

FERMILAB TERMS AND CONDITIONS

Commercial Items

Fermi Research Alliance, LLC d/b/a Fermilab

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1. DEFINITIONS

As used throughout this subcontract, the following terms shall have the meanings set forth below--

- (a) The terms "Commercial component", "Commercial item", and "Non-developmental item" shall have the meanings contained in the clause at Federal Acquisition Regulation (FAR) 2.101, Definitions.
- (b) The term "Department" shall mean the U.S. Department of Energy or any duly authorized representative thereof.
- (c) The term "Fermilab" shall mean Fermi Research Alliance, LLC, and includes the successor to or any duly authorized representative thereof.
- (d) The term "Government" shall mean the United States Government acting through the U.S. Department of Energy or any successor agency.
- (e) Except as otherwise provided in this subcontract, the term "sub-subcontract" includes purchase orders under this subcontract.

1.1 When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless—

- (a) The solicitation, or amended solicitation, provides a different definition;
- (b) The contracting parties agree to a different definition;
- (c) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or
- (d) The word or term is defined in FAR Part 31, for use in the cost principles and procedures. When a solicitation provision or

contract clause uses a word or term that is defined in the Department of Energy Acquisition Regulation (DEAR) (48 CFR chapter 9), the word or term has the same meaning as the definition in 48 CFR 902.101 or the definition in the part, subpart, or section of 48 CFR chapter 9 where the provision or clause is prescribed in effect at the time the solicitation was issued, unless an exception in (a) applies.

2. ACCEPTANCE OF SUBCONTRACT

Acceptance of this subcontract must be in accordance with and strictly limited to the requirements set forth in this subcontract, including these Terms and Conditions. Any attempted change by the Subcontractor of the requirements set forth in this subcontract without the proper acknowledgment or agreement by Fermilab shall have no force or effect. Where no such acknowledgment or agreement has been obtained, performance by the Subcontractor shall be deemed to be an acceptance by the Subcontractor of the requirements set forth in this subcontract.

3. INSPECTION

(a) If this subcontract is for supplies, then the inspection provisions of paragraph (b) apply. If this subcontract is for services, then the inspection provisions of paragraph (c) apply. If this subcontract is for both supplies and services, then the provisions of (b) apply to that portion of the work which is for supplies, and those of (c) apply to that portion of the work which is for services.

(b) SUPPLIES.

(i) "Supplies," as used in this paragraph, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(ii) Fermilab has the right to inspect and test all supplies called for by this subcontract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. Fermilab shall perform inspections and tests in a manner that will not unduly delay the work. Fermilab assumes no contractual obligation to perform any inspection or test for the benefit of the Subcontractor unless specifically set forth elsewhere in this subcontract. If Fermilab performs an inspection or test on the premises of the Subcontractor or a sub-subcontractor, the Subcontractor shall furnish, and shall require all sub-subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(iii) Fermilab has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with subcontract requirements. Fermilab may reject nonconforming supplies with or without disposition instructions. The Subcontractor shall remove supplies rejected or required to be corrected. However, Fermilab may require or permit correction in place, promptly after notice, by and at the expense of the Subcontractor. The Subcontractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when, required, shall disclose the corrective action taken. If the Subcontractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, Fermilab may either

(A) By subcontract or otherwise, remove, replace, or correct the supplies and charge the cost to the Subcontractor

or

(B) Terminate the subcontract for cause. Unless the Subcontractor corrects or replaces the supplies within the delivery schedule, Fermilab may require their delivery and make an equitable price reduction.

(iv) Fermilab shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the subcontract. Fermilab failure to inspect and accept or reject the supplies shall not relieve the Subcontractor from responsibility, nor impose liability on Fermilab, for nonconforming supplies. Inspections and tests by Fermilab do not relieve the Subcontractor of responsibility for defects or other failures to meet subcontract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the subcontract.

(v) If acceptance is not conclusive for any of the reasons in the last sentence of (iv) above, Fermilab, in addition to any other rights and remedies provided by law, or under other provisions of this subcontract, shall have the right to require the Subcontractor

(A) At no increase in subcontract price, to correct or replace the nonconforming supplies at the original point of delivery or at the Subcontractor's plant at Fermilab's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Subcontractor and Fermilab; provided, that Fermilab may require a reduction in subcontract price if the Subcontractor fails to meet such delivery schedule, or

(B) Within a reasonable time after receipt by the Subcontractor of notice of defects or nonconformance, to repay such portion of the subcontract as is equitable under the circumstances if Fermilab elects not to require correction or replacement. When supplies are returned to the Subcontractor, the Subcontractor shall bear the transportation cost from the original point of delivery to the Subcontractor's plant and return to the original point when that point is not the Subcontractor's plant.

(c) SERVICES.

(i) "Services," as used in this paragraph, includes services performed, workmanship, and materials furnished or utilized in the performance of services.

(ii) Fermilab has the right to inspect and test all services called for by this subcontract, to the extent practicable at all times and places during the term of the subcontract. Fermilab shall perform inspections and tests in a manner that will not unduly delay the work. If Fermilab performs inspections or tests on the premises of the Subcontractor or a sub-subcontractor, the Subcontractor shall furnish, and shall require sub-subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(iii) If any of the services do not conform with subcontract requirements, Fermilab may require the Subcontractor to perform the services again in conformity with subcontract requirements, at no increase in subcontract amount. When the defects in

services cannot be corrected by re-performance, Fermilab may require the Subcontractor to take necessary action to ensure that future performance conforms to subcontract requirements, and may reduce the subcontract price to reflect the reduced value of the services performed. If the Subcontractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with subcontract requirements, Fermilab may, by subcontract or otherwise, perform the services and charge to the Subcontractor any cost incurred by Fermilab that is directly related to the performance of such service, or may terminate the subcontract for cause.

4. ASSIGNMENT

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

5. CHANGES

Changes in the requirements of this subcontract may be made only by written agreement of the parties.

6. PAYMENT

Payment will be made after acceptance of the items/services by Fermilab and receipt of a proper invoice. Discount time will be computed from the date of delivery at place of acceptance or from receipt of proper invoice at the office specified by Fermilab, whichever is later. Payment is made, for discount purposes, when the Fermilab check is mailed.

7. EXCUSABLE DELAYS

The Subcontractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Subcontractor and without its fault or negligence such as, acts of God or the public enemy, acts of Fermilab, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Subcontractor shall notify Fermilab in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to Fermilab of the cessation of such occurrence.

8. RISK OF LOSS

Unless the subcontract specifically provides otherwise, risk of loss or damage to the supplies provided under this subcontract shall remain with the Subcontractor until, and shall pass to Fermilab upon:

- (a) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
- (b) Delivery of the supplies to Fermilab at the destination specified in the subcontract, if transportation is f.o.b. destination.

9. TAXES

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

10. TERMINATION FOR FERMILAB'S CONVENIENCE

Fermilab reserves the right to terminate this subcontract, or any part hereof, for its sole convenience. In the event of such termination, the Subcontractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and sub-subcontractors to cease work. Subject to the terms of this subcontract, the Subcontractor shall be paid a percentage of the subcontract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Subcontractor can demonstrate to the satisfaction of Fermilab using its standard record keeping system, have resulted from the termination. The Subcontractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This clause does not give Fermilab any right to audit the Subcontractor's records. The Subcontractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

11. TERMINATION FOR CAUSE

Fermilab may terminate this subcontract, or any part hereof, for cause in the event of any default by the Subcontractor, or if the Subcontractor fails to comply with any subcontract requirement, or fails to provide Fermilab, upon request, with adequate assurances of future performance. In the event of termination for cause, Fermilab shall not be liable to the Subcontractor for any amount for supplies or services not accepted, and the Subcontractor shall be liable to Fermilab for any and all rights and remedies provided by law and by other provisions of this subcontract. If it is determined that Fermilab improperly terminated this subcontract for cause, such termination shall be deemed a termination for Fermilab's convenience.

12. TITLE

Unless specified elsewhere in this subcontract, title to items furnished under this subcontract shall pass to the Government upon acceptance, regardless of when or where Fermilab takes physical possession.

