FL-102B

INTELLECTUAL PROPERTY CLAUSES
for

Consultant Subcontract with
Other Than Small Business Concern
or Non-Profit Organization Covered by P.L. 96-517

CONTENTS

1. PATENT RIGHTS - ACQUISITION BY THE GOVERNMENT (48 C.F.R. 952.227-13)

(a) *Definitions.*

"Invention", as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

"Practical application", as used in this clause, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

"Subject invention", as used in this clause, means any invention of the Subcontractor conceived or first actually reduced to practice in the course of or under this subcontract.

"Patent Counsel", as used in this clause, means the Department of Energy Patent Counsel assisting the procuring activity (Office of Intellectual Property Law, Attn: B. Smith; U.S. Department of Energy; Chicago Operations Office; Argonne, IL 60439).

"DOE patent waiver regulations", as used in this clause, means the Department of Energy patent waiver regulations at 10 C.F.R. Part 784.

"Agency licensing regulations" and "applicable agency licensing regulations", as used in this clause, mean the Department of Energy patent licensing regulations at 10 C.F.R. Part 781.

(b) *Allocations of Principal Rights.*

(1) Assignment to the Government. The Subcontractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Subcontractor under subparagraph (b)(2) and paragraph (d) of this clause.

(2) Greater rights determinations.

(i) The Subcontractor, or an employee-inventor after consultation with the Subcontractor, may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the DOE patent waiver regulations. A request for a determination of whether the Subcontractor or the employee-inventor is entitled to acquire such greater rights must be submitted to the Patent Counsel with a copy to Fermilab at the time of the first disclosure of the invention pursuant to subparagraph (e)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by DOE for good cause shown in writing by the Subcontractor. Each determination of greater rights under this subcontract shall be subject to paragraph (c) of this clause, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.

(ii) Within two (2) months after the filing of a patent application, the Subcontractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and, promptly upon issuance of a patent, provide the patent number and issue date for any subject invention in any country for which the Subcontractor has been granted title or the right to file and prosecute on behalf of the United States by the Department of Energy.

(iii) Not less than thirty (30) days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application.

(iv) Upon request, the Subcontractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(c) *Minimum Rights Acquired by the Government.*

(1) With respect to each subject invention to which the Department of Energy grants the Subcontractor principal or exclusive rights, the Subcontractor agrees as follows:

(i) The Subcontractor hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency).

(ii) The Subcontractor agrees that with respect to any subject invention in which DOE has granted it title, DOE has the right in accordance with the procedures in the DOE patent waiver regulations (10 C.F.R. Part 784) to require the Subcontractor, and assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Subcontractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if it determines that --

(A) Such action is necessary because the Subcontractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(B) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Subcontractor, assignee, or their licensees;

(C) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Subcontractor, assignee, or licensees; or

(D) Such action is necessary because the agreement required by paragraph (I) of this clause has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(iii) The Subcontractor agrees to submit to Fermilab on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Subcontractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Subcontractor, and such other data and information as DOE through Fermilab may reasonably specify. The Subcontractor also agrees to provide additional reports as may be requested by DOE through Fermilab in connection with any march-

in proceedings undertaken by that agency in accordance with subparagraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Subcontractor, its licensee, or assignee to be privileged and confidential and is so marked, the Department of Energy agrees that, to the extent permitted by law, it will not disclose such information to persons outside the Government.

(iv) The Subcontractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the government, and to provide for such refund in any instrument transferring rights in the invention to any party.

(v) The Subcontractor agrees to provide for the Government's paid-up license pursuant to subparagraph (c)(1)(i) of this clause in any instrument transferring rights in a subject invention and to provide for the granting of licenses as required by subparagraph (c)(1)(ii) of this clause, and for the reporting of utilization information as required by subparagraph (c)(1)(iii) of this clause, whenever the instrument transfers principal or exclusive rights in a subject invention.

