materials regularly produced for sale at scheduled rates under Departmental programs (e.g., routine irradiation services,

isotopes, heavy water, transmission of electricity, uranium enrichment services, Naval Petroleum Reserve oil sales).

(2) Work performed by non-DOE/non-NNSA contractor personnel at a DOE-approved user facility (e.g., the National Synchrotron Light Source 2).

(3) Activities funded under the Contributed Funds Act of 1921 [Title 43 United States Code (U.S.C.) 395] or emergencies involving the protection of life, Federal lands, buildings, or equipment or law enforcement, disaster assistance, or production and maintenance of the power distribution system.

(4) DOE/NNSA-funded work or services performed by one DOE/NNSA Site/Facility Management Contractor for another.

(5) Visits or assignments of foreign nationals to DOE/NNSA facilities.

(6) Consulting services by employees not identifying themselves as DOE/NNSA or DOE/NNSA Site/Facility Management Contractor representatives.

(7) Cooperative Research and Development Agreements (CRADAs) performed under the National Competitiveness Technology Transfer Act of 1989.

(8) Work for the NNSA Naval Nuclear Propulsion Program.

(9) Assignments under the Intergovernmental Personnel Act of 1970 (5 U.S.C. §§ 3371-3375).

(10) Work directly funded by the Department of Homeland Security as defined in DOE O 484.1, *Reimbursable Work Performed for the Department of Homeland Security*, current version.

(11) Agreements for Commercializing Technology (ACT).

(12) Consistent with Secretarial Delegation Order Number 00-033.00A to the Administrator and Chief Executive Officer, Bonneville Power Administration, this Directive does not apply to Strategic Partnership Projects performed at Bonneville Power Administration.

4. REQUIREMENTS. It is Departmental policy that DOE/NNSA resources are made available to non-DOE/non-NNSA entities when private facilities are inadequate. Requirements of DOE/NNSA directives, applicable regulations, and the following requirements must be satisfied before work is performed.

a. In operating DOE/NNSA Federally Funded Research and Development centers (FFRDCs) or other facilities, a DOE/NNSA Site/Facility Management Contractor may not respond to Requests for Proposals (RFPs) or other procurement solicitations from another Federal agency or non-Federal entity that involves head-to-head competition with other solicitation respondents as an offeror, team member, or subcontractor to an offeror.

b. A DOE/NNSA Site/Facility Management Contractor operating an FFRDC or other DOE/NNSA facility may respond to Broad Agency Announcements, financial assistance solicitations, Program Research and Development Announcements, and similar solicitations from other Federal agencies or non-Federal entities when the following conditions have been met:

(1) Response to the solicitation does not result in head to head competition with other solicitation respondents as an offeror, team member, or subcontractor to an offeror.

(2) The cognizant field office has been notified of intent to respond.

(3) The solicitation is a general research announcement used for the acquisition of basic or applied research to further advance scientific knowledge or understanding rather than focused on a specific system or hardware solution.

(4) Evaluation and selection is performed through a merit or peer review process using pre-established general selection criteria.

(5) The primary bases for selection include quality of the scientific/ technical approach, importance to the Agency, and funds availability.

c. The following determinations and a written certification of their completion must be made prior to the acceptance of a SPP agreement (see paragraph 8.a). The proposed work—

(1) is consistent with or complementary to missions of DOE/NNSA and the facility to which the work is to be assigned,

(2) will not adversely impact DOE/NNSA programs assigned to the facility,

(3) will not place the facility in direct competition with the domestic private sector, and

(4) will not create a detrimental future burden on DOE/NNSA resources.

For work performed under a DOE or NNSA contract the RCO must ensure the determinations are made and provide the written certification. For work performed at Headquarters, the DOE/NNSA Program Secretarial Officer (PSO), or designee to whom written delegation has been provided pursuant to 5.i.(4),

must ensure the determinations are made and provide the written certification. In all cases the determination and certification process is an inherently governmental function and may not be delegated to a contractor.

Master Scope of Work Process: Consistent with current DOE/NNSA policy requirements, the RCO may approve a Master Scope of Work (MSW) for routine work with non-Federal sponsors[1]. If the DOE/NNSA Site/facility Management Contractor and the RCO agree upon an MSW, individual project transactional approval by the RCO is not required if the DOE NNSA Site/Facility Management Contractor determines that the proposed transaction falls within the approved MSW. Rather, the DOE NNSA Site/Facility Management contractor applies the RCO's MSW written certification and approval to the transaction. The DOE NNSA Site/Facility Management Contractor, must provide to the RCO a written determination of its decision that the project falls within the MSW, subject to RCO review and oversight. The RCO is still responsible for placing the work and funding onto the contract as required for all work at the facility using standard contracting procedures and consistent with the DOE Chief Financial Officer's (CFO) guidance. Any proposed work that has specific requirements, e.g., a foreign engagement (DOE Policy 485.1, *Foreign Engagements with DOE National Laboratories*, current version) or work involving animal subjects, must receive the necessary approvals for such requirements before the proposed work can enter or re-enter the MSW process. The MSW process must never be authorized or utilized for any type of classified or other work requiring classification guidance.

d. In addition to paragraph 4.c., above, all Federal agency sponsors must provide on or with the funding document a written statement [example below] confirming that—

(1) the requesting Agency has determined that entering into an SPP agreement with DOE/NNSA complies with the requirements of the Economy Act of 1932, as amended (31 U.S.C. 1535), or other applicable authorizations [e.g., Executive Order (E.O.) 12333];

(2) the requesting Agency has determined that entering into an SPP agreement with DOE/NNSA complies with competition requirements in Federal Acquisition Regulation (FAR) Part 6, section 6.002, Limitations; and

(3) to the best of the requesting Agency's knowledge, the work will not place DOE/NNSA and their Site/Facility Management Contractor in direct competition with the domestic private sector.

[1] The first negotiated MSW at each site shall be approved by the Headquarters Office of the Cognizant Secretarial Officer.

Sample Statement from a Federal Agency

This agreement is entered into pursuant to the authority of the Economy Act of 1932, as amended (31 U.S.C. 1535,) or other statutory authority and adheres to Federal Acquisition Regulation (FAR) 6.002. To the best of our knowledge, the work requested will not place DOE/NNSA and its Site/Facility Management Contractor in direct competition with the domestic private sector.

e. The requirements of paragraphs 4.a.–4.d. must be met before a SPP agreement can be accepted or before modifications outside the scope of an existing SPP agreement can be approved.

NOTE: For previously approved work with schedule and/or cost changes but no change in scope, reapplying the determinations and certification process is not required.

f. Pricing of work and biennial reviews of prices and charges of materials and services must be in accordance with DOE O 522.1A, *Pricing of Departmental Materials and Services*, current version.

g. Before SPP construction that exceeds the DOE-approved GPP limit at a DOE site can begin, approval must be granted by the DOE Cognizant Secretarial Officer (CSO) 5.j.(3) and the DOE Chief Financial Officer 5.b.(4). The CFO must be notified seven days in advance of approval of a construction project funded through an SPP agreement that exceeds $1 million but is less than the DOE-approved GPP limit. For a NNSA site, approval for SPP construction that exceeds the DOE-approved GPP limit must be granted by the Associate Administrator for Acquisition and Project Management 6.f.(6) and Associate Administrator for Management and Budget 6.a.(3) and notification provided to the NNSA Director, Office of Deputy Associate Administrator for Budget 6.b.(4), before work can begin. Projects must meet the following requirements:

(1) Construction projects must be performed according to requirements of DOE O 413.3B, *Program Project Management for the Acquisition of Capital Assets*, current version.

(2) Upon completion, title to permanent construction work must vest in DOE/NNSA.

(3) Construction funded through SPP agreements must not supplement DOE-funded construction activities unless the SPP-funded portion of the construction effort is explicitly approved by the CFO.

h. Equipment acquired as part of a project must be accounted for and maintained in the same manner as DOE/NNSA property. Disposition of equipment must be as

previously agreed or as instructed by the sponsor. Equipment shipping costs are the responsibility of the sponsor.

i. The DOE/NNSA Site/Facility Management Contractor must determine the work to be subcontracted, if any, and select necessary subcontractor(s).

j. Intelligence and Intelligence-related projects (defined in paragraph 8.i.) must be conducted in accordance with—

(1) Executive Order 12333, as amended,

(2) Other Executive Orders and Presidential Directives,

(3) U.S. laws,

(4) Intelligence Community Directives,

(5) Remaining Director, Central Intelligence, Directives,

(6) DOE's *"Procedures for Intelligence Activities,"*[2] and

(7) Department of Energy Delegation Order No. 00-020.00A to the Director of Intelligence and Counterintelligence, dated March 19, 2013, and subsequent revisions.

k. Special Access Program (SAP) reimbursable SPP require review and approval of the DOE Special Access Oversight Committee (SAPOC) and must follow the specific guidelines and requirements in accordance with DOE O 471.5, *Special Access Program,* current version. Intelligence SAPs will be reviewed and approved by the Director, Office of Intelligence and Counterintelligence, 5.f.1.

l. Work directly funded by a foreign sponsor and performed at a DOE (non-NNSA facility) shall be reviewed and approved consistent with DOE P 485.1, which requires the review and concurrence of the Office of International Affairs; CSO [5.j.4(c)]; Cognizant PSO or designee; Cognizant General Counsel Office; Office of Intelligence and Counterintelligence; and Office of Nonproliferation and Arms Control.

m. Work directly funded by a foreign sponsor and performed at an NNSA facility shall be reviewed and approved consistent with DOE P 485.1, which requires the review and coordination with the Office of International Affairs; and the review and concurrence of the CSO; Cognizant PSO or designee; Cognizant General Counsel Office; Office of Intelligence and Counterintelligence; and Office of Nonproliferation and Arms Control. Also, Field Offices shall notify the NNSA

[2] DOE's "Procedures for Intelligence Activities" are approved by the Office of the Attorney General.

Principal Deputy Administrator or designee (NNSA Office of Strategic Partnership Programs).

n. SPP agreements involving human, including their identified data and bio-specimens, or animal subjects, whether performed domestically or in an international environment, regardless of the classification level, must comply with Federal regulations and DOE/NNSA directives/requirements for human or animal subject protection. For intelligence and intelligence-related projects involving human subjects, these projects are reviewed by the Central DOE Institutional Review Board – Classified (IRB-C). See DOE O 443.1B, Chg. 1, *Protection of Human Research Subjects*, current version, and DOE N 443.1, *Protection of Human Subjects in Classified Research*, current version, for the applicable requirements when conducting human subject research.

o. Work that involves research, development or production of radioisotope or fission systems or their components, when the potential ultimate application is to produce power or propulsion in space or to produce terrestrial power for national security or defense applications under the Atomic Energy Act authority (i.e. not NRC-licensed), at non-NNSA facilities requires the concurrence of the Office of Nuclear Infrastructure Programs (NE-3) (see paragraph 5.h.) Such work, when performed at an NNSA facility, requires concurrence of the NNSA Office of Strategic Partnership Programs 6.g. and will be coordinated with the Office of Nuclear Infrastructure Programs (NE-3) and notification provided to the Office of Nuclear Infrastructure Programs (NE-3) when accepted.

p. Cost estimates for federally sponsored SPP agreement must specifically identify the amount of laboratory directed research and development (LDRD) funds to be collected as part of the project costs. The following language must be included in each SPP agreement unless a formal agreement regarding LDRD funding has been reached between DOE/NNSA and the sponsoring Federal agency:

> "Consistent with the Department of Energy's (DOE's) full cost recovery policy, DOE collects, as part of its standard indirect cost rate, a laboratory directed research and development (LDRD) cost. Based on the amount of funds accepted for this project, $_____ represents an estimated amount that will be used for LDRD. The DOE believes that LDRD efforts provide opportunities in research that are instrumental in maintaining cutting-edge science capabilities that benefit all of the customers of the laboratory. The DOE will conclude that by you providing funds to DOE to perform work, you acknowledge that such activities are beneficial to your organization and consistent with appropriations acts that provide funds to you. "

q. If the DOE-approved standard SPP terms and conditions for non-federally sponsored SPP agreements are used, the DOE/NNSA review and approval should be limited to completing the required DOE/NNSA determinations and Contracting Officer certification and other concurrences/approvals as follows:

DOE determination that the agreement complies with the Order; approving the agreement scope of work; and placing the work and funding onto the contract. DOE review and approval of pre-approved terms and conditions is not required.

r. Requests for exceptions to DOE non-federal sponsors SPP agreement pre-approved articles (Attachment 1), addition of other articles or deletion of articles must be approved by the DOE RCO. The RCO may approve Site Specific pre-approved articles that are consistent with this Order.

5. RESPONSIBILITIES—NON-NNSA ENTITIES WITHIN DOE. In keeping with Title 50 U.S.C. § 2401, SPP responsibilities have been separated into DOE organizational responsibilities, below, and NNSA organizational responsibilities in paragraph 6.

a. Office of Management.

(1) Establishes, in conjunction with Cognizant Secretarial Officers (CSO) and NNSA officials,[3] DOE SPP policies.

(2) Approves requests for excluding non-NNSA SPP agreement from requirements of this Order including in cases of national emergency [for NNSA exclusions, see paragraph [6.b.(5)].

(3) Develops, maintains, and updates the standard SPP agreement for non-Federal sponsors (See Attachment 1).

b. Chief Financial Officer.

(1) Establishes and maintains DOE SPP financial policies and procedures.

(2) Develops and maintains financial information on SPP and prepares financial reports as necessary.

(3) Coordinates with responsible Cognizant Secretarial Officers to ensure the availability of funds for SPP accepted and performed at Headquarters.

(4) Concurs on construction projects funded by a SPP agreement that exceed the DOE-approved GPP limits.

(5) Establishes and assigns required SPP values in the DOE financial management systems and coordinates with the Field CFOs on these matters.

c. Office of International Affairs. Reviews and concurs, or for NNSA reviews and comments, on all SPP agreement requests to be directly funded by foreign

[3]NNSA officials whose responsibilities parallel those of DOE Secretarial Officers are Deputy Administrators and Assistant Deputy Administrators.

sponsors to ensure consistency with international agreements and foreign policy objectives.

d. DOE General Counsel/Field Counsel.

(1) Provides legal advice and representation on SPP agreement issues.

(2) Establishes policy on patent and technical data.

(3) Advises on patent and technical data contract clauses.

(4) Approves waiver of patent rights.

(5) Reviews and concurs on non-NNSA foreign sponsored SPP agreements.

e. Associate Director, Office of Biological and Environmental Research. Acts as the DOE Institutional Official for the Protection of Human Subjects in Research and is the Secretary's designee to oversee the DOE/NNSA's Protection of Human Subjects in Research.

(1) In consultation with NNSA, oversees the implementation of the DOE system to ensure that all human subject research complies with established Federal regulations and DOE directives/requirements.