13. WARRANTY

(a) The Subcontractor warrants that all supplies or services furnished under this subcontract will conform to the specifications and all other requirements, will be free from defects in material or workmanship, and will otherwise be merchantable and fit for use for the particular purpose described in this subcontract. Such warranties together with the Subcontractor's service and other

warranties and guarantees, if any, shall survive inspection, tests, acceptance, and payment, and shall run to Fermilab, its successors and assigns.

(b) In the case of supplies, the Subcontractor shall, within a reasonable time after receipt of written notice from Fermilab and without cost to Fermilab, repair or replace any defects in materials or workmanship or nonconformance with specifications which may appear during the period ending on a date twelve months after initial use by Fermilab or eighteen months after delivery, whichever is earlier, unless a different warranty period is provided in the subcontract. If, within a reasonable time, the Subcontractor is unable or refuses to correct or replace such defective or nonconforming supplies, Fermilab may, at its option, either return for credit or, by subcontract or otherwise, repair or replace such supplies and assess the Subcontractor the cost occasioned thereby.

(c) In the case of services, the Subcontractor shall, within a reasonable time after receipt of written notice from Fermilab and without cost to Fermilab, correct any defects or nonconformities in the services furnished under this subcontract which appear within one year after the date of acceptance by Fermilab, unless a different warranty period is provided in the subcontract. If, within a reasonable time, the Subcontractor is unable or refuses to correct or re-perform, Fermilab may, by subcontract or otherwise, correct or replace with similar services and charge to the Subcontractor the cost occasioned thereby, or make an equitable adjustment in the subcontract price. If, however, Fermilab does not require correction or re-performance, it may at its option make an equitable adjustment in the subcontract price.

(d) Energy Consuming Products. When the subcontract requires the specification or delivery of energy consuming products for use in Federal facility, the Subcontractor will specify or deliver EnergyStar® qualified products or products conforming to the Federal Energy Management Program's (FEMP) Energy Efficiency Requirements, whichever may be applicable, provided products with such a designation are available and are life cycle cost effective and meet applicable performance standards. Information about these products is available for EnergyStar® at <http://www.energystar.gov/products> and for FEMP at http://www.eere.energy.gov/femp/procurement/eep_requirements.cfm.

(e) Environmentally Preferable Purchasing for Desktop or Laptop Computers or Monitors. When the subcontract requires the specification or delivery of desktop or laptop computers or monitors in a DOE facility, the Subcontractor will specify or deliver Electronic Product Environmental Acquisition Tool (EPEAT) registered products conforming to the IEEE 1680-2006 Standard, provided such products are available, are life cycle cost efficient, and meet applicable performance requirements. Information on EPEAT-registered computer products is available at www.epeat.net.

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

(i) If this subcontract involves the acquisition of Information Technology (IT) that uses Internet Protocol (IP) technology, the Subcontractor agrees that:

(A) All deliverables that involve IT that uses IP (products, services, software, etc.) will comply with IPv6 standards and interoperate with both IPv6 and IPv4

(B) It has IPv6 technical support for development and implementation and fielded product management available.

(ii) If the Subcontractor plans to offer a deliverable that involves IT that is not initially compliant, the Subcontractor agrees to:

(A) Obtain the Laboratory Procurement Official approval before starting work on the deliverable;

(B) Provide a migration path and firm commitment to upgrade to IPv6 for all application and product features by June 2008, and;

(C) Have IPv6 technical support for development and implementation and fielded product management available.

(iii) Should the Subcontractor find that the statement of work or specifications of this subcontract do not conform to the IPv6 standard, it must notify Fermilab of such nonconformance and act in accordance with instructions provided by Fermilab.

(g) The rights and remedies of Fermilab provided in this clause are in addition to and do not limit any rights afforded to Fermilab by law or by any other clause of this subcontract.

14. LIMITATION OF LIABILITY

Except as otherwise provided by an express or implied warranty, the Subcontractor will not be liable to Fermilab for consequential damages resulting from any defect or deficiencies in accepted items.

15. APPLICABLE LAW

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

16. ENVIRONMENTAL PROTECTION

In performing this subcontract, the Subcontractor shall comply with the requirements set forth in all applicable Federal and non-Federal environmental protection laws, codes, ordinances, Executive Orders, regulations, and directives.

17. OTHER COMPLIANCES

The Subcontractor shall comply with all applicable Federal, State and local laws, executive orders, rules, and regulations in its performance of this subcontract.

18. COMPLIANCE WITH REQUIREMENTS UNIQUE TO GOVERNMENT CONTRACTS AND SUBCONTRACTS

18.1 The Subcontractor agrees to comply with the following FAR clauses, which are incorporated into this subcontract by reference, to implement provisions of law or executive orders applicable to acquisition of commercial items:

- (a) FAR 52.203-13, Contractor Code of Business Ethics and Conduct (APR 2010) (Pub. L. 110-252, Title VI, Chapter 1 (41 U.S.C. 251 note)), if the subcontract exceeds \$5,000,000 and has a performance period of more than 120 days. In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.
- (b) FAR 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (JUN 2010) (Section 1553 of Pub. L. 111-5), if the subcontract is funded under the Recovery Act.
- (c) FAR 52.219-8, Utilization of Small Business Concerns (OCT 2014) (15 U.S.C. 637(d)(2) and (3)), if the subcontract offers further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$650,000 (\$1,500,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.
- (d) FAR 52.222-26, Equal Opportunity (MAR 2007) (E.O. 11246).
- (e) FAR 52.222-35, Equal Opportunity for Veterans (SEP 2010) (38 U.S.C. 4212(a));
- (f) FAR 52.222-36, Affirmative Action for Workers with Disabilities (OCT 2010) (29 U.S.C. 793).
- (g) FAR 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O.13496), if flow down is required in accordance with paragraph (f) of FAR clause 52.222-40.
- (h) FAR 52.222-41 Service Contract Act of 1965 (NOV 2007)
- (i) FAR 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment--Requirements (FEB 2009) (41 U.S.C. 351, et seq.).
- (j) FAR 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services--Requirements (Nov 2007) (41 U.S.C. 351, et seq.).
- (k) FAR 52.222-50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).
- (l) FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States Jul 2013) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).
- (m) FAR 52.225-1, Buy American Act – Supplies (FEB 2009)
- (n) FAR 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (FEB 2006) (46 U.S.C. App. 1241 and 10 U.S.C. 2631), if flow down is required in accordance with paragraph (d) of FAR clause 52.247-64.
- (o) FAR 52.222-54, Employment Eligibility Verification (Jan 2009).

19. SUB-SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS

- (a) To the maximum extent practicable, the Subcontractor shall incorporate, and require its sub-subcontractors at all tiers to incorporate, commercial items or non-developmental items as components of items to be supplied under the subcontract.
- (b) Except to the extent set forth elsewhere in this subcontract or where necessary to establish the reasonableness of prices under FAR Part 15, the Subcontractor is not required to include any FAR provision or clause, other than those listed in clause 18 above, in any sub-subcontract at any tier under this subcontract.
- (c) The Subcontractor shall include the terms of this clause, including this paragraph (c), in sub-subcontracts awarded under this subcontract.

20. AUTHORIZATION AND CONSENT

- (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
 - (i) Embodied in the structure or composition of any article the delivery of which is accepted by the Government or Fermilab under this subcontract or
 - (ii) Used in machinery, tools, or methods whose use necessarily results from compliance by the Subcontractor or any lower-tier sub-subcontractor with
 - (A) Specifications or written provisions forming a part of this subcontract or
 - (B) 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 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.

21. PATENT INDEMNITY

- (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.

22. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

(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.

23. DISPUTES

The parties agree that they will attempt in good faith to resolve through negotiation any dispute, claim, or controversy arising out of or relating to this subcontract. If such efforts fail to result in a mutually agreeable resolution, the parties shall consider the use of alternative disputes resolution (ADR). In the event that ADR fails or is not used, the parties may thereafter pursue any remedy they may have at law or in equity.

24. SUSPECT/COUNTERFEIT PARTS

24.1 Notwithstanding any other provisions of this agreement, the Subcontractor warrants that all items provided to the Laboratory shall be genuine, new and unused unless otherwise specified in writing by the Laboratory. Subcontractor further warrants that all items used by the Subcontractor during performance of work at Fermi National Accelerator Laboratory include all genuine, original, and new components, or are otherwise suitable and fit for the intended purpose. Subcontractor's warranty extends to labels and/or trademarks or logos affixed, or designed to be affixed, to items supplied or delivered to the Laboratory.