(2) Nothing contained in this paragraph (c) shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(d) *Minimum Rights to the Subcontractor.*

(1) The Subcontractor is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Subcontractor fails to disclose the subject invention within the times specified in subparagraph (e)(2) of this clause. The Subcontractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Subcontractor is a part and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the subcontract was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Subcontractor's business to which the invention pertains.

(2) The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 C.F.R. Part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Subcontractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, DOE through Fermilab will furnish the Subcontractor a written notice of its intention to revoke or modify the license, and the Subcontractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Subcontractor) after the notice to show cause why the license should not be revoked or modified. The Subcontractor has the right to appeal, in accordance with applicable agency licensing regulations and 37 C.F.R. Part 404 concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(4) The Subcontractor may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the conditions in subparagraphs (d)(4)(i) through (d)(4)(vii) of this clause. Such request must be made in writing to the Patent Counsel as part of the disclosure required by subparagraph (e)(2) of this clause, with a copy to Fermilab. DOE approval, if given, will be based on a determination that this would best serve the national interest.

(i) The recipient of such rights, when specifically requested by DOE, and three years after issuance of a foreign patent disclosing the subject invention, shall furnish DOE a report stating:

(A) The commercial use that is being made, or is intended to be made, of said invention, and

(B) The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.

(ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government (including any Government agency) and States and domestic municipal governments, unless the Secretary of Energy or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.

(iii) If noted elsewhere in this subcontract as a condition of the grant of an advance waiver of the Government's title to inventions under this subcontract, or, if no advance waiver was granted but a waiver of the Government's title to an identified invention is granted pursuant to subparagraph (b)(2) of this clause upon a determination by the Secretary of Energy that it is in the Government's best interest, this license shall include the right of the Government to sublicense foreign governments pursuant to any existing or future treaty or agreement with such foreign governments.

(iv) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall have the right to terminate the foreign patent rights granted in this subparagraph (d)(4) in whole or in part unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee that effective steps necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.

(v) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall have the right, commencing four years after foreign patent rights are accorded under this subparagraph (d)(4), to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:

(A) If the Secretary of Energy or designee determines, upon review of such material as he deems relevant, and after the recipient of such rights or other interested person has had the opportunity to provide such relevant and material information as the Secretary or designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or

(B) Unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

(vi) If the Subcontractor is to file a foreign patent application on a subject invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures for such period of time as specified by Patent Counsel, but in no event shall the Government or its employees be liable for any publication thereof.

(vii) Subject to the license specified in subparagraph (d)(1), (2), and (3) of this clause, the Subcontractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the Subcontractor or inventor fails to have a patent application filed in a timely manner or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the Subcontractor or inventor shall, not less than 60 days before the expiration period for any action required by any patent office, notify the Patent Counsel of such failure or decision, and deliver to the Patent Counsel, the executed instruments necessary for the conveyance specified in this paragraph.

(e) *Invention Identification, Disclosures, and Reports.*

(1) The Subcontractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed or Subcontractor personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this subcontract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Subcontractor shall furnish DOE through Fermilab a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Subcontractor shall disclose each subject invention to the DOE Patent Counsel with a copy to Fermilab within 2 months after the inventor discloses it in writing to Subcontractor personnel responsible for patent matters or, if earlier, within 6 months after the Subcontractor becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Subcontractor. The disclosure to DOE shall be in the form of a written report and shall identify the subcontract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Subcontractor shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor. The report should also include any request for a greater rights determination in accordance with subparagraph (b)(2) of this clause. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Subcontractor contends in writing at the time the invention is disclosed that it was not so made.

(3) The Subcontractor shall furnish the following to the Patent Counsel, with a copy to Fermilab:

(i) Interim reports every 12 months (or such longer period as may be specified by DOE) from the date of the subcontract, listing subject inventions during that period, and certifying that all subject inventions have been disclosed (or that there are not such inventions) and that the procedures required by subparagraph (e)(1) of this clause have been followed.