(2) Coordinates with DOE-IN on all Intelligence and Intelligence-related human subjects SPP, regardless of funding source or classification.

(3) Oversees the implementation of animal research protection.

f. Director, Office of Intelligence and Counterintelligence (DOE-IN).

(1) Manages, reviews, and approves proposed intelligence and intelligence-related SPP including intelligence SAPs pursuant to 4.j. in coordination with the appropriate field office manager or designee.

(2) Coordinates program review of intelligence and intelligence-related SPP with the participation of appropriate Field Intelligence Elements (defined in paragraph 8.f.) and field office manager or designee.

(3) Reviews intelligence and intelligence-related SPP for duplication of effort if duplication is not requested by the sponsor.

(4) Serves as central point of contact for coordination with sponsors of intelligence and intelligence-related SPP.

(5) Informs, if applicable, the Cognizant Secretarial Officer, e.g. the Director of Science of problems with intelligence and intelligence-related SPP.

(6) Conducts counterintelligence review of SPP agreements funded by a foreign sponsor.

g. NNSA Assistant Deputy Administrator for Nonproliferation Research and Development. Reviews and provides comments on nuclear proliferation and detonation detection technology-related SPP.

h. Office of Nuclear Infrastructure Programs. Concurs on proposals involving radioisotope or fission systems or their components, when the potential ultimate application is to produce electric power or propulsion in space or to produce terrestrial power for defense or national security applications under DOE Atomic Energy Act authority (i.e. not NRC-licensed) at non-NNSA facilities; coordinates with NNSA on such work at NNSA facilities. This excludes fusion, weapons-related activities and naval propulsion reactors.

i. Program Secretarial Officers.

(1) Accepts Headquarters accepted SPP agreements in accordance with the requirements of paragraph 4.c. Once accepted, forwards copies of all information to the RCO to approve placement of work and funding onto the contract where the work will be performed. For work accepted and performed at Headquarters copies of all information and decision documentation should be maintained and available by the accepting office.

(2) Reviews and concurs on foreign-sponsored SPP agreements to ensure the use of program developed technologies is acceptable for the purpose of the SPP agreement.

(3) Ensures SPP work performed at Headquarters involving human and/or animal subjects is compliant with established Federal regulations and DOE directives/requirements for protection of these subjects.

(4) Approves written delegations of authority for completing the determinations and certification process for Headquarters accepted SPP agreements consistent with 4.c.

j. Cognizant Secretarial Officers.

(1) Develop and recommend changes in SPP policies to the Director, Office of Management, or Office of the Chief Financial Officer.

(2) Notify other Secretarial Officers of significant or sensitive SPP agreements.

(3) After obtaining concurrence from the Office of the Chief Financial Officer, approve facility construction that exceeds the DOE-approved GPP limit.

(4) For DOE facilities under their cognizance--

(a) Approve or designate the Head of the Field Element to approve annual SPP levels and requests for increases.

(b) Conduct periodic reviews of field office SPP agreement review and approval systems using a risk based management approach. The approach shall ensure that:

1 CSO approved risk based schedule is established that ensures sites are reviewed no less than every five years;

2 Sites with higher levels of identified risk will be reviewed more frequently; and

3 Reviews include assessment of review and approval procedures to ensure compliance with DOE-wide SPP policies and procedures.

(c) Review and concur in foreign sponsored SPP agreements.

(d) Provide copies of approved annual SPP levels to other program organizations as requested.

k. Heads of DOE Field Elements.

(1) Manage site-specific SPP agreement review, approval, and oversight functions to ensure SPP actions at facilities under their purview are consistent with DOE SPP policies and procedures.

NOTE: In this capacity, Heads of Field Elements are accountable to the Cognizant Secretarial Officers.

(2) Develop and implement procedures for review, acceptance, authorization, and monitoring of SPP agreements consistent with DOE policies and procedures and encourage parallel review and processing by DOE, the sponsor, and the DOE/NNSA Site/Facility Management Contractor.

(3) For facilities under their purview:

(a) Recommend annual SPP funding levels for the CSOs approval, or if delegated, notify the CSO of the approved funding level.

(b) Monitor SPP funding levels to ensure consistency with approved funding levels.

(c) Submit requests for funding level increases to the CSOs for approval or if delegated this authority by the CSO notify the CSO of the approved increase.

(4) Notify the CSO of SPP agreements that involve sensitive subjects.

(5) Ensure that DOE/NNSA and/or Site/Facility management Contractor representatives review proposed SPP agreements that involve human and/or animal subjects for compliance with established Federal regulations and DOE directives/requirements for protecting these subjects.

(6) Ensure that information generated pursuant to SPP under their purview is protected in accordance with applicable DOE security, safeguards, and classification and controlled unclassified information policies; site security plans; and supplemental security plans specific to the projects.

(7) Ensure that DOE/NNSA and Site/Facility Management Contractors review projects for compliance with the National Environmental Policy Act of 1969 and DOE environment, safety, and health requirements.

(8) Ensure that the appropriate Headquarters Element, per this Order is involved in the SPP agreement review process.

(9) Establish and implement closeout procedures for SPP agreements.

(10) Ensure that resulting scientific and technical information is disseminated consistent with existing DOE Orders and regulations.

(11) Establish performance measures to assess the effectiveness of the procedures for review, acceptance authorization, and monitoring of SPP agreements.

(12) Ensure that a summary of each active SPP agreement is maintained. At minimum, the information should include:

(a) project title and description,

(b) sponsoring entity,

(c) assigned laboratory or contractor,

(d) field points of contact,

(e) total estimated cost, and

(f) estimated start and completion dates.

(13) Ensure that project information documenting policy compliance is maintained by DOE and/or the performing DOE/NNSA Site/Facility Management Contractor.

(14) In coordination with CSO, submit to the Director, Office of Management requests to grant exclusions from the requirements of this Order for non-NNSA projects.

(15) Ensure that projects directly funded by foreign sponsors and performed at non-NNSA sites are reviewed, have the concurrence of the Office of International Affairs; appropriate Program Secretarial Officer or their designee; CSO; Cognizant General Counsel Office; the appropriate Headquarters or field component of the Office of Intelligence and Counter intelligence; and the Office of Nonproliferation and Arms Control.

(16) Ensure DOE determines non-Federally sponsored agreements using DOE approved standard terms and conditions comply with the Order, approves the agreement scope of work and places the work and funding onto the contract.

6. RESPONSIBILITIES—NNSA ORGANIZATIONS.

a. Associate Administrator for Management and Budget.

(1) Working in coordination with the DOE Office of Management, and other Program Secretarial Officers, establishes DOE SPP agreement policies.

(2) Develops and implements SPP agreement procedural guidance for NNSA organizations.

(3) After notifying the Deputy Associate Administrator for Budget, approves facility construction that exceeds the DOE-approved GPP limit.

b. Deputy Associate Administrator for Budget.

(1) Conducts periodic reviews of the implementation of this Order by NNSA headquarters and heads of field elements

(2) Develops and maintains financial information on SPP agreements and prepares financial reports as necessary.

(3) Coordinates with responsible Deputy Administrators (DAs) to ensure the availability of funds for SPP agreements accepted and performed at Headquarters.

(4) Provides notification to the Cognizant Deputy Administrator on construction projects that exceed the DOE-approved GPP limit.

(5) Approves requests for excluding SPP agreements from requirements of this Order including in cases of national emergency for NNSA sites in coordination with the DOE Director, Office of Management.

(6) Provides concurrence in the development and updating of the standard SPP agreement for non-Federal sponsors.

c. NNSA Office of the General Counsel or NNSA Field Counsel.

(1) Provides legal advice and representation on issues related to SPP agreements.

(2) Establishes policy on patent and technical data in coordination with the DOE Assistant General Counsel for Technology Transfer.

(3) Advises on patent and technical data clauses of contracts in coordination with the DOE Assistant General Counsel for Technology Transfer.

(4) Coordinates the approval of waiver of patent rights with the DOE Assistant General Counsel for Technology Transfer.

(5) Reviews and concurs on NNSA foreign sponsored SPP agreements.

d. Director, Office of Intelligence and Counterintelligence (DOE-IN).

(1) Manages, reviews, and approves proposed intelligence and intelligence-related SPP including intelligence SAPs pursuant to 4.j. in coordination with the appropriate field office manager or designee.

(2) Coordinates program review of intelligence and intelligence-related SPP with the participation of appropriate Field Intelligence Elements 8.f. and field office manager or designee.

(3) Reviews intelligence and intelligence-related SPP for duplication of effort if duplication is not requested by the sponsor.

(4) Serves as central point of contact for coordination with sponsors of intelligence and intelligence-related SPP.

(5) Inform, if applicable, the Cognizant Secretarial Officer (e.g., NNSA Principal Deputy Administrator) and Field Office Manager of problems with intelligence and intelligence-related SPP, at sites under the FOM and CSO's cognizance.

(6) Conducts counterintelligence review of SPP agreements funded by a foreign sponsor.

e. NNSA Assistant Deputy Administrator for Defense Nuclear Nonproliferation Research and Development. Reviews SPP agreements involving projects for detecting nuclear proliferation and nuclear detonations, and provides comments to the NNSA Office of Strategic Partnership Programs for possible action in coordination with the relevant field office.

f. NNSA Deputy Administrator for Defense Programs. Responsible for oversight of SPP agreements at NNSA sites through the NNSA Office of Strategic Partnership Programs. Responsibilities include the following and may be further delegated.

(1) Develop and recommend changes in SPP policies to the NNSA Associate Administrator for Management and Budget.

(2) Accepts Headquarters accepted SPP agreements in accordance with the requirements of paragraph 4.c. for NNSA. Once accepted, copies of all information should be forwarded to the cognizant RCO to approve placement of work and funding onto the contract where the work will be performed. For work performed at Headquarters, copies of all information and decision documentation should be maintained and available.

(3) Review and concur in foreign-sponsored SPP that use NNSA program developed technologies and sites.

(4) Ensure work performed at Headquarters involving human or animal subjects complies with established Federal regulations and NNSA directives/requirements for the protection of these subjects.

(5) Notify appropriate Secretarial Officers of significant or sensitive SPP agreements.

(6) After obtaining notification from the Director, Office of Field Financial Management, approve facility construction that exceeds the DOE-approved GPP limit.

(7) For NNSA facilities:

(a) Approve or designate the head of the Field element to approve annual SPP levels and requests for increases to approved levels

(b) Conduct periodic reviews of site office SPP agreement review and approval systems using a risk based management approach. The approach shall ensure that:

1 A DA approved risk-based schedule is established that ensures sites are reviewed no less than every five years;

2 Sites with higher levels of identified risk will be reviewed more frequently; and

3 Reviews include assessment of review and approval procedures to ensure compliance with DOE-wide SPP policies and procedures.

(a) Approves requests for excluding non-NNSA SPP agreements from requirements of this Order including in cases of national emergency for NNSA sites.

g. NNSA Office of Counterterrorism and Counterproliferation. Reviews and provides concurrence on SPP agreements involving improvised nuclear devices (IND), radiological dispersal devices (RDDs), radiological exposure devices (REDs) to the NNSA Office of Strategic Partnership Programs for action.

h. NNSA Office of Strategic Partnership Programs.

(1) Establishes with the Office of Management and Cognizant Secretarial Officers DOE SPP policies.

(2) Reviews and concurs in foreign sponsored SPP agreements to ensure that work is appropriate for performance at NNSA sites and to ensure the use of program developed technologies is acceptable for the purpose of the SPP agreement.

(3) Ensures that SPP work performed involving human subjects, including their identified data and bio-specimens, is compliant with established Federal regulations and DOE directives/requirements for protection of these subjects, working closely with NNSA's Human Subjects Research Program Manager and the DOE Institutional Official for the Protection of Human Subjects in Research.

(4) Provide copies of approved annual SPP levels to other program organizations as requested.

(5) Concurs on work that involves research, development or production of radioisotope or fission systems or their components as described in 4.o when performed at an NNSA facility in coordination with the Office of Nuclear Infrastructure Programs (NE-3), and provides notification to the Office of Nuclear Infrastructure Programs (NE-3) of any accepted work described above.

(6) Concurs on work that involves the research, development, or discussion of improvised nuclear devices, both systems and components unless otherwise restricted by applicable program guidance or DOE Orders.

(7) Annually reviews the SPP program for efficiencies, duplication of effort, and other improvement measures.

(8) Concurs on work involving research and development projects for detecting nuclear proliferation and nuclear detonations, including nuclear fuel-cycle-related and potential dual-use technologies, radiation and radionuclide detection technologies, technologies for detecting weaponization, nuclear forensics, and explosion monitoring.

i. Field Office Managers.

(1) Responsible for oversight and management of all SPP activities conducted at their sites.

(2) Develop and implement procedures for SPP review, acceptance, authorization, monitoring, and closeout, consistent with NNSA policies and procedures.

(3) Encourage parallel review and processing by NNSA, the sponsor, and the Site/Facility Management Contractor.

(4) For facilities under their purview:

(a) Recommend annual SPP funding levels for the NNSA Principal Deputy Administrator's (PDA) approval, or if delegated, notify the PDA of the approved funding level,

(b) Monitor SPP funding levels to ensure consistency with approved funding levels, and

(c) Submit requests for level increases for the PDA's approval or if delegated notify the PDA of the approved funding level.

(5) Notify the NNSA Principal Deputy Administrator of SPP agreements that involve sensitive subjects.

(6) Ensure that NNSA and/or Site/Facility Management Contractors review proposed SPP agreements involving human, including their identified data and bio-specimens, or animal subjects for compliance with established Federal regulations and NNSA directives/requirements for protecting these subjects.

(7) Ensure that SPP under their purview are protected in accordance with applicable NNSA security, safeguards, classification, and controlled unclassified information policies; site security plans; and supplemental security plans specific to the project.

(8) Ensure that NNSA and Site/Facility Management Contractors review SPP for compliance with the National Environmental Policy Act of 1969 and other NNSA environment, safety, and health requirements.

(9) Coordinate with the NNSA Office of Strategic Partnership Programs to ensure that appropriate Headquarters elements are involved in the review process.

(10) Establish and implement closeout procedures for SPP. Ensure that resulting scientific and technical information is disseminated consistent with existing DOE/NNSA Orders and regulations.

(11) Establish performance measures to assess the effectiveness of the procedures for SPP review, acceptance, authorization and monitoring consistent with NNSA policies and procedures.

(12) Ensure that a summary of each active SPP agreement is maintained. At minimum, the information should include:

(a) project title and description,

(b) sponsoring Entity,

(c) assigned laboratory or contractor,

(d) field points of contact,

(e) total estimated costs, and

(f) estimated start and completion dates.

(13) Ensure that project file information documenting policy compliance is maintained by NNSA and/or the performing Site/Facility Management Contractor.

(14) Submit to the Principal Deputy Administrator requests for exclusion from requirements of this Order.

(15) Ensure that projects directly funded by foreign sponsors and performed at NNSA sites are; reviewed and coordinated with the DOE Office of International Affairs, reviewed and concurred on by the, CSO, Cognizant PSO or designee, Cognizant General Counsel Office, Office of Intelligence and Counterintelligence, Office of Nonproliferation and Arms Control. Also, provide notification to the NNSA Principal Deputy Administrator or designee (NNSA Office of Strategic Partnership Programs).

(16) Provide notification of SPP agreements involving nuclear nonproliferation detection technology projects to the NNSA Assistant Deputy Administrator, Office of Defense Nuclear Nonproliferation Research and Development.

(17) Ensure NNSA determines non-Federally sponsored agreements using DOE approved standard terms and conditions comply with the Order, approves the agreement scope of work and places the work and funding onto the contract.

7. REFERENCES.

a. DOE O 241.1B, *Scientific and Technical Information Management*, current version, which establishes requirements and assigns responsibilities to ensure that scientific and technical information emanating from DOE research is appropriately identified, processed, disseminated, and preserved.

b. DOE O 443.1B, *Protection of Human Research Subjects*, current version, which establishes the procedures and responsibilities for implementing the policy and requirements established in 45 CFR Part 46 10 CFR Part 745.

c. DOE N 443.1, *Protection of Human Subjects in Classified Research*, current version, supplements DOE O 443.1B for research that is classified in whole or in part.

d. DOE O 457.1A, *Nuclear Counterterrorism*, current version, support for DOE activities for health, safety, and common defense by reducing the threat of inadvertent or unauthorized disclosure of sensitive improvised nuclear device (IND) information.

e. DOE O 470.4B, *Safeguards and Security Program*, current version, which provides requirements for registering SSP activities in DOE's Safeguard and Security Information Management System.

f. DOE O 471.1B, *Identification and Protection of Unclassified Controlled Nuclear Information*, current version, which provides requirements and responsibilities for identifying Unclassified Controlled Nuclear Information and protecting it from unauthorized dissemination.

g. DOE O 471.3, *Identifying and Protecting Official Use Only Information*, current version, which establishes a program within DOE and NNSA to identify certain unclassified controlled information as Official Use Only (OUO) and to identify, mark, and protect documents containing such information.

h. DOE O 471.5, *Special Access Program Policies, Responsibilities, and Procedures*, current version, which delineates policies, responsibilities, and procedures for SAP projects.

i. DOE O 475.2B, *Identifying Classified Information*, current version, which specifies responsibilities, authorities, policies, and procedures for management of the DOE Classification System.

j. DOE O 522.1A, *Pricing of Departmental Materials and Services*, current version, which establishes requirements and assigns responsibilities for setting and conducting biennial reviews of the prices and charges for materials or services sold or provided by DOE, either directly or through Site/Facility Management Contractors, to organizations and persons outside DOE/NNSA.

k. DOE P 485.1, *Foreign Engagements with DOE National Laboratories*, current version, which establishes additional review criteria and procedures for foreign engagements including SPP agreements.

l. *Department of Energy Financial Management Handbook*, current version, Chapter 13, Reimbursable Work, Revenues, and Other Collections, which establishes DOE-/NNSA-wide financial policy and procedural guidance for certain interagency reimbursable actions and reimbursable actions with non-DOE/non-NNSA entities.

m. *DOE Procedures for Intelligence Activities*, which provide supplemental guidance/requirements for the conduct of intelligence and intelligence-related work.

n. The Atomic Energy Act of 1954 (P.L. 83-303), as amended (42 U.S.C. 2011 et seq.), Sections 31, 32, and 33, which authorize the conduct of research and development and certain training activities for non-DOE/non-NNSA entities, provided that private facilities or laboratories are inadequate for that purpose. It authorizes such charges as may be appropriate for the conduct of those activities.

o. The Contributed Funds Act of 1921 (43 U.S.C. 395), which permits contributions from a non-Federal participant or partner toward the cost of a project.

p. The Economy Act of 1932, as amended (31 U.S.C. 1535), which authorizes an Agency to place orders for goods and services, subject to availability, with another Government agency when the head of the ordering Agency determines that it is in the best interest of the Government.

q. The Energy Reorganization Act of 1974 (P.L. 93-438), Section 205 (42 U.S.C. 5845), which requires Federal agencies to furnish to the NRC, on a reimbursable basis, such research services as NRC deems necessary and requests for the performance of its function.

r. The Intergovernmental Cooperation Act of 1968, as amended, (31 U.S.C. 6505), which authorizes Federal agencies to perform work for State and local governments in accordance with the requirements of Office of Management and Budget (OMB) Circular A-97.

s. The National Competitiveness Technology Transfer Act of 1989 (P.L. 101-189), Sections 3131, 3132, 3133, and 3159, which prescribe technology transfer as a DOE mission.

t. The National Environmental Policy Act of 1969 (P.L. 91-190), which encourages efforts to prevent or eliminate damage to the environment.

u. The National Defense Authorization Act for Fiscal Year 2000 (P.L. 106-65), dated Title XXXII, as amended, which establishes NNSA responsibilities.

v. The Stevenson-Wydler Technology Innovation Act of 1980 (P.L. 96-480), as amended, Section 11, which states as public policy that the Federal Government must strive to transfer Federally owned or originated technology to State and local governments and the private sector.

w. Executive Order 12333, *United States Intelligence Activities*, as amended, part 1.13, which establishes responsibilities for DOE to support the U.S. intelligence community by providing expert technical, analytical, and research capability to others within the intelligence community and by anticipating how DOE can contribute to the formulation of intelligence collection and analysis requirements.

x. FAR 17.5, “Interagency Agreements,” which prescribes policies and procedures for a Federal agency to obtain supplies or services from another Federal agency.

y. FAR 17.7, “Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense,” which prescribes policies and procedures specific to acquisitions of supplies and services by non-defense agencies on behalf of the Department of Defense.

z. FAR 35.017, “Federally Funded Research and Development Center” (FFRDCs), which establishes Government-wide policies for review and termination of FFRDCs.

aa. OMB Circular A-97, which defines rules and regulations permitting Federal agencies to provide specialized or technical services to State and local units of government under Title III of the Intergovernmental Cooperation Act of 1968.

bb. Title 45 of Code of Federal Regulations (CFR) part 46, "Federal Policy for the Protection of Human Subjects," which sets forth Federal regulations for protection of human subjects involved in research activities.

cc. Title 10 Code of Federal Regulations (CFR) Part 745, “Protection of Human Subjects,” which sets forth DOE's directives/regulations for protecting human subjects involved in research activities.

dd. Department of Energy Delegation Order No. 00-020.00A to the Director of Intelligence and Counterintelligence, dated March 19, 2013, and subsequent revisions.

8. DEFINITIONS. The following terms apply to SPP conducted through DOE/NNSA and their Site/Facility Management Contractors.

a. Acceptance. The official signing of a reimbursable agreement (e.g., bilateral sales contract or interagency agreement) by a cognizant DOE/NNSA RCO or a federal official with delegated authority to commit DOE/NNSA and/or their Site/Facility Management Contractors to perform work under Strategic Partnership Project Agreements.

b. Bilateral Sales Contract. A binding agreement that commits DOE, NNSA or a DOE/NNSA Site/Facility Management Contractor to perform work for a non-Federal entity. Agreements with non-federal customers require bilateral sales contracts.

c. Cognizant Secretarial Officers/NNSA Principal Deputy Administrator. Headquarters Assistant Secretaries, Deputy Administrator and Directors responsible for oversight or institutional management of DOE/NNSA facilities.

d. DOE Institutional Official for the Protection of Human Subjects in Research. Senior official delegated by the Secretary (DOE O 443.1B, Chg. 1) to oversee the DOE/NNSA's Protection of Human Subjects in Research.

e. DOE/NNSA Site/Facility Management Contractors. Operate and maintain Government-owned facilities under contract with and for the benefit of DOE/NNSA.

f. Field Intelligence Element (FIE). An intelligence component of the DOE-IN Field Intelligence Enterprise, which includes DOE/NNSA Site/Facility management Contractors and subcontractor employees located at DOE/NNSA facilities that provide products and services to DOE, the Intelligence Community (IC), and non-IC Federal agencies. FIE Directors are approved by the Director of DOE-IN and have responsibility for compliance and oversight of all intelligence and intelligence-related SPP at the DOE/NNSA facility in coordination with the field office manager.

g. Heads of Field Elements/Field Office Managers. Officials who direct activities of DOE/NNSA field or site offices and field organizations reporting directly to Headquarters. NNSA FOMs serve as line management, site-level mission integrators, and as the authorizing officials for activities at the site on behalf of the Administrator

h. Human Subjects. Living individuals about whom a researcher obtains data through intervention or interaction with the individual or through identifiable information.

i. Intelligence and Intelligence-Related SPP.

(1) Intelligence projects are sponsored by an organization identified in Executive Order 12333 as an element of the Intelligence Committee and funded by either the National Intelligence Program or the Military Intelligence Program and within the authorities of that organization in

accordance with Executive Order 12333, applicable U.S. laws, other Executive Orders, Presidential Directives, Intelligence Community Directives, and DOE *Procedures for Intelligence Activities*;

(2) Intelligence-related projects are sponsored by non-Intelligence Community Federal agencies, regardless of appropriation type, utilizing DOE's authorities under Executive Order 12333 applicable U.S. laws, other Executive Orders, Presidential Directives, Intelligence Community Directives, and DOE *Procedures for Intelligence Activities*; and

(3) Activity for which the cognizant technical DOE Headquarters official is the Director, Office of Intelligence and Counterintelligence.

j. Interagency Agreement. Provides the statement of work, terms and conditions, funding, billing, and payment data in support of a reimbursable agreement. The format of the requesting Agency is acceptable as long as it contains the appropriate elements as outlined in this Order.

k. Master Scope of Work. A detailed description of a routine scope of work (encompassing one or more projects) containing information sufficient to: (1) ensure that the DOE/NNSA Site/facility Management Contractor and the RCO have a common understanding of the work to be performed; and (2) allow DOE to make all reviews, approvals, determinations, and certifications required pursuant to this Order and other relevant DOE policy.

l. Non-DOE/non NNSA Entities. Federal agencies; State, regional, and local governments; private or commercial firms; not-for-profit organizations; international organizations; and foreign governments.

m. Program Secretarial Officers and Deputy NNSA Administrators. Headquarters Assistant Secretaries, Deputy Administrators, and Directors who have management responsibility for program planning, budgeting, and execution, of DOE/NNSA mission program activities. In this capacity, these individuals have funded program related technology development proposed for use in the SPP work and must concur on its use on all foreign-sponsored SPP agreements.

n. Program Secretarial Officer/Cognizant Secretarial Officer/Deputy NNSA Administrator Designee. A DOE/NNSA federal official provided specific authorities through written delegation to act on behalf of the delegating official.

o. Reimbursable Agreement. A written agreement to perform work or provide a service for another Federal agency or non-Federal entity on a reimbursable basis.

p. Research. Systematic investigation, including research, development, testing, and evaluation designed to develop, expand or contribute to general knowledge.

q. DOE/NNSA Responsible Contracting Officer. A DOE/NNSA official with responsibility for administering the contract for the operation of a DOE/NNSA research or production facility.

r. Sponsor. An entity that provides Strategic Partnership Project Agreement funding.

s. Strategic Partnership Projects. Work for non-DOE/non-NNSA entities by DOE/NNSA and/or their Site/Facility Management Contractors or use of DOE/NNSA facilities for work that is not directly funded by DOE/NNSA appropriations consistent with the requirements of this Order.

9. CONTACT. For information about this Order, contact the Office of Contract and Financial Assistance Policy at 202-287-1507.

BY ORDER OF THE SECRETARY OF ENERGY:

DAN BROUILLETTE
Deputy Secretary

DOE NON-FEDERAL SPONSORS
STRATEGIC PARTNERSHIP PROJECT AGREEMENT

Introduction:

The DOE approved Standard Strategic Partnership Project Agreement Articles, Optional Language and Guidance below may be used to negotiate and develop SPP agreements with non-federal parties, also referred to as sponsors. DOE's objective is to accommodate non-federal party needs, expedite review and approval processing, while protecting the interests of the government and to promote consistency among sites performing work for non-federal sponsors. DOE anticipates that site offices and DOE/NNSA Site/Facility Management Contractors will negotiate customized/site-specific pre-approved models, tailored from this standard agreement, to accommodate prime contracts and sponsor needs. Prior to their use, customized/site specific standard models are required to be approved by the RCO. Modifications to existing standard articles or the inclusion of additional articles is permitted however, such changes are subject to the approval of the RCO. Articles not applicable to a particular Statement of Work (SOW) may be reserved. When used, standard articles require no further DOE review and approval. Alternative contract clauses may not conflict with the terms and conditions of the facility contract.

U. S. DEPARTMENT OF ENERGY

STRATEGIC PARTNERSHIP PROJECT AGREEMENT
WITH NON-FEDERAL SPONSORS

Strategic Partnership Project Agreement No. _____

Between

(Insert here the name of the U. S. Department
Of Energy Site/Facility Management Contractor)

Operating Under Contract No. _____ for the
U. S. Department of Energy

And

(Insert here the name of the non-Federal Sponsor)

The obligations of the above-identified DOE Site/Facility Management Contractor shall apply to any successor in interest to said contractor continuing the operation of the DOE facility involved in this Strategic Partnership Project Agreement.

Guidance:

The agreement number, the names of the parties, and the contract number must be included in the agreement immediately preceding Article I.

List of Articles

Article I. PARTIES TO THE AGREEMENT

Language:

(insert here the name of the DOE/NNSA Site/Facility Management Contractor), hereinafter referred to as the "Facility Contractor," has been requested by (insert here the name of the non-Federal Sponsor), hereinafter referred to as the "Sponsor," collectively referred to as the “Parties,” to use best efforts to perform the work set forth in the SOW, attached hereto as Appendix A. It is understood by the Parties that, the Facility Contractor is obligated to comply with the terms and conditions of its Facility Prime Contract with the United States Government (hereinafter called the "Government") represented by the United States Department of Energy (hereinafter called the "Department" or "DOE") when providing goods, services, products, materials, or information to the non-Federal Sponsor under this Agreement.

Guidance Article I:

The names of the DOE Facility Contractor and the non-federal Sponsor must be inserted in this article. There must be a SOW for the agreement attached as Appendix A. The SOW must include a technical description of the work as well as the identity of the principal investigator. The SOW shall also include as appropriate: disposition of property purchased under the Agreement; identification of Facility Contractor’s background intellectual property; identification of the Sponsor’s personnel that will work at the laboratory/facility, and/or equipment or materials that will be provided by the Sponsor; identification of deliverables and reporting requirements; and schedule of work. Any proprietary information included in the SOW should be clearly marked as such. The Sponsor agrees to provide a nonproprietary description of the SOW for public dissemination. The name of the Sponsor cannot be considered proprietary.

