

- E. The Subcontractor shall include the substance of this clause, including this paragraph (E), in each lower-tier subcontract or purchase under this subcontract that may involve international air transportation.

**CLAUSE 36 - TERMINATION FOR CONVENIENCE OF NREL/GOVERNMENT  
(EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS) (SEP 1996)**

*Derived from FAR 52.249-5 (FD)*

- A. NREL may terminate performance of work under this subcontract in whole or, from time to time, in part if the NREL Subcontract Administrator determines that a termination is in NREL's/Government's interest. The NREL Subcontract Administrator shall terminate by delivering to the Subcontractor a Notice of Termination specifying the extent of termination and the effective date.
- B. After receipt of a Notice of Termination and except as directed by the NREL Subcontract Administrator, the Subcontractor shall immediately proceed with the following obligations:
1. Stop work as specified in the notice.
  2. Place no further subcontracts or orders (referred to as lower-tier subcontracts in this clause), except as necessary to complete the continued portion of the subcontract.
  3. Terminate all applicable lower-tier subcontracts and cancel or divert applicable commitments covering personal services that extend beyond the effective date of termination.
  4. Assign to NREL, as directed by the NREL Subcontract Administrator, all right, title, and interest of the Subcontractor under the lower-tier subcontracts terminated, in which case NREL shall have the right to settle or pay any termination settlement proposal arising out of those terminations.
  5. With approval or ratification to the extent required by the NREL Subcontract Administrator, settle all outstanding liabilities and termination settlement proposals arising from the termination of lower-tier subcontracts; approval or ratification will be final for purposes of this clause.
  6. Transfer title to the Government (if not already transferred) and, as directed by the NREL Subcontract Administrator, deliver to NREL any information and items that, if the subcontract had been completed, would have been required to be furnished, including--
    - (i) Materials or equipment produced, in process, or acquired for the work terminated; and
    - (ii) Completed or partially completed plans, drawings, and information.
  7. Complete performance of the work not terminated.

8. Take any action that may be necessary, or that the NREL Subcontract Administrator may direct, for the protection and preservation of the property related to this subcontract that is in the possession of the Subcontractor and in which the Government has or may acquire an interest.
9. Use its best efforts to sell, as directed or authorized by the NREL Subcontract Administrator, termination inventory other than that retained by the Government under subparagraph (B)(6) of this clause; **provided**, however, that the Subcontractor--
  - (i) Is not required to extend credit to any purchaser; and
  - (ii) May acquire the property under the conditions prescribed by, and at prices approved by, the NREL Subcontract Administrator. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by NREL under this subcontract, credited to the price or cost of the work, or paid in any other manner directed by the NREL Subcontract Administrator.
- C. The Subcontractor shall submit complete termination inventory schedules no later than one hundred twenty (120) days from the effective date of termination, unless extended in writing by the NREL Subcontract Administrator upon written request of the Subcontractor within this one hundred twenty (120)-day period.
- D. After termination, the Subcontractor shall submit a final termination settlement proposal to the NREL Subcontract Administrator in the form and with the certification prescribed by the NREL Subcontract Administrator. The Subcontractor shall submit the proposal promptly but no later than one (1) year from the effective date of termination unless extended in writing by the NREL Subcontract Administrator upon written request of the Subcontractor with this one (1)-year period. If the Subcontractor fails to submit the termination settlement proposal within the time allowed, the NREL Subcontract Administrator may determine, on the basis of information available, the amount, if any, due the Subcontractor because of the termination and shall pay the amount determined.
- E. Subject to paragraph (D) of this clause, the Subcontractor and the NREL Subcontract Administrator may agree upon the whole or any part of the amount to be paid because of the termination. This amount may include reasonable cancellation charges incurred by the Subcontractor and any reasonable loss on outstanding commitments for personal services that the Subcontractor is unable to cancel; **provided**, that the Subcontractor exercised reasonable diligence in diverting such commitments to other operations. The subcontract shall be amended and the Subcontractor paid the agreed amount.
- F. The cost principles and procedures in Part 31.3 of the Federal Acquisition Regulations (FAR), in effect on the date of the subcontract, shall govern all costs claimed, agreed to, or determined under this clause; however, if the Subcontractor is not an educational institution, and is a nonprofit organization under Office of Management and Budget (OMB) Circular A-122, "Cost Principles for Nonprofit Organizations," July 8, 1980, those cost principles shall apply; **provided**, that if the Subcontractor is a nonprofit institution listed in Attachment C of OMB Circular A-122, the cost principles at FAR 31.2 for commercial organizations shall apply to such Subcontractor.