24.2 Subcontractor shall indemnify Fermi Research Alliance, LLC and the U.S. Department of Energy, their agents and third parties for any financial loss, injury, or property damage resulting directly or indirectly from material, components, or parts that are not genuine, original, and unused, or not otherwise suitable and fit for the intended purpose. This includes but is not limited to materials that are defective, suspect, or counterfeit; materials that have been provided under false pretenses; and materials or items that are materially altered, damaged, deteriorated, degraded, or result in product failure.

24.3 Types of material, parts, and components known to have been misrepresented include but are not limited to fasteners; hoisting, rigging and lifting equipment; cranes; hoists; valves; pipe and fittings; electrical equipment and devices; plate, bar shapes, channel members, and other heat treated materials and structural items; welding rod and electrodes; and computer memory modules.

24.4 Because falsification of information or documentation may constitute criminal conduct, Subcontractor acknowledges and agrees that Fermilab may reject and retain such information or items at no cost and identify, segregate, and report such information or activities to cognizant Department of Energy Officials.

25. SUBCONTRACTOR POLICY TO BAN TEXT MESSAGING WHILE DRIVING

25.1 DEFINITION. AS USED IN THIS CLAUSE—

(a) "Driving"—

(1) Means operating a motor vehicle on an active roadway with the motor running, including while temporarily stationary because of traffic, a traffic light, stop sign, or otherwise.

(2) Does not include operating a motor vehicle with or without the motor running when one has pulled over to the side of, or off, an active roadway and has halted in a location where one can safely remain stationary.

(b) "Text messaging" means reading from or entering data into any handheld or other electronic device, including for the purpose of short message service texting, e-mailing, instant messaging, obtaining navigational information, or engaging in any other form of electronic data retrieval or electronic data communication. The term does not include glancing at or listening to a navigational device that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device either before driving or while stopped in a location off the roadway where it is safe and legal to park.

25.2 This clause implements Executive Order 13513, Federal Leadership on Reducing Text Messaging While Driving, dated October 1, 2009.

25.3 The Subcontractor should—

- (a) Adopt and enforce policies that ban text messaging while driving—
 - (i) Company-owned or -rented vehicles, Government-owned vehicles, or Fermilab-owned vehicles; or
 - (ii) Privately-owned vehicles when on official Government or Fermilab business or when performing any work for or on behalf of the Government or Fermilab.
- (b) Conduct initiatives in a manner commensurate with the size of the business, such as—
 - (i) Establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving; and
 - (ii) Education, awareness, and other outreach to employees about the safety risks associated with texting while driving.

25.4 SUB-SUBCONTRACTS

The Subcontractor shall insert the substance of this clause, including this paragraph 25.4, in all sub-subcontracts that exceed the micro-purchase threshold.

26. SUSTAINABLE ACQUISITION

26.1 The following provisions apply only to first tier subcontracts exceeding the simplified acquisition threshold that support operation of Fermilab and offer significant subcontracting opportunities for energy efficient or environmentally sustainable products or services.

26.2 Pursuant to Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, Fermilab is committed to managing its facilities in an environmentally preferable and sustainable manner that will promote the natural environment and protect the health and well-being of its employees and subcontractor service providers. In the performance of work under this contract, the Subcontractor shall provide its services in a manner that promotes the natural environment, reduces greenhouse gas emissions, and protects the health and well-being of Fermilab employees, subcontract service providers and visitors using Fermilab.

26.3 Green purchasing or sustainable acquisition has several interacting initiatives. The Subcontractor must comply with initiatives that are current as of the contract award date. Fermilab may require compliance with revised initiatives from time to time. The Subcontractor may request an equitable adjustment to the terms of its contract using the procedures in the FL Changes Clauses. The initiatives important to these Orders are explained on the following Government or Industry Internet Sites:

- (a) Recycled Content Products are described at <http://epa.gov/cpg>.
- (b) Biobased products are described at <http://www.biopreferred.gov/>.
- (c) Energy efficient products are at <http://energystar.gov/> products for Energy Star products.
- (d) Energy efficient products are at <http://www.femp.energy.gov/> procurement for FEMP designated products.
- (e) Environmentally preferable and energy efficient electronics including desktop computers, laptops and monitors are at <http://www.epeat.net> the Electronic Products Environmental Assessment Tool (EPEAT) the Green Electronics Council site.
- (f) Greenhouse gas emission inventories are required, including Scope 3 emissions, which include contractor emissions. These are discussed at Section 13 of Executive Order 13514 which can be found at <http://www.archives.gov/federal-register/executiveorders/disposition.html>.
- (g) Non-Ozone Depleting Alternative Products are at <http://www.epa.gov/ozone/strathome.html>.
- (h) Water efficient plumbing products are at <http://epa.gov/watersense>.

26.4 The clauses at FAR 52.223-2, Affirmative Procurement of Biobased Products under Service and Construction Contracts, 52.223-15, Energy Efficiency in Energy Consuming products, and 52.223-17 Affirmative procurement of EPA Designated items in Service and Construction Contracts, require the use of products that have biobased content, are energy efficient, or have recycled content. To the extent that the services provided by the Subcontractor require provision of any of the above types of products, the Subcontractor must provide the energy efficient and environmentally sustainable type of product unless that type of product—

- (a) Is not available;
- (b) Is not life cycle cost effective (or does not exceed 110% of the price of alternative items if life cycle cost data is unavailable), EPEAT is an example of lifecycle costs that have been analyzed by the Department of Energy and found to be acceptable at the silver and gold level;
- (c) Does not meet performance needs; or,
- (d) Cannot be delivered in time to meet a critical need.

26.5 In the performance of this contract, the Subcontractor shall comply with the requirements of Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, (<http://www.epa.gov/greeningepa/practices/eo13423.htm>) and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance (<http://www.archives.gov/federal-register/executive-orders/disposition.html>). The Subcontractor shall also consider the best practices within the DOE Acquisition Guide, Chapter 23, Acquisition Considerations Regarding Federal leadership in Environmental, Energy, and Economic Performance. This guide includes information concerning recycled content products, biobased products, energy efficient products, water efficient products, alternative fuels and vehicles, non-ozone depleting substances and other environmentally preferable products and services. This guide is available on the internet at: <http://energy.gov/management/downloads/acquisition-guide-0>.

26.6 In complying with the requirements of paragraph 26.3 of this clause, the Subcontractor shall coordinate its activities with and submit required reports through Fermilab's ES&H Section to complete DOE Sustainable Acquisition reporting requirements.

26.7 The Subcontractor shall prepare and submit performance reports using prescribed Fermilab formats, at the end of the Federal fiscal year, on matters related to the acquisition of environmentally preferable and sustainable products and services. This is a material

delivery under the contract. Failure to perform this requirement may be considered a failure that endangers performance of this contract and may result in termination for default (see FAR 52.249-6, Termination (Cost Reimbursement)).

26.8 The Subcontractor will comply with the procedures in paragraphs 26.4 through 26.6 of this clause regarding the collection of all data necessary to generate the reports required under paragraphs 26.4 through 26.6 of this clause, and submit the reports directly to the ES&H Section at Fermilab. The Subcontractor will advise Fermilab if it is unable to procure energy efficient and environmentally sustainable items and cite which of the reasons in paragraph 26.4 of this clause apply. The reports may be submitted at the conclusion of the subcontract term provided that the subcontract delivery term is not multiyear in nature. If the delivery term is multi-year, the Subcontractor shall report its accomplishments for each Federal fiscal year in a manner and at a time or times acceptable to both parties. Failure to comply with these reporting requirements may be considered a breach of contract with attendant consequences.

26.9 There are several programs under which relevant products have been evaluated.

(a) Recycled Content <http://www.epa.gov/epawaste/conserve/tools/cpg/products/index.htm>

(b) Energy Star and FEMP Designated Products at <http://energystar.gov/>

(c) Water-efficient Products at <http://www.epa.gov/watersense/>

(d) Biobased products at <http://www.biobased.oce.usda.gov/fb4p/>

(e) EPEAT registered electronic products at <http://www.epeat.net/>

(f) Non-Ozone Depleting Substance at <http://www.epa.gov/ozone/snap/index.html>

26.10 For a list of government-approved materials, Subcontractors can consult with <http://www.sftool.gov/greenprocurement>.

27. PROVIDING ACCELERATED PAYMENT TO SMALL BUSINESS SUBCONTRACTORS (DEC 2013)

(a) Upon receipt of accelerated payments from Fermilab the Subcontractor shall make accelerated payments to its small business subcontractors under this contract, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor.

(b) The acceleration of payments under this clause does not provide any new rights under the Prompt Payment Act.

(c) Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including subcontracts with small business concerns for the acquisition of commercial items.

28. EQUAL OPPORTUNITY FOR VETERANS (JUL 2014)

28.1 DEFINITIONS.

(a) "Active duty wartime or campaign badge veteran," "Armed Forces service medal veteran," "disabled veteran," "protected veteran," "qualified disabled veteran," and "recently separated veteran" have the meanings given in FAR 22.1301.

(b) "All employment openings" includes all positions except executive and senior management, those positions that will be filled from within the subcontractor's organization, and positions lasting three days or less. This term includes full-time employment, temporary employment of more than three days' duration, and part-time employment.

(c) "Executive and senior management" means—

(i) Any employee—

(A) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(B) Whose primary duty consists of the management of the enterprise in which the individual is employed or of a customarily recognized department or subdivision thereof;

(C) Who customarily and regularly directs the work of two or more other employees; and

(D) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; or

(ii) Any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.

(d) "Other protected veteran" means a veteran who served on active duty in the U.S. military, ground, naval, or air service, during a war or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.

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

28.2 GENERAL.

(a) This subcontractor and sub-subcontractor shall abide by the requirements of 41 CFR 60-300.5(a), as of March 24, 2014. This clause prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

28.3 EQUAL OPPORTUNITY FOR VEVRRAA PROTECTED VETERANS.

(a) The definitions set forth in 41 CFR 60-300.2 apply to the terms used throughout this Clause, and they are incorporated herein by reference.

(b) The subcontractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran, recently separated veteran, active duty wartime or campaign badge veteran, or Armed Forces service medal veteran

(hereinafter collectively referred to as “protected veterans(s)) in regard to any position for which the employee or applicant for employment is qualified. The subcontractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices, including the following:

- (i) Recruitment, advertising, and job application procedures;
- (ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;
- (iii) Rates of pay or any other form of compensation and changes in compensation;
- (iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (v) Leaves of absence, sick leave, or any other leave;
- (vi) Fringe benefits available by virtue of employment, whether or not administered by the subcontractor;
- (vii) Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- (viii) Activities sponsored by the subcontractor including social or recreational programs; and
- (ix) Any other term, condition, or privilege of employment.

28.4 LISTING OPENINGS.

(a) The subcontractor agrees to immediately list all employment openings which exist at the time of the execution of this subcontract and those which occur during the performance of this subcontract, including those not generated by this subcontract and including those occurring at an establishment of the subcontractor other than the one where the subcontract is being performed, but excluding those of independently operated corporate affiliates, with the appropriate employment service delivery system where the opening occurs. Listing employment openings with the state workforce agency job bank or with the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment service delivery system. In order to satisfy the listing requirement described herein, subcontractors must provide information about the job vacancy in any manner and format permitted by the appropriate employment service delivery system which will allow that system to provide priority referral of veterans protected by VEVRAA for that job vacancy. Providing information on employment openings to a privately run job service or exchange will satisfy the subcontractor’s listing obligation if the privately run job service or exchange provides the information to the appropriate employment service delivery system in any manner and format that the employment service delivery system permits which will allow that system to provide priority referral of protected veterans.

(b) Listing of employment openings with the appropriate employment service delivery system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a *bona fide* job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicants or from any particular group of job applicants, and nothing herein is intended to relieve the subcontractor from any requirements in Executive orders or regulations regarding nondiscrimination in employment.

(c) Whenever a subcontractor, other than a state or local governmental subcontractor, becomes contractually bound to the listing provisions in paragraphs 28.3(a) and 28.3(b) of this clause, it shall advise the employment service delivery system in each state where it has establishments that: (a) It is a Federal subcontractor, so that the employment service delivery systems are able to identify them as such; and (b) it desires priority referrals from the state of protected veterans for job openings at all locations within the state. The subcontractor shall also provide to the employment service delivery system the name and location of each hiring location within the state and the contact information for the contractor official responsible for hiring at each location. The “contractor official” may be a chief hiring official, a Human Resources contact, a senior management contact, or any other manager for the subcontractor that can verify the information set forth in the job listing and receive priority referrals from employment service delivery systems. In the event that the subcontractor uses any external job search organizations to assist in its hiring, the contractor shall also provide to the employment service delivery system the contact information for the job search organization(s). The disclosures required by this paragraph shall be made simultaneously with the subcontractor’s first job listing at each employment service delivery system location after the effective date of this final rule. Should any of the information in the disclosures change since it was last reported to the employment service delivery system location, the contractor shall provide updated information simultaneously with its next job listing. As long as the subcontractor is contractually bound to these provisions and has so advised the employment service delivery system, there is no need to advise the employment service delivery system of subsequent subcontracts. The subcontractor may advise the employment service delivery system when it is no longer bound by this contract clause.

(d) The provisions of paragraphs 28.3(a) and 28.3(b) of this clause do not apply to the listing of employment openings which occur and are filled outside of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Wake Island, and the Trust Territories of the Pacific Islands.

28.5 NONCOMPLIANCE.

(a) The subcontractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(b) In the event of the subcontractor’s noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

28.6 POSTINGS & NOTICE.

(a) The subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Deputy Assistant Secretary for Federal Contract Compliance, provided by or through Fermilab. Such notices shall state the rights of applicants and employees as well as the subcontractor’s obligation under the law to take affirmative

action to employ and advance in employment qualified employees and applicants who are protected veterans. The subcontractor must ensure that applicants or employees who are disabled veterans are provided the notice in a form that is accessible and understandable to the disabled veteran (e.g., providing Braille or large print versions of the notice, posting the notice for visual accessibility to persons in wheelchairs, providing the notice electronically or on computer disc, or other versions). With respect to employees who do not work at a physical location of the subcontractor, a subcontractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the subcontractor provides computers that can access the electronic posting to such employees, or the subcontractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the subcontractor to notify job applicants of their rights if the subcontractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

(b) The subcontractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the subcontractor is bound by the terms of the VEVRAA, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, protected veterans.

28.7 SUB-SUBCONTRACTS.

The subcontractor will include the provisions of this clause in every sub-subcontract or purchase order of \$100,000 or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to VEVRAA so that such provisions will be binding upon each sub-subcontractor or vendor. The subcontractor will take such action with respect to any sub-subcontract or purchase order as the Director, office of Federal Contract Compliance programs, may direct to enforce such provisions, including action for noncompliance.

28.8 The subcontractor must, in all solicitations or advertisements for employees placed by or on behalf of the subcontractor, state that all qualified applicants will receive consideration for employment without regard to their protected veteran status.

29. EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES (JUL 2014)

(a) This subcontractor and sub-subcontractor shall abide by the requirements of 41 CFR 60-741.5(a) as of March 24, 2014. This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

(b) **SUBCONTRACTS.** The subcontractor shall include the terms of this clause in every sub-subcontract or purchase order in excess of \$10,000 unless exempted by rules, regulations, or orders of the Secretary, so that such provisions will be binding upon each sub-subcontractor or vendor. The subcontractor shall act as specified by the Director, Office of Federal Contract Compliance Programs of the U.S. Department of Labor, to enforce the terms, including action for noncompliance. Such necessary changes in language may be made as shall be appropriate to identify properly the parties and their undertakings.

29.1 FERMILAB SUBCONTRACTS. Each subcontracting agency and each subcontractor shall include the following equal opportunity clause, found at 41 CFR 60-741.5(a) as of March 24, 2014 in each of its covered Fermilab subcontracts or sub-subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

(a) **EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES (JUL 2013).** The subcontractor will not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The subcontractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on their physical or mental disability in all employment practices, including the following:

- (i) Recruitment, advertising, and job application procedures;
- (ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;
- (iii) Rates of pay or any other form of compensation and changes in compensation;
- (iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (v) Leaves of absence, sick leave, or any other leave;
- (vi) Fringe benefits available by virtue of employment, whether or not administered by the subcontractor;
- (vii) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- (viii) Activities sponsored by the subcontractor including social or recreational programs; and
- (ix) Any other term, condition, or privilege of employment.

(b) **NONCOMPLIANCE.** The subcontractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

(c) In the event of the subcontractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

(d) **POSTINGS & NOTICE.** The subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Deputy Assistant Secretary for Federal Contract Compliance Programs, provided by or through Fermilab. Such notices shall state the rights of applicants and employees as well as the subcontractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities. The subcontractor must ensure that applicants and employees with disabilities are provided the notice in a form that is accessible and understandable to the individual applicant or employee (e.g., providing Braille or large print versions of the notice, or

posting a copy of the notice at a lower viewing height for easy viewing by a person in a wheelchair). With respect to employees who do not work at a physical location of the subcontractor, a subcontractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the subcontractor provides computers, or access to computers, that can access the electronic posting to such employees, or the subcontractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the subcontractor to notify job applicants of their rights if the subcontractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

(e) The subcontractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the subcontractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, as amended, and is committed to take affirmative action to employ and advance in employment individuals with physical or mental disabilities.

(f) SUB-SUBCONTRACTS. The subcontractor will include the provisions of this clause in every sub-subcontract or purchase order in excess of \$10,000, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to section 503 of the act, as amended, so that such provisions will be binding upon each sub-subcontractor or vendor. The subcontractor will take such action with respect to any sub-subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

30. SUB-SUBCONTRACTS FOR COMMERCIAL ITEMS (OCT 2014)

(a) DEFINITIONS. AS USED IN THIS CLAUSE—

(i) Commercial item has the meaning contained in Federal Acquisition Regulation 2.101, Definitions.

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

(b) To the maximum extent practicable, the Subcontractor shall incorporate, and require its Sub-subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under this contract.

(c) (i) The Subcontractor shall insert the following clauses in sub-subcontracts for commercial items:

(A) 52.203-13, Contractor Code of Business Ethics and Conduct (APR 2010) (41 U.S.C. 3509), if the subcontract exceeds \$5,000,000 and has a performance period of more than 120 days. In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(B) 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (JUN 2010) (Section 1553 of Pub. L. 111-5), if the subcontract is funded under the Recovery Act.

(C) 52.219-8, Utilization of Small Business Concerns (OCT 2014) (15 U.S.C. 637(d)(2) and (3)), if the subcontractor offers further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$650,000 (\$1.5 million for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(D) 52.222-26, Equal Opportunity (MAR 2007) (E.O. 11246).

(E) 52.222-35, Equal Opportunity for Veterans (JUL 2014) (38 U.S.C. 4212(a));

(F) 52.222-36, Equal Opportunity for Workers with Disabilities (JUL 2014) (29 U.S.C. 793).

(G) 52.222-37, Employment Reports on Veterans (JUL 2014) (38 U.S.C. 4112).

(H) 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496), if flow down is required in accordance with paragraph (f) of FAR clause 52.222-40.

(I) 52.222-50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

(J) 52.225-26, Contractors Performing Private Security Functions Outside the United States (JUL 2013) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

(K) 52.232-40, Providing Accelerated Payments to Small Business Subcontractors (DEC 2013), if flow down is required in accordance with paragraph (c) of FAR clause 52.232-40.

(L) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (FEB 2006) (46 U.S.C. App. 1241 and 10 U.S.C. 2631), if flow down is required in accordance with paragraph (d) of FAR clause 52.247-64.

(ii) While not required, the Subcontractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(d) The Subcontractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract.

31. ANTI-KICKBACK PROCEDURES (MAY 2014)

(Applicable only if this subcontract exceeds \$150,000)

31.1 DEFINITIONS—

(a) "Kickback," as used in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime Contractor, prime Contractor employee, Subcontractor, or Subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contractor in connection with a subcontract relating to a prime contract.

(b) "Person," as used in this clause, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

- (c) "Prime Contract," as used in this clause, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.
- (d) "Prime Contractor," as used in this clause, means a person who has entered into a prime contract with the United States.
- (e) "Prime Contractor employee," as used in this clause, means any officer, partner, employee, or agent of a prime Contractor.
- (f) "Subcontract," as used in this clause, means a contract or contractual action entered into by a prime Contractor or Subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.
- (g) "Subcontractor," as used in this clause,
 - (i) Means any person, other than the prime Contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or subcontract entered into in connection with such prime contract, and
 - (ii) Includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier Subcontractor.
- (h) "Subcontractor employee" means any officer, partner, employee, or agent of a Subcontractor.

31.2 41 U.S.C. CHAPTER 87, KICKBACKS, PROHIBITS ANY PERSON FROM—

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

31.3 (a) When the Subcontractor has reasonable grounds to believe that a violation described in paragraph 31.2 of this clause may have occurred, the Subcontractor shall promptly report in writing the possible violation. Such reports shall be made to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Attorney General.

(b) The Subcontractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph 31.2 of this clause.

(c) Fermilab may--

- (i) Offset the amount of the kickback against any monies owed by Fermilab under this subcontract and/or
- (ii) Direct that the Subcontractor withhold from sums owed the sub-subcontractor under the prime contract the amount of the kickback. Fermilab may direct that monies withheld under subdivision 31.3(c)(i) of this clause be paid over to Fermilab unless Fermilab has already offset those monies under subdivision 31.3(c)(ii) of this clause. In either case, the Subcontractor shall notify Fermilab when the monies are withheld.

(d) The Subcontractor agrees to incorporate the substance of this clause, including this subparagraph 31.3(d), in all sub-subcontracts that exceed \$150,000.

32. CONTRACTOR EMPLOYEE WHISTLEBLOWER RIGHTS AND REQUIREMENT TO INFORM EMPLOYEES OF WHISTLE BLOWER RIGHTS (APR 2014)

(a) This subcontract and employees working on this subcontract will be subject to the whistleblower rights and remedies in the pilot program on Contractor employee whistleblower protections established at 41 U.S.C. 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and FAR 3.908.

(b) The Subcontractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in section 3.908 of the Federal Acquisition Regulation.

(c) The Subcontractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts over the simplified acquisition threshold.

33. PERSONAL IDENTITY VERIFICATION OF SUBCONTRACTOR PERSONNEL (JAN 2011)

(Only applicable to subcontracts where the subcontractor's employees require routine physical access to the Federally controlled facility and/or routine access to a Federally-controlled information system).

33.1 The Subcontractor shall comply with agency personal identity verification procedures identified in the contract that implement Homeland Security Presidential Directive-12 (HSPD-12), Office of Management and Budget (OMB) guidance M-05-24, and Federal Information Processing Standards Publication (FIPS PUB) Number 201.

33.2 The Subcontractor shall account for all forms of Government-provided or Fermilab provided identification issued to the Sub-subcontractor employees in connection with performance under this contract. The Subcontractor shall return such identification to the issuing agency at the earliest of any of the following, unless otherwise determined by Fermilab;

- (a) When no longer needed for contract performance.
- (b) Upon completion of the Subcontractor employee's employment.
- (c) Upon contract completion or termination.

33.3 Fermilab may delay final payment under a contract if the Sub-subcontractor fails to comply with these requirements.

33.4. The Subcontractor shall insert the substance of clause, including this paragraph 33.4, in all sub-subcontracts when the sub-subcontractor's employees are required to have routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system. It shall be the responsibility of the Subcontractor to return such identification to the issuing agency in accordance with the terms set forth in paragraph 33.2 of section 33, unless otherwise approved in writing by Fermilab.

