Article I Acceptance

Seller and WHOI hereby agree and it is their intent that UCC §2-207 shall not apply to this Agreement. Each Order, invoice or other document relating to the performance of this Agreement constitutes an integral part of the Agreement and, unless otherwise indicated in this Agreement, this Agreement shall exclusively control the relationship of the parties with respect to all goods and services being purchased pursuant to any Order and the performance of all or any portion of the materials, supplies, or services covered by any Order shall constitute unqualified acceptance of all the terms and conditions contained herein, the terms of this Agreement shall govern.

Article II Lobbying

Seller certifies to WHOI that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, Congress, or any Member of Congress, his or her representative or delegate, in violation of 18 U.S.C. § 1913. Seller agrees that this Agreement shall be interpreted to provide WHOI with the limited right to use the Confidential Information solely as necessary in performance of this Agreement. During the term of this Agreement and for a period of three (3) years after its expiration or cancellation, the parties agree to comply with the requirements of such grant insofar as they are consistent with the terms of this Agreement. During the term of this Agreement and for a period of three (3) years after its expiration or cancellation, Seller agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Water Act, as amended, its predecessors, or other means.

Article III Assignment

This Agreement and any Orders are assignable by WHOI. Except as to any payment due hereunder, this Agreement and any Orders are not assignable by Seller without written approval of WHOI.

Article IV Audit

WHOI, during normal business hours and at its own expense, shall have the right to audit all pertinent books and records of Seller, and make reasonable inspections of Seller's facilities, systems, or other means of documentation connected to the performance of this Agreement to verify compliance with the terms of this Agreement. WHOI will provide Seller notice of any such audit or inspection at least seventy-two (72) hours before it occurs. Seller is hereby obligated to maintain complete, accurate, and up-to-date books and records at all times during the course of its dealings with WHOI. The parties agree that a denial of any audit or inspection contemplated herein, or the failure to maintain correct, accurate, and up-to-date books and records, is a material breach of this Agreement.

Article V Changes to Order/Cancellation

WHOI may make changes within the general scope of any Order, including changes to drawings and specifications for specially manufactured supplies, place of delivery, and method of shipment or packing of the Order by giving notice to Seller and subsequently confirming such changes in writing. If such changes affect the cost of, or the time required for performance of any Order, an equitable adjustment in the price or delivery or both shall be made. No change by Seller shall be recognized without written approval of WHOI. No change in any Order may be made unless the change is first authorized in writing by an authorized representative of WHOI. Seller for an Order or amendment to an Order must be made in writing within thirty (30) days from the date of receipt by Seller of notice of such change. Nothing in this Article shall excuse Seller from proceeding with performance of such Order as charged hereunder.

Article VI Choice of Law/Venue

This Agreement shall be governed by and construed in accordance with the internal laws of the State of Massachusetts without giving effect to any choice of law or conflict of law provision or rule (whether of the State of Massachusetts or any other jurisdiction). Any legal suit, action, or proceeding arising out of or based upon this transaction may be brought in any state or federal court in the United States and the courts of the State of Massachusetts, in each case located in the State of Massachusetts, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit or proceeding. Trial by jury is expressly waived by all parties. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to any transaction contemplated by this Agreement.

Article VII Compliance with Clean Air Act and Federal Water Pollution Control Act

Seller shall comply with all applicable laws, standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7471a) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations of these Acts shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

Article VIII Confidentiality

WHOI may disclose to Seller certain of WHOI's proprietary scientific, technical or business data or information (collectively, "Confidential Information") to the extent that the disclosure is necessary to fulfill the terms of this Agreement and for a period of three (3) years after its expiration or earlier termination, Seller shall maintain the Confidential Information in strict confidence, shall not transfer or disclose Confidential Information to any third party, and shall not use the Confidential Information for any purpose other than as specifically authorized in this Agreement. If Seller receives Confidential Information that such restrictions shall not apply to the extent that the information: (i) is at the date of disclosure, or thereafter becomes, public or available to the general public other than through the act or default of Seller; (ii) is obtained by Seller from a third party who lawfully possesses such information and is not under any obligation of confidentiality; (iii) is already in Seller’s possession at the time of receipt from WHOI and prior possession can be properly documented by Seller; (iv) is independently developed by employees of Seller without the aid, application, or use of Confidential Information, and such independent development is not the property of, or is not otherwise under an obligation to disclose or use to WHOI; if Seller is compelled by law to disclose Confidential Information, it must provide WHOI with notice and the opportunity to protect such Confidential Information through a protective order, injunction, or other means.