Background rights, if any, that are affected may be addressed in the patent rights article, the rights in technical data article, in a separate article somewhere within the agreement, or in a separate agreement.

Any environmental, safety, and health issues must be addressed, especially if there are to be any materials, equipment, or other tangible property provided by the Sponsor for use at the facility in furtherance of the project.

Article II. TERM OF THE AGREEMENT

Language:

The Facility Contractor’s estimated period of performance for completion of the SOW is _____ months/years from the effective date. The effective date of this Agreement shall be the later of (1) the date on which it is signed by the last of the Parties, (2) the date on which it is approved by DOE or (3) Receipt of funds.

OPTION 1: If the Facility Contractor has a DOE site-specific approved procedure that requires the DOE RCO to review and approve the agreement before the Facility Contractor and sponsor sign the following paragraph can be used:

The Facility Contractor's estimated period of performance for completion of the SOW is _____ months/years from the effective date. The effective date of this Agreement shall be the date on which it is signed by the last of the Parties or receipt of funds whichever occurs last.

OPTION 2: Where the Facility Contractor and the Sponsor would like to have a hard "stop" date, the first sentence can be replaced with the following:

The Facility Contractor intends to complete performance of the SOW by _____ (date).

Guidance Article II:

The term of the Agreement shall be provided.

If there are several Sponsors executing the Agreement (i.e., a multi-party SPP), the work cannot begin until DOE has approved all of the Sponsors. If the project has begun and the Agreement provides that a new Sponsor may be added by Amendment, the new Sponsor cannot participate until DOE has approved. For multi-party SPPs it is suggested DOE Headquarters Patent Counsel be consulted to ensure correct disposition of patent and data rights.

Article III. COSTS

Language:

1. The Facility Contractor estimated cost for the work to be performed under this Agreement is $_____.

2. The Facility Contractor has no obligation to continue or complete performance of the work at a cost in excess of its estimated cost, including any subsequent amendment.

3. The Facility Contractor agrees to provide at least _____days' notice to the Sponsor if the actual cost to complete performance will exceed its estimated cost.

Guidance Article III:

The Facility Contractor shall determine the cost of the work to be performed under this Agreement in accordance with Department of Energy policy for pricing work it performs for others as set forth in DOE Order 522.1A, "Pricing of Departmental Materials and Services," or subsequent Order revisions.

There must be a statement of funding for the Agreement, showing the estimated cost for the work as determined by the Facility Contractor. There must also be a statement that describes the obligations of the Facility Contractor relative to exceeding estimated cost.

Costs incurred to meet sponsor-specific requirements exceeding those applied to DOE work in areas such as, Environment, Safety and Health, Security, or project and financial reporting etc., shall be reimbursed by the Sponsor.

Article IV. FUNDING AND PAYMENT

Language:

OPTION 1: For integrated Facility Contractors authorized to receive deposits in their financial institution account authorized per the DOE contract:

The Sponsor shall provide sufficient funds in advance to reimburse the Facility Contractor for costs to be incurred in performance of the work described in this Agreement, and the Facility Contractor shall have no obligation to perform in the absence of adequate advance funds (Insert appropriate funding language from Guidance below). Payment shall be made directly to the Facility Contractor who will then notify the Department of Energy as appropriate. Upon termination or completion, any excess funds shall be refunded by the Facility Contractor to the Sponsor.

OPTION 2: For non-integrated Facility Contractors:

The Sponsor shall provide sufficient funds in advance to reimburse the Facility Contractor for costs to be incurred in performance of the work described in this Agreement, and the Facility Contractor shall have no obligation to perform in the absence of adequate advance funds. (Insert appropriate funding language from Guidance below). Payment shall be made directly to the Department's Lockbox or another account as directed by the Facility Contractor based upon Departmental direction. Upon termination or completion, any excess funds shall be refunded by the Facility Contractor to the Sponsor.

Funding Requirements

The following provides additional advance payment funding requirement language to be included in Article IV Option 1 or 2 as appropriate. They are all consistent with current DOE policy on requiring advance payments, as elaborated in the DOE's Financial Management Handbook, Chapter 13.

1. For agreements that are $25,000 or less or where the work will be completed in 60 days or less add the following language:

The Sponsor shall provide the Facility Contractor full funding for the Agreement prior to beginning work.

2. For agreements that have an estimated cost greater than $25,000 and whose period of performance exceeds 60 days add the following language:

   The Sponsor shall provide to the Facility Contractor, prior to any work being performed, an advance payment sufficient to cover anticipated work that will be performed for the first billing cycle. In addition, the Sponsor shall provide 60 days of additional funding to ensure that funds remain available for work during subsequent billing cycles.

3. For small business Sponsors who are using funds from a Small Business Innovative Research (SBIR) or a Small Business Technology Transfer (STTR) award add the following language:

   The Sponsor shall provide to the Facility Contractor, prior to any work being performed, an advance payment sufficient to cover the anticipated cost of the work that will be performed for the first 30 days of this Agreement. If the period of performance exceeds 30 days, the Sponsor shall continue to provide advance payments for 30 day increments, so that the work can continue without interruption.

Guidance Article IV:

A billing cycle is the period of time between billings, usually 30 days. The billing cycle is complete when the customer is billed for services rendered during that period.

As a general rule, costs incurred for non-Federal reimbursable work cannot be charged to a DOE budgetary resource. Limited exceptions such as the Department's Cost of Work for Other/SPP advance funding are described in chapter 13 of the Financial Management Handbook.

The Facility Contractor performing the work may provide DOE with earned award or management fees, royalties, or other corporate funds to support the advance funding requirements.

DOE financial assistance recipients may use funds provided by DOE to obtain access to DOE facilities or sponsor research or other work at DOE laboratories if the work is consistent with the terms and conditions of the financial assistance award. Normal advance payment requirement apply to recipients of DOE financial assistance awards.

Field CFOs or Field/Site Offices may require additional advance payments to account for estimated termination costs or other costs as appropriate for individual

projects. For instance, with foreign sponsors, the Field CFO or Site Offices may require full funding due to complexities associated with delayed payments and exchange rates. Accordingly, language for full funding in item 1 above may be used. Additional language may be needed to clearly identify the terms of these additional advance funding requirement.

As noted above, advance payment requirements are more restrictive for small businesses using funds from an SBIR or STTR grant. As defined in Section 9 of the Small Business Act (15 U.S.C. 638), Advance Payment:

> If a small business concern receiving an award under this section enters into an agreement with a Federal laboratory or federally funded research and development center for portions of the activities to be performed under that award, the Federal laboratory or federally funded research and development center may not require advance payment from the small business concern in an amount greater than the amount necessary to pay for 30 days of such activities.

Although Facility Contractors may not require more than 30 days advance payment from these Sponsors, the Sponsors may voluntarily agree to a larger advance covering a longer period, including full payment up front, if the Sponsor determines that such an arrangement is in its interest. Voluntary provision of a larger advance payment amount than that required by the Small Business Act shall not be basis for granting a Sponsor priority access to laboratory facilities or researchers or for providing any other benefits. Please see Chapter 13 of the Financial Management Handbook for funding for these types of awards when the Sponsor only provides 30 days advance payment.

Other Exceptions to Funding Requirements

Other exceptions to DOE's normal advance funding requirements can be found under Chapter 13 of the Financial Management Handbook. Additional language may be needed to cover these situations.

ARTICLE V. SOURCE OF FUNDS

Language:

The Sponsor hereby represents that, if the funding it brings to this Agreement has been secured through other agreements, those other agreements do not have any terms and conditions (including intellectual property terms and conditions) that conflict with the terms and conditions of this Agreement.

Guidance Article V:

The Facility Contractor's performance of the SOW shall be conducted consistent with the terms and conditions of this Agreement and the terms and conditions of the Prime Contract. If the Sponsor's funding is secured through an agency award (such as a

SBIR, STTR, Cooperative Agreement or Federal Contract), the Facility Contractor and the Sponsor should make sure that terms and conditions (including intellectual property terms and conditions) don't conflict with the terms and conditions of this Agreement. The Sponsor's Federal Award may require flow-down provisions. The Sponsor should seek guidance or a variance from its Funding Agency to not flow down provisions whenever possible. However, the Facility Contractor may consider including Sponsor requested requirements in this Agreement and shall seek DOE RCO approval for such deviations. All costs associated with Sponsor-specific terms and conditions must be reimbursed by the Sponsor.

If the Sponsor is working under an International Agreement, there may be special requirements or terms that need to be added to the Agreement to comply with Treaties. The Facility Contractor should consult with cognizant field office before negotiating the Agreement to address these issues.

Article VI. TANGIBLE PERSONAL PROPERTY

Language:

Upon termination of this Agreement, tangible personal property or equipment produced or acquired in conducting the work under this Agreement shall be owned by the Sponsor. Tangible personal property or equipment produced or acquired as part of this Agreement will be accounted for and maintained during the term of the Agreement in the same manner as Department of Energy property or equipment. Costs incurred for disposition of property shall be the responsibility of the Sponsor and included in costs allocated in Article III or paid separately by the Sponsor.

OPTION:

Upon termination of this Agreement, tangible personal property or equipment produced or acquired in conducting the work under this Agreement shall be owned as follows:
_____
_____
_____. Tangible personal property or equipment produced or acquired as part of this Agreement will be accounted for and maintained during the term of the Agreement in the same manner as Department of Energy property or equipment. Costs incurred for disposition of property shall be the responsibility of the Sponsor and included in costs allocated in Article III or paid separately by the Sponsor.

Guidance Article VI:

There must be agreement among the parties as to who will retain any property provided, produced or acquired under the SPP Agreement. RCOs must ensure tangible personal property management is consistent with 41 CFR Part 102, the General Services Administration personal property regulations and 41 CFR Part 109, the Department of Energy property management regulations.

Personal property provided by the Sponsor for use in this Agreement may be permanently transferred to Government ownership, when the Parties mutually agree to such a transfer, and an appropriate DOE or other Federal agency program representative verifies that the personal property has continuing value to Government-funded research efforts, under the gift acceptance authority of 42 U.S.C. 5817(f) or the acceptance of contributions authority under 42 U.S.C. 7278. Any acceptance of personal property will need to be reviewed by the DOE Office of General Counsel or the NNSA Office of General Counsel, as appropriate. Furthermore, the DOE RCO (after conferring with DOE Property manager or DOE program must approve acceptance of such property before it is transferred to DOE because DOE will be responsible for maintaining, tracking and ultimately disposing of the personal property when it becomes obsolete.

When projects generate tangible research products (biological materials) the materials may be apportioned to each party for further use. Types of biological materials that can be replicated or reproduced include, but are not limited to, plasmids, deoxyribonucleic acid molecules, living organisms of any sort and their progeny including viruses, prokaryote and eukaryote cell lines, transgenic plants and animals. This clause should clearly state that intention to avoid a dispute at the end of the project as to (1) who has title to the material and (2) what is the percentage allocation of materials.

Article VII. PUBLICATION MATTERS

Language:

The publishing Party shall provide the other Party a ___ day period in which to review and comment on proposed publications that disclose any of the following generated in the course of the Agreement: technical developments, research findings, or identify Proprietary Information (as defined in paragraph 1.B of Article XV). The publishing Party shall not publish or otherwise disclose Proprietary Information identified by the other Party, except as mandated by law.

The Sponsor will not use the name of Facility Contractor or the United States Government or their employees in any promotional activity, such as advertisements, with reference to any product or service resulting from this Agreement, without prior written approval of the Government and Facility Contractor.

OPTION

When SPP is for research and the parties intend to publish results, the first paragraph above can be replaced with the following:

The Parties will provide reciprocal copies of articles including publication of information generated pursuant to this Agreement for review and comment ____ days prior to publication. Reasonable consideration will be given to any comments provided.

Publication may proceed ____ days (mutually agreed upon term) following provision of copies of any publication.

Guidance Article VII:

It is within the discretion of the Facility Contractor and the Sponsor to determine whether a Publication Matters article is necessary for inclusion. If there will be no Publication Matters article, this section will be titled [Reserved]. If it is determined that there may be or will be publications covering the work under the Agreement, then the standard article will normally be used.

Sponsors publishing results of research may consider the standard language too restrictive. In these cases the optional language can be used.

The pre-publication review process must take into consideration the protection of rights for filing U.S. and foreign patent applications, as any disclosure may potentially restrict filing. Also, should the Sponsor want to protect proprietary information brought into the Agreement or, where authorized, generated under the Agreement, such information should not be disclosed unless agreed to by the Sponsor.

Article VIII. LEGAL NOTICE

Language:

The Parties agree that the following legal notice shall be affixed to each report furnished to the Sponsor under this Agreement and to any report resulting from this Agreement which may be distributed by the Sponsor: (INSERT NOTICE)

Sample Legal Notice:

DISCLAIMER

> This report may contain research results which are experimental in nature. Neither the United States Government, nor any agency thereof, nor Facility Contractor, nor any of their employees, makes any warranty, express or implied, or assumes any legal responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference to any specific commercial product, process, or service by its trade name, trademark, manufacturer, or otherwise, does not constitute or imply an endorsement or recommendation by the United States Government or any agency thereof, or by the Facility Contractor. The United States Government reserves for itself a royalty-free, worldwide, irrevocable, non-exclusive license for Governmental purposes to publish, disclose, distribute, translate, duplicate, exhibit, prepare derivative works, and perform any such data included herein. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof, or by the Facility

Contractor and shall not be used for advertising or product endorsement purposes.

Guidance Article VIII:

A standard legal disclaimer notice on publications is needed to protect the interests of the Facility Contractor and the Government. The sample legal notice should clearly state that the report contains the results of experimental research and therefore the Government and Facility Contractor do not warrant the results and further are not responsible for accuracy, completeness, or usefulness. In addition, it should be clear that the Government and Facility Contractor are not endorsing any products or process and should not be used in advertising any endorsements. Each Facility Contractor may use the above version or their own preapproved publications statement.

ARTICLE IX. DISCLAIMER

Language:

THE GOVERNMENT AND THE FACILITY CONTRACTOR MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS STRATEGIC PARTNERSHIP PROJECT AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT; THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. NEITHER THE GOVERNMENT NOR THE FACILITY CONTRACTOR SHALL BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS STRATEGIC PARTNERSHIP PROJECT AGREEMENT.

Guidance Article IX:

There must be a disclaimer of express or implied warranties as to the conduct of the research. This statement should be in the form of a Uniform Commercial Code (UCC)-type disclaimer, which should be conspicuous in the Agreement so as to meet the standards of due notice. There are many ways to do this such as to use bold type, all capital letters, bold italics, or to have an especially large type font specifying the disclaimer. The Facility Contractor has flexibility in choosing the correct style based on the needs of the Sponsor.

