

# Woods Hole Oceanographic Institution

## Terms and Condition of Purchase

THIS TERMS AND CONDITIONS OF PURCHASE (this "Agreement") is made and entered into as of \_\_\_\_\_, 20\_\_ (the "Effective Date"), by and between the WOODS WHOLE OCEANOGRAPHIC INSTITUTION, a Massachusetts company ("WHOI"), and the undersigned supplier ("Seller").

WHEREAS, WHOI may from time to time desire to purchase certain goods and services from Seller; WHEREAS, WHOI and Seller intend for this Agreement to govern the purchase and sale of such goods and services; and

WHEREAS, WHOI and Seller intend that WHOI will from time to time submit 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

Seller and WHOI hereby agree and it is their intent that UCC §2-207 shall not apply to this Agreement or to any invoice or acceptance form of Seller relating to this Agreement. The parties intend that this Agreement shall exclusively control the relationship of the parties with respect to all goods and services being purchased pursuant to any Order and in the event of any inconsistency between any invoice or acceptance form sent by Seller to WHOI and this Agreement, this Agreement shall control. WHOI, from time to time, may submit Orders under this Agreement, and Seller may accept or decline such Orders at its discretion. The materials, supplies or services covered by any Order shall be furnished by Seller subject to all the terms and conditions set forth in this Agreement including the following, which Seller, in accepting any Order agrees to be bound by and to comply with in all particulars and no other terms or conditions shall be binding upon the parties unless hereafter accepted by them in writing. Written acceptance or shipment of all or any portion of the materials or supplies, or the performance of all or any portion of the services, covered by any Order shall constitute unqualified acceptance of all its terms and conditions. The terms of any proposal referred to in any Order are included and made a part of such Order only to the extent of specifying the nature of the materials, supplies, or services ordered, the price therefore, and the delivery thereof, and then only to the extent that such terms are consistent with the terms and conditions of this Agreement. In the event that the terms of any Order are inconsistent with the terms contained herein, the terms of this Agreement shall govern.

### 2. Article II Anti-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, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Seller agrees to disclose any lobbying with non-Federal funds that has occurred or will take place in connection with obtaining any Federal award.

### 3. Article III Assignment

This Agreement and any Order 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.

### 4. 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 to make reasonable inspections of Seller's facilities and systems 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.

### 5. 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. Any claim of Seller for an adjustment under this Article must be made in writing within thirty (30) days from the date of receipt by Seller of notification of such change. Nothing in this Article shall excuse Seller from proceeding with performance of such Order as charged hereunder.

### 6. 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 or conflict of law provision or rule (whether of the Massachusetts or any other jurisdiction). Any legal suit, action, or proceeding arising out of or based upon this transaction may be instituted in the Federal Courts of the United States of America or 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 action or proceeding. Trial by jury is expressly waived by all parties. The United Nations Convention on the International Sale of Goods shall not apply to any transaction contemplated by this Agreement.

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

Seller shall comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) 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).

### 8. Article VIII Confidentiality

WHOI may disclose to Seller certain of WHOI's proprietary scientific, technical or business data or information relating to the Material or its use in connection with this Agreement (the "Confidential Information"). All such Confidential Information is and shall remain the sole property of WHOI. Seller shall have 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 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 expressly set forth above, without WHOI's prior written authorization; provided 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 is lawfully in possession of such information and not under any obligation of confidentiality; (iii) is already in Seller's possession at the time of receipt from WHOI and such 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 can be properly documented by Seller; or (v) must be disclosed by Seller under a legal obligation. 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.

### 9. 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 insofar as they are

applicable to the subject matter of the order and with all pertinent provisions of Part 27 of the FAR.

### 10. Article X Davis-Bacon (if applicable)

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"):

(a)(1) Minimum wages.

(i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in (a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-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 easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii)(B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program. *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) Withholding. WHOI or the applicable Agency shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the Agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) Payrolls and basic records.

(i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the

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ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the pertinent agency if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to WHOI. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit them to WHOI or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, sponsor, or owner).

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the pertinent agency or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) Apprentices and trainees—

(i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

(5) Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

(6) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the pertinent Agency or WHOI may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved 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 contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) Certification of eligibility.

(i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) Contract Work Hours and Safety Standards Act. The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or § 4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$25 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.

(3) Withholding for unpaid wages and liquidated damages. The pertinent agency shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the pertinent agency and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

### 11. Article XI Equal Opportunity

Seller 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 promoted women and minority group persons at all job levels and in all aspects of employment. Seller and WHOI shall abide by the requirements of 41 CFR 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, disability or veteran status.

### 12. Article XII Declared Valuation of Shipments

Except as otherwise provided on the face of the applicable order, all shipments by Seller under this 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.

### 13. Article XIII Delivery/Shipping

Except as otherwise provided on the face of the applicable order, all shipments by Seller under this

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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 procedure.

- 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 mutually agreed to by the parties. The parties will complete the process of selecting a mediator within fifteen (15) business days of the date of the written notice invoking mediation. If the parties are unable to select a mediator and/or reach a mediated resolution within thirty (30) days after the selection of the 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, using the procedures specified by the Associations then current Employment Arbitration Rules, and such appointment shall be binding upon the parties. Any arbitration will take place in New York, New York. The award of the arbitrator will be final and binding. The parties waive any right to appeal the arbitration 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 or during 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 abridgement 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 mechanism to resolve disputes arising under this Agreement. The Parties agree to use their respective best efforts to resolve any dispute(s) that may arise regarding this Agreement.

a. 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 finally any dispute arising out of, relating to or in connection with this Agreement, including any question regarding its existence, validity, or termination.

- i. Where the amount in controversy is \$200,000 or less, the dispute shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Non-Administered Arbitration by a sole arbitrator. Notwithstanding the CPR Rules, the Parties further agree that such arbitration where the amount in controversy is \$200,000 or less shall not involve third-party discovery; shall be resolved on the papers and sworn witness statements, without a hearing, absent exceptional circumstances; and shall be resolved within six months of selection of the arbitrator.
- ii. Where the amount in controversy exceeds \$200,000, the dispute shall be finally resolved by arbitration in accordance with the CPR Rules for Administered Arbitration by a sole arbitrator, or, if the amount in controversy exceeds \$5 million, by three arbitrators, of whom each Party shall designate one, with the third arbitrator to be appointed by CPR.
- iii. 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, the arbitration and this 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 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 an award of attorney's fees, expenses, costs, or punitive or exemplary damages (except that the arbitrator(s) may sanction any Party for misconduct occurring during the arbitration). The Parties waive any right to appeal the arbitration 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 or during 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 OMB Guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR Part 1986 Comp., p. 189) and 12689 (3 CFR Part 1989 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, and expenses (including reasonable attorneys' fees and costs) that they may suffer 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 caused by the negligence or willful misconduct 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 settlement of the indemnified claims.

### 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 venturer 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

The materials, supplies or services furnished shall be exactly as specified in each Order, free from all defects in Seller's design, workmanship and materials, and, except as otherwise provided in this Agreement, shall be subject to inspection and test by WHOI at all times and places. If any item, shipment of items, or services are rejected as nonconforming by WHOI (for failure to meet WHOI's specifications or any other reason) as of or before the end of the Inspection Period ("Rejected Items"), Seller shall, at its cost and as directed by WHOI (i) Accept a return of such item or items. (ii) Repair such Rejected Items, which work shall include, but shall not be limited to, performing such additional work as is necessary to make such Rejected Items fully conforming ("the Remedial Work"). (iii) replace the Rejected Items with new items, such replacement items to be delivered in accordance with any and all instructions provided by WHOI and to include at Seller's cost any required installation (including removal of the Rejected Item). If WHOI determines in its sole discretion that Remedial Work is necessary for the repair of any Rejected Items, then WHOI may elect to either perform the Remedial Work itself or to have a third party perform the Remedial Work, in which case the cost of such Remedial Work shall be offset against the amounts otherwise due to Seller for such Rejected Items or charged separately by WHOI to Seller. Further, WHOI may require that the Remedial Work be performed on WHOI's premises by Seller, in which case WHOI shall provide Seller with reasonable access to its premises and otherwise assist Seller with such arrangements as are necessary to perform the Remedial Work. With respect to any Rejected Items to be repaired, WHOI will not be deemed to have accepted such items unless and until the Rejected Items are fully repaired to the requirements of the Agreement and the order in question and are independently accepted in writing by WHOI following such Remedial Work. Rejected Items, if not required to be repaired as provided by this Section, shall be removed by Seller at its cost from the premises immediately after notification, and, if not so removed by Seller, such Rejected Items may be disposed of or stored by WHOI at Seller's expense. Seller shall bear all risks as to Rejected Items and, in addition to any costs for Which Seller may become liable under this Agreement, shall reimburse WHOI for all transportation costs, other costs incurred, or payments to Seller in accordance with the terms of this Agreement for Rejected Items. Notwithstanding final acceptance of and payment, Seller shall be liable for latent defects, fraud, or other such gross mistakes as amount to fraud.

### 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 with respect to events covered by Article XIII. Such insurance (i) shall be issued by an insurer 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; (ii) shall list WHOI as an additional insured with a waiver of subrogation thereunder, (iii) shall be endorsed to include product liability coverage, and (iv) 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. Seller shall provide WHOI with Certificates of Insurance evidencing compliance with this Section annually. Additional insurance coverage and/or limits may be required in specific instances.

### 20. Article XX Limitation on Liability

To the maximum extent permitted by law, WHOI's total liability to Seller for any and all liabilities, claims or damages arising out of or relating to this Agreement, howsoever caused and regardless of the legal theory asserted, including breach of contract or warranty, tort, strict liability, statutory liability or otherwise, shall not, in the aggregate, exceed the total dollar amount of the Order in question.

Further, notwithstanding any provision of this Agreement to the contrary, neither party shall be liable to the other party for any punitive, exemplary, special, indirect, incidental or consequential damages (including, but not limited to, lost profits, lost business opportunities, loss of use or equipment down time, and loss of or corruption to data) arising out of or relating to this Agreement, regardless of the legal theory under which such damages are sought (whether arising under contract, admiralty, tort or otherwise by operation of law), and even if the parties have been advised of the possibility of such damages or loss.

### 21. Article XXI Liquidated Damages/Penalty

WHOI does not accept any provision for liquidated damages in favor of Seller or that imposes penalties upon WHOI

### 22. Article XXII Merger/Integration

This Agreement, including any attachments, schedules, and/or exhibits, constitutes the entire Agreement and understanding between the parties concerning this subject and as of its date, cancels, terminates and supercedes all prior written and oral understandings, Agreements, proposals, promises and representations of the parties respecting any of the subject matter. No subsequent representation, modification or amendment of this Agreement will be effective unless signed by both parties.

### 23. Article XXIII Other Applicable Laws

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 examination of records by the Controller General, the Occupational Health and Safety Act, the Uniform Guidance, and 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 herein by reference. The date of the applicable Order determines the date of the FAR clause that is applicable.

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 assessed 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

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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 XXIV Payment, Extra Charges, Drafts

Seller shall be paid, upon submission of acceptable invoices, for materials and supplies delivered and accepted or services rendered and accepted N30. WHOI will not pay cartage, shipping, packaging or boxing expenses, unless specified in the applicable Order. Drafts will not be honored. Invoices must be accompanied by 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 Grants, Contracts, and Cooperative Agreements.

If a Federal award given to WHOI 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"):

Patent Rights (Small Business Firms and Nonprofit Organizations)

#### (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 novel variety of plant which is or may be protected 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 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. 2401(d)), 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 permitted by law or government regulations, available to the public on reasonable terms.

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

(5) Small Business Firm means a small business concern as defined at section 2 of Pub.L. 85-536 (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 121.3-8 and 13 CFR 121.3-12, respectively, will be used.

(6) Nonprofit Organization means a university or other institution of higher education 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.

#### (b) Allocation of Principal Rights

The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to 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 or have practiced for or on behalf of the United States the subject invention throughout the world.