- G. NREL may, under the terms and conditions it prescribes, make partial payments against costs incurred by the Subcontractor for the terminated portion of this subcontract, if the NREL Subcontract Administrator believes the total of these payments will not exceed the amount to which the Subcontractor will be entitled.
- H. The Subcontractor has the right of appeal as provided under the Disputes clause, except that if the Subcontractor failed to submit the termination settlement proposal within the time provided in paragraph (D) and failed to request a time extension, there is no right of appeal.

**CLAUSE 37 - TERMINATION (COST-REIMBURSEMENT) (SEP 1996)**

*Derived from FAR 52.249-6 (FD)*

*(Applies to cost reimbursement subcontracts except subcontracts for research and development work with educational or nonprofit institutions)*

- A. NREL may terminate performance of work under this subcontract in whole or, from time to time, in part, if --
  - 1. The NREL Subcontract Administrator determines that a termination is in NREL's/Government's interest; or
  - 2. The Subcontractor defaults in performing this subcontract and fails to cure the default within ten (10) days (unless extended by the NREL Subcontract Administrator) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger performance.
- B. The NREL Subcontract Administrator shall terminate by delivering to the Subcontractor a Notice of Termination specifying whether termination is for default of the Subcontractor or for convenience of NREL/Government, the extent of termination, and the effective date. If, after termination for default, it is determined that the Subcontractor was not in default or that the Subcontractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Subcontractor as set forth in the Excusable Delays clause, the rights and obligations of the parties will be the same as if the termination was for the convenience of NREL/Government.
- C. After receipt of a Notice of Termination, and except as directed by the NREL Subcontract Administrator, the Subcontractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:
  - 1. Stop work as specified in the notice.
  - 2. Place no further lower-tier subcontracts or orders (referred to as lower-tier subcontracts in this clause), except as necessary to complete the continued portion of the subcontract.
  - 3. Terminate all lower-tier subcontracts to the extent they relate to the work terminated.
  - 4. Assign to NREL, as directed by the NREL Subcontract Administrator, all right, title, and interest of the Subcontractor under the lower-tier subcontracts terminated, in which case NREL shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

5. With approval or ratification to the extent required by the NREL Subcontract Administrator, settle all outstanding liabilities and termination settlement proposals arising from the termination of lower-tier subcontracts, the cost of which would be reimbursable in whole or in part, under this subcontract; approval or ratification will be final for purposes of this clause.
  6. Transfer title to the Government (if not already transferred) and, as directed by the NREL Subcontract Administrator, deliver to NREL --
    - (i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated;
    - (ii) The completed or partially completed plans, drawings, information, and other property that, if the subcontract had been completed, would be required to be furnished to NREL; and
    - (iii) The jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this subcontract, the cost of which the Subcontractor has been or will be reimbursed under this subcontract.
  7. Complete performance of the work not terminated.
  8. Take any action that may be necessary, or that the NREL Subcontract Administrator may direct, for the protection and preservation of the property related to this subcontract that is in the possession of the Subcontractor and in which NREL/Government has or may acquire an interest.
  9. Use its best efforts to sell, as directed or authorized by the NREL Subcontract Administrator, any property of the types referred to in subparagraph (C)(6) of this clause; **provided**, however, that the Subcontractor--
    - (i) Is not required to extend credit to any purchaser; and
    - (ii) May acquire the property under the conditions prescribed by, and at prices approved by, the NREL Subcontract Administrator. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by NREL under this subcontract, credited to the price or cost of the work, or paid in any other manner directed by the NREL Subcontract Administrator.
- D. The Subcontractor shall submit complete termination inventory schedules no later than one hundred twenty (120) days from the effective date of termination, unless extended in writing by the NREL Subcontract Administrator upon written request of the Subcontractor within this one hundred twenty (120)-day period.
- E. After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Subcontractor may submit to the NREL Subcontract Administrator a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the NREL Subcontract Administrator. The Subcontractor may request the NREL/Government to remove those items or enter into an

agreement for their storage. Within fifteen (15) days, NREL/Government will accept the items and remove them or enter into a storage agreement. The NREL Subcontract Administrator may verify the list upon removal of the items, or if stored, within forty-five (45) days from submission of the list, and shall correct the list, as necessary, before final settlement.