In most agreements the Sponsor should be not added to the Disclaimer however, in cases where a sponsor provides data and other information a disclaimer of warranties specific to the provided items may be permitted if such disclaimers are not in conflict with other indemnity provisions of the agreement." If the Sponsor is added to the Disclaimer the following language must also be inserted after the Disclaimer. "Irrespective of any disclaimers by the Sponsor above, the Sponsor shall still be held fully accountable for any and all indemnities agreed to in this Agreement. To the extent that any Disclaimer language is read to be in conflict with an indemnity provision, the indemnity provision shall control."

ARTICLE X. GENERAL INDEMNITY

Language:

Except for any loss, liability, or claim resulting from any willful misconduct or negligent acts or omissions of the Government, the Facility Contractor, or persons acting on their behalf ("Indemnified Parties"), the Sponsor agrees to indemnify and hold harmless the Indemnified Parties against any loss, liability, or claim, including all damages, costs, and expenses, including attorney's fees, directly relating to:

1. injury to or death of persons or other living things or injury to or destruction of property arising out of the performance of the Agreement by the Indemnified Parties; or

2. use of the services performed, materials supplied, or information given under the Agreement by any person including the Sponsor or Facility Contractor.

OPTION 1: U.S. STATES, U.S. STATE AGENCIES, AND FEDERALLY-FUNDED DOMESTIC SPONSORS

OPTION 1 GUIDANCE:

This article may be reserved for the following Sponsor types: (1) a federally-funded domestic Sponsor (i.e., all Sponsors except for foreign engagements as defined by DOE policy, e.g., DOE Policy 485.1) funding work that advances a U.S. Government mission; and (2) a U.S. state, a U.S. state agency, a U.S. state college or university, or a political subdivision of a U.S state or an agency thereof, which are often precluded from providing indemnification under state or local law. A decision to reserve this article pursuant to this option is made based on Sponsor type regardless of whether the conditions described in the standard guidance exist or are expected to exist. The written determination described in the standard guidance, therefore, is not required to exercise Option 1.

Guidance Article X:

If this article is not reserved pursuant to Option 1, this article should be reserved except when one or more of the following conditions exist: (1) the Sponsor is providing material

or equipment to the DOE Facility Contractor; (2) the Sponsor is sending its employees or representatives to the facility; or (3) the Sponsor has directed that specific activities not normally performed by the DOE Facility Contractor be performed as part of the SOW.

In order to reserve the article where Option 1 is not applicable, the DOE Facility Contractor must make a written determination that none of the foregoing conditions exists or is expected to exist. If this article is reserved and one or more of the above conditions in fact does exist during the course of the work being performed, the DOE Facility Contractor must notify the DOE Site Office and the Agreement must be amended to include this article. If the Agreement is not amended, any liability otherwise within the scope of this article may be considered unallowable subject to FAR cost principles and cost allowability clauses in the Prime Contract.

The decision whether to reserve this article, including whether to exercise Option 1, should be made by the DOE Facility Contractor in accordance with this guidance and the Option 1 guidance.

ARTICLE XI. PRODUCT LIABILITY INDEMNITY

Language:

Except for any loss, liability, or claim resulting from any willful misconduct or negligent acts or omissions of the Government, the Facility Contractor, or persons acting on their behalf ("Indemnified Parties"), the Sponsor agrees to hold harmless and indemnify the Indemnified Parties against any losses, liabilities, and claims, including all damages, costs, and expenses, including attorney's fees, arising from personal injury or property damage occurring as a result of the making, using, or selling of a product, process, or service by or on behalf of the Sponsor, its assignees, or licensees, which was derived from the work performed under this Agreement.

For purposes of this Article, neither the Government nor the Facility Contractor shall be considered assignees or licensees of the Sponsor, as a result of reserved Government and Facility Contractor rights. This Article shall apply only if the Sponsor was:

1. informed as soon and as completely as practical by the appropriate Indemnified Party of the allegation or claim;

2. afforded, to the maximum extent by applicable laws, rules, or regulations, an opportunity to participate in and control its defense Facility Contractor; and

3. given all reasonably available information and reasonable assistance requested by the Sponsor.

No settlement for which the Sponsor would be responsible shall be made without the Sponsor's consent, unless required by a court of competent jurisdiction.

OPTION 1: Assumption of responsibility by the Facility Contractor for product liability claims

Except for any loss, liability, or claim resulting from any willful misconduct or negligent acts or omissions of the Government, its employees, or persons acting on their behalf ("Indemnified Parties"), the Facility Contractor agrees to hold harmless and indemnify the Indemnified Parties against any losses, liabilities, and claims, including all damages, costs, and expenses, including attorney's fees, arising from personal injury or property damage occurring as a result of the making, using, or selling of a product, process, or service by or on behalf of the Sponsor, its assignees, or licensees, which was derived from the work performed under this Agreement.

For purposes of this Article, the Government shall not be considered an assignee or licensee of the Sponsor, as a result of reserved Government rights.

This Article shall apply only if the Facility Contractor was:

1. informed as soon and as completely as practical by the appropriate Indemnified Party of the allegation or claim;

2. afforded, to the maximum extent by applicable laws, rules, or regulations, an opportunity to participate in and control its defense; and

3. given all reasonably available information and reasonable assistance requested by the Facility Contractor.

No settlement for which the Facility Contractor would be responsible shall be made without the Facility Contractor's consent, unless required by a court of competent jurisdiction.

OPTION 1 GUIDANCE:

The Facility Contractor may voluntarily agree to accept all or some of the risks associated with product liability claims. For example, the Facility Contractor may voluntarily agree not to require indemnification from the Sponsor. If the Facility Contractor accepts these risks, the Department of Energy will not indemnify either party for any liability related to product liability claims. The standard article, appropriately modified to identify the indemnifying parties and/or the degree of their respective obligations, may be used for Article XI in such a case. However, if this option is used, any liability otherwise within the scope of the standard article may be considered unallowable subject to FAR cost principles and cost allowability clauses in the Prime Contract.

OPTION 2: U.S. States and U.S. state agencies

It is agreed that when the Agreement involves a U.S. State, a U.S. State agency, a U.S. State college or university, or a political subdivision of a U.S. State or an agency thereof, and such

entity is limited by law from assuming all such indemnification obligations, the product liability article may begin with:

To the extent permitted by {name of U.S. State} State law and except for. . .

OPTION 3: Public Domain or Not Commercialized

If the Sponsor and Facility Contractor agree to one of the following:

(1) the Sponsor will not seek intellectual property protection for any of the results under the Agreement (*e.g.*, not asserting copyright or marking data as Proprietary Information) and will not have any preferential access to any intellectual property of the Facility Contractor developed under the Agreement unless such preferential access is negotiated under a separate agreement between Sponsor and Facility Contractor, in which product liability indemnity would be addressed pursuant to the Facility Contractor's contract with DOE;

(2) intellectual property, if secured by the Sponsor, will not be commercialized for profit, e.g., releasing copyrighted software under an open source license; or

(3) the Agreement is for technical services that won't generate protectable intellectual property,

then the following statement can used in place of the standard article:

Notwithstanding any other provision of this Agreement, the Sponsor agrees that all technology and information generated under this Agreement will be placed in the public domain (with the appropriate disclaimer) or the results will be a product, process, or service that will not be commercialized for profit. Therefore, a standard Product Liability provision where the Sponsor would indemnify the Facility Contractor and the Government is not included in this Agreement. However, if the Sponsor does commercialize the technology generated under this Agreement, the Sponsor agrees that the following standard article XI, "Product Liability Indemnity" applies:

Except for any loss, liability, or claim resulting from any willful misconduct or negligent acts or omissions of the Government, the Facility Contractor, or persons acting on their behalf ("Indemnified Parties"), the Sponsor agrees to hold harmless and indemnify the Indemnified Parties against any losses, liabilities, and claims, including all damages, costs, and expenses, including attorney's fees, arising from personal injury or property damage occurring as a result of the making, using, or selling of a product, process, or service by or on behalf of the Sponsor, its assignees, or licensees, which was derived from the work performed under this Agreement.

For purposes of this Article, neither the Government nor the Facility Contractor shall be considered assignees or licensees of the Sponsor, as a result of reserved Government and Facility Contractor rights. This Article shall apply only if the Sponsor was:

1. informed as soon and as completely as practical by the appropriate Indemnified Party of the allegation or claim;

2. afforded, to the maximum extent by applicable laws, rules, or regulations, an opportunity to participate in and control its defense Facility Contractor; and

3. given all reasonably available information and reasonable assistance requested by the Sponsor.

No settlement for which the Sponsor would be responsible shall be made without the Sponsor's consent, unless required by a court of competent jurisdiction.

If Option 3(1) applies, in the alternative, the above statement may be omitted and the article may be reserved in its entirety.

OPTION 4: Purchase of product liability insurance

If the Sponsor and/or the Facility Contractor agree to purchase and maintain adequate product liability insurance to protect the Government and the Facility Contractor against product liability claims, the following language should be used, subject to DOE Headquarters Patent Counsel approval:

The (Sponsor, Facility Contractor, or Parties) agree to obtain and maintain product liability insurance in the amount of $ _____during the life of this Agreement and subsequently for the life of any products, processes, or services resulting from work under the Agreement. However, the Sponsor is still liable for any claim above the insurance policy where the claim against the Government or the Facility Contractor for product liability is for an amount above the value of the insurance. A copy of this product liability insurance policy shall be provided to both the Government and the Facility Contractor, including any material modifications thereto, including any notices of termination.

The cost for this insurance shall not be charged directly or indirectly to the Government.

OPTION 5: Sponsor requirement to defend

If the parties wish to require the Sponsor to defend an indemnified claim in order to control litigation costs, for example, the standard clause can be amended as follows:

Strike “the Sponsor agrees to hold harmless and indemnify” and insert “the Sponsor agrees to defend, hold harmless, and indemnify.”

OPTION 6: Additional paragraph— Indemnification of the Government and the Facility Contractor by Sponsor’s licensees

When the Sponsor isn’t commercializing the information or technology generated under the Agreement, but licensing or transferring rights to the technology (e.g., owned by Sponsor or

license in Facility Contractor's) to a third party, the Sponsor agrees to add the following additional paragraph to protect the Government and Facility Contractor

> For licensees granted or assignments made by Sponsor to any third party in technology derived from the work performed under this Agreement, such licenses shall include the requirement that the third party shall agree to the provisions above.

OPTION 7: Additional paragraph— Indemnification of the Government, the Facility Contractor, and the Sponsor by the Facility Contractor's licensees

When the Facility Contractor retains rights to license or otherwise transfer technology arising under an Agreement, the Facility Contractor may agree to flow down to its licensees or transferees indemnification of the Sponsor, in addition to the Government and the Facility Contractor, from product liability. If used, the following paragraph would normally be in addition to the standard language:

> For licenses granted or assignments made by Facility Contractor to any third party in technology derived from the work performed under this Agreement, such licenses or assignment shall include the Sponsor as an Indemnified Party.

Guidance Article XI:

If the results of the research covered by the Agreement are protected in any way for the purpose of commercialization (such as through patents, copyrights, or through generated information declared proprietary information under the provisions of the "Rights in Technical Data" article of the agreement), or if there is a specific, identifiable facility technology being transferred, e.g., via a commercial license, there must be a provision that indemnifies the Facility Contractor and the Government for all costs related to personal injury and property damage that may result from the Sponsor's commercialization and use of a product, process, or service. The protection should usually take the form of one or more of the above provisions on product liability, as appropriate.

ARTICLE XII. INTELLECTUAL PROPERTY INDEMNITY – LIMITED

LANGUAGE:

The Sponsor shall indemnify and hold harmless the Government, the Facility Contractor, and persons acting on their behalf ("Indemnified Parties") against any losses, liabilities, and claims, including all damages, costs, and expenses, including attorney's fees, for infringement of any United States patent, copyright, trade secret, or other intellectual property right if arising out of any acts required or directed by the Sponsor to be performed under this Agreement to the extent such acts are not already performed at the facility. Such indemnity shall not apply to a claim or allegation of infringement that is settled without the consent of the Sponsor unless required by a court of competent jurisdiction.

OPTION 1: U.S. STATES, U.S. STATE AGENCIES, AND FEDERALLY-FUNDED DOMESTIC SPONSORS

OPTION 1 GUIDANCE:

This article may be reserved for the following Sponsor types: (1) a federally-funded domestic Sponsor (i.e., all Sponsors except for foreign engagements as defined by DOE policy, e.g., DOE Policy 485.1) funding work that advances a U.S. Government mission; and (2) a U.S. state, a U.S. state agency, a U.S. state college or university, or a political subdivision of a U.S state or an agency thereof, which are often precluded from providing indemnification under state or local law. A decision to reserve this article pursuant to this option is made based on Sponsor type regardless of whether the conditions described in the standard guidance exist or are expected to exist. The written determination described in the standard guidance, therefore, is not required to exercise Option 1.

OPTION 2: INTELLECTUAL PROPERTY WARRANTY

> Sponsor represents and warrants that it is not aware of any activity under the Statement of Work that would infringe upon any intellectual property right of any third party, such as any patent, copyright, trade secret, or other intellectual property right. Sponsor agrees that it has exercised reasonable efforts and diligence in making this representation and warranty. The foregoing representation and warranty shall be ongoing during the term of the Agreement and considered to have been made again at and as of the date of each modification to the Statement of Work.

OPTION 2 GUIDANCE:

An Intellectual Property (IP) warranty provision may be used in lieu of the standard article for domestic Sponsors (i.e., all Sponsors except for foreign engagements as defined by DOE policy, e.g., DOE Policy 485.1). Option 2 provides a warranty provision that would require Sponsors to warrant that they are not aware of any activity under the Statement of Work that would infringe upon the intellectual property rights of a third party. A decision to use the IP warranty provision pursuant to this guidance is made regardless of whether the conditions described in the standard guidance exist or are expected to exist. The written determination described in the standard guidance, therefore, is not required to exercise Option 2.

Guidance Article XII:

If Option 1 or Option 2 is not exercised, the Department of Energy requires limited intellectual property indemnification in certain Agreements where the Agreement, at least in part, directs or requires activities that are not already performed at the facility. In such cases, indemnity is strictly limited to activities which satisfy this condition. Indemnification is needed because only the Sponsor is in a position to vet such activity for potential intellectual property risk and the Department of Energy has not provided its authorization or consent to use or

manufacture a patented invention or copyrighted work, for example, in the performance of such work activities. For these reasons, the Department of Energy will not carry any potential intellectual property risk associated with such Sponsor-directed work that is new to a particular facility.

In order to reserve this article where Option 1 or 2 is not exercised, the DOE Facility Contractor must make a written determination that the activities under the Agreement are already performed at the facility. If this article is reserved, and during the course of the Agreement activities not already performed at the facility are in fact performed, the Facility Contractor must notify the DOE Site Office and the Agreement must be amended to include this article. If the Agreement is not amended, any liability otherwise within the scope of this article may be considered unallowable subject to FAR cost principles and cost allowability clauses in the Prime Contract.

The decision whether to reserve this article, including whether to exercise Option 1 or 2, is to be made by the DOE Facility Contractor in accordance with this guidance and the guidance of Options 1 and 2.

With respect to software development (e.g. writing code) by the Facility Contractor under the Agreement, the potential for intellectual property liability may be increased in view of the nature of the work being performed. It may be difficult to determine whether or not such acts are not already performed at the facility or may infringe on third-party copyrighted software. Accordingly, the Facility Contractor should consider whether software development is a primary purpose of the Statement of Work. If software development or coding is a primary purpose of the effort proposed, the article should *not* be reserved, however, Option 2 may be used in lieu of the standard article in accordance with the Option 2 guidance.

ARTICLE XIII: NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

LANGUAGE:

Each Party shall report to the other Party, promptly and in reasonable written detail, each claim or allegation of infringement of any patent, copyright, trade secret, or other intellectual property right based on the performance of this Agreement of which a Party has knowledge. In the event of any claim or suit against a Party based on such alleged infringement, the other Parties shall furnish to the Party, when requested by the Party, all evidence and information in the possession of the other Party pertaining to such suit or claim.

Guidance Article XIII:

This notice is needed to prevent potential prejudice against the Sponsor, the Facility Contractor, and the Government in the event of a claim or allegation relating to activities under the Agreement. For example, notice is necessary to avoid prejudice to the Parties if a third party raises allegations against the Sponsor or the Facility Contractor, or if any party asserts as a defense or seeks compensation from the Government under 28

U.S.C. § 1498. Under such circumstances, the Parties must be informed to prevent prejudice in preparing a response to any potential allegations or claims. Such notice is particularly needed when a Sponsor is subject to Article XII relating to intellectual property indemnity.

This Article may be reserved, subject to DOE RCO approval, if Article XII relating to intellectual property indemnity has been reserved and the Agreement is for non-Research, Development and Demonstration work (e.g., technical assistance, educational purposes, etc.).

Article XIV: PATENT RIGHTS

DOE has long waived title to inventions under an Agreement to the Sponsor, subject to DOE's Class Patent Waiver last updated in 2012 as DOE Waiver No. W(C)-2011-009, available here: https://energy.gov/sites/prod/files/2013/10/f3/W%28C%292011-009.pdf. This Article restates the parties' patent rights according to the Class Patent Waiver. To the extent that this Article conflicts with DOE's Class Patent Waiver, updated from time to time, the Class Waiver controls. When the Class Waiver applies, the Sponsor is granted the right to elect title to Facility Contractor Subject Inventions. Please see general guidance below regarding when the Class Waiver applies.

Language:

Class Waiver Applies

1. The following definitions shall be used for this Clause.

   A. "Subject Invention" means any invention or discovery of the Facility Contractor, or, to the extent the Sponsor is performing any work under this Agreement, of the Sponsor, conceived in the course of or under this Agreement, or, in the case of an invention previously conceived by the Sponsor, first actually reduced to practice in the course of or under this Agreement. "Subject Invention" includes any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, whether patented under the Patent Laws of the United States of America or any foreign country, or unpatented.

   B. "Patent Counsel" means the DOE/NNSA field Patent Counsel assisting the procuring activity which has the administrative responsibility for the Facility where the work under this Agreement is to be performed.

2. Rights of the Sponsor

   A. Election to Retain Rights

      Subject to the provisions of paragraph 3 with respect to any Subject Invention reported and elected in accordance with paragraph 4 of this article, the Sponsor

may elect to retain the entire right, title, and interest throughout the world to each Subject Invention and any patent application filed in any country on a Subject Invention and in any resulting patent secured by the Sponsor. Where appropriate, the filing of patent applications by the Sponsor is subject to DOE and other Government security regulations and requirements.

3. Rights of Facility Contractor and Government

A. Assignment to either the Facility Contractor or the Government

The Sponsor agrees to assign to either the Facility Contractor or the Government, as requested by the Facility Contractor or Government, the entire right, title, and interest in any country to each Subject Invention for which the Sponsor:

(1) does not elect pursuant to this Clause to retain such rights; or

(2) elects to retain title to a Subject Invention pursuant to Paragraph 2 but fails to have a patent application filed in that country on the Subject Invention or decides not to continue prosecution or not to pay any maintenance fees covering the invention.

B. Terms and Conditions of Waived Rights

(1) To preserve the Facility Contractor's and the Government's residual rights to Subject Inventions, and in patent applications and patents on Subject Inventions, the Sponsor shall take all actions in reporting, electing, filing on, prosecuting, and maintaining invention rights promptly, but in any event, in sufficient time to satisfy domestic and foreign statutory and regulatory time requirements, or, if the Sponsor decides not to take appropriate steps to protect the invention rights, it shall notify the Facility Contractor in sufficient time to permit either the Facility Contractor or the Government to file, prosecute, and maintain patent applications and any resulting patents prior to the end of such domestic or foreign statutory or regulatory time requirements.

(2) The Sponsor shall convey or ensure the conveyance of any executed instruments necessary to vest in either the Facility Contractor or the Government the rights set forth in this Clause.

(3) With respect to any Subject Invention in which the Sponsor retains title, the Government retains a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced by or on behalf of the United States the Subject Invention throughout the world.

(4) The Sponsor shall provide the Government a copy of any patent application filed on a Subject Invention within 6 months after such application is filed, including its serial number and filing date.

(5) Preference for U.S. Industry. Notwithstanding any other provision of this Clause, the Sponsor 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 products embodying the Subject Invention or produced through the use of the Subject Invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Sponsor 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.

(6) The Sponsor agrees to refund any amounts received as royalty charges on any Subject Invention in procurement by or on behalf of the Government and to provide for that refund in any instrument transferring rights to any party in the invention.

(7) The specification of any United States patent applications and any patent issuing thereon covering a Subject Invention, must include the following statement. "The Government has rights in this invention pursuant to *(specify this underlying Agreement*)."

4. Invention Identification, Disclosures, and Reports

A. The Sponsor shall furnish the Patent Counsel a written report containing full and complete technical information concerning each Subject Invention it makes within 6 months after conception or first actual reduction to practice, whichever occurs first, in the course of or under this Agreement, but in any event prior to any on sale, public use, or public disclosure of such invention known to the Sponsor. The report shall identify the Agreement and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding to the extent known at the time of disclosure, of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any election of invention rights under this Clause. When an invention is reported under this paragraph 4.A., it shall be presumed to have been made in the manner specified in Section (a) of 42 U.S.C. 5908.

B. The Facility Contractor shall report to DOE Subject Inventions it makes in accordance with the procedures set forth in Contract _____. In addition, the Facility Contractor shall disclose to the Sponsor at the same time

as disclosure to the Department of Energy any Subject Inventions made by the Facility Contractor under this Agreement and the Sponsor shall notify the Department of Energy within 6 months of receipt of such disclosure by the Sponsor of any election of patent rights under this Clause.

C. Requests for extension of time for election under subparagraphs A. and B. may be granted by Patent Counsel for good cause shown in writing.

5. Limitation of Rights

Nothing contained in this patent rights Clause shall be deemed to give the Government any rights with respect to any invention other than a Subject Invention except as set forth in the Facilities License of Paragraph 6.

6. Facilities License

In addition to the rights of the Parties with respect to Subject Inventions , the Sponsor 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 first actually reduced to practice or acquired by the Sponsor, which at any time, through completion of work under this Agreement, are owned or controlled by the Sponsor and are incorporated in the facility as a result of this Agreement to such an extent that the facility is not restored to the condition existing prior to this Agreement (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 the 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.

7. Early Termination of Agreement

The terms and conditions of this Clause shall survive this Agreement, in the event that this Agreement is terminated before completion of the SOW.

<u>OPTION 1</u>: Laboratory Retains Title (Class Waiver Alternative Option)

When the Laboratory will retain title to its own Subject Inventions as allowed by the current Class Waiver and DOE policy (see General Guidance below for more details), or by Bayh-Dole rights the following provision can be used in lieu of the standard clause above. The Sponsor is not granted even a license in Facility Contractor's Subject Inventions. The Laboratory can grant such a license, but it will need Programmatic concurrence for a Sponsor that is Foreign.

Language:

1. The following definitions shall be used for this Clause.

"Subject Invention" means any invention or discovery of the Facility Contractor, or, to the extent the Sponsor is performing any work under this Agreement, of the Sponsor, conceived in the course of, or under this Agreement or, in the case of an invention previously conceived by the Sponsor first actually reduced to practice in the course of or under this Agreement. "Subject Invention" includes any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, whether patented under the Patent Laws of the United States of America or any foreign country, or unpatented.

2. Any Subject Invention made by the Facility Contractor under this Agreement will be governed by the provisions of the M&O Contract with the DOE.

3. The Sponsor may retain title to its own Subject Inventions, subject to, the Government retaining a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced by or on behalf of the United States the Subject Inventions throughout the world, a requirement to report their Subject Inventions to DOE within 6 months after conception or first actual reduction to practice, whichever occurs first, in the course of or under this Agreement, U.S. Preference (35 U.S.C. § 204), and such other conditions consistent with DOE patent waiver policy.

OPTION 2: Laboratory Retains Title When Federal Funding Agreement Exists (Class Waiver Inapplicable)

If the Sponsor is under a Federal funding agreement (e.g., grant, contract or cooperative agreement), the Sponsor should follow the terms of its Federal funding agreement for reporting and electing Subject Inventions to that Federal agency. Since Federal funds are being used, the Facility Contractor shall retain the right to elect title to its Subject Inventions under Bayh-Dole or the Class Waiver for Facility Contractors that are a Large Business.

PATENT RIGHTS (CLASS WAIVER INAPPLICABLE)

1. Facility Contractor will follow its Facility Contract terms to report and protect its inventions.
2. The Sponsor will follow the terms of its Government funding agreement (i.e., Grant, Contract, and Cooperative Agreement) to report and protect its inventions.

OPTION 3: NO R&D PERFORMED (Clause Reserved)

Where no research, development, or demonstration is to be conducted in the performance of the SOW, the clause can be reserved:

[**RESERVED**]

OPTION 4: LABORATORY FACILITY CONTRACTOR WILL ISSUE SUBCONTRACTS (When Applicable)

It is preferable for the Sponsor to issue subcontracts and instruct the subcontractors to work directly with the Facility Contractor to perform the work. However, a Sponsor may request the Facility Contractor to issue and administer the subcontracts, but the Facility Contractor will need to ensure that the Sponsor has certain rights in the subcontractor's Subject Inventions. Therefore, the following standard clause applying the Class Waiver should be used with the following modifications when the Sponsor is providing privately-obtained funds:

1. Replace the definition of Subject Inventions with the following:

   "Subject Invention" means any invention or discovery of the Facility Contractor, or, to the extent the Sponsor or a subcontractor of the Facility Contractor is performing any work under this Agreement, of the Sponsor or subcontractor of the Facility Contractor respectively, conceived in the course of, or under this Agreement or, in the case of an invention previously conceived by the Sponsor or subcontractor of the Facility Contractor, first actually reduced to practice in the course of or under this Agreement. "Subject Invention" includes any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, whether patented under the Patent Laws of the United States of America or any foreign country, or unpatented.

2. Add the following Paragraph at the end of the Article:

   The patent rights clause in a subcontract issued to a subcontractor of the Facility Contractor under this Agreement will provide for the Sponsor to elect title to the subcontractors' Subject Inventions subject to the Government retaining a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced by or on behalf of the United States the Subject Inventions throughout the world, a requirement to report their Subject Inventions to DOE within 6 months after conception or first actual reduction to practice, whichever occurs first, in the course of or under this Agreement, U.S. Preference (35 U.S.C. § 204), and such other conditions consistent with DOE patent waiver policy.

OPTION 5: RESTRICTED GOVERNMENT RIGHTS

There may be rare occasions when the Class Waiver applies so that the Sponsor may elect title to Facility Contractor Subject Inventions, however the Government Use License may be restricted to only Research and Development license. The associated clause is found in Appendix C of the Class Waiver (W(C) 2011-009).

Guidance Article XIV:

For Option 1, the Class Waiver has strict requirements when the Facility Contractor can retain title to its Subject Inventions. These requirements may be updated or changed by Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62). The Class Waiver should be reviewed for more detailed explanations, but the current policy is as follows:

1. when the Sponsor is either foreign-owned or foreign-controlled or is sponsoring research on behalf of a foreign entity, the Facility Contractor can retain title; but the Class Waiver may apply with approval by DOE/NNSA field Patent Counsel and with the concurrence of the cognizant program official;

2. when any Subject Invention that might be made would be a research tool and there is a Departmental and public interest in having the tool available to many potential research and commercial organizations. It is recommended to consult DOE/NNSA field Patent Counsel;

3. when the Sponsor declines the waiver;

4. when the Sponsor's interest is in fewer fields of use, and utilization of the facility or commercialization of the underlying technology can be maximized by limiting the Sponsor's exclusivity in any inventions to a particular field of use and inserting such license into the clause;

For Option 1, the Facility Contractor can grant the Sponsor a license (royalty-bearing exclusive or royalty-free non-exclusive) if requested for (1)-(3) above. However, any license in Facility Contractor's inventions to a foreign entity will require cognizant program official concurrence and DOE/NNSA field Patent Counsel approval. This clause can be used when Federal funds are used since Bayh-dole rights apply and the Sponsor retains title to the Sponsor's Subject Inventions and reports the invention to DOE.

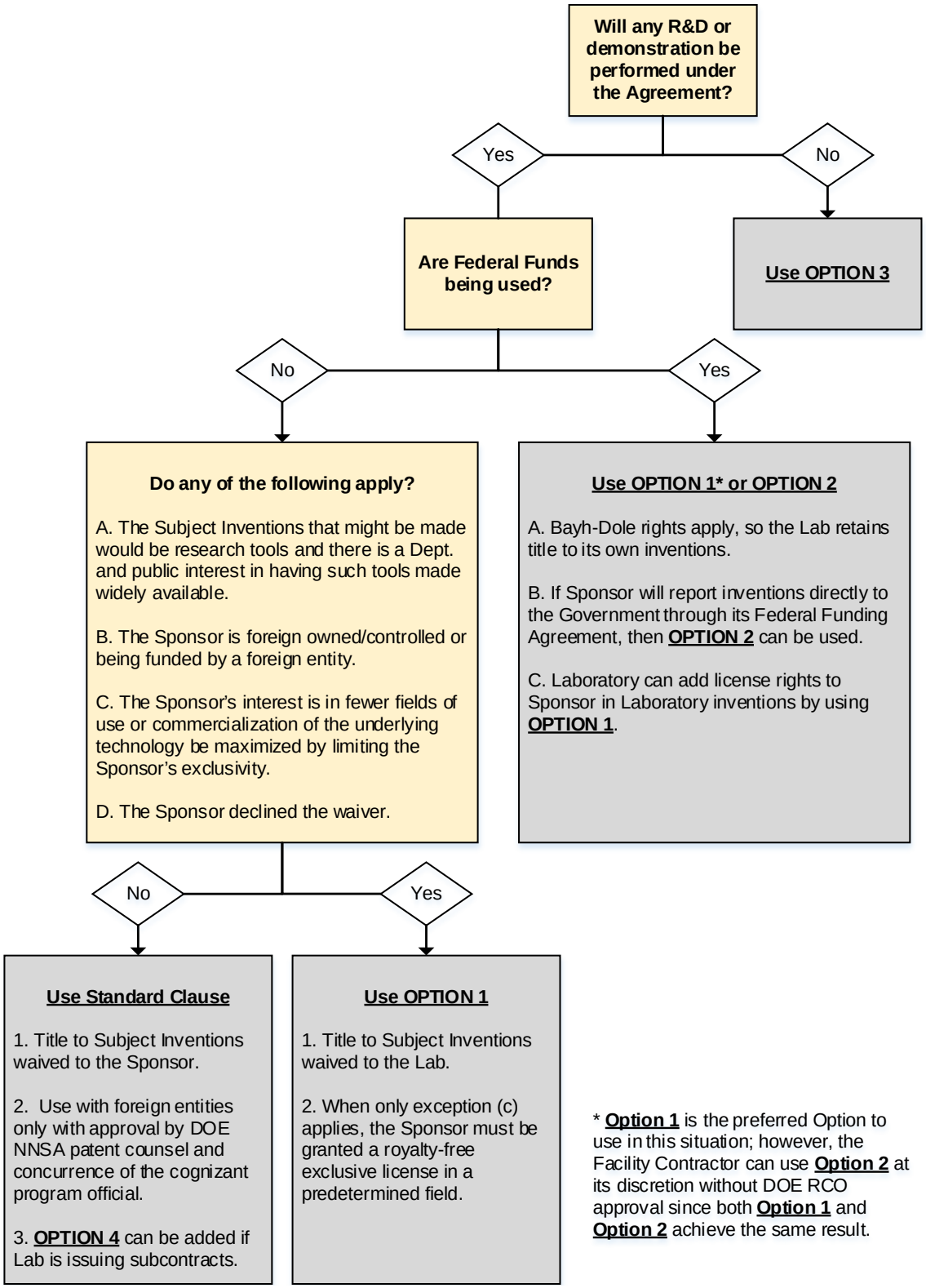
For Option 2, the Sponsor is using Federal funds to support the work performed at the DOE facility. Under Bayh-Dole, the Facility Contractor may elect title to its Subject Inventions. It is simpler to state that the Sponsor will follow its Federal funding Agreement in any Sponsor Subject Inventions reported and elected from the funding agency.
However, the Facility Contractor can use Option 2 at its discretion without DOE RCO approval since there are very few Sponsor Subject Inventions made under SPP and the DOE would get all the Government rights associated with those Sponsor Subject Inventions through the funding agency.

If the Sponsor requires ownership of Subject Inventions developed by subcontractors of the Facility Contractor, then Option 4 should be used unless otherwise approved by the assistant General Counsel for Technology Transfer and Intellectual Property. The Facility Contractor will need to modify the standard FAR/DEAR clause for patent rights to allow the Sponsor to elect title of the subcontractor's Subject Inventions in accordance with the Class Waiver. However, this only applies when the Sponsor is using private funds. If the

Sponsor is using Federal funds, then Bayh-Dole may apply to subcontractor and Sponsor will not have any rights. DOE Patent Counsel should be consulted when the subcontractor is a large business (Bayh-Dole doesn't apply) to determine if option 4 can be used.

For Option 5, the Class Waiver (W(C) 2011-009) has an Appendix C where the Class Waiver applies, but the Government's rights in Subject Inventions may be limited to R&D research. This flexibility was added to be similar to terms allowed in Agreements for Commercializing Technology (ACT). Any use of the Government R&D License must be accompanied by expanded Government access to the data generated as proscribed in Appendix C of the Waiver that limits the protection of the Generated Information for a maximum period of five years, which DOE Program may require a shorter period based on the expected project results. It is not expected that there will be many requests to use these provisions. In order to use this provision, the DOE/NNSA field Patent Counsel must be consulted so that the requirements of the Class Waiver are addressed before beginning any negotiations with the Sponsor. This Option 5 will not be allowed for SPP Agreements involving national security and may also be denied for environmental management programs or when the Sponsor is an entity connected to the Facility Contractor.

Disposition of Patent Rights in SPP



* **Option 1** is the preferred Option to use in this situation; however, the Facility Contractor can use **Option 2** at its discretion without DOE RCO approval since both **Option 1** and **Option 2** achieve the same result.

Additional Language: Background Intellectual Property

When appropriate, the following Article for Background Intellectual Property (BIP) may be used and should be accompanied by a list of BIP attached to the SPP as an annex to facilitate future amendments. Since the notice informs the Sponsor of existing intellectual property that might need to be licensed to commercialize, the language below may be modified such that only the Contractor is required to provide a list of BIP.

Article: BACKGROUND INTELLECTUAL PROPERTY

Each Party may use the other Party's Background Intellectual Property identified in Annex of this SPP solely in performance of research under the Statement of Work. This SPP does not grant to either Party any option, grant, or license to commercialize, or otherwise use the other Party's Background Intellectual Property. Licensing of Background Intellectual Property, if agreed to by the Parties, shall be the subject of separate licensing agreements between the Parties.

Each Party has used reasonable efforts to list all relevant Background Intellectual Property, but Background Intellectual Property may exist that is not identified. Neither Party shall be liable to the other Party because of failure to list Background Intellectual Property.

Article XV. RIGHTS IN TECHNICAL DATA - USE OF FACILITY

This Article restates the parties' data rights described in DOE SPP Class Patent Waiver No. W(C)-2011-009 available here:https://energy.gov/sites/prod/files/2013/10/f3/W%28C%292011-009.pdf. To the extent that this Article conflicts with the DOE SPP Class Patent Waiver, as updated from time to time, the SPP Class Waiver controls.

Language:

RIGHTS IN TECHNICAL DATA –PROPRIETARY DATA PROTECTION

1. The following definitions shall be used for this Clause

   A. "Generated Information" means information produced in the performance of this Agreement, and Facility subcontracts under this Agreement.

B. "Proprietary Information" means information which is developed at private expense, is marked as Proprietary Information, and embodies (1) trade secrets or (2) commercial or financial information which is privileged or confidential under the Freedom of Information Act (5 U.S.C. 552 (b)(4)).

C. "Unlimited Rights" means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

2. For the work to be performed at the DOE/NNSA facility, the Sponsor agrees to furnish to the Facility Contractor or leave at the facility that information, if any, which is (1) essential to the performance of work by the Facility Contractor personnel or (2) necessary for the health and safety of such personnel in the performance of the work. Any information furnished to the Facility Contractor shall be deemed to have been delivered with Unlimited Rights unless marked as Proprietary Information. The Sponsor agrees that it has the sole responsibility for appropriately identifying and marking all documents containing Proprietary Information, whether such documents are furnished by the Sponsor or produced under this Agreement and made available to the Sponsor for review.

3. The Sponsor may designate as Proprietary Information any Generated Information where such data would embody trade secrets or would comprise commercial or financial information that is privileged or confidential if it were obtained from a third party. Such Proprietary Information will, to the extent permitted by law, be maintained in confidence and disclosed or used by the Facility Contractor (under suitable protective conditions) only for the purpose of carrying out the Facility Contractor's responsibilities under this Agreement. Upon completion of activities under this Agreement, such Proprietary Information will be disposed of as requested by the Sponsor. Before the Facility Contractor releases data associated with this Agreement to anyone, the Sponsor will be afforded the opportunity to review that data to ascertain whether it is Proprietary Information and to mark it as such.

4. The Government and Facility Contractor agree not to disclose properly marked Proprietary Information to anyone other than the Sponsor without written approval of the Sponsor, except to Government employees who are subject to the statutory provisions against disclosure of confidential information set forth in the Trade Secrets Act (18 U.S.C. 1905). The Government and Facility Contractor shall have the right, at reasonable times up to three (3) years after the termination or completion of this Agreement, to inspect any information designated as Proprietary Information by the Sponsor, for the purpose of verifying that such information has been properly identified as Proprietary Information.

5. The Sponsor is solely responsible for the removal of all of its Proprietary Information from the facility by or before termination of this Agreement. The Sponsor may request the Facility Contractor to return or destroy all Proprietary Information. The Government and Facility Contractor shall have Unlimited Rights in any information which is not removed from the Facility by termination of this Agreement. The Government and

Facility Contractor shall have Unlimited Rights in any Proprietary Information which is incorporated into the facility or equipment under this Agreement to such extent that the facility or equipment is not restored to the condition existing prior to such incorporation.

6. The Sponsor agrees that the Facility Contractor will provide to the Department of Energy a nonproprietary description of the work performed under this Agreement.

7. The Government shall have Unlimited Rights in all Generated Information produced or information provided to the Facility Contractor by the Parties under this Agreement, except for information which is disclosed in a Subject Invention disclosure being considered for patent protection, or which is marked as being Proprietary Information.

8. Copyrights. The Sponsor may assert copyright in any of its Generated Information, and may also require the Facility Contractor, at the Sponsor's expense, to assert and assign copyright as may exist in any Generated Information produced by the Facility Contractor which the Sponsor wishes to copyright. Subject to the other provisions of this clause, and to the extent copyright is asserted, the Government reserves for itself and others acting in its behalf, a paid-up, world-wide, irrevocable, non-exclusive license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, prepare derivative works, and perform any such copyrighted works.

9. The terms and conditions of this Clause shall survive this Agreement, in the event that the Agreement is terminated before completion of the SOW.

OPTION 1: (Unlimited rights/Nonproprietary)

If the Sponsor does not intend to have Laboratory data protected, then the following clause can be used. If the Sponsor is a foreign entity, then the following clause must be used unless DOE/NNSA field Patent Counsel approves the use of the standard provision.

RIGHTS IN TECHNICAL DATA (UNLIMITED RIGHTS/NONPROPRIETARY)

1. The following definitions shall be used.

   A. "Generated Information" means information produced in the performance of this Agreement or any Facility subcontract under this Agreement.

   B. "Proprietary Information" means information which is developed at private expense, is marked as Proprietary Information, and embodies (1) trade secrets or (2) commercial or financial information which is privileged or confidential under the Freedom of Information Act (5 U.S.C. 552 (b)(4)).

   C. "Unlimited Rights" means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

2. For work performed at the DOE/NNSA Facility, the Sponsor agrees to furnish to the Facility Contractor or leave at the facility that information, if any, which is (1) essential to the performance of work by the Facility Contractor personnel or (2) necessary for the health and safety of such personnel in the performance of the work. Any information furnished to the Facility Contractor shall be deemed to have been delivered with Unlimited Rights unless marked as Proprietary Information. The Sponsor agrees that it has the sole responsibility for appropriately identifying and marking all documents provided containing Proprietary Information

3. The Sponsor, Facility Contractor, and the Government shall have Unlimited Rights in all Generated Information, except for information which is disclosed in a Subject Invention disclosure being considered for patent protection.

4. The Government and Facility Contractor agree not to disclose properly marked Proprietary Information without written approval of the Sponsor, except to Government employees who are subject to the statutory provisions against disclosure of confidential information set forth in the Trade Secrets Act (18 U.S.C. 1905).

5. The Sponsor is solely responsible for the removal of all of its Proprietary Information from the facility by or before termination of this Agreement. The Sponsor may request the Facility Contractor to return or destroy all of the Sponsor's Proprietary Information subject to paragraph (2) above. The Government and Facility Contractor shall have Unlimited Rights in any information which is not removed from the facility by termination of this Agreement. The Government and Facility Contractor shall have Unlimited Rights in any Proprietary Information which is incorporated into the facility or equipment under this Agreement to such extent that the facility or equipment is not restored to the condition existing prior to such incorporation.

6. The Sponsor agrees that the Facility Contractor will provide to the Department of Energy a nonproprietary description of the work performed under this Agreement.

7. Copyrights. The Parties may assert copyright in any of their Generated Information. Subject to the other provisions of this clause, and to the extent copyright is asserted, the Government reserves for itself and others acting in its behalf, a paid-up, world-wide, irrevocable, non-exclusive license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, prepare derivative works, and perform any such copyrighted works.

8. The terms and conditions of this article shall survive the Agreement, in the event that the Agreement is terminated before completion of the SOW.

OPTION 2: Facility Contractor software

If Software is being developed under the SPP by the Facility Contractor such that the software is (i) a derivative work of the Facility Contractor owned software or (ii) original

but could be generally useful in the commercial world and the Sponsor's needs are satisfied with a non-exclusive license, then the clause above can be modified as follows:

In paragraph 1, add a definition for Computer Software as follows:

D. "Computer Software" means (i) computer programs that comprise 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) recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

Replace the Copyright paragraph in the above clauses (standard or Option)

COPYRIGHT: The Parties may assert Copyright in any of their Generated Information. Subject to the other provisions of this clause including Computer Software generated by the Facility Contractor below, and to the extent copyright is asserted, the Government reserves for itself and others acting in its behalf, a paid-up, world-wide, irrevocable, non-exclusive license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, prepare derivative works, and perform any such copyrighted works.

For Computer Software generated by the Facility Contractor under this agreement, the Facility Contractor grants to the Sponsor a royalty-free, nontransferable, non-exclusive, irrevocable worldwide copyright license for its own use.

When the Facility Contractor asserts copyright in its Computer Software developed under this Agreement, the Government has for itself and others acting on its behalf, a royalty-free, nontransferable, nonexclusive, irrevocable worldwide copyright license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government (narrow-license). After the Facility Contractor abandons or no longer commercializes the Copyrighted Computer Software, the Government has for itself and others acting on its behalf, a royalty-free, nontransferable, nonexclusive, irrevocable worldwide copyright license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government (broad-license)

A separate copyright license may be necessary in Facility Contractor Computer Software developed outside of this Agreement and used to perform the work in this Agreement, such as creating derivative works.

OPTION 3: Facility Services Agreement-Proprietary

When the work performed is testing Sponsor's materials/samples or services type of work or training (where training materials already exist), the Patent Rights clause may be reserved and the following Option 3 (for Proprietary work) or Option 4 (for non-Proprietary work) may be used. These provisions are not to be used if any research and development will occur. See guidance for more information.

1. The following definitions shall be used:

   A. "Generated Information" means information produced in the performance of this Agreement or any Facility subcontract under this Agreement.

   B. "Proprietary Information" means information which is developed at private expense, is marked as Proprietary Information, and embodies (1) trade secrets or (2) commercial or financial information which is privileged or confidential under the Freedom of Information Act (5 U.S.C. 552 (b)(4)).