(ii) A final report, within 3 months after completion of the subcontracted work listing all subject inventions or certifying that there were no such inventions, and listing all sub-subcontracts at any tier containing a patent rights clause or certifying that there were no such sub-subcontracts.

(4) The Subcontractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Subcontractor each subject invention made under subcontract in order that the Subcontractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (e)(2) of this clause.

(5) The Subcontractor agrees, subject to FAR 27.302(j), that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) *Examination of Records Relating to Inventions.*

(1) DOE, Fermilab, or any authorized representative shall, until 3 years after final payment under this subcontract, have the right to examine any books (including laboratory notebooks), records, and documents of the Subcontractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this subcontract to determine whether--

(i) Any such inventions are subject inventions;

(ii) The Subcontractor has established and maintains the procedures required by subparagraphs (e)(1) and (4) of this clause;

(iii) The Subcontractor and its inventors have complied with the procedures.

(2) If DOE learns of an unreported Subcontractor invention which DOE believes may be a subject invention, the Subcontractor may be required to disclose the invention to DOE for a determination of ownership rights.

(3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentially of the information involved.

(g) *Reserved.*

(h) *Sub-subcontracts.*

(1) The Subcontractor shall include the clause at 48 C.F.R. 952.227-11 (suitably modified to identify the parties) in all sub-subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the sub-subcontract is subject to the Exceptional Circumstances Determination by DOE. In all other sub-subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Subcontractor shall include this clause (suitably modified to identify the parties). The Subcontractor shall not, as part of the consideration for awarding the sub-subcontract, obtain rights in the sub-subcontractor's subject inventions.

(2) In the event of a refusal by a prospective sub-subcontractor to accept such a clause the Subcontractor--

(i) Shall promptly submit a written notice to DOE, with a copy to Fermilab, setting forth the sub-subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such sub-subcontract without the written authorization of DOE.

(3) In the case of sub-subcontracts at any tier, DOE, the sub-subcontractor, and Subcontractor agree that the mutual obligations of the parties created by this clause constitute a subcontract between the sub-subcontractor and DOE with respect to those matters covered by this clause.

(4) The Subcontractor shall promptly notify the Patent Counsel, with a copy to Fermilab, in writing upon the award of any sub-subcontract at any tier containing a patent rights clause by identifying the sub-subcontractor, the applicable patent rights clause, the work to be performed under sub-subcontract, and the dates of award and estimated completion. Upon request of DOE, the Subcontractor shall furnish a copy of such sub-subcontract, and, no more frequently than annually, a listing of the sub-subcontracts that have been awarded.

(5) The Subcontractor shall identify all subject inventions of the sub-subcontractor of which it acquires knowledge in the performance of this subcontract and shall notify the Patent Counsel, with a copy to Fermilab, promptly upon identification of the inventions.

(i) *Preference United States Industry.* Unless provided otherwise, no Subcontractor that receives title to any subject invention and no assignee of any such Subcontractor shall 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 will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the Government upon a showing by the Subcontractor or 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.

(j) *Atomic Energy.*

(1) No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of or under this subcontract.

(2) Except as otherwise authorized in writing by DOE, the Subcontractor will obtain patent agreements to effectuate the provisions of subparagraph (e)(1) of this clause from all persons who perform any part of the work under this subcontract, except nontechnical personnel, such as clerical employees and manual laborers.

(k) *Background Patents.*

(1) Background Patent means a domestic patent covering an invention or discovery which is not a subject invention and which is owned or controlled by the Subcontractor at any time through the completion of this subcontract:

(i) Which the Subcontractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this subcontract.

(2) The Subcontractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any background patent for purposes of practicing a subject of this subcontract by or for the Government in research, development, and demonstration work only.

(3) The Subcontractor also agrees that upon written application by DOE, it will grant to responsible parties, for purposes of practicing a subject of this subcontract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the Subcontractor believes that exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Subcontractor.