Article IX Copyright, Data and Patent Rights

If any order is placed under a higher tier contract, which grants copyright, data or patent rights to the U.S. Government, Seller agrees to comply with the requirements of such grant as if they are applicable to the subject matter of the order and with all pertinent provisions of Part 27 of the FAR.

10. Minimum Wages

If the Davis-Bacon Act applies to an Order, as determined by the applicable governmental agency or contracting officer, the following clauses shall apply to Seller (where “contractor” shall mean “Seller”):

(i) Minimum Wages.

(ii) Covered Employees.

(iii) Prevailing Wage.

(iv) Davis-Bacon Act.

(v) Davis-Bacon poster.

(vi) Davis-Bacon Act post- (W-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be seen by all employees.

(vii) Davis-Bacon Act Agreement.

11. Final Wage Determination.

12. Written Statements.


14. Waiver.

WHEREAS, WHOI and Seller intend that WHOI will from time to time submitt orders for the purchase of such goods and services, the terms of which shall be controlled by this Agreement (each, an “Order”);

The parties hereby agree as follows:

1. Article I Acceptance

2. Article II Lobbying

3. Article III Assignment

4. Article IV Audit

5. Article V Changes to Order/Cancellation

6. Article VI Choice of Law/Venue

7. Article VII Compliance with Clean Air Act and Federal Water Pollution Control Act

8. Article VIII Confidentiality

9. Article IX Copyright, Data and Patent Rights

10. Minimum Wages

11. Final Wage Determination

12. Written Statements

13. Employee Rights

14. Waiver
ratios and wage rates prescribed in the applicable programs. (iiii) The contractor shall submit a weekly report for each week in which any contract work is performed a copy of all payroll records for the applicable program and that such information is complete, current, and accurate. In addition, the contractor shall maintain all social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to identify an individual identifying number for each employee (e.g., the last four digits of the social security number), and the employee's name as shown on the applicable program. The required subcontractor payroll records shall be maintained in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor or any of its subcontractors and the Department of Labor, the U.S. Department of the Treasury, or the appropriate governmental agency.

11. Article XI Equal Opportunity

Seller shall maintain and provide racially segregated facilities for employees at any establishment under Seller’s direct control. The contractor shall not maintain or provide racially segregated facilities for employees at any establishment under his control. Seller agrees to adhere to the principles set forth in Executive Orders 11246 and 11375, and to undertake specifically to maintain employment policies and practices that affirmatively promote equality of opportunity of minority group persons and women; to take affirmative steps to hire and promote qualified persons of all races, and will not discriminate against any individual employed or refusing to employ any individual based on such individual’s race, color, religion, sex, sexual orientation, national origin, citizenship, and in any other respect prohibited by law.

12. Article XII Declared Valuation of Shipments

Except as otherwise provided on the face of the order, all shipments by Seller under this agreement shall be declared for insurance at the maximum invoice value applicable to F.O.S. Shipment, following all applicable transportation charges. Disputes over the declared value of shipments are subject to the provisions of Section 3(a) of the Act.

13. Article X Delivery/Shipping

Except as otherwise provided on the face of the order, all shipments by Seller under this agreement shall be declared for insurance at the maximum invoice value applicable to F.O.S. delivery or transportation charges. Disputes over the declared value of shipments are subject to the provisions of Section 3(a) of the Act.
Agreement for WHOI account shall be made at the maximum declared value applicable to & lowest transportation rate of classification and the bill of lading shall so note.