   C. "Unlimited Rights" means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

2. As directed by the Sponsor, Generated Information produced under this Agreement may be marked as Proprietary Information and provided to the Sponsor before termination of this Agreement. If the Sponsor provides Proprietary Information, which is not Generated Information, to the Facility Contractor to perform the work, such Proprietary Information will be destroyed or returned to the Sponsor as directed in writing from the Sponsor. The DOE, the Facility Contractor and the Sponsor shall have Unlimited Rights in all Generated Information, as well as Generated Information marked as Proprietary Information and Proprietary Information provided by the Sponsor, but only to the extent such Proprietary Information is not removed from the Facility Contractor's facility before termination of this Agreement. The Sponsor agrees that the Facility Contractor may provide to the DOE, a non-proprietary description of the work to be performed under this Agreement.

OPTION 4: Facility Services Agreements – Non-Proprietary

As appropriate, such as when the Sponsor is using federal funds, the Facility Contractor may use the following alternative paragraph 2 in option 3 above, ``which does not give the Sponsor the right to mark Generated Information as Proprietary Information:

Generated Information shall not be marked as Proprietary Information. If the Sponsor provides Proprietary Information to the Facility Contractor to perform the work, such Proprietary Information will be destroyed or returned to the Sponsor as directed by the

Sponsor in writing. The DOE, the Facility Contractor and the Sponsor shall have Unlimited Rights in all Generated Information and Proprietary Information provided by the Sponsor, only if such Proprietary Information has not been removed from the Facility Contractor's facility before termination of this Agreement. The Sponsor agrees that the Facility Contractor may provide to the DOE, a non-proprietary description of the work to be performed under this Agreement.

General Guidance:

The obligations of the parties with respect to proprietary information require that all such materials be sufficiently identified and marked, so that the personnel involved in the project understand what materials are to be protected. If information could not be protected as a valid trade secret or commercial or financial information if brought into the agreement by the Sponsor, then it should not be protected under the Agreement. If the parties will be using biological materials, specimen materials, equipment, or other tangible personal property that a party wants to protect as proprietary, then such items should be included in the definition of proprietary information to ensure such protection. Additional information can be found at 48 CFR 927.400. The parties may wish to return proprietary information before the conclusion of the Agreement if such information is no longer needed for work under the Agreement.

In most software related projects, the Sponsor is funding the Laboratory to produce a derivative work of existing Facility Contractor Software that meets the specifications of the Sponsor. To grant the Sponsor the right to mark as Proprietary Information may be detrimental to the value of the Facility Contractor Software. In addition, if the software is an original work that could be useful for commercial community, the Sponsor may only need a non-exclusive license. If the parties want to negotiate greater rights (e.g., exclusive license) or rights in the underlying Facility Contractor Software, that can be done by separate license agreement between the parties.

As it appears in the standard clause in the Agreement, the data article allows the Sponsor to secure all rights in generated information designated by the Sponsor as proprietary information. The government would get minimum rights therein. With respect to such designated generated information, the Sponsor receives the maximum data rights available to the Sponsor under the Class Patent Waiver.

However, there are circumstances that justify or require greater data rights (Option 1) for the Facility Contractor/the Department, than Sponsor ownership having all rights. Indications of situations in which such greater rights may be justified are:

1. the Sponsor is not providing proprietary information or material to the facility;

2. the Sponsor is not likely to use the results of the work for commercial activity or is an institution that does not want to assert proprietary rights in the data to the exclusion of any rights in the Government;

3. the Sponsor cannot show that the primary use of the data will be in the U.S. rather than in a foreign country;

4. the SPP SOW is directly related to specific ongoing projects (this is an instance where 5-year protection might be appropriate) or the Sponsor is using Federal funds where statutory limits may exist in protecting data. Specific language for time period is allowed by the Class Waiver but requires consulting with DOE/NNSA field Patent Counsel for requirements the Class Waiver (Appendix C) where designating data as Protected SPP Information might be appropriate;

5. the SPP SOW requires only a paper study and is not directed to a particular commercial product of the sponsor (this is an instance where unlimited rights in the government might be appropriate);

6. per the Class Patent Waiver, title to all inventions is not going to the Sponsor; or,

7. any benefit to the U.S. Government would be lost by the removal of the data from the facility.

When the work performed is testing materials or services type of work, Option 3 may be used. The limited use of this provision is for situations such as (1) testing samples or materials provided by the Sponsor, (2) providing Facility Contractor's expertise training to the Sponsor where the training materials already exist. This Option 3 is only to be used when little or no new data will be developed such as test results to be delivered to Sponsor. This provision is not to be used if any research and development will occur or if the Sponsor requests deviations to Option 3 to increase protections. In these cases, the standard clause should be used. Option 4 should be used when it is not necessary or appropriate to mark the Generated Information as Proprietary Information (e.g. when the Sponsor is using Federal funds).

Before the Agreement is entered into, the Facility Contractor or the Department of Energy may require that greater data rights be obtained. The data rights acquired by the government/Facility Contractor depend on the circumstances, and can range from unlimited rights to some lesser level of protection, such as a period of protection (e.g., 5 years), or having only part of the data being proprietary to the sponsor. The Department of Energy or the Facility Contractor can also obtain greater rights in copyright, especially where the agreement covers work that is derivative of prior work at the DOE facility. In unusual circumstances the parties can agree that the Sponsor will leave proprietary information at the facility.

ARTICLE XVI: ASSIGNMENT AND NOTIFICATION

Neither this Agreement nor any interest therein or claim thereunder shall be assigned or transferred by either Party, except as authorized in writing by the other Party to this Agreement; provided, however, the Facility Contractor may transfer it to the Department, or its designee, with notice of such transfer to the Sponsor, and the Facility

Contractor shall have no further responsibilities except for the confidentiality, use, and/or non-disclosure obligations of this Agreement.

If the Sponsor intends to assign or transfer any interest in this Agreement to a third party or the Sponsor is merging or being acquired by a third party, the Sponsor shall notify the Facility Contractor with details of the pending action for a determination. The Facility Contractor shall reply in writing whether such transfer is acceptable or invoke the termination clause.

Guidance Article XVI:

The Facility Contractor must be allowed to transfer this Agreement to a successor Facility Contractor of the facility without disruption of the work being performed. The Sponsor is given notice and the opportunity to terminate the project under the provisions of the termination clause.

If the Sponsor is transferring this Agreement to a third party or the Sponsor is acquired by a third party, then DOE must be notified to make a determination whether the project may continue with the third party or the Sponsor controlled by the third party, respectively. This is especially an issue when a foreign entity is involved (e.g., a domestic entity is assigning the Agreement to a foreign entity; foreign entity acquiring a domestic Sponsor; or the transfer between entities of different foreign countries), which will most likely require a DOE headquarters review (e.g., program and international affairs).

Article XVII. SIMILAR OR IDENTICAL SERVICES

Language:

The Government and/or Facility Contractor shall have the right to perform similar or identical services in the SOW for other Sponsors as long as the Sponsor's Proprietary Information is not utilized.

Guidance Article XVII:

Although a Facility Contractor can agree to perform proprietary work for a private entity in accordance with the DOE policies, the Facility Contractor cannot agree to grant an individual company exclusive access to a particular facility, technical capability, or individual researcher. Because the services provided by the Facility Contractor under an SPP agreement are unique and not otherwise available in the private sector, restricting access to those capabilities could substantially lessen competition and/or perceived to be unfair.

The Facility Contractor must, however, respect the Proprietary Information rights of the private company and not transfer that information to another company that is using the same facility or capability at the laboratory.

Note: This prohibition on granting exclusive rights pertains only to the services that are offered by a Facility Contractor through an SPP agreement and should not be confused with the ability of a Facility Contractor to grant exclusive rights to a specific invention through a license agreement

Article XVIII. EXPORT CONTROL

Language:

Each Party is responsible for its own compliance with laws, regulations governing export control.

Guidance Article XVIII:

There must be an export control warning statement to warn the parties that material and information resulting from the Agreement may be export controlled. This statement should be conspicuous, like the Uniform Commercial Code-like disclaimer (e.g. bold or italic type font, capital letters). DOE RCOs can approve modified language requested by the Facility Contractor.

ARTICLE XIX: DISPUTES

The Parties shall attempt to jointly resolve all disputes arising from this Agreement. In the event a dispute arises under this Agreement, the Sponsor is encouraged to contact Facility Contractor's Technology Partnerships Ombudsman in order to resolve such dispute before pursuing third-party mediation or other remedies. If the Parties are unable to jointly resolve a dispute within 60 days, the Parties agree to submit the dispute to a third-party mediation process that is mutually agreed upon by the Parties

If the Parties want to include a more detailed description of resolving disputes, the following options could be used as additional paragraphs added to the standard paragraph above:

OPTION 1: Mediation

After the Parties have consulted with the Technology Partnership Ombudsman in accordance with the paragraph above, the Parties can initiate mediation, which shall commence within 30 days of selection of the mediator and shall be held in a mutually convenient location. The mediator's role shall be to facilitate an agreement between the Parties, based on their mutual interests. The Parties agree to share the costs of mediation equally.

Neither Party will be prevented from resorting to a judicial proceeding if (1) good faith efforts to resolve the dispute have been unsuccessful or (2) interim relief from a court is necessary to prevent serious injury.

OPTION 2: DOE RCO Determination

After the Parties have consulted with the Technology Partnership Ombudsman in accordance with the paragraph above, the Parties can have the dispute decided by the DOE RCO, who shall reduce his/her decision to writing within 60 days of receiving in writing the request for a decision by either Party to this Agreement. The DOE RCO shall mail or otherwise furnish a copy of the decision to the Parties. The decision of the DOE RCO is final unless, within 120 days, the Participant brings an action for adjudication in a court of competent jurisdiction in the State of_____.

OPTION 3: Arbitration

After the Parties have consulted with the Technology Partnership Ombudsman in accordance with the paragraph above and have mutually agreed not to enter into mediation, the Parties can request to have the dispute settled by arbitration conducted in the State of _____ in accordance with the then current and applicable rules of the American Arbitration Association. Judgment upon the award rendered by the Arbitrator(s) shall be nonbinding on the Parties.

OPTION 4: Arbitration with foreign sponsors (International Agreement/Treaty clause)

After the Parties have consulted with the Technology Partnership Ombudsman in accordance with the paragraph above and have mutually agreed not to enter into mediation, the Parties can request to have the dispute settled by an arbitral tribunal for binding arbitration in accordance with the applicable rules of international law. Unless the Parties agree otherwise in writing, the arbitration rules of UNCITRAL shall govern.

OPTION 5: Litigation

After the Parties have consulted with the Technology Partnership Ombudsman in accordance with the paragraph above and are unable to jointly resolve the dispute, the Parties can seek resolution through a judicial proceeding. Neither Party will be prevented from resorting to a judicial proceeding if (1) good faith efforts to resolve the dispute have been unsuccessful or (2) interim relief from a court is necessary to prevent serious injury. Any and all litigation involving disputes, claims, or either Party's rights and duties under or arising as a result of this Agreement shall brought in a court of competent jurisdiction. To the extent that there is no applicable U.S. Federal law, this agreement and performance thereunder shall be governed by the applicable State law.

GENERAL GUIDANCE:

The standard Disputes clause in the agreement must be included in all SPP agreements. DOE believes that contacting the Laboratory Technology *Partnership Ombudsman* is essential in resolving disputes quickly and efficiently. If the Technology *Partnership Ombudsman* is unsuccessful in assisting the Parties in resolving the conflict, the Parties should attempt to settle disputes by mediation or by DOE RCO before entering into binding or nonbinding arbitration and/or seeking adjudication in a court of competent jurisdiction. It is strongly recommended that the Facility Contractor seek to include an intermediate step after it attempts to directly resolve the dispute with the Sponsor before going to court.

If mediation is undertaken, it is recommended that the confidentiality provisions of the Alternative Dispute Resolution Act be incorporated into the agreement to mediate. Sample agreements are available from the DOE Office of Conflict Prevention and Resolution. If the Parties decide to replace mediation with another form of Alternative Dispute Resolution, such as a neutral evaluation or mini-trial, the DOE Office of Conflict Prevention and Resolution can provide information and guidance on these processes.

It is DOE policy (See DOE General Counsel Issues Arbitration Guidance for Facility Contractors) that mediation is the principal method of alternate dispute resolution. However, there is currently no legal prohibition on Facility Contractors including binding arbitration clauses (See Option 3 & 4) in their contracts with others. It often will be a good idea to include arbitration clauses as a means of limiting the risk of litigation which is often more time consuming and expensive than arbitration. DOE, including NNSA, does however “regulate” the use of arbitration once a dispute has arisen under our Facility Contractor Legal Management Requirements. However, Agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act and Department of Energy guidance. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to.

Article XX. ENTIRE AGREEMENT AND MODIFICATIONS

Language:

1. This Agreement with its annexes contains the entire agreement between the Parties with respect to the subject matter hereof, and all prior representations or agreements relating hereto have been merged into this document and are thus superseded in totality by this Agreement.

2. Any agreement to materially change any terms or conditions of this Agreement or the annexes shall be valid only if the change is made in writing, executed by the Parties hereto, and approved by DOE.

Guidance Article XX:

The Agreement must include an article stating that all terms and conditions of the Agreement are entirely contained within this document, its annexes (for example, SOW) and the terms and conditions of the M&O Prime Contract. The parties should not rely on previous statements or documents that didn't get incorporated into this Agreement unless separately executed documents such as licenses. Any subsequent modifications need to be done in writing by an amendment to this Agreement. However, a no-cost extension of time that doesn't change any terms of the Agreement (except Article II: Term of Agreement) or the SOW will not require DOE RCO approval.

When the Facility Contractor is entering into an Agreement with a division or subsidiary of another corporation, it may be desirable to add a statement to the signatory line of the Sponsor stating that the person attests that he/she has the legal authority to bind the company to all the terms and conditions of the Agreement.

Article XXI. TERMINATION

Language:

This Agreement may be terminated by either Party following ___ days written notice to the other Party. If Article IV provides for advance funding, this Agreement may also be terminated by the Facility Contractor in the event of failure by the Sponsor to provide the necessary advance funding. In the event of termination either by the Sponsor or by the Facility Contractor (e.g., for lack of advance funding), the Sponsor shall be responsible for the Facility Contractor's costs (including closeout costs), but in no event shall the Sponsor's cost responsibility exceed the total cost to the Sponsor as described in Article III, above.

It is agreed that any obligations of the Parties regarding Proprietary Information or other intellectual property will remain in effect, despite early termination of the Agreement.

Guidance:

The Agreement should include a termination clause. The termination clause may also reference to Funding and Costs Articles, in so far as to clearly state that "failure of the Sponsor to provide the necessary advance funding, or to promptly pay the invoices rendered by the Facility Contractor is cause for termination of the Agreement."