(4) Notwithstanding subparagraph (k)(3) of this clause, the Subcontractor shall not be obligated to license any background patent if the Subcontractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(i) a competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or

(ii) the Subcontractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

(l) *Publication.* It is recognized that during the course of the work under this subcontract, the Subcontractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this subcontract. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Subcontractor, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.

(m) *Forfeiture of Rights in Unreported Subject Inventions.*

(1) The Subcontractor shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Subcontractor fails to report to Patent Counsel within six months after the time the Subcontractor:

(i) Files or causes to be filed a United States or foreign patent application thereon: or

(ii) Submits the final report required by subparagraph (c)(2)(ii) of this clause, whichever is later.

(2) However, the Subcontractor shall not forfeit rights in a subject invention if, within the time specified in subparagraph (m)(1) of this clause, the Subcontractor:

(i) Prepares a written decision based upon a review of the record that the invention was conceived nor first actually reduced to practice in the course of or under the subcontract and delivers the decision to Patent Counsel, with a copy to Fermilab ; or

(ii) Contending that the invention is not a subject invention, the Subcontractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel, with a copy to Fermilab; or

(iii) Establishes that the failure to disclose did not result from the Subcontractor's fault or negligence.

(3) Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes clause of this subcontract), the Subcontractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (m) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

2. **FACILITIES LICENSE** (48 C.F.R. 970.5204-71(n))

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

3. **RIGHTS IN DATA - FACILITIES** (48 C.F.R. 970.5204-82)

(a) *Definitions.*

(1) "Computer databases," as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) "Computer software," as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer databases.

(3) "Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term "data" does not include data incidental to the administration of this subcontract, such as financial, administrative, cost and pricing, or management information.

(4) "Limited rights data," as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth at FAR 52.227-14.

(5) "Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice at FAR 52.227-14.

(6) "Technical data," as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer database.

(7) "Unlimited rights," as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any means, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.*

(1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this subcontract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this subcontract, except as provided herein regarding copyright, limited rights data, or restricted computer software, or except for other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Work for Others Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this subcontract at all reasonable times. The Subcontractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this subcontract delivered to the Government or otherwise disposed of by the Subcontractor, either as the DOE or FRA may from time to time direct during the progress of the work or in any event as the DOE through FRA shall direct upon completion or termination of this subcontract. The Subcontractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the DOE through FRA. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (e) ("Rights in Limited Rights Data") or paragraph (f) ("Rights in Restricted Computer Software") of Department of Energy Acquisition Regulation (DEAR) 970.5204-82;

(v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this subcontract on any data furnished hereunder if, in response to a written inquiry by DOE through FRA concerning the propriety of the markings, the Subcontractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE through FRA will notify the Subcontractor of the action taken.

(2) The Subcontractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this subcontract, data it first produces in the performance of this subcontract, except for data in DOE's uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Subcontract have been met as of the date of the private use of such data.

(3) The Subcontractor agrees that for limited rights or restricted computer software or other technical, business or financial data in the form of recorded information which it receives from, or is given access to by, DOE, FRA or a third party, and for technical data or computer software it first produces under this Subcontract which is authorized to be marked by DOE, the Subcontractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyrighted Material.*

(1) The Subcontractor shall not, without prior written authorization of the DOE through FRA, assert copyright in any technical data or computer software first produced in the performance of this subcontract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a nonexclusive, paid-up irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the Subcontractor.

(2) The Subcontractor agrees not to include in the technical data or computer software delivered under the subcontract any material copyrighted by the Subcontractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of FRA and the Government of the same scope as set forth in paragraph (c) (1) of this clause. If the Subcontractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data or computer software to be delivered, rather than merely incorporated therein by reference, the Subcontractor shall obtain the written authorization of the DOE through FRA to include such material in the technical data or computer software prior to its delivery.

(d) *Sub-subcontracting.*

(1) Unless otherwise directed by FRA, the Subcontractor agrees to use in sub-subcontracts in which technical data or computer software is expected to be produced or in sub-subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 C.F.R. (FAR) Subpart 27.4 as supplemented by 48 C.F.R. (DEAR) 927.401 through 927.409, the clause entitled "Rights in Data-General" at 48 C.F.R. 52.227-14 modified in accordance with 927.409 (a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval

of DOE Patent Counsel, and the Subcontractor shall not acquire rights in a sub-subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at FAR 52.227-16, Additional Data Requirements, shall be included in sub-subcontracts in accordance with DEAR 927.409(h). The Subcontractor shall use instead the Rights in Data-Facilities clause at DEAR 970.5204-82 in sub-subcontracts, including sub-subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under the FRA contract with DOE.

(2) It is the responsibility of the Subcontractor to obtain from its sub-subcontractors technical data and computer software and rights therein, on behalf of FRA and the Government, necessary to fulfill the Subcontractor's obligations to FRA and the Government with respect to such data. In the event of refusal by a sub-subcontractor to accept a clause affording FRA and the Government such rights, the Subcontractor shall:

(i) Promptly submit written notice to FRA setting forth reasons for the sub-subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the sub-subcontract without the written authorization of FRA.

(3) Neither the Subcontractor nor higher-tier sub-subcontractors shall use their power to award sub-subcontracts as economic leverage to acquire rights in a sub-subcontractor's limited rights data or restricted computer software for their private use.

4. ADDITIONAL DATA REQUIREMENTS (FAR 52.227-16)

Note: This clause does not apply to the subcontract if the subcontract is for the conduct of basic or applied research, as set out elsewhere in this subcontract, to be performed solely by a college or university, and the estimated cost is not in excess of $500,000.00.

(a) In addition to the data (as defined in the clause at 52.227-14, Rights in Data-General clause or other equivalent included in this subcontract) specified elsewhere in this subcontract to be delivered, the DOE through FRA may, at any time during subcontract performance or within a period of 3 years after acceptance of all items to be delivered under this subcontract, order any data first produced or specifically used in the performance of this subcontract.

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

(c) When data are to be delivered under this clause, the Subcontractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(d) The DOE through FRA may release the Subcontractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in paragraph (a) of this clause.

5. AUTHORIZATION AND CONSENT (48 C.F.R. 52.227-1)

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

(b) The Subcontractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all lower-tier sub-subcontracts for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed the simplified acquisition

threshold at Federal Acquisition Regulation (FAR) 2.101); however, omission of this clause from any lower-tier sub-subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

6. **NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT** (48 C.F.R. 52.227-2)

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

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

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

7. **REFUND OF ROYALTIES** (48 C.F.R. 952.227-9)

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

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

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

(d) The Subcontractor will be compensated for royalties reported under paragraph (c) of this clause, only to the extent that such royalties were included in the subcontract price and are determined by Fermilab to be properly chargeable to the Government and allocable to the subcontract. To the extent that any royalties that are included in the subcontract price are not, in fact, paid by the Subcontractor or are determined by Fermilab not to be properly chargeable to the Government and allocable to the subcontract, the subcontract price shall be reduced. Repayment or credit to Fermilab shall be made as Fermilab directs. The approval by Fermilab or DOE of any individual payments or royalties shall not prevent the Government from contesting at any time the enforceability, validity, scope of, or title to, any patent or the proprietary nature of data pursuant to which a royalty or other payment is to be or has been made.

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

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

8. RIGHTS IN DATA - GENERAL

(a) *Definitions.*

(1) "Computer databases," as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) "Computer software," as used in this clause, means:

(i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and

(ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) "Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. For the purposes of this clause, the term does not include data incidental to the administration of this subcontract, such as financial, administrative cost and pricing, or management information.

(4) "Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

(5) "Limited rights data," as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

(6) "Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software.

(7) "Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

(8) "Technical data," as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(9) "Unlimited rights," as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.*

(1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in:

(i) Data first produced in the performance of this subcontract;

(ii) Form, fit, and function data delivered under this subcontract;

(iii) Data delivered under this subcontract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair items, components, or processes delivered or furnished for use under this subcontract; and

(iv) All other data delivered under this subcontract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) below.

(2) The Subcontractor shall have the right to:

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this subcontract (except Restricted Data in category C-24, 10 C.F.R. Part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology), unless provided otherwise in paragraph (d) below;

(ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (e) and (f) below; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this subcontract to the extent provided in subparagraph (c)(1) below.

(c) *Copyright.*

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

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

(3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) *Release, Publication and Use of Data.*

(1) The Subcontractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this subcontract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided below in this paragraph or expressly set forth in this subcontract.

(2) The Subcontractor agrees that to the extent it receives or is given access to data necessary for the performance of this subcontract which contain restrictive markings, the Subcontractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the DOE via FRA.

(3) The Subcontractor agrees not to assert copyright in computer software first produced in the performance of this subcontract without prior written permission of the DOE and FRA. When such permission is granted,

the DOE through FRA shall specify appropriate terms, conditions, and submission requirements to assure utilization, dissemination, and commercialization of the data. The Subcontractor, when requested, shall promptly deliver to DOE through FRA a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled.

(e) *Unauthorized Marking of Data.*

(1) Notwithstanding any other provisions of this subcontract concerning inspection or acceptance, if any data delivered under this subcontract are marked with restrictive notices and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this subcontract, FRA may at any time either return the data to the Subcontractor, or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) FRA shall make written inquiry to the Subcontractor affording the Subcontractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Subcontractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by FRA for good cause shown), FRA shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Subcontractor provides written justification to substantiate the propriety of the markings within the period set in subdivision (i) above, FRA shall consider such written justification and determine whether or not the markings are to be canceled or ignored. If FRA determines that the markings are authorized, the Subcontractor shall be so notified in writing. If FRA determines that the markings are not authorized, FRA shall furnish the Subcontractor a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Subcontractor files suit in a court of competent jurisdiction within 90 days of receipt of the FRA's decision. FRA shall continue to abide by the markings under this subdivision (iii) until final resolution of the matter either by the FRA's determination becoming final (in which instance FRA shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) Except to the extent that an action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Subcontractor is not precluded by this paragraph (e) from bringing a claim, as applicable, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this subcontract.

(f) *Omitted or Incorrect Markings.*

(1) Data delivered to FRA without either the limited rights or restricted rights notice as authorized by paragraph (g) below, or the copyright notice required by paragraph (c) above, shall be deemed to have been furnished with unlimited rights, and FRA assumes no liability for disclosure, use, or reproduction of such data. However, to the extent the data has otherwise not been disclosed without restriction, the Subcontractor may request, within 6 months (or a longer time approved by FRA for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Subcontractor's expense, and FRA may agree to do so if the Subcontractor:

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent:

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that neither FRA nor the Government has any liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The DOE, through FRA, may also:

(i) permit correction at the Subcontractor's expense of incorrect notices if the Subcontractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or

(ii) correct any incorrect notices.

(g) *Protection of Limited Rights Data and Restricted Computer Software.*

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

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

(i) *Relationship to Patents.* Nothing contained in this clause shall imply a license to the Government or FRA under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

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

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

(1) such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this subcontract;

(2) such data, in the form of results obtained by their use, are being supplied by the Subcontractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the Subcontractor or its licensees have take effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or

(3) such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the subcontract results.

9. **PATENT INDEMNITY** (48 C.F.R. 52.227-3)

(a) The Subcontractor shall indemnify Fermilab, the Government, and their officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this subcontract, or out of the use or disposal by or for the account of the Government or Fermilab of such supplies or construction work.

(b) This indemnity shall not apply unless the Subcontractor shall have been informed as soon as practicable by the Government or Fermilab of the suit or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this

indemnity shall not apply to (1) an infringement resulting from compliance with specific written instructions of Fermilab or the Department Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the subcontract not normally used by the Subcontractor, (2) an infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance, or (3) a claimed infringement that is unreasonably settled without the consent of the Subcontractor, unless required by final decree of a court of competent jurisdiction.