14. Article XIV Dispute Resolution

Notwithstanding anything to the contrary contained in this Agreement, the parties specifically agree to the following dispute resolution procedures:

a) Negotiation between Executives. The parties will attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives. If the executives are unable to reach a mutually acceptable resolution within thirty (30) days after either party gives the other written notice of the dispute, then both parties will subject themselves to the mediation procedures set forth below, at the request of either party, before seeking any other means of resolving the dispute.

b) Mediation. If any party invokes mediation, then the executives will mutually agree upon a mediator in New York, New York. The mediation will consist of a single mediator to be agreed upon by the parties. The parties will complete the selection of selecting a mediator within fifteen (15) business days of the date of the written notice involving mediation. If the parties are unable to select a mediator and/or reach a mutually resolved resolution within thirty (30) days after the selection of mediator, then both parties will arbitrate the matter subject to the procedures set forth below.

c) Arbitration. The parties shall arbitrate any dispute arising out of, relating to or in connection with this Agreement, including any question regarding its existence, validity or termination, which cannot be resolved through mediation. The arbitration will be governed by and construed in accordance with the laws of New York, and will be referred to and finally resolved by arbitration under the American Arbitration Associations Rules of Arbitration. The arbitration will consist of a single arbitrator mutually agreed to by the parties, or in the absence of such agreement, each party will select an arbitrator and those arbitrators will select an arbitrator who will arbitrate the dispute. If the two arbitrators are unable to agree within ten (10) days, either party may request that the American Arbitration Association appoint an arbitrator in accordance with the procedures specified therein. The arbitrator so appointed shall have the same powers as a mediator, including the right to hold conferences and to make decisions upon the record, and his decisions shall be binding upon the parties. Any arbitration shall take place in New York, New York. The award of the arbitrator shall be final and binding. The parties retain the right to appeal this award, to the extent a right to appeal may be lawfully waived. Each party retains the right to seek judicial assistance: (i) to compel arbitration; (ii) to obtain injunctive relief or other measures of protection pending during or after arbitration; (iii) to enforce any decision of the arbitrator, including the final award.

d) Exceptions. Any party, before or during any arbitration may apply to a court having jurisdiction for a temporary restraining order, preliminary injunction, or any other interim or conservatory relief, where such relief is necessary to protect its interests pending completion of any arbitration proceeding without being in breach of this arbitration agreement and without any abridgment of the powers of the arbitrator.

Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive dispute resolution procedures and the parties agree to use their respective best efforts to resolve any dispute(s) that may arise regarding this Agreement.

Any dispute that arises under or with respect to this Agreement that cannot be resolved shall in the first instance be the subject of formal negotiations between respective executive officers of each Party. The dispute shall be considered to have arisen when one Party sends the other Party a written notice of dispute. The period for formal negotiations shall be fourteen (14) days from receipt of the written notice of dispute unless such time period is modified by written agreement of the Parties.

b) If the Parties cannot timely resolve a dispute by executive negotiation, the Parties shall arbitrate to resolve any dispute arising out of, relating to or in connection with this Agreement, including any question regarding its existence, validity, or termination.

i. WHOI at its option may require that arbitration be held in New York, New York. The arbitrator is required to rule on any objections to the arbitrability of a claim or the admissibility of evidence, including questions of arbitrability, in accordance with any agreements of the parties.

ii. The arbitrator is required to render a decision on the record, which is final, binding and non-appealable.

iii. The arbitrator is required to rule on any objections to the arbitrability of a claim or the admissibility of evidence, including questions of arbitrability, in accordance with any agreements of the parties.

iv. Any arbitration occurring will take place in Boston, Massachusetts, and the arbitrator(s) must be licensed to practice law in Massachusetts. Although the substantive terms of this Agreement shall be governed by the laws of the Commonwealth of Massachusetts, and the Agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and related jurisprudence. The award of the arbitrator(s) will be final and binding and judgment upon the award may be entered upon by any court having jurisdiction thereof. Notwithstanding any applicable rules, the Parties shall be responsible for their own attorney fees, expenses, and costs, and the arbitrator(s) shall be without authority to enter any award requiring the payment of the other party's attorney's fees, expenses, costs, or any other damages (except that the arbitrator(s) may sanction any Party for misconduct occurring during the arbitration). The Parties waive any right to appeal the award, to the extent a right to appeal may be lawfully waived. Each party retains the right to seek judicial assistance: (i) to compel arbitration; (ii) to obtain interim measures of protection pending during or after arbitration; (iii) to enforce any decision of the arbitrator, including the final award.

c) Notwithstanding the foregoing, injunctive relief from such court may be sought without resorting to a form of alternative dispute resolution to prevent irreparable harm that would be caused by a breach of this Agreement.

15. Article XV Excluded Parties List System

Seller represents and warrants that it is not listed on the government wide Excluded Parties List System in the System for Award Management (SAM), in accordance with the GSA Guidelines at 2 CFR 190 which implements Executive Order 13310 (3 CFR Part 13B6c Comp., p. 189) and 18 U.S.C. (3 CFR Part 13B Comp., p. 235), “Debarment and Suspension.”

16. Article XVI Indemnity

Except to the extent specifically prohibited by law, Seller shall indemnify, defend, and hold harmless, WHOI and its respective officers, directors, employees, and agents against any and all losses, liabilities, damages, claims, expenses, and expenses of investigation; and judgments, settlements, and compromise of any kind relating to any claim or cause of action that may result as a result of any claims, demands, actions, or other proceedings, including those relating to intellectual property, made or instituted by any third party against any of them and arising out of or relating to any transaction conducted pursuant to this Agreement, except to the extent a right to indemnification of WHOI. WHOI retains the right to control all aspects of the defense against any of the foregoing, including, but not limited to any decisions regarding the selection of counsel and/or the selection of any experts.

17. Article XVII Independent Contractor

Both parties acknowledge and agree that any transaction between the parties does not create or imply a particular relationship between WHOI and Seller and further agrees that Seller and WHOI are acting independently of each other; not as an affiliate, employee, agent, partner or joint venture with the other. Neither Seller nor WHOI shall have the authority to represent, bind or act on behalf of the other.

18. Article XVIII Inspection

Any provisions required to be included in a Federally Funded Contract by agreement, any applicable flow down regulations mandated by agreement or otherwise, including, but not limited to any decisions regarding the selection of counsel and/or the selection of any experts.

19. Article XIX Insurance

Seller shall obtain and carry in full force and effect Commercial General Liability Insurance, including Products-Completed Operations Liability, Auto Liability, Workers’ Compensation insurance, and any other insurance required by law or consistent with industry best practices, which shall protect Seller and WHOI while Seller is performing the work required by this Agreement. The policy shall be licensed to practice in the Commonwealth of Massachusetts and rated A- VII or above or an insurer pre-approved by WHOI, such approval not to be unreasonably withheld; (i) shall list WHOI as an additional insured with a waiver of subrogation thereunder; (ii) shall be endorsed to include product liability coverage, and (iii) shall assure written notice to be given to WHOI prior to any cancellation or material change thereof. The limits of such insurance shall not be less than One Million Dollars ($1,000,000) per occurrence with an aggregate of Two Million Dollars ($2,000,000) for bodily injury including death; One Million Dollars ($1,000,000) per occurrence with an aggregate of Two Million Dollars ($2,000,000) for property damage; and One Million Dollars ($1,000,000) per occurrence with an aggregate of Two Million Dollars ($2,000,000) for Products-Completed Operations Liability. In the alternative Seller may self-insure subject to prior approval of WHOI. WHOI shall provide WHOI with Certificate of Insurance evidences thereof. If Seller fails to provide such Certificate evidences of insurance for the period set forth below, at the request of either party, before seeking any other means of resolving the dispute.

20. Article XX Limitation of Liability

Any provision required to be included in a Federally Funded Contract by agreement, any applicable and valid Executive Order, Federal, State or local law, ordinance, rule or regulation, including the express approval of the Contracting Officer, the Occupational Health and Safety Act, the Uniform Commercial Code, the Re-negotiation Act of 1951, as amended, shall be deemed to be incorporated herein.

All flow down regulations mandated by agreement or otherwise, including, but not limited to the following to the extent such regulations are applicable, are incorporated by reference. The date of the applicable Order determines the date of the FAR clause that applies.

The full text of cited FAR provisions will be made available to the Seller at its request to WHOI’s authorized representative. Alternatively, the full text of the clauses can be accessed at: http://www.acquisition.gov/far/.

For purposes of each Order, the following changes to the FAR clauses are made for incorporation of these clauses into the Order:

“contractor” or “prime contractor” shall mean “Seller.” “Government” shall mean “WHOI.”

“Contracting Officer” shall mean “WHOI’s Purchasing Representative.” “Contract” or “Schedule” shall mean each “Order.”

Seller agrees to flow-down, as required, all applicable FAR clauses to its lower-tier suppliers. Seller
further agrees that all notifications and other communications required by these clauses shall be made through the WHOI’s Purchasing Representative, unless this Agreement or any Order specifically provides otherwise.

24. Article XVIII Payment, Extra Charges, Drafts

Sellers shall pay all taxes on the exchange of acceptable invoices, for materials and supplies delivered and accepted or services rendered and accepted. WHOI will not pay carriage, shipping, packaging or boxing expenses, unless specified in the applicable Order. Drafts will not be honored. Invoices must be accompanied by one set of transportation receipts, documentation sent electronically, if transportation is payable and charged as a separate item.

25. Article XXV Rights to Inventions Made by Nonprofit Organizations and Small Business Firms under Government Contracts, Grants, and Cooperative Agreements

(a) Definitions

(1) Invention means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novelty of a plant which is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

(2) Subject invention means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that the invention is in a field of use not claimed in a patent application, and the information is related to the performance of a patent application.

(b) General

(1) A Federal award exceeding $100,000 meets the definition of "funding agreement" under 37 CFR 401.2(a) and Seller is providing services or goods through an Order that falls under that "funding agreement," the following clauses shall apply to Seller (where "contractor" shall mean "Seller"): Par. 3(iii) Small Business Firms and Nonprofit Organizations

(c) Nonprofit or Small Business Firm Rights

(1) Seller may assign the right to the subject invention to a nonprofit corporation or entity or a small business firm or a small nonprofit organization. The subcontractor will retain all rights provided for the contractor regardless of tier, for experimental, developmental or research work to be performed by a small business firm or domestic nonprofit organization. The subcontractor will retain all rights provided for the contractor in the clause, and the contractor will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor’s subject inventions.

(2) The contractor will include in all other subcontracts, regardless of tier, for experimental development or research work the patent rights clause required by (c)(4) section of agency implementing regulations or FAR.

(d) March-in Rights

(1) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (or subcontract) for cooperative research and development (CRD), the contractor agrees that the Federal agency has the right to require the contractor, an assignee or exclusive licensee of a subject invention to grant a license to a Federal employee, including a contractor employee, to practice the subject invention or to operate in the case of a machine or system; and, in each case, under Title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

(2) The contractor agree to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the contractor each subject invention made in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401d), must also occur during the period of contract performance.

(3) Practical Application means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are to the extent possible paid for by law over a reasonable period of time to permit the filing of the patent application prior to the expiration of the 1-year period of time prescribed in section 37 CFR 404.18(a).

(4) Made when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(e) Small Business Concerns: Small business concerns as defined at section 2 of Pub. L. 86-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in government procurement and subcontracting at 13 CFR 121.2-8 and 13 CFR 121.3-12, respectively, will be used.

(f) National Security and Other Government Regulations

(1) National security or other government regulations may govern the disclosure of inventions or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (25 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(g) Authorization of Title Rights

The contractor may retain the entire right, title, and interest throughout the world to each subject invention specified under the provisions of this clause and 35 U.S. C. 203. With respect to any subject invention in which the contractor retains title, the Federal government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice for or on behalf of the United States the subject invention throughout the world.

(h) Invention Disclosure, Election of Title and Filing of Patent Application by Contractor

(1) The contractor will disclose each subject invention to the Federal Agency within two months after the invention has been conceived or first actually reduced to practice in the performance of work under the contract. The contractor will immediately, and not later than two months after the invention has been conceived or first actually reduced to practice in the performance of work under the contract, and the contractor will notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the contractor.

(2) The contractor shall elect whether or not to retain title to any such invention by notifying the Federal agency within two years of disclosure to the Federal agency. However, in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can be obtained in the United States, the contractor shall, in the absence of any election by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The contractor will file its initial patent application on a subject invention to which it elects to retain title within one year after filing of the disclosure, or if earlier, by one year after completion of any experimental, developmental or research work to be performed by the contractor or its assigns, for which Government support had been furnished, unless valid patent protection can be obtained in the United States after a patent application is filed. The contractor will file patent applications in additional countries or international patent offices within ten months of the corresponding initial patent application or six months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(i) Preferences for United States Industry

The contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the contractor or its licensees or assignees. Such reports shall include information regarding the subject of the invention, the field of use, the date of disclosure to the federal agency, the date of first commercial sale or use, gross royalties received by the contractor, and such other data and information as the agency may reasonably specify. The contractor also agrees to provide the Federal agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (i) of this clause.

(j) Reporting on Utilization of Subject Inventions

The contractor agrees to submit request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the contractor or its licensees or assignees. Such reports shall include information regarding the subject of the invention, the field of use, the date of disclosure to the federal agency, the date of first commercial sale or use, gross royalties received by the contractor, and such other data and information as the agency may reasonably specify. The contractor also agrees to provide the Federal agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (i) of this clause.

(k) March-in Rights

The contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency may, in accordance with the provisions in 37 CFR 401.5 and any supplemental regulations of the agency to require the contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partial exclusive, or exclusive license in any field of use to a responsible applicant or applicant group. In those cases in which the contractor fails to comply with this requirement, such failure may be deemed to be a violation of the contract. The exclusive license requires such a request the Federal agency has the right to grant such a license itself if the Federal agency determines that:

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

(j) March-in Rights

(2) The contractor action is necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee or licensees.

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

(j) March-in Rights

(2) The contractor action is necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee or licensees.

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

(j) March-in Rights

(2) The contractor action is necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee or licensees.

(3) Such action is necessary because the contractor or assignee has not taken, or is not expected to take, within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use.
employee co-inventors (when the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(a) and 37 CFR 401.10.

(3) The balance of any royalties or income earned by the contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education. The contractor shall be authorized to use any proceeds from marketing the invention which, if executed, is equally likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms, provided, that the contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference to a small business firm, whenever such a preference is involved, shall be at the discretion of the contractor. However, the contractor agrees that the Secretary may review the contractor's licensing program and decisions regarding small business applicants, and the contractor will negotiate changes to its licensing policies, procedures, or conditions in writing with the Secretary when the Secretary so directs.

(4) It will make efforts that are reasonable under the circumstances to attract licenses of subject invention that are small business firms and that it will give a preference to a small business firm when licensing a subject invention. The contractor determines in good faith that a small business firm has the capability and resources to market the invention which, if executed, is equally likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference to a small business firm, whenever such a preference is involved, shall be at the discretion of the contractor. However, the contractor agrees that the Secretary may review the contractor's licensing program and decisions regarding small business applicants, and the contractor will negotiate changes to its licensing policies, procedures, or conditions in writing with the Secretary when the Secretary so directs.

(5) Except as otherwise provided in this clause, inventions made by the United States for or on behalf of the United States the subject invention throughout the world.

§ 401.3(a)(4), the standard clause at § 401.14(a), of this section, shall be used with the following modifications unless a substitute clause is drafted by DOE:

(a) The title of the clause shall be changed to read as follows: Patent Rights to Nonprofit DOE Facility Operators.

(b) Add an “(a)” after “(1)“ in paragraph (c)(1) and add subparagraphs (b) and (C) to paragraph (c)(1) as follows:

(C) At the time an invention is disclosed under activities funded by the naval nuclear propulsion or weapons related programs of DOE, then the provisions of this subparagraph (c)(1)(B) will apply in lieu of paragraphs (c)(2) and (3). In such cases the contractor agrees to assign the government the entire right, title, and interest thereto throughout the world in and to the subject invention except to the extent that rights are retained by the contractor through a greater determination of rights that may be retained by the contractor, or an employee-inventor, with authorization of the contractor, may submit a request for greater rights at the time the invention is disclosed or within a reasonable timeframe thereafter. DOE will process such a request in accordance with paragraphs (c)(2) and (3). Each determination of greater rights will be subject to paragraphs (h)-(k) of this clause and such additional conditions, if any, deemed to be appropriate by the Department of Energy.

(c) At the time an invention is disclosed in accordance with (c)(1)(a) above, or within 90 days thereafter, the contractor will submit a written statement as to whether or not the invention occurred under a naval nuclear propulsion or weapons-related program of the Department of Energy. If this statement is not filed within this time, subparagraph (c)(1)(B) will apply in lieu of paragraphs (c)(2) and (3). The contractor will be deemed conclusive unless, within 60 days thereafter, the Contracting Officer disagrees in writing, in which case the determination of the Contracting Officer will be deemed conclusive unless the contractor files a claim under the Contract Disputes Act within 60 days after the Contracting Officer's determination. Pending resolution of the matter, the invention will be subject to subparagraph (c)(1)(B).

(3) Paragraph (k)(3) of the clause will be modified as prescribed at § 401.5(a).

(c) In paragraph (k)(3), replace (b) of the basic clause with the following paragraphs (l) and (m):

(l) Allocation of principal rights. (1) The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause, including (2) below, and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government through the Contractor shall exclusively, irrevocably, assume all responsibility, rights, and obligations of ownership of the invention and each invention subject to the provisions of this clause, including (2) below, and the Contractor agrees to assign the Government the entire right, title, and interest in and to each such invention.

(m) The balance of any royalties or income earned by the contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education; and

§ 401.3(a)(4), the standard clause at § 401.14(a), of this section, shall be used with the following modifications unless a substitute clause is drafted by DOE:

(a) The title of the clause shall be changed to read as follows: Patent Rights to Nonprofit DOE Facility Operators.

(b) Add an “(a)” after “(1)“ in paragraph (c)(1) and add subparagraphs (b) and (C) to paragraph (c)(1) as follows:

(C) At the time an invention is disclosed under activities funded by the naval nuclear propulsion or weapons related programs of DOE, then the provisions of this subparagraph (c)(1)(B) will apply in lieu of paragraphs (c)(2) and (3). In such cases the contractor agrees to assign the government the entire right, title, and interest thereto throughout the world in and to the subject invention except to the extent that rights are retained by the contractor through a greater determination of rights that may be retained by the contractor, or an employee-inventor, with authorization of the contractor, may submit a request for greater rights at the time the invention is disclosed or within a reasonable timeframe thereafter. DOE will process such a request in accordance with paragraphs (c)(2) and (3). Each determination of greater rights will be subject to paragraphs (h)-(k) of this clause and such additional conditions, if any, deemed to be appropriate by the Department of Energy.

(c) At the time an invention is disclosed in accordance with (c)(1)(a) above, or within 90 days thereafter, the contractor will submit a written statement as to whether or not the invention occurred under a naval nuclear propulsion or weapons-related program of the Department of Energy. If this statement is not filed within this time, subparagraph (c)(1)(B) will apply in lieu of paragraphs (c)(2) and (3). The contractor will be deemed conclusive unless, within 60 days thereafter, the Contracting Officer disagrees in writing, in which case the determination of the Contracting Officer will be deemed conclusive unless the contractor files a claim under the Contract Disputes Act within 60 days after the Contracting Officer's determination. Pending resolution of the matter, the invention will be subject to subparagraph (c)(1)(B).

(3) Paragraph (k)(3) of the clause will be modified as prescribed at § 401.5(a).

(c) In paragraph (k)(3), replace (b) of the basic clause with the following paragraphs (l) and (m):

(l) Allocation of principal rights. (1) The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause, including (2) below, and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government through the Contractor shall exclusively, irrevocably, assume all responsibility, rights, and obligations of ownership of the invention and each invention subject to the provisions of this clause, including (2) below, and the Contractor agrees to assign the Government the entire right, title, and interest in and to each such invention.

(m) The balance of any royalties or income earned by the contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education; and

§ 401.3(a)(4), the standard clause at § 401.14(a), of this section, shall be used with the following modifications unless a substitute clause is drafted by DOE:

(a) The title of the clause shall be changed to read as follows: Patent Rights to Nonprofit DOE Facility Operators.

(b) Add an “(a)” after “(1)“ in paragraph (c)(1) and add subparagraphs (b) and (C) to paragraph (c)(1) as follows:

(C) At the time an invention is disclosed under activities funded by the naval nuclear propulsion or weapons related programs of DOE, then the provisions of this subparagraph (c)(1)(B) will apply in lieu of paragraphs (c)(2) and (3). In such cases the contractor agrees to assign the government the entire right, title, and interest thereto throughout the world in and to the subject invention except to the extent that rights are retained by the contractor through a greater determination of rights that may be retained by the contractor, or an employee-inventor, with authorization of the contractor, may submit a request for greater rights at the time the invention is disclosed or within a reasonable timeframe thereafter. DOE will process such a request in accordance with paragraphs (c)(2) and (3). Each determination of greater rights will be subject to paragraphs (h)-(k) of this clause and such additional conditions, if any, deemed to be appropriate by the Department of Energy.

(c) At the time an invention is disclosed in accordance with (c)(1)(a) above, or within 90 days thereafter, the contractor will submit a written statement as to whether or not the invention occurred under a naval nuclear propulsion or weapons-related program of the Department of Energy. If this statement is not filed within this time, subparagraph (c)(1)(B) will apply in lieu of paragraphs (c)(2) and (3). The contractor will be deemed conclusive unless, within 60 days thereafter, the Contracting Officer disagrees in writing, in which case the determination of the Contracting Officer will be deemed conclusive unless the contractor files a claim under the Contract Disputes Act within 60 days after the Contracting Officer's determination. Pending resolution of the matter, the invention will be subject to subparagraph (c)(1)(B).

(3) Paragraph (k)(3) of the clause will be modified as prescribed at § 401.5(a).

(c) In paragraph (k)(3), replace (b) of the basic clause with the following paragraphs (l) and (m):

(l) Allocation of principal rights. (1) The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause, including (2) below, and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government through the Contractor shall exclusively, irrevocably, assume all responsibility, rights, and obligations of ownership of the invention and each invention subject to the provisions of this clause, including (2) below, and the Contractor agrees to assign the Government the entire right, title, and interest in and to each such invention.

(m) The balance of any royalties or income earned by the contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education; and
specific line item for services or an order line item includes requirements for an adaption or improvement to commercially available goods, such line item or requirement shall presumably be considered to be Developed IP, and Seller shall bear the burden of establishing that any IP delivered in satisfaction of said PO line item does not constitute Developed IP. Further, any IP developed during the period of performance of this Agreement in satisfaction of the requirements of this Agreement shall presumably be considered Developed IP unless Seller can establish by documented evidence that such IP was wholly developed outside of this Agreement, including being exclusively funded by Seller and being conceived and reduced to practice without any reference to any goods or services purchased by WHOI pursuant to this Agreement. All WHOI’s IP shall be deemed its property and shall not be used by others or disclosed to others without WHOI’s prior written permission.

All Developed IP that is considered “Work Made for Hire” as defined in Section 101 of the United States Copyright Act, 17 U.S.C. § 101, and used in 17 U.S.C. § 201 (or relevant EU legislation and the UK Copyright, Design and Patents Act 1988, c. 48, as amended), shall be deemed a “work made for hire” under this Agreement, with all right, title and interest in such Developed IP vesting with WHOI. For all other IP not deemed a work made for hire, Seller hereby assigns all such Developed IP to WHOI (or to any of WHOI’s affiliates as designated by WHOI) at no additional cost to WHOI. In addition, Seller, will provide reasonable, timely assistance to WHOI (at WHOI’s expense) to enable WHOI to secure WHOI’s rights in Developed IP, including providing written notice to WHOI within 15 days of developing any Developed IP. Seller will procure from its employees and subcontractors, at Seller’s sole expense (including any compensation due Seller’s employees), all WHOI’s rights in any Developed IP, and will secure from Seller’s employees the execution of all patent applications, assignments, and other instruments necessary for the procurement of patents and other intellectual property rights and the vesting of title thereto in Developed IP. Seller also grants WHOI a fully paid-up perpetual license to employ any IP present in the goods and services purchased by WHOI in the use of those goods and services.