34. COMBATING TRAFFICKING IN PERSONS (FEB 2009)

34.1 DEFINITIONS. AS USED IN THIS CLAUSE—

- (a) "Coercion" means—
 - (i) Threats of serious harm to or physical restraint against any person;
 - (ii) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
 - (iii) The abuse or threatened abuse of the legal process.
- (b) "Commercial sex act" means any sex act on account of which anything of value is given to or received by any person.
- (c) "Debt bondage" means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.
- (d) "Employee" means an employee of the Subcontractor directly engaged in the performance of work under the contract who has other than a minimal impact or involvement in contract performance.
- (e) "Forced labor" means knowingly providing or obtaining the labor or services of a person—
 - (i) By threats of serious harm to, or physical restraint against, that person or another person;
 - (ii) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
 - (iii) By means of the abuse or threatened abuse of law or the legal process.
- (f) "Involuntary servitude" includes a condition of servitude induced by means of—
 - (i) Any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such conditions, that person or another person would suffer serious harm or physical restraint; or
 - (ii) The abuse or threatened abuse of the legal process.
- (g) "Severe forms of trafficking in persons" means—
 - (i) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
 - (ii) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.
- (h) "Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

34.2 POLICY.

The United States Government has adopted a zero tolerance policy regarding trafficking in persons. Subcontractors and subcontractor employees shall not—

- (a) Engage in severe forms of trafficking in persons during the period of performance of the contract;
- (b) Procure commercial sex acts during the period of performance of the contract; or
- (c) Use forced labor in the performance of the contract.

34.3 SUBCONTRACTOR REQUIREMENTS

The Subcontractor shall—

- (a) Notify its employees of—
 - (i) The United States Government's and Fermilab's zero tolerance policy described in paragraph 34.2 of this clause;

and

- (ii) The actions that will be taken against employees for violations of this policy. Such actions may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment; and
- (b) Take appropriate action, up to and including termination, against employees or subcontractors that violate the policy in paragraph (b) of this clause.

34.4 NOTIFICATION.

The Subcontractor shall inform Fermilab immediately of—

- (a) Any information it receives from any source (including host country law enforcement) that alleges a Subcontractor employee, subcontractor, or sub-subcontractor employee has engaged in conduct that violates this policy; and
- (b) Any actions taken against Subcontractor employees, sub-subcontractors, or sub-subcontractor employees pursuant to this clause.

34.5 REMEDIES.

In addition to other remedies available to Fermilab or the Government, the Subcontractor's failure to comply with the requirements of paragraphs (c), (d), or (f) of this clause may result in—

- (a) Requiring the Subcontractor to remove a Subcontractor employee or employees from the performance of the contract;
- (b) Requiring the Subcontractor to terminate a subcontract;
- (c) Suspension of contract payments;
- (d) Loss of award fee, consistent with the award fee plan, for the performance period in which the Fermilab or Government determined Subcontractor non-compliance;
- (e) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or
- (f) Suspension or debarment.

34.6 SUB-SUBCONTRACTS.

The Subcontractor shall include the substance of this clause, including paragraph 34.6, in all subcontracts.

34.7 MITIGATING FACTOR.

Fermilab may consider whether the Subcontractor had a Trafficking in Persons awareness program at the time of the violation as a mitigating factor when determining remedies. Additional information about Trafficking in Persons and examples of awareness

programs can be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons at <http://www.state.gov/g/tip>.

35. REPORTING EXECUTIVE COMPENSATION AND FIRST-TIER SUBCONTRACT AWARDS (JUL 2013)

35.1 DEFINITIONS. AS USED IN THIS CLAUSE—

- (a) "Executive" means officers, managing partners, or any other employees in management positions.
- (b) "First-tier subcontract" means a subcontract awarded directly by FRA for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include FRA's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs.
- (c) "Month of award" means the month in which a contract is signed by the Contracting Officer or the month in which a first-tier subcontract is signed by FRA.
- (d) "Total compensation" means the cash and noncash dollar value earned by the executive during FRA's or the subcontractor's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)):
 - (i) Salary and bonus.
 - (ii) Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Financial Accounting Standards Board's Accounting Standards Codification (FASB ASC) 718, Compensation-Stock Compensation.
 - (iii) Earnings for services under non-equity incentive plans. This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
 - (iv) Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
 - (v) Above-market earnings on deferred compensation which is not tax-qualified.
 - (vi) Other compensation, if the aggregate value of all such other compensation (e.g., severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

35.2 FEDERAL FUNDING ACCOUNTABILITY AND TRANSPARENCY ACT.

Section 2(d)(2) of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252), requires FRA to report information on subcontract awards. The law requires all reported information be made public, therefore, FRA is responsible for notifying its subcontractors that the required information will be made public.

35.3 DISCLOSURE OF CLASSIFIED INFORMATION.

Nothing in this clause requires the disclosure of classified information.

35.4 FIRST-TIER SUBCONTRACT INFORMATION.

Unless otherwise directed by the procurement officer, or as provided in paragraph 35.6 of this clause, by the end of the month following the month of award of a first-tier subcontract with a value of \$25,000 or more, the subcontractor shall report the following information to the Procurement Administrator within 15 days of the award. FRA shall report the following information at <http://www.frs.gov> for the first-tier subcontract. (FRA shall follow the instructions at <http://www.frs.gov> to report the data.

- (a) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.
- (b) Name of the subcontractor.
- (c) Amount of the subcontract award.
- (d) Date of the subcontract award.
- (e) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.
- (f) Subcontract number (the subcontract number assigned by FRA).
- (g) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district.
- (h) Subcontractor's primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district.
- (i) The prime contract number, and order number if applicable.
- (j) Awarding agency name and code.
- (k) Funding agency name and code.
- (l) Government contracting office code.
- (m) Treasury account symbol (TAS) as reported in FPDS.
- (n) The applicable North American Industry Classification System code (NAICS).

35.5 EXECUTIVE COMPENSATION OF THE FIRST-TIER SUBCONTRACTOR.

- (a) Unless otherwise directed by the Procurement Administrator, within 15 days of the subcontract award the subcontractor shall report the names and total compensation of each of the five most highly compensated executives if —
 - (i) In the subcontractor's preceding fiscal year, the subcontractor received —
 - (A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and
 - (B) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and

(ii) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at <http://www.sec.gov/answers/execomp.htm>.)

(b) Unless otherwise directed by FRA, by the end of the month following the award of a first-tier subcontract with a value of \$25,000 or more, and annually thereafter (calculated from the prime contract award date), the first-tier subcontractor shall report the names and total compensation of each of the five most highly compensated executives for that first-tier subcontractor for the first-tier subcontractor's preceding completed fiscal year at <http://www.fsrs.gov> if—

(i) In the subcontractor's preceding fiscal year, the subcontractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and

(B) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and

(ii) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at <http://www.sec.gov/answers/execomp.htm>.)

35.6 FRA shall not split or break down first-tier subcontract awards to a value less than \$25,000 to avoid the reporting requirements in paragraph 35.4.

35.7 FRA is required to report information on a first-tier subcontract covered by paragraph 35.4 when the subcontract is awarded. Continues reporting on the same subcontract is not required unless one of the reported data elements changes during the performance of the subcontract. FRA is not required to make further reports after the first-tier subcontract expires.

35.8 If the subcontractor in the previous tax year had gross income from all sources under \$300,000, FRA does not need to report awards for that subcontractor.

35.9 The FSRS database at <http://fsrs.gov> will be prepopulated with some information from SAM and FPDS databases. If FPDS information is incorrect, the subcontractor should notify FRA. If the SAM database information is incorrect, the subcontractor is responsible for correcting this information.

36. EMPLOYMENT ELIGIBILITY VERIFICATION (AUG 2013)

(Only applicable for services by a cots provider, that are in excess of \$3,000 and provided in the unites states)

36.1 DEFINITIONS. AS USED IN THIS CLAUSE—

(a) "Commercially available off-the-shelf (COTS) item" —

(i) Means any item of supply that is—

(A) A commercial item (as defined in FAR paragraph (1) of the definition at 2.101);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Subcontractor, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products. Per 46 CFR 525.1(c)(2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

(b) "Employee assigned to the contract" means an employee who was hired after November 6, 1986 (after November 27, 2009, in the Commonwealth of the Northern Mariana Islands), who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at FAR 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(i) Normally performs support work, such as indirect or overhead functions; and

(ii) Does not perform any substantial duties applicable to the contract.

(c) "Subcontract" means any contract, as defined in FAR 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

(d) "Subcontractor" means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

(e) "United States," as defined in 8 U.S.C. 1101(a)(37), means the 50 States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands and the U.S. Virgin Islands

36.2 ENROLLMENT AND VERIFICATION REQUIREMENTS.

(a) If the Subcontractor is not enrolled as a Federal Contractor in E-Verify at time of contract award, the Subcontractor shall—

(i) ENROLL.

Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;

(ii) VERIFY ALL NEW EMPLOYEES.

Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Subcontractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph 36.2(c) of this section); and

(iii) **VERIFY EMPLOYEES ASSIGNED TO THE CONTRACT.**

For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph 36.2(d) of this section).

(b) If the Subcontractor is enrolled as a Federal Contractor in E-Verify at time of contract award, the Subcontractor shall use E-Verify to initiate verification of employment eligibility of—

(i) **ALL NEW EMPLOYEES.**

(A) Enrolled 90 calendar days or more. The Subcontractor shall initiate verification of all new hires of the Subcontractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph 36.2(c) of this section); or

(B) Enrolled less than 90 calendar days. Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Subcontractor shall initiate verification of all new hires of the Subcontractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph 36.2(c) of this section); or

(ii) **EMPLOYEES ASSIGNED TO THE CONTRACT.**

For each employee assigned to the contract, the Subcontractor shall initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph 36.2(d) of this section).

(c) If the Subcontractor is an institution of higher education (as defined at 20 U.S.C. 1001(a)); a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond, the Subcontractor may choose to verify only employees assigned to the contract, whether existing employees or new hires. The Subcontractor shall follow the applicable verification requirements at 36.2(a) or 36.2(b), respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(d) Option to verify employment eligibility of all employees. The Subcontractor may elect to verify all existing employees hired after November 6, 1986, rather than just those employees assigned to the contract. The Subcontractor shall initiate verification for each existing employee working in the United States who was hired after November 6, 1986, within 180 calendar days of—

(i) Enrollment in the E-Verify program; or

(ii) Notification to E-Verify Operations of the Subcontractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(e) The Subcontractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.

(i) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Subcontractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Subcontractor will be referred to a suspension or debarment official.

(ii) During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the Subcontractor is excused from its obligations under paragraph 36.2 of this clause. If the suspension or debarment official determines not to suspend or debar the Subcontractor, then the Subcontractor must reenroll in E-Verify.

36.3 WEB SITE.

Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security Web site: <http://www.dhs.gov/E-Verify>.

36.4 Individuals previously verified. The Subcontractor is not required by this clause to perform additional employment verification using E-Verify for any employee—

(a) Whose employment eligibility was previously verified by the Subcontractor through the E-Verify program;

(b) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or

(c) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD)-12, Policy for a Common Identification Standard for Federal Employees and Contractors.

36.5 SUB-SUBCONTRACTS.

The Subcontractor shall include the requirements of this clause, including this paragraph (36.5) (appropriately modified for identification of the parties), in each sub-subcontract that—

(a) Is for—

(i) Commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item); or

(ii) Construction;

(b) Has a value of more than \$3,000; and

(c) Includes work performed in the United States.

37. REQUIRED SOURCES FOR HELIUM AND HELIUM USAGE DATA (APR 2014)

37.1 DEFINITIONS—

(a) Bureau of Land Management, as used in this clause, means the Department of the Interior, Bureau of Land Management, Amarillo Field Office, Helium Operations, located at 801 South Fillmore Street, Suite 500, Amarillo, TX 79101-3545.

(b) Federal helium supplier means a private helium vendor that has an in-kind crude helium sales contract with the Bureau of Land Management (BLM) and that is on the BLM Amarillo Field Office's Authorized List of Federal Helium Suppliers available via the Internet at http://www.blm.gov/nm/st/en/fo/Amarillo_Field_Office.html.

(c) Major helium requirement means an estimated refined helium requirement greater than 200,000 standard cubic feet (scf) (measured at 14.7 pounds per square inch absolute pressure and 70 degrees Fahrenheit temperature) of gaseous helium or 7510 liters of liquid helium delivered to a helium use location per year.

37.2 REQUIREMENTS

(a) Subcontractors must purchase major helium requirements from Federal helium suppliers, to the extent that supplies are available.

(b) The Subcontractor shall provide to the Procurement Manager the following data within 5 days after the Subcontractor or sub-subcontractor receives a delivery of helium from a Federal helium supplier –

- (i) The name of the supplier;
- (ii) The amount of helium purchased;
- (iii) The delivery date(s); and
- (iv) The location where the helium was used.

37.3 SUB-SUBCONTRACTS

The Subcontractor shall insert this clause, including this paragraph 37.3, in any sub-subcontract or order that involves a major helium requirement.

38. NONDISPLACEMENT OF QUALIFIED WORKERS

38.1. DEFINITIONS:

(a) "Service employee", as used in this clause, means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in [29 CFR part 541](#). The term "service employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

38.2 The Subcontractor and its sub-subcontractors shall, except as otherwise provided herein, in good faith offer those service employees employed under the predecessor contract whose employment will be terminated as a result of award of this subcontract or the expiration of the subcontract under which the service employees were hired, a right of first refusal of employment under this subcontract in positions for which the service employees are qualified.

(a) The Subcontractor and its sub-subcontractors shall determine the number of service employees necessary for efficient performance of this subcontract and may elect to employ fewer employees than the predecessor Subcontractor employed in connection with performance of the work.

(b) Except as provided in paragraph 38.3 of this clause, there shall be no employment opening under this subcontract, and the Subcontractor and any sub-subcontractors shall not offer employment under this subcontract, to any person prior to having complied fully with this obligation.

(i) The successor Subcontractor and its sub-subcontractors shall make a bona fide express offer of employment to each service employee as provided herein and shall state the time within which the service employee must accept such offer, but in no case shall the period within which the service employee must accept the offer of employment be less than 10 days.

(ii) The successor Subcontractor and its sub-subcontractors shall decide any question concerning a service employee's qualifications based upon the individual's education and employment history, with particular emphasis on the employee's experience on the predecessor subcontract, and the Subcontractor may utilize employment screening processes only when such processes are provided for by the subcontracting agency, are conditions of the service contract, and are consistent with Executive Order 13495.

(iii) Where the successor Subcontractor does not initially offer employment to all the predecessor subcontract service employees, the obligation to offer employment shall continue for 90 days after the successor subcontractor's first date of performance on the subcontract.

(iv) An offer of employment will be presumed to be bona fide even if it is not for a position similar to the one the employee previously held, but is one for which the employee is qualified, and even if it is subject to different employment terms and conditions, including changes to pay or benefits. (See 29 CFR 9.12 for a detailed description of a bona fide offer of employment).

38.3 (a) Notwithstanding the obligation under paragraph 38.2 of this clause, the successor Subcontractor and any sub-subcontractors

(i) May employ under this subcontract any service employee who has worked for the subcontractor or sub-subcontractor for at least three months immediately preceding the commencement of this subcontract and who would otherwise face lay-off or discharge,

(ii) Are not required to offer a right of first refusal to any service employee(s) of the predecessor subcontractor who are not service employees within the meaning of the Service Contract Act, 41 U.S.C. 6701(3), and

(iii) are not required to offer a right of first refusal to any service employee(s) of the predecessor subcontractor whom the Subcontractor or any of its sub-subcontractors reasonably believes, based on the particular service employee's past performance, has failed to perform suitably on the job (see 29 CFR 9.12 (c)(4) for additional information). The successor Subcontractor bears the responsibility of demonstrating the appropriateness of claiming any of these exceptions.

(b) In addition, any Subcontractor or sub-subcontractor that has been certified by the U.S. Small Business Administration as a HUBZone small business concern must ensure that it complies with the statutory and regulatory requirements of the HUBZone Program (e.g., it must ensure that at least 35 percent of all of its employees reside within a HUBZone). The HUBZone small business

Subcontractor or sub-subcontractor must consider whether it can meet the requirements of this clause and Executive Order 13495 while also ensuring it meets the HUBZone Program's requirements.

(c) Nothing in this clause shall be construed to permit a Subcontractor or sub-subcontractor to fail to comply with any provision of any other Executive order or law. For example, the requirements of the HUBZone Program (see FAR subpart [19.13](#)), Executive Order 11246 (Equal Employment Opportunity), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 may conflict, in certain circumstances, with the requirements of Executive Order 13495. All applicable laws and Executive orders must be satisfied in tandem with, and if necessary prior to, the requirements of Executive Order 13495, 29 CFR part 9, and this clause.