- F. After termination, the Subcontractor shall submit a final termination settlement proposal to the NREL Subcontract Administrator in the form and with the certification prescribed by the NREL Subcontract Administrator. The Subcontractor shall submit the proposal promptly, but no later than one (1) year from the effective date of termination, unless extended in writing by the NREL Subcontract Administrator upon written request of the Subcontractor within this one (1)-year period. However, if the NREL Subcontract Administrator determines that the facts justify it, a termination settlement proposal may be received and acted on after one (1) year or any extension. If the Subcontractor fails to submit the proposal within the time allowed, the NREL Subcontract Administrator may determine, on the basis of information available, the amount, if any, due the Subcontractor because of the termination and shall pay the amount determined.
- G. Subject to paragraph (F) of this clause, the Subcontractor and the NREL Subcontract Administrator may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The subcontract shall be amended, and the Subcontractor paid the agreed amount.
- H. If the Subcontractor and the NREL Subcontract Administrator fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the NREL Subcontract Administrator shall determine, on the basis of information available, the amount, if any, due the Subcontractor and shall pay the amount, which shall include the following:
1. All costs reimbursable under this subcontract, not previously paid, for the performance of this subcontract before the effective date of termination, and those costs that may continue for a reasonable time with the approval of or as directed by the NREL Subcontract Administrator; however, the Subcontractor shall discontinue those costs as rapidly as practicable.
  2. The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the subcontract if not included in subparagraph (H)(1) of this clause.
  3. The reasonable costs of settlement of the work terminated, including--
    - (i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
    - (ii) The termination and settlement of lower-tier subcontracts (excluding the amounts of such settlements); and
    - (iii) Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory. If the termination is for default, no amounts for the preparation of the Subcontractor's termination settlement proposal may be included.

4. A portion of the fee payable under the subcontract, determined as follows:
  - (i) If the subcontract is terminated for the convenience of NREL/Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the subcontract, but excluding subcontract effort included in lower-tier subcontractor's termination proposals, less previous payments for fee.
  - (ii) If the subcontract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by NREL is to the total number of articles (or amount of services) of a like kind required by the subcontract.
5. If the settlement includes only fee, it will be determined under subparagraph (H)(4) of this clause.
- I. The cost principles and procedures in Part 31 of the Federal Acquisition Regulation, in effect on the date of this subcontract, shall govern all costs claimed, agreed to, or determined under this clause.
- J. The Subcontractor shall have the right of appeal, under the Disputes clause, from any determination made by the NREL Subcontract Administrator under paragraph (F), (H), or (L) of this clause, except that if the Subcontractor failed to submit the termination settlement proposal within the time provided in paragraph (F) and failed to request a time extension, there is no right of appeal. If the NREL Subcontract Administrator has made a determination of the amount due under paragraph (F), (H), or (L) of this clause, NREL shall pay the Subcontractor--
  1. The amount determined by the NREL Subcontract Administrator if there is no right of appeal or if no timely appeal has been taken; or
  2. The amount finally determined on an appeal.
- K. In arriving at the amount due the Subcontractor under this clause, there shall be deducted --
  1. All unliquidated advance or other payments to the Subcontractor, under the terminated portion of this subcontract.
  2. Any claim which NREL/Government has against the Subcontractor under this subcontract; and
  3. The agreed price for, or the proceeds of sale of materials, supplies, or other things acquired by the Subcontractor or sold under this clause and not recovered by or credited to NREL/Government.
- L. The Subcontractor and NREL Subcontract Administrator must agree to any equitable adjustment in fee for the continued portion of the subcontract when there is a partial termination. The NREL Subcontract Administrator shall amend the subcontract to reflect the agreement.

- M. 1. NREL may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Subcontractor for the terminated portion of the subcontract, if the NREL Subcontract Administrator believes the total of these payments will not exceed the amount to which the Subcontractor will be entitled.
2. If the total payments exceed the amount finally determined to be due, the Subcontractor shall repay the excess to NREL/Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Subcontractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Subcontractor's termination settlement proposal because of retention or other disposition of termination inventory until ten (10) days after the date of the retention or disposition, or a later date determined by the NREL Subcontract Administrator because of the circumstances.
- N. The provisions of the clause relating to fee are inapplicable if this subcontract does not include a fee.

*ALTERNATE IV (SEP 1996).*

*(If the subcontract is a TIME-AND-MATERIAL or LABOR- HOUR subcontract, substitute the following paragraphs (H) and (L) for paragraphs (H) and (L) of the basic clause:)*

- H. If the Subcontractor and the NREL Subcontract Administrator fail to agree in whole or in part on the amount to be paid because of the termination of work, the NREL Subcontract Administrator shall determine, on the basis of information available, the amount, if any, due the Subcontractor and shall pay the amount determined as follows:
1. If the termination is for the convenience of NREL/Government, include--
- (i) An amount for direct labor hours (as defined in the Schedule of the subcontract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule, less any hourly rate payments already made to the Subcontractor;
  - (ii) An amount (computed under the provisions for payment of materials) for material expenses incurred before the effective date of termination, not previously paid to the Subcontractor;
  - (iii) An amount for labor and material expenses computed as if the expenses were incurred before the effective date of termination if they are reasonably incurred after the effective date, with the approval of or as directed by the NREL Subcontract Administrator; however, the Subcontractor shall discontinue these expenses as rapidly as practicable;
  - (iv) If not included in subdivision (H)(1)(i), (ii), or (iii) of this clause, the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the subcontract; and

- (v) The reasonable costs of settlement of the work terminated, including--
  - a. Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
  - b. The termination and settlement of Lower-tier subcontracts (excluding the amounts of such settlements); and
  - c. Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory.

2. If the termination is for default of the Subcontractor, include the amounts computed under subparagraph (H)(1) of this clause but omit--

- (i) Any amount for preparation of the Subcontractor's termination settlement proposal; and
- (ii) The portion of the hourly rate allocable to profit for any direct labor hours expended in furnishing materials and services not delivered to and accepted by NREL/Government.

\* \* \* \* \*

I. If the termination is partial, the Subcontractor may file with the NREL Subcontract Administrator a proposal for an equitable adjustment of the price(s) for the continued portion of the subcontract. The NREL Subcontract Administrator shall make any equitable adjustment agreed upon. Any proposal by the Subcontractor for an equitable adjustment under this clause shall be requested within ninety (90) days from the effective date of termination, unless extended in writing by the NREL Subcontract Administrator.

**CLAUSE 38 - EXCUSABLE DELAYS (APR 1984)**

*Derived from FAR 52.249-14 (FD)*

*(Applies to cost reimbursement subcontracts on a fee basis)*

A. Except for defaults of subcontractors at any tier, the Subcontractor shall not be in default because of any failure to perform this subcontract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Subcontractor. Examples of these causes are--

- 1. Acts of God or of the public enemy,
- 2. Acts of the Government in either its sovereign or contractual capacity,
- 3. Fires,
- 4. Floods,
- 5. Epidemics,

6. Quarantine restrictions,
7. Strikes,
8. Freight embargoes, and
9. Unusually severe weather.

In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Subcontractor. "Default" includes failure to make progress in the work so as to endanger performance.

- B. If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Subcontractor and lower-tier subcontractor, and without the fault or negligence of either, the Subcontractor shall not be deemed to be in default, unless--
  1. The lower-tier subcontracted supplies or services were obtainable from other sources;
  2. The NREL Subcontract Administrator ordered the Subcontractor in writing to purchase these supplies or services from the other source; and
  3. The Subcontractor failed to comply reasonably with this order.
- C. Upon request of the Subcontractor, the NREL Subcontract Administrator shall ascertain the facts and extent of the failure. If the NREL Subcontract Administrator determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of NREL/Government under the termination clause of this subcontract.

**CLAUSE 39 - REFUND OF ROYALTIES (FEB 1995)**

*Derived from DEAR 952.227-9 (FD)*

- A. The subcontract price includes certain amounts for royalties payable by the Subcontractor or lower-tier subcontractors or both, which amounts have been reported to the DOE through NREL.
- B. The term "royalties" as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this subcontract or any lower-tier subcontract hereunder. The term also includes any costs or charges associated with the access to, use of, or other right pertaining to data that is represented to be proprietary and is related to the performance of this subcontract or the copying of such data or data that is copyrighted.
- C. The Subcontractor shall furnish to the DOE through NREL, before final payment under this subcontract, a statement of royalties paid or required to be paid in connection with performing this subcontract and lower-tier subcontracts hereunder together with the reasons.
- D. The Subcontractor will be compensated for royalties reported under paragraph (C) of this clause, only to the extent that such royalties were included in the subcontract price and are determined by the DOE to be properly chargeable to the Government and allocable to the subcontract. To

the extent that any royalties that are included in the subcontract price are not, in fact, paid by the Subcontractor or are determined by the DOE not to be properly chargeable to the Government and allocable to the subcontract, the subcontract price shall be reduced. Repayment or credit to the Government shall be made as the DOE directs. The approval by DOE of any individual payments or royalties shall not prevent the Government from contesting at any time the enforceability, validity, scope of, or title to, any patent or the proprietary nature of data pursuant to which a royalty or other payment is to be or has been made.

- E. If, at any time within three (3) years after final payment under this subcontract, the Subcontractor for any reason is relieved in whole or in part from the payment of the royalties included in the final subcontract price as adjusted pursuant to paragraph (D) of this clause, the Subcontractor shall promptly notify the DOE through NREL of that fact and shall reimburse the Government in a corresponding amount.
- F. The substance of this clause, including this paragraph (F), shall be included in any subcontract in which the amount of royalties reported during negotiation of the subcontract exceeds \$250.

**CLAUSE 40 - FOREIGN TRAVEL (FEB 1997)**

*Derived from DEAR 952.247-70 (FD)*

- A. Foreign travel, when charged directly, shall be subject to the prior approval of the NREL Subcontract Administrator for each separate trip regardless of whether funds for such travel are contained in an approved budget. Foreign travel is defined as any travel outside of Canada, Mexico, and the United States and its territories and possessions.
- B. Request for approval shall be submitted at least forty-five (45) days prior to the planned departure date, be on a Request for Approval of Foreign Travel form, and when applicable, include a notification of proposed soviet-bloc travel.

**CLAUSE 41 - INTEGRATION OF ENVIRONMENT, SAFETY, AND HEALTH INTO WORK PLANNING AND EXECUTION (JUN 1997)**

*Derived from DEAR 970.5204-2 (FD)*

*(Applies to subcontracts that involve complex or hazardous work that is to be performed on a Government-owned or -leased facility.)*

- A. For the purposes of this clause,
  - 1. "Safety" encompasses environment, safety, and health, including pollution prevention and waste minimization; and
  - 2. "Employees" include Lower-tier subcontractor employees.
- B. In performing work under this subcontract, the Subcontractor shall perform work safely, in a manner that ensures adequate protection for employees, the public, and the environment, and shall be accountable for the safe performance of work. The Subcontractor shall exercise a degree of care commensurate with the work and the associated hazards. The Subcontractor shall ensure that management of environment, safety, and health (ES&H) functions and activities becomes an

integral but visible part of the Subcontractor's work planning and execution processes. The Subcontractor shall, in the performance of work, ensure that:

1. Line management is responsible for the protection of employees, the public, and the environment. Line management includes those Subcontractor and lower-tier subcontractor employees managing or supervising employees performing work.
2. Clear and unambiguous lines of authority and responsibility for ensuring ES&H are established and maintained at all organizational levels.
3. Personnel possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities.
4. Resources are effectively allocated to address ES&H, programmatic, and operational considerations. Protecting employees, the public, and the environment is a priority whenever activities are planned and performed.
5. Before work is performed, the associated hazards are evaluated and an agreed-upon set of ES&H standards and requirements are established which, if properly implemented, provide adequate assurance that employees, the public, and the environment are protected from adverse consequences.
6. Administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and associated hazards. Emphasis should be on designing the work and/or controls to reduce or eliminate the hazards and to prevent accidents and unplanned releases and exposures.
7. The conditions and requirements to be satisfied for operations to be initiated and conducted are established and agreed-upon by NREL/Government and the Subcontractor. These agreed-upon conditions and requirements are requirements of the subcontract and binding upon the Subcontractor. The extent of documentation and level of authority for agreement shall be tailored to the complexity and hazards associated with the work and shall be established in a Safety Management System.

C. The Subcontractor shall manage and perform work in accordance with a documented Safety Management System (System) that fulfills all conditions in paragraph (B) of this clause at a minimum. Documentation of the System shall describe how the Subcontractor will:

1. Define the scope of work;
2. Identify and analyze hazards associated with the work;
3. Develop and implement hazard controls;
4. Perform work within controls; and
5. Provide feedback on adequacy of controls and continue to improve safety management.

- D. The System shall describe how the Subcontractor will establish, document, and implement safety performance objectives, performance measures, and commitments in response to DOE program and budget execution guidance while maintaining the integrity of the System. The System shall also describe how the Subcontractor will measure system effectiveness.
- E. The Subcontractor shall submit to the NREL Subcontract Administrator documentation of its System for review and approval. Dates for submittal, discussions, and revisions to the System will be established by the NREL Subcontract Administrator. Guidance on the preparation, content, review, and approval of the System will be provided by the NREL Subcontract Administrator. On an annual basis, the Subcontractor shall review and update, for DOE approval, its safety performance objectives, performance measures, and commitments consistent with and in response to DOE's program and budget execution guidance and direction. Resources shall be identified and allocated to meet the safety objectives and performance commitments as well as maintain the integrity of the entire System. Accordingly, the System shall be integrated with the Subcontractor's business processes for work planning, budgeting, authorization, execution, and change control.
- F. The Subcontractor shall comply with, and assist the DOE in complying with, ES&H requirements of all applicable laws and regulations, and applicable directives identified in the clause of this subcontract on Laws, Regulations, and DOE Directives. The Subcontractor shall cooperate with Federal and non-Federal agencies having jurisdiction over ES&H matters under this subcontract.
- G. The Subcontractor shall promptly evaluate and resolve any noncompliance with applicable ES&H requirements and the System. If the Subcontractor fails to provide resolution or if, at any time, the Subcontractor's acts or failure to act causes substantial harm or an imminent danger to the environment or health and safety of employees or the public, the NREL Subcontract Administrator may issue an order stopping work in whole or in part. Any stop work order issued by a NREL Subcontract Administrator under this clause (or issued by the Subcontractor to a lower-tier subcontractor in accordance with paragraph (I) of this clause) shall be without prejudice to any other legal or contractual rights of NREL/Government. In the event that the NREL Subcontract Administrator issues a stop work order, an order authorizing the resumption of the work may be issued at the discretion of the NREL Subcontract Administrator. The Subcontractor shall not be entitled to an extension of time or additional fee or damages by reason of, or in connection with, any work stoppage ordered in accordance with this clause.
- H. The Subcontractor is responsible for compliance with the ES&H requirements applicable to this contract regardless of the performer of the work.
- I. The Subcontractor shall include a clause substantially the same as this clause in lower-tier subcontracts involving complex or hazardous work on site at a DOE-owned or -leased facility. Such lower-tier subcontracts shall provide for the right to stop work under the conditions described in paragraph (G) of this clause. Depending on the complexity and hazards associated with the work, the Subcontractor may require that the lower-tier subcontractor submit a Safety Management System for the Subcontractor's review and approval.

**CLAUSE 42 - ACCOUNTS, RECORDS, AND INSPECTION (JUN 1996)**

*Derived from DEAR 970.5204-9 (FD)*

A. Accounts.

The Subcontractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting all allowable costs incurred, revenues or other applicable credits, fixed-fee accruals, and the receipt, use and disposition of all Government property coming into the possession of the Subcontractor under this subcontract. The system of accounts employed by the Subcontractor shall be acceptable to NREL/Government and in accordance with generally accepted accounting principles consistently applied.

B. Inspection and Audit of Accounts and Records.

All books of account and records relating to this subcontract shall be subject to inspection and audit by NREL/Government at all reasonable times, before and during the period of retention provided for in (D) below, and the Subcontractor shall afford proper facilities for such inspection and audit.

C. Audit of Subcontractors' Records.

The Subcontractor also agrees, with respect to any lower-tier subcontracts (including fixed price or unit-price lower-tier subcontracts or purchase orders) where, under the terms of the lower-tier subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the lower-tier subcontractor's costs or arrange for such an audit to be performed by the cognizant Government audit agency through the NREL Subcontract Administrator.

D. Disposition of Records.

Except as agreed upon by NREL and the Subcontractor, all financial and cost reports, books of account and supporting documents, and other data evidencing costs allowable, revenues, and other applicable credits under this subcontract, shall be the property of the Government, and shall be delivered to NREL or otherwise disposed of by the Subcontractor either as the NREL Subcontract Administrator may from time to time direct during the progress of the work or, in any event, as the NREL Subcontract Administrator shall direct upon completion or termination of this subcontract and final audit of accounts hereunder. Except as provided in this subcontract, all other records in the possession of the Subcontractor relating to this subcontract shall be preserved by the Subcontractor for a period of three (3) years after final payment under this subcontract or otherwise disposed of in such manner as may be agreed upon by NREL/Government and the Subcontractor.

E. Reports.

The Subcontractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this subcontract as the NREL Subcontract Administrator may from time to time require.

F. Inspections.

NREL/Government shall have the right to inspect the work and activities of the Subcontractor under this subcontract at such time and in such manner as it shall deem appropriate.

G. Lower-tier Subcontracts.

The Subcontractor further agrees to require the inclusion of provisions similar to those in paragraphs (A) through (G) and paragraph (I) of this clause in all lower-tier subcontracts (including fixed price or unit price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the lower-tier subcontract, costs incurred are a factor in determining the amount payable to the lower-tier subcontractor.

*(The following paragraph (H) shall be included in--*

1. *All cost-type subcontracts (or lower-tier subcontracts) involving an estimated cost exceeding \$5 million and expected to run more than two (2) years, and*
2. *Any other cost-type subcontract (or lower-tier subcontract) where deemed advisable by the DOE Head of the Contracting Activity and when the Subcontractor (or lower-tier subcontractor) already has an established internal audit organization.)*

H. Internal Audit.

The Subcontractor agrees to conduct an internal audit and examination satisfactory to NREL/Government of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this subcontract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the NREL Subcontract Administrator.

I. Comptroller General.

1. The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Subcontractor's directly pertinent records involving transactions related to this subcontract or a lower-tier subcontract hereunder.
2. This paragraph may not be construed to require the Subcontractor or lower-tier subcontractor to create or maintain any record that the Subcontractor or lower-tier subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.
3. Nothing in this subcontract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this subcontract.

**CLAUSE 43 - PRINTING CLAUSE FOR SUBCONTRACTS (APR 1984)**

*Derived from DEAR 970.5204-19 (FD)*

- A. To the extent that duplicating or printing services may be required in the performance of this subcontract, the Subcontractor shall provide or secure such services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and DOE Directives relative thereto.

- B. The term "Printing" includes the following processes: composition, platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this subcontract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.
- C. Printing services not obtained in compliance with this guidance shall result in the cost of such printing being disallowed.
- D. In all lower-tier subcontracts hereunder which require printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations), the Subcontractor shall include a provision substantially the same as this clause.

**CLAUSE 44 - PROPERTY (JUNE 1997)**

*Derived from DEAR 970.5204-21 (FD)*

*(Applies to cost reimbursement subcontracts)*

- A. Furnishing of Government property.

The Government reserves the right to furnish any property or services required for the performance of the work under this subcontract.

- B. Title to property.

Except as otherwise provided by the NREL Subcontract Administrator, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Subcontractor, for the cost of which the Subcontractor is entitled to be reimbursed as a direct item of cost under this subcontract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The Subcontractor shall make such disposition of rejected items as the NREL Subcontract Administrator shall direct. Title to other property, the cost of which is reimbursable to the Subcontractor under this subcontract, shall pass to and vest in the Government upon

1. Issuance for use of such property in the performance of this subcontract, or
2. Commencement of processing or use of such property in the performance of this subcontract, or
3. Reimbursement of the cost thereof by the Government, whichever first occurs.

Property furnished by the Government and property purchased or furnished by the Subcontractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

- C. Identification.

To the extent directed by the NREL Subcontract Administrator, the Subcontractor shall identify Government property coming into the Subcontractor's possession or custody, by marking and segregating in such a way, satisfactory to the NREL Subcontract Administrator, as shall indicate its ownership by the Government.

D. Disposition.

The Subcontractor shall make such disposition of Government property which has come into the possession or custody of the Subcontractor under this subcontract as the NREL Subcontract Administrator may direct during the progress of the work or upon completion or termination of this subcontract. The Subcontractor may, upon such terms and conditions as the NREL Subcontract Administrator may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the NREL Subcontract Administrator and the Subcontractor as the fair value thereof. The amount received by the Subcontractor as the result of any disposition, or the agreed fair value of any such property acquired by the Subcontractor, shall be applied in reduction of costs allowable under this subcontract or shall be otherwise credited to account to the Government, as the NREL Subcontract Administrator may direct. Upon completion of the work or the termination of this subcontract, the Subcontractor shall render an accounting, as prescribed by the NREL Subcontract Administrator, of all Government property which had come into the possession or custody of the Subcontractor under this subcontract.

E. Protection of Government property management of high-risk property and classified materials.

1. The Subcontractor shall take all reasonable precautions, and such other actions as may be directed by the NREL Subcontract Administrator, or in the absence of such direction, in accordance with sound business practice, to safeguard and protect Government property in the Subcontractor's possession or custody.
2. In addition, the Subcontractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of high-risk property and classified materials throughout the life cycle of the property and materials consistent with the policies, practices and procedures for property management contained in the Federal Property Management regulations (41 CFR chapter 101), the Department of Energy Property Management regulations (41 CFR chapter 109), and other applicable regulations.
3. High-risk property is property, the loss, destruction, damage to, or the unintended or premature transfer of which could pose risks to the public, the environment, or the national security interests of the United States. High-risk property includes proliferation sensitive, nuclear related dual use, export controlled, chemically or radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list.

F. Risk of loss of Government property.

1. (i) The Subcontractor shall not be liable for the loss or destruction of, or damage to, Government property unless such loss, destruction, or damage was caused by any of the following:

- a. Willful misconduct or lack of good faith on the part of the Subcontractor's managerial personnel;
- b. Failure of the Subcontractor's managerial personnel to take all reasonable steps to comply with any appropriate written direction of the NREL Subcontract Administrator to safeguard such property under paragraph (E) of this clause; or
- c. Failure of Subcontractor managerial personnel to establish, administer, or properly maintain an approved property management system in accordance with paragraph (I)(1) of this clause.

(ii) If, after an initial review of the facts, the NREL Subcontract Administrator informs the Subcontractor that there is reason to believe that the loss, destruction of, or damage to the Government property results from conduct falling within one of the categories set forth above, the burden of proof shall be upon the Subcontractor to show that the Subcontractor should not be required to compensate the Government for the loss, destruction, or damage.

2. In the event that the Subcontractor is determined liable for the loss, destruction or damage to Government property in accordance with (F)(1) of this clause, the Subcontractor's compensation to the Government shall be determined as follows:

(i) For damaged property, the compensation shall be the cost of repairing such damaged property, plus any costs incurred for temporary replacement of the damaged property. However, the value of repair costs shall not exceed the fair market value of the damaged property. If a fair market value of the property does not exist, the NREL Subcontract Administrator shall determine the value of such property, consistent with all relevant facts and circumstances.

(ii) For destroyed or lost property, the compensation shall be the fair market value of such property at the time of such loss or destruction, plus any costs incurred for temporary replacement and costs associated with the disposition of destroyed property. If a fair market value of the property does not exist, the NREL Subcontract Administrator shall determine the value of such property, consistent with all relevant facts and circumstances.

3. The portion of the cost of insurance obtained by the Subcontractor that is allocable to coverage of risks of loss referred to in paragraph (F)(1) of this clause is not allowable.

G. Steps to be taken in event of loss. In the event of any damage, destruction, or loss to Government property in the possession or custody of the Subcontractor with a value above the threshold set out in the Subcontractor's approved property management system, the Subcontractor:

1. Shall immediately inform the NREL Subcontract Administrator of the occasion and extent thereof,
2. Shall take all reasonable steps to protect the property remaining, and

3. Shall repair or replace the damaged, destroyed, or lost property in accordance with the written direction of the NREL Subcontract Administrator.

The Subcontractor shall take no action prejudicial to the right of the Government to recover therefore, and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

H. Government property for Government use only.

Government property shall be used only for the performance of this subcontract.

I. Property Management.

1. Property Management System.

- (i) The Subcontractor shall establish, administer, and properly maintain an approved property management system of accounting for and control, utilization, maintenance, repair, protection, preservation, and disposition of Government property in its possession under the subcontract. The Subcontractor's property management system shall be submitted to the NREL Subcontract Administrator for approval and shall be maintained and administered in accordance with sound business practice, applicable Federal Property Management regulations and Department of Energy Property Management regulations, and such directives or instructions which the NREL Subcontract Administrator may from time to time prescribe.
- (ii) In order for a property management system to be approved, it must provide for:
  - a. Comprehensive coverage of property from the requirement identification, through its life cycle, to final disposition;
  - b. Employee personal responsibility and accountability for Government-owned property;
  - c. Full integration with the Subcontractor's other administrative and financial systems; and
  - d. A method for continuously improving property management practices through the identification of best practices established by "best in class" performers.
- (iii) Approval of the Subcontractor's property management system shall be contingent upon the completion of the baseline inventory as provided in subparagraph (I)(2) of this clause.

2. Property Inventory.

- (i) Unless otherwise directed by the NREL Subcontract Administrator, the Subcontractor shall within six months after execution of the subcontract provide a baseline inventory covering all items of Government property.
- (ii) If the Subcontractor is succeeding another Subcontractor in the performance of this subcontract, the Subcontractor shall conduct a joint reconciliation of the property inventory with the predecessor Subcontractor.

The Subcontractor agrees to participate in a joint reconciliation of the property inventory at the completion of this subcontract. This information will be used to provide a baseline for the succeeding subcontract as well as information for closeout of the predecessor subcontract.

- J. The term "Subcontractor's managerial personnel" as used in this clause means the Subcontractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of:
1. All or substantially all of the Subcontractor's business; or
  2. All or substantially all of the Subcontractor's operations at any one facility or separate location to which this subcontract is being performed; or
  3. A separate and complete major industrial operation in connection with the performance of this subcontract; or
  4. A separate and complete major construction, alteration, or repair operation in connection with performance of this subcontract; or
  5. A separate and discrete major task or operation in connection with the performance of this subcontract.

*(Note: Substitute the following paragraph (J) for nonprofit Subcontractors:)*

- J. The term "Subcontractor's managerial personnel" as used in this clause means the Subcontractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of:
1. The Subcontractor's business; or
  2. The Subcontractor's operations at any one facility or separate location at which this subcontract is being performed; or
  3. The Subcontractor's Government property system and/or a Major System Acquisition or Major Project as defined in DOE Order 4700.1 (Version in effect on effective date of subcontract).
- K. The Subcontractor shall include this clause in cost reimbursable lower-tier subcontracts.

**CLAUSE 45 - