

FERMI RESEARCH ALLIANCE, LLC (FRA)

TERMS AND CONDITIONS FOR COMMERCIAL ITEMS

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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 "FRA" shall mean Fermi Research Alliance, LLC, a private not-for-profit Limited Liability Company that manages and operates the Fermi National Accelerator Laboratory under U.S. Department of Energy Contract No. DE-AC02-07CH11359, and includes the successor to or any duly authorized representative thereof. FRA is the contracting entity for this Subcontract.
 - (d) The term "Fermilab" shall mean the physical site of the Fermi National Acceleratory Laboratory, including property, facilities, equipment, and accumulated technical data that are owned by the United States Government.
 - (e) The term "Government" shall mean the United States Government acting through the U.S. Department of Energy or any successor agency.
 - (f) Except as otherwise provided in this Subcontract, the term "sub-subcontract" includes purchase orders issued by the Subcontractor 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 FRA 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) FRA 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. FRA shall perform inspections and tests in a manner that will not unduly delay the work. FRA 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 FRA

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) FRA 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. FRA may reject nonconforming supplies with or without disposition instructions. The Subcontractor shall remove supplies rejected or required to be corrected. However, FRA 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, FRA 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, FRA may require their delivery and make an equitable price reduction.

- (iv) FRA shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the Subcontract. FRA failure to inspect and accept or reject the supplies shall not relieve the Subcontractor from responsibility, nor impose liability on FRA, for nonconforming supplies. Inspections and tests by FRA 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, FRA, 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 FRA's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Subcontractor and FRA; provided, that FRA 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 FRA 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) FRA 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. FRA shall perform inspections and tests in a manner that will not unduly delay the work. If FRA 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, FRA 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, FRA 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, FRA may, by Subcontract or otherwise, perform the services and charge to the Subcontractor any cost incurred by FRA 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 FRA. FRA 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 FRA 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 FRA, whichever is later. Payment is made, for discount purposes, when the FRA 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 FRA, 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 FRA 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 FRA 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 FRA upon:

- (a) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
- (b) Delivery of the supplies to FRA 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 CONVENIENCE OF FRA

FRA 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 FRA 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 FRA 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

FRA 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 FRA, upon request, with adequate assurances of future performance. In the event of termination for cause, FRA shall not be liable to the Subcontractor for any amount for supplies or services not accepted, and the Subcontractor shall be liable to FRA for any and all rights and remedies provided by law and by other provisions of this Subcontract. If it is determined that FRA improperly terminated this Subcontract for cause, such termination shall be deemed a termination for FRA'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 FRA 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 FRA, its successors and assigns.
- (b) In the case of supplies, the Subcontractor shall, within a reasonable time after receipt of written notice from FRA and without cost to FRA, 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 FRA 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, FRA 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 FRA and without cost to FRA, correct any defects or nonconformities in the services furnished under this Subcontract which appear within one year after the date of acceptance by FRA, 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, FRA 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, FRA 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/eeep_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 FRA of such nonconformance and act in accordance with instructions provided by FRA.
- (g) The rights and remedies of FRA provided in this clause are in addition to and do not limit any rights afforded to FRA 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 FRA 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. 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 FRA 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 FRA 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.

19. PATENT INDEMNITY

- (a) The Subcontractor shall indemnify FRA, 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 FRA 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 FRA 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 FRA 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.

20. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

- (a) The Subcontractor shall report to the Department Contracting Officer through FRA 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 FRA 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 FRA or the Government, when requested by FRA 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 FRA.
- (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.

21. 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.

22. SUSPECT/COUNTERFEIT PARTS

- 22.1** 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.
- 22.2** 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.
- 22.3** 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.
- 22.4** Because falsification of information or documentation may constitute criminal conduct, Subcontractor acknowledges and agrees that FRA 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.

23. SUBCONTRACTOR POLICY TO BAN TEXT MESSAGING WHILE DRIVING

23.1 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.

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

23.3 The Subcontractor should—

- (a) Adopt and enforce policies that ban text messaging while driving—
 - (i) Company-owned or -rented vehicles, Government-owned vehicles, or FRA-owned vehicles; or
 - (ii) Privately-owned vehicles when on official Government or FRA business or when performing any work for or on behalf of the Government or FRA.
- (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.

23.4 SUB-SUBCONTRACTS

The Subcontractor shall insert the substance of this clause, including this paragraph 23.4, in all sub-subcontracts that exceed the micro-purchase threshold.

24. SUSTAINABLE ACQUISITION

24.1 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.

24.2 Pursuant to Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, FRA 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 FRA employees, Subcontract service providers and visitors using Fermilab.

24.3 Green purchasing or sustainable acquisition has several interacting initiatives. The Subcontractor must comply with initiatives that are current as of the contract award date. FRA 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>.

24.4 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.

24.5 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>.

24.6 In complying with the requirements of paragraph 24.3 of this clause, the Subcontractor shall coordinate its activities with and submit required reports through FRA's ES&H Section to complete DOE Sustainable Acquisition reporting requirements.

24.7 The Subcontractor shall prepare and submit performance reports using prescribed FRA 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)).

24.8 The Subcontractor will comply with the procedures in paragraphs 24.4 through 24.6 of this clause regarding the collection of all data necessary to generate the reports required under paragraphs 24.4 through 24.6 of this clause, and submit the reports directly to the ES&H Section at FRA. The Subcontractor will advise FRA if it is unable to procure energy efficient and environmentally sustainable items and cite which of the reasons in paragraph 24.4 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.

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

- (a) Recycled Content <http://www.epa.gov/epawaste/conservation/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/ozon/snap/index.html>

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

25. THIS SUBCONTRACT AND SUB-SUBCONTRACTS FOR COMMERCIAL ITEMS

25.1 DEFINITIONS. AS USED IN THIS CLAUSE—

- (a) “Commercial item” has the meaning contained in Federal Acquisition Regulation 2.101, Definitions.
- (b) “Sub-subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Subcontractor or sub-subcontractor at any tier.

25.2 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 this Subcontract.

25.3 (a) The following clauses are incorporated into this Subcontract:

- (i) FAR 52.203-13, Contractor Code of Business Ethics and Conduct (OCT 2015) (41 U.S.C. 3509), if the sub-subcontract exceeds \$5.5 million 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.
- (ii) 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 sub-subcontract is funded under the Recovery Act.
- (iii) FAR [52.203-19](#), Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (JAN 2017).
- (iv) FAR [52.204-21](#), Basic Safeguarding of Covered Contractor Information Systems (JUN 2016), other than sub-subcontracts for commercially available off-the-shelf items, if flow down is required in accordance with paragraph (c) of FAR clause [52.204-21](#).
- (v) FAR 52.219-8, Utilization of Small Business Concerns (NOV 2016) (15 U.S.C. 637(d)(2) and (3)), if the sub-subcontract offers further sub-subcontracting opportunities. If the sub-subcontract (except sub-subcontracts to small business concerns) exceeds \$700,000 (\$1.5 million for construction of any public facility), the sub-subcontractor must include 52.219-8 in lower tier subcontracts that offer sub-subcontracting opportunities.
- (vi) FAR 52.222-21, Prohibition of Segregated Facilities (APR 2015)
- (vii) FAR 52.222-26, Equal Opportunity (SEP 2016) (E.O. 11246).
- (viii) FAR 52.222-35, Equal Opportunity for Veterans (OCT 2015) (38 U.S.C. 4212(a));
- (ix) FAR 52.222-36, Equal Opportunity for Workers with Disabilities (JUL 2014) (29 U.S.C. 793).
- (x) FAR 52.222-37, Employment Reports on Veterans (FEB 2016) (38 U.S.C. 4212).
- (xi) 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.

(xii) (A) FAR 52.222-50, Combating Trafficking in Persons (MAR 2015) (22 U.S.C. chapter 78 and E.O. 13627).

(B) Alternate I (MAR 2015) of FAR 52.222-50 (22 U.S.C. chapter 78 and E.O. 13627).

(xiii) FAR 52.222-55 Minimum Wages under Executive Order 13658 (DEC 2015), if flowdown is required in accordance with paragraph (k) of FAR clause 52.222-55.

Note to paragraph (FAR 52.244-6(c)(1)(xiii)): By a court order issued on October 24, 2016, this paragraph is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, GSA, DoD and NASA will publish a document in the Federal Register advising the public of the termination of the injunction.

(xiv) FAR [52.222-59](#), Compliance with Labor Laws (Executive Order 13673) (OCT 2016), if the estimated subcontract value exceeds \$500,000, and is for other than commercially available off-the-shelf items.

(xv) [52.222-60](#), Paycheck Transparency (Executive Order 13673) (OCT 2016), if the estimated subcontract value exceeds \$500,000, and is for other than commercially available off-the-shelf items.

(xvi) [52.222-62](#), Paid Sick Leave Under Executive Order 13706 (JAN 2017) (E.O. 13706), if flowdown is required in accordance with paragraph (m) of FAR clause [52.222-62](#).

(xvii)(A) [52.224-3](#), Privacy Training (JAN 2017) (5 U.S.C. 552a) if flow down is required in accordance with 52.224-3(f).

(B) Alternate I (JAN 2017) of [52.224-3](#), if flow down is required in accordance with [52.224-3](#)(f) and the agency specifies that only its agency-provided training is acceptable).

(xviii) FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States (OCT 2016) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

(xix) FAR 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.

(xx) 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.

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

3.4 The Subcontractor shall include the terms of this clause, including this paragraph 3.4, in sub-subcontracts for commercial items.

26. ANTI-KICKBACK PROCEDURES

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

26.1 DEFINITIONS. AS USED IN THIS CLAUSE—

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

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

(c) "Prime Contract" means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

(d) "Prime Contractor" means a person who has entered into a prime contract with the United States.

(e) "Prime Contractor employee" means any officer, partner, employee, or agent of a prime Contractor.

(f) "Subcontract" means a contract or contractual action entered into by a prime Contractor or Subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

- (g) "Subcontractor":
 - (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.

26.2 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.

26.3 (a) When the Subcontractor has reasonable grounds to believe that a violation described in paragraph 26.2 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 26.2 of this clause.

(c) FRA may—

- (i) Offset the amount of the kickback against any monies owed by FRA 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. FRA may direct that monies withheld under subdivision 26.3(c)(i) of this clause be paid over to FRA unless FRA has already offset those monies under subdivision 26.3(c)(ii) of this clause. In either case, the Subcontractor shall notify FRA when the monies are withheld.

(d) The Subcontractor agrees to incorporate the substance of this clause, including this subparagraph 26.3(d), in all sub-subcontracts that exceed \$150,000.

27. REPORTING EXECUTIVE COMPENSATION AND FIRST-TIER SUBCONTRACT AWARDS

Applies to Subcontracts as indicated below.

27.1 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.

27.2 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.

27.3 DISCLOSURE OF CLASSIFIED INFORMATION.

Nothing in this clause requires the disclosure of classified information.

27.4 FIRST-TIER SUBCONTRACT INFORMATION.

Unless otherwise directed by the FRA Procurement Administrator, or as provided in paragraph 27.6 of this clause, by the end of the month following the month of award of a first-tier Subcontract with a value of \$30,000 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.fsrs.gov> for the first-tier Subcontract. (FRA shall follow the instructions at <http://www.fsrs.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 Subcontract 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).

27.5 EXECUTIVE COMPENSATION OF THE FIRST-TIER SUBCONTRACTOR.

- (a) Unless otherwise directed by the FRA 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/excomp.htm>.)
- (b) Unless otherwise directed by FRA, by the end of the month following the award of a first-tier sub-subcontract with a value of \$30,000 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 sub-grants), 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 sub-grants), 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/excomp.htm>.)

27.6 Neither FRA nor the Subcontractor shall not split or break down first-tier Subcontract awards to a value less than \$30,000 to avoid the reporting requirements in paragraph 27.4.

27.7 FRA is required to report information on a first-tier Subcontract covered by paragraph 27.4 when the Subcontract is awarded. Continued 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.

27.8 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.

27.9 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.

28. RESTRICTION ON CERTAIN FOREIGN PURCHASES

28.1 Unless advance authorization has been obtained by FRA from the Office of Foreign Assets Control (OFAC) in the Department of the Treasury, the Subcontractor shall not acquire, for use in the performance of this contract, any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

28.2 Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea, into the United States or its outlying areas. Lists of entities and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at <http://www.treas.gov/offices/enforcement/ofac/sdn/>. More information about these restrictions, as well as updates, is available in the OFAC's regulations at 31 CFR chapter V and/or on OFAC's website at <http://www.treas.gov/offices/enforcement/ofac>.

28.3 The Contractor shall insert this clause, including this paragraph 28.3, in all Subcontracts.

29. COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS

29.1 The Subcontractor shall comply with all applicable U.S. export control laws and regulations.

29.2 The Subcontractor's responsibility to comply with all applicable laws and regulations exists independent of, and is not established or limited by, the information provided by this clause.

29.3 Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive Orders, and regulations, including but not limited to—

- (a) The Atomic Energy Act of 1954, as amended;
- (b) The Arms Export Control Act (22 U.S.C. 2751 et seq.);
- (c) The Export Administration Act of 1979 (50 U.S.C. app. 2401 et seq.), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95-223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 et seq.);
- (d) Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961);
- (e) Assistance to Foreign Atomic Energy Activities (10 CFR part 810);
- (f) Export and Import of Nuclear Equipment and Material (10 CFR part 110);
- (g) International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130);
- (h) Export Administration Regulations (EAR) (15 CFR parts 730 through 774); and
- (i) Regulations administered by the Office of Foreign Assets Control (31 CFR parts 500 through 598).

29.4 In addition to the Federal laws and regulations cited above, National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical, and Engineering Information establishes a national policy that, to the maximum extent possible, the products of fundamental research shall remain unrestricted. NSDD 189 provides that no restrictions may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes. As a result, contracts confined to the performance of unclassified fundamental research generally do not involve any export-controlled activities. NSDD 189 does not take precedence over statutes. NSDD 189 does not exempt any research from statutes that apply to export controls such as the Atomic Energy Act, as amended; the Arms Export Control Act; the Export Administration Act of 1979, as amended; or the U.S. International Emergency Economic Powers Act; or the regulations that implement those statutes (e.g., the ITAR, the EAR, 10 CFR part 110 and 10 CFR part 810). Thus, if items (e.g., commodities, software or technologies) that are controlled by U.S. export control laws or regulations are used to conduct research or are generated as part of the research efforts, the export control laws and regulations apply to the controlled items.

29.5 The Subcontractor shall include the substance of this clause, including this paragraph 29.5, in all solicitations and Subcontracts.

30. BASIC SAFEGUARDING OF COVERED CONTRACTOR INFORMATION SYSTEMS – FAR 52.204-21 (JUN 2016)

This clause applies to Subcontracts (other than commercially available off-the-shelf items) in which the Subcontract may have Federal contract information residing in or transiting through its information system.

- 30.1 Definitions. As used in this clause– “Covered contractor information system” means an information system that is owned or operated by a contractor that processes, stores, or transmits Federal contract information.

“Federal contract information” means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as on public websites) or simple transactional information, such as necessary to process payments.

“Information” means any communication or representation of knowledge such as facts, data, or opinions, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual (Committee on National Security Systems Instruction (CNSSI) 4009).

“Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information ([44 U.S.C. 3502](#)).

“Safeguarding” means measures or controls that are prescribed to protect information systems.

30.2 Safeguarding requirements and procedures.

- (a) The Subcontractor shall apply the following basic safeguarding requirements and procedures to protect covered contractor information systems. Requirements and procedures for basic safeguarding of covered contractor information systems shall include, at a minimum, the following security controls:
- i. Limit information system access to authorized users, processes acting on behalf of authorized users, or devices (including other information systems).
 - ii. Limit information system access to the types of transactions and functions that authorized users are permitted to execute.
 - iii. Verify and control/limit connections to and use of external information systems.
 - iv. Control information posted or processed on publicly accessible information systems.
 - v. Identify information system users, processes acting on behalf of users, or devices.
 - vi. Authenticate (or verify) the identities of those users, processes, or devices, as a prerequisite to allowing access to organizational information systems.
 - vii. Sanitize or destroy information system media containing Federal Contract Information before disposal or release for reuse.
 - viii. Limit physical access to organizational information systems, equipment, and the respective operating environments to authorized individuals.
 - ix. Escort visitors and monitor visitor activity; maintain audit logs of physical access; and control and manage physical access devices.
 - x. Monitor, control, and protect organizational communications (i.e., information transmitted or received by organizational information systems) at the external boundaries and key internal boundaries of the information systems.
 - xi. Implement subnetworks for publicly accessible system components that are physically or logically separated from internal networks.
 - xii. Identify, report, and correct information and information system flaws in a timely manner.
 - xiii. Provide protection from malicious code at appropriate locations within organizational information systems.
 - xiv. Update malicious code protection mechanisms when new releases are available.
 - xv. Perform periodic scans of the information system and real-time scans of files from external sources as files are downloaded, opened, or executed.

(b) Other requirements. This clause does not relieve the Subcontractor of any other specific safeguarding requirements specified by Federal agencies and departments relating to covered contractor information systems generally or other Federal safeguarding requirements for controlled unclassified information (CUI) as established by Executive Order 13556.

(c) Sub-subcontracts. The Subcontractor shall include the substance of this clause, including this paragraph (c), in sub-subcontracts under this contract (including sub-subcontracts for the acquisition of commercial items, other than commercially available off-the-shelf items), in which the sub-subcontractor may have Federal contract information residing in or transiting through its information system.

31. UNENFORCEABILITY OF UNAUTHORIZED OBLIGATIONS

In accordance with FAR 52.232-39 (JUN 2013), except as stated in paragraph (b) of this clause, when any supply or service acquired under this Subcontract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government or FRA to indemnify the Subcontractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

- (a) Any such clause is unenforceable against the Government or FRA. Neither the Government nor any Government authorized end user such as FRA shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government, any Government authorized end user, or FRA to such clause.
- (b) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.
- (c) Paragraph (a) of this clause does not apply to indemnification by the Government or FRA that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

32. BUY AMERICAN ACT – SUPPLIES

32.1 Definitions. As used in this clause—

- (a) "Commercially available off-the-shelf (COTS) item"—
 - (i) Means any item of supply (including construction material) that is—
 - (A) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);
 - (B) Sold in substantial quantities in the commercial marketplace; and
 - (C) Offered to FRA, under a contract or Subcontract at any tier, 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.
- (b) "Component" means an article, material, or supply incorporated directly into an end product.
- (c) "Cost of components" means—
 - (i) For components purchased by the Subcontractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
 - (ii) For components manufactured by the Subcontractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph 17.1(c)(i) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.
- (d) "Domestic end product" means—
 - (i) An unmanufactured end product mined or produced in the United States;
 - (ii) An end product manufactured in the United States, if—
 - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or
 - (B) The end product is a COTS item.
- (e) "End product" means those articles, materials, and supplies to be acquired under the contract for public use.
- (f) "Foreign end product" means an end product other than a domestic end product.

(g) "United States" means the 50 States, the District of Columbia, and outlying areas.

32.2 41 U.S.C. chapter 83, Buy American, provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the component test of the Buy American statute is waived for an end product that is a COTS item (See 12.505(a)(1)).

32.3 Offerors may obtain from the Procurement Administrator a list of foreign articles that the Procurement Administrator will treat as domestic for this contract.

32.4 The Subcontractor shall use only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled "Buy American Certificate."

33. 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.

34. STOP WORK ORDER

FRA may, at any time, by written order to the Subcontractor, require the Subcontractor to stop all, or any part, of the work called for by this Subcontract contract for a period of 90 days after the order is delivered to the Subcontractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Subcontractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Subcontractor, or within any extension of that period to which the parties shall have agreed, FRA shall either—

(a) Cancel the stop-work order; or

(b) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of FRA, clause of this contract.

If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Subcontractor shall resume work. FRA shall make an equitable adjustment in the delivery schedule or Subcontract price, or both, and the Subcontract shall be modified, in writing, accordingly, if—

(a) The stop-work order results in an increase in the time required for, or in the Subcontractor's cost properly allocable to, the performance of any part of this Subcontract; and

(b) The Subcontractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if FRA decides the facts justify the action, FRA may receive and act upon the claim submitted at any time before final payment under this Subcontract.

If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of FRA, FRA shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

If a stop-work order is not canceled and the work covered by the order is terminated for default, FRA shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

35. FERMILAB SITE AND FACILITIES ACCESS REQUIREMENTS

(a) All Subcontractor and lower-tier subcontractor employees requiring access to any Fermilab facility or sites, including on-site or remote access to Fermilab/FRA computer systems, are subject to DOE access restrictions. Any questions should be directed to either the subcontract designated Technical Representative or FRA Procurement Administrator.

- (b) The Subcontractor shall not assign foreign national (non-U.S. citizen) employees or other personnel to work at any Fermilab facility or site, including through on-site or remote access to Fermilab/FRA computer systems, who were born in, are citizens of, are employed or sponsored by or represent a government, company, institution, or other organization based in a country on the Department of State's List of State Sponsors of Terrorism without prior written approval from DOE Headquarters. Terrorist-sponsoring countries currently include Iran, Sudan and Syria, but may be updated from time to time by the State Department. Requests for access must be submitted to the FRA Procurement Administrator at least 180 days in advance to allow time for approval from the DOE.
- (c) FRA also is required by DOE to document all foreign national employees who were born in, are citizens of, are employed or sponsored by or represent a government, company, institution or organization based in, a sensitive country and who require access to a Fermilab facility or site, including either on-site or remote access to Fermilab/FRA computer systems. To obtain site access, the Subcontractor must provide the place of birth and citizenship for all foreign national employees/personnel working on this subcontract who may access a Fermilab facility or site, including on-site or remote access to Fermilab/FRA computer systems. Employees/personnel from specific sensitive countries may need additional processing and/or be subject to specific restrictions as required by DOE Order 142.3A.

(END OF TERMS AND CONDITIONS FOR COMMERCIAL ITEMS)