38.4 (a) The Subcontractor shall, not less than 30 days before completion of the Subcontractor's performance of services on the subcontract, furnish Fermilab with a certified list of the names of all service employees working under this subcontract and its sub-subcontracts at the time the list is submitted. The list shall also contain anniversary dates of employment of each service employee under this subcontract and its predecessor subcontracts with either the current or predecessor subcontractors or their sub-subcontractors. Where changes to the workforce are made after the submission of the certified list described in this paragraph, the Subcontractor shall, in accordance with paragraph 38.5 of this clause, not less than 10 days before completion of the services on this subcontract, furnish Fermilab with an updated certified list of the names of all service employees employed within the last month of subcontract performance. The updated list shall also contain anniversary dates of employment, and, where applicable, dates of separation of each service employee under the subcontract and its predecessor subcontracts with either the current or predecessor Subcontractors or their sub-subcontractors.

(b) Immediately upon receipt of the certified service employee list but not before subcontract award, Fermilab shall provide the certified service employee list to the successor subcontractor, and, if requested, to employees of the predecessor subcontractor or sub-subcontractors or their authorized representatives.

(c) Fermilab will direct the predecessor Subcontractor to provide written notice (Appendix B to 29 CFR chapter 9) to service employees of their possible right to an offer of employment with the successor subcontractor. Where a significant portion of the predecessor Subcontractor's workforce is not fluent in English, the notice shall be provided in English and the language(s) with which service employees are more familiar. The written notice shall be—

- (i) Posted in a conspicuous place at the worksite; or
- (ii) Delivered to the service employees individually. If such delivery is via e-mail, the notification must result in an

electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.

38.5 (a) If required in accordance with [52.222-41\(n\)](#), the predecessor Subcontractor shall, not less than 10 days before completion of this subcontract, furnish Fermilab a certified list of the names of all service employees working under this subcontract and its sub-subcontracts during the last month of subcontract performance. The list shall also contain anniversary dates of employment of each service employee under this subcontract and its predecessor subcontracts either with the current or predecessor Subcontractors or their sub-subcontractors. If there are no changes to the workforce before the predecessor subcontract is completed, then the predecessor Subcontractor is not required to submit a revised list 10 days prior to completion of performance and the requirements of [52.222-41\(n\)](#) are met. When there are changes to the workforce after submission of the 30-day list, the predecessor Subcontractor shall submit a revised certified list not less than 10 days prior to performance completion.

(b) Immediately upon receipt of the certified service employee list but not before subcontract award, Fermilab shall provide the certified service employee list to the successor subcontractor, and, if requested, to employees of the predecessor subcontractor or sub-subcontractors or their authorized representatives.

38.6 The Subcontractor and sub-subcontractor shall maintain the following records (regardless of format, e.g., paper or electronic) of its compliance with this clause for not less than a period of three years from the date the records were created.

(a) Copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any service employee meeting(s) at which the offers were extended, a summary of each meeting, a copy of any written notice that may have been distributed, and the names of the service employees from the predecessor subcontract to whom an offer was made.

(b) A copy of any record that forms the basis for any exemption claimed under this part.

(c) A copy of the service employee list provided to or received from the subcontracting agency.

(d) An entry on the pay records of the amount of any retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division to each service employee, the period covered by such payment, and the date of payment, and a copy of any receipt form provided by or authorized by the Wage and Hour Division. The Subcontractor shall also deliver a copy of the receipt to the service employee and file the original, as evidence of payment by the Contractor and receipt by the service employee, with the Administrator or an authorized representative within 10 days after payment is made.

38.7 Disputes concerning the requirements of this clause shall not be subject to the general disputes clause ([52.223-1](#)) of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes within the meaning of this clause include disputes between or among any of the following: The Contractor, the Subcontractor, the contracting agency, the U.S. Department of Labor, and the service employees under the subcontract or its predecessor subcontract. Fermilab will refer any service employee who wishes to file a complaint, or ask questions concerning this subcontract clause, to the: Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. Contact e-mail: displaced@dol.gov.

38.8 The Subcontractor shall cooperate in any review or investigation by the Department of Labor into possible violations of the provisions of this clause and shall make such records requested by such official(s) available for inspection, copying, or transcription upon request.

38.9 If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the Subcontractor or its sub-subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate

sanctions may be imposed and remedies invoked against the Subcontractor or its sub-subcontractors, as provided in Executive Order 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

38.10 The Subcontractor shall take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance. However, if the Subcontractor, as a result of such direction, becomes involved in litigation with a sub-subcontractor, or is threatened with such involvement, the Subcontractor may request that Fermilab and the United States, through Fermilab and the Secretary, enter into such litigation to protect the interests of Fermilab and the United States.

38.11 Fermilab will withhold, or cause to be withheld, from the Subcontractor under this or any other subcontract with the same Subcontractor, such sums as an authorized official of Fermilab or the Department of Labor requests, upon a determination by the Administrator, the Administrative Law Judge, or the Administrative Review Board, that there has been a failure to comply with the terms of this clause and that wages lost as a result of the violations are due to service employees or that other monetary relief is appropriate. If Fermilab or the Administrator, upon final order of the Secretary, finds that the Subcontractor has failed to provide a list of the names of service employees working under the contract, Fermilab may, in his or her discretion, or upon request by the Administrator, take such action as may be necessary to cause the suspension of the payment of subcontract funds until such time as the list is provided to Fermilab.

38.12 SUB-SUBCONTRACTS.

In every sub-subcontract over the simplified acquisition threshold entered into in order to perform services under this subcontract, the Subcontractor shall include a provision that ensures—

- (a) That each sub-subcontractor will honor the requirements of paragraphs 38.2 through 38.3 of this clause with respect to the service employees of a predecessor sub-subcontractor or sub-subcontractors working under this subcontract, as well as of a predecessor Subcontractor and its sub-subcontractors;
- (b) That the sub-subcontractor will provide the Subcontractor with the information about the service employees of the sub-subcontractor needed by the Subcontractor to comply with paragraphs 38.4 and 38.5 of this clause; and
- (c) The recordkeeping requirements of paragraph 38.6 of this clause.

39. EMPLOYMENT REPORTS VETERANS AND COMPLIANCE WITH VETERANS' EMPLOYMENT REPORTING REQUIREMENTS (JUL 2014)

39.1 DEFINITIONS. AS USED IN THIS CLAUSE—

(a) "Armed Forces service medal veteran," "disabled veteran," "active duty wartime or campaign badge veteran," and "recently separated veteran," have the meanings given in FAR 22.1301.

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

- (a) The total number of employees in the subcontractor's workforce, by job category and hiring location, who are disabled veterans, other protected veterans, (*i.e.* active duty wartime or campaign badge veterans), Armed Forces service medal veterans, and recently separated veterans;
- (b) The total number of new employees hired during the period covered by the report, and of the total, the number of disabled veterans, other protected veterans (*i.e.* active duty wartime or campaign badge veterans), Armed Forces service medal veterans, and recently separated veterans; and
- (c) The maximum number and minimum number of employees of the Subcontractor or sub-subcontractors at each hiring location during the period covered by the report.

39.3 The subcontractor shall report the above items by completing the Form VETS-100A, entitled "Federal Contractor Veterans' Employment Report (VETS-100A Report)."

39.4 The Subcontractor shall submit VETS-100A Reports no later than September 30 of each year.

39.5 The employment activity report required by paragraphs 39.2(2) and 39.2(3) of this clause shall reflect total new hires, and maximum and minimum number of employees, during the most recent 12-month period preceding the ending date selected for the report. Subcontractors may select an ending date—

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

39.6 The number of veterans reported must be based on data known to the Subcontractor when completing the VETS-100A. The Subcontractor's knowledge of veterans status may be obtained in a variety of ways, including an invitation to applicants to self-identify (in accordance with 41 CFR 60-300.42), voluntary self-disclosure by employees, or actual knowledge of veteran status by the subcontractor. This paragraph does not relieve an employer of liability for discrimination under [38 U.S.C. 4212](#).

39.7 The Subcontractor shall insert the terms of this clause in sub-subcontracts of \$100,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor.

39.8 By submission of its offer, the offeror represents that, if it is subject to the reporting requirements of [38 U.S.C. 4212\(d\)](#) (*i.e.*, if it has any contract or subcontract containing Federal Acquisition Regulation clause [52.222-37](#) [clause 6 above], Employment Reports on Veterans), it has submitted the most recent VETS-100A Report required by that clause.