#### (c) 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 inventor discloses it in writing to contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the Contractor will promptly 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 will elect in writing 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 still be obtained in the United States, the period for election of title may be shortened 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 election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The contractor will file patent applications in additional countries or international patent offices within either 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.

(4) Requests for extension of the time for disclosure, election, and filing under subparagraphs (1), (2), and (3) may, at the discretion of the agency, be granted.

#### (d) Conditions When the Government May Obtain Title

The contractor will convey to the Federal agency, upon written request, title to any subject invention—

(1) If the contractor fails to disclose or elect title to the subject invention within the times specified in (c), above, or elects not to retain title; provided that the agency may only request title within 60 days after learning of the failure of the contractor to disclose or elect within the specified times.

(2) In those countries in which the contractor fails to file patent applications within the times specified in (c) above; provided, however, that if the contractor has filed a patent application in a country after the times specified in (c) above, but prior to its receipt of the written request of the Federal agency, the contractor shall continue to retain title in that country.

(3) In any country in which the contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

#### (e) Minimum Rights to Contractor and Protection of the Contractor Right to File

(1) The contractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the contractor fails to disclose the invention within the times specified in (c), above. The contractor's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the contractor is a party and includes the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the Federal agency except when transferred to the successor of that party of the contractor's business to which the invention pertains.

(2) The contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and agency licensing regulations (if any). This license will not be revoked in that field of use or the

geographical areas in which the contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency for good cause shown by the contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

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

#### (f) Contractor Action to Protect the Government's Interest

(1) The contractor agrees to execute or to have executed and promptly deliver to the Federal agency all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the contractor elects to retain title, and (ii) convey title to the Federal agency when requested under paragraph (d) above and to enable the government to obtain patent protection throughout the world in that subject invention.

(2) The contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the contractor each subject invention made under contract in order that the contractor can comply with the disclosure provisions of paragraph (c), above, and to execute all papers necessary to file patent applications on subject inventions and to establish the government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by (c)(1), above. The contractor shall instruct such employees through employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The contractor will notify the Federal agency of any decisions not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than thirty days before the expiration of the response period required by the relevant patent office.

(4) The contractor agrees to include, within the specification of any United States patent applications and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with government support under (identify the contract) awarded by (identify the Federal agency). The government has certain rights in the invention."

#### (g) Subcontracts

(1) The contractor will include this clause, suitably modified to identify the parties, in all subcontracts, 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 this 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 developmental or research work the patent rights clause required by (cite section of agency implementing regulations or FAR).

(3) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (but not a grant or cooperative agreement), the agency, subcontractor, and the contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and 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 (j) of this clause.

#### (h) Reporting on Utilization of Subject Inventions

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 status of development, 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 additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), the agency agrees it will not disclose such information to persons outside the government without permission of the contractor.

#### (i) Preference for United States Industry

Notwithstanding any other provision of this clause, the contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject inventions in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the Federal agency upon a showing by the contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

#### (j) March-in Rights

The contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency to require the contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the contractor, assignee, or exclusive licensee refuses 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.

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

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

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

#### (k) Special Provisions for Contracts with Nonprofit Organizations

If the contractor is a nonprofit organization, it agrees that:

(1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions, provided that such assignee will be subject to the same provisions as the contractor;

(2) The contractor will share royalties collected on a subject invention with the inventor, including Federal

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employee co-inventors (when the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) 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; and

(4) It will make efforts that are reasonable under the circumstances to attract licensees 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 if the contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as 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 in any specific case will 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 practices with the Secretary when the Secretary's review discloses that the contractor could take reasonable steps to implement more effectively the requirements of this paragraph (k)(4).

(l) Communication

(Complete According to Instructions at 401.5(b))

(b) When the Department of Energy (DOE) determines to use alternative provisions under § 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:

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

(2) Add an "(A)" after "(1)" in paragraph (c)(1) and add subparagraphs (B) and (C) to paragraph (c)(1) as follows:

(B) If the subject invention occurred 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 rights determination or under paragraph (e), below. 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 time thereafter. DOE will process such a request in accordance with procedures at 37 CFR 401.15. 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 statement 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(g).

(c) As prescribed in § 401.3, replace (b) of the basic clause with the following paragraphs (1) and (2):

(b) 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 shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(2) If the Contractor performs services at a Government owned and operated laboratory or at a Government owned and contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710(a), the Government may require the Contractor to negotiate an agreement with the CRADA collaborating party or parties regarding the allocation of rights to any subject invention the Contractor makes, solely or jointly, under the CRADA. The agreement shall be negotiated prior to the Contractor undertaking the CRADA work or, with the permission of the Government, upon the identification of a subject invention. In the absence of such an agreement, the Contractor agrees to grant the collaborating party or parties an option for a license in its inventions of the same scope and terms set forth in the CRADA for inventions made by the Government.

### 26. Article XXVI Severability

If any provision of this Agreement is determined to be invalid, illegal or unenforceable, the remaining provisions of this Agreement remain in full force and effect so long as the essential terms and conditions of this Agreement reflect the original intent of the parties and remain valid, legal and enforceable.

### 27. Article XXVII Solid Waste Disposal Act Compliance

Seller shall comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines..

### 28. Article XXVIII Term

The parties' obligations under this Agreement shall continue for two (2) years after the later of the date of final payment by WHOI or the date of completion of Seller's performance, except for the provisions relating to Indemnity, Confidentiality, Warranty, and Limitation on Liability, which shall survive indefinitely or until extinguished by their own terms.

### 29. Article XXIX Termination

a) WHOI may, by written notice, stating the extent and effective date terminate any Order for convenience in whole or in part at any time, stating the extent and effective date of such termination. WHOI shall pay Seller as full compensation for performance until such termination (1) the unit or pro rata order price for the delivered and accepted portion; and (2) a reasonable amount, not otherwise recoverable from other sources by Seller as approved by WHOI, with respect to the undelivered or unaccepted portion of the Order, provided compensation hereunder shall in no event exceed the total order price.

b) WHOI may by written notice terminate any Order for Seller's default, in whole or in part, at any time, if Seller refuses or fails to comply with the provisions of this Agreement or any Order or so fails to make progress as to endanger performance and does not cure such failure within a reasonable period of time, or fails to make deliveries of the materials or supplies or perform the services within the time

specified or any written extension thereof. In such event, WHOI may purchase or otherwise secure materials, supplies or services and, except as otherwise provided herein, Seller shall be liable to WHOI for any excess costs occasioned WHOI thereby. If, after notice of termination for default, WHOI determines that Seller was not in default or that the failure to perform the Order is due to causes beyond the control and without the fault or negligence of Seller (including, but not restricted to, acts of God or of the public enemy, acts of WHOI, acts of Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor or supplier due to such causes and without the fault or negligence of the subcontractor or supplier), termination shall be deemed for the convenience of WHOI, unless WHOI shall determine that the materials, supplies or services covered by the Order were obtainable from other sources in sufficient time to meet the required delivery schedule.

- c) If WHOI determines that Seller has been delayed in the work due to causes beyond the control and without the fault or negligence of Seller, WHOI may extend the time for completion of the work called for by the Order in question, when promptly applied for in writing by Seller, and if such delay is due to failure of WHOI, not caused or contributed to by Seller, to perform services or deliver property in accordance with the terms of this Agreement and the applicable Order, the time and price of such Order shall be subject to change under the Changes Article. Sole remedy of Seller in event of delay by failure of WHOI to perform shall, however, be limited to any money actually and necessarily expended in the work during the period of delay, solely by reason of the delay. No allowance will be made for anticipated profits.
- d) The rights and remedies of WHOI provided in the Article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.
- e) As used in this Article, the word "Seller" includes Seller and his sub-suppliers at any tier.

### 30. Article XXX Title

Title to the material and supplies purchased hereunder shall pass directly from Seller to WHOI or Government upon acceptance, subject to the right of WHOI to reject within sixty (60) days of delivery (the "Inspection Period").

### 31. Article XXXI Waiver

This Agreement may be amended, supplemented, or otherwise modified only by means of a written instrument signed by both parties. Any waiver of any rights or failure to act in a specific instance shall relate only to such instance and shall not be construed as an agreement to waive any rights or fail to act in any other instance, whether or not similar.

### 32. Article XXXII Warranties

Seller represents and warrants to WHOI that the goods and services (and all components thereof) sold by Seller to WHOI shall:

- a) Be new, unused and of good quality;
- b) Conform to all of Seller's specifications, standards, drawings, samples, and other description furnished to, or expressly adopted by WHOI;
- c) Conform to specifications, standards, drawings, samples, performance criteria and any other other instruction provided by, or originating from, WHOI;
- d) If designed by Seller, be free of defects and/or non-conformances in design;
- e) Comply with all then-current safety standards (including labeling requirements, if Seller is to provide labels); and contain adequate warnings (if Seller is to provide warnings);
- f) Be free of asbestos, lead paint, or other hazardous substances;
- g) Be free from defects in material and workmanship and meet all applicable manufacturer's, industry, and safety standards; and
- h) Not infringe on any third party patent, copyright, trade secret, trademark, or any other intellectual property right of any third party and there is no actual or threatened claim or lawsuit by any third party based on violation of such rights;

Seller warrants that goods will perform as specified, and be free from defects in material and workmanship, for a period of two (2) years commencing with the end of the Inspection Period such that any cause of action for breach of this warranty accrues, for limitations purposes, when WHOI discovers Seller's refusal or inability to maintain the goods as warranted.

In addition to, and not in lieu of, Seller's warranty obligations above, if, within two (2) years after the end of the Inspection Period, any of the goods or services are found to be not in accordance with the requirements of the Order, Seller shall correct it promptly after receipt of written notice from WHOI to do so. Seller warrants any goods or services furnished in connection with the correction of nonconforming goods or services from the date that Seller completes the correction in the same manner as contained in this Article 26. Cost of replacement, rework, resulting damages to other work, inspection, repackaging, delivery, and storage of such goods and services shall be at Seller's expense. This provision shall survive any inspection, delivery, acceptance, payment, expiration or earlier termination of this Order and such warranties shall run to WHOI, its successors, assigns, employees, and users of any goods delivered or services performed under the Order. Nothing herein shall limit WHOI's rights by contract, law or equity for damages arising out of or resulting from goods or services that are found to be not in accordance with the requirements of the Order.

Seller shall assign to WHOI any warranties it receives from a manufacturer or supplier of goods sold by Seller and purchased by WHOI.

### 33. Article XXXIII Warranty on Price/Most Favored Nation

Seller shall not at any time sell similar goods or services to a different buyer at prices below those stated in this Agreement. If Seller charges a different buyer a lower price for such goods or services under similar quantity and delivery conditions, Seller must immediately apply the lower price for the goods or services under this Agreement to WHOI's order. If Seller fails to meet the lower price, WHOI, at its option, may terminate the applicable order without liability pursuant to the [Termination Provision].

### 34. Article XXXIV Works For Hire

Nothing in this Agreement shall entitle WHOI to ownership rights in any data, information, specifications, designs, drawings, programs, derivative works, computer software including source code or object code, ideas, techniques, methods, processes, know-how, documentation and materials, inventions, or discoveries whether or not patentable (collectively, "IP"), developed by Seller prior to or outside the scope of this Agreement ("Seller's Background IP"). WHOI shall be entitled to full ownership of all IP (along with any intellectual property rights thereto, including any trade secrets, patents, patent applications, copyrights, maskworks, database rights, industrial property rights, and other similar rights, regardless of the jurisdiction, and any applications), conceived or first actually reduced to practice in the performance of this Agreement or any Order contemplated hereunder ("Developed IP"), and such Developed IP shall be treated, at the time of conception, as WHOI's property. For the avoidance of doubt, Developed IP includes any and all IP developed or conceived in contemplation of an Order being issued by WHOI for goods or services, regardless of the actual date of conception or reduction to practice. When an Order includes a

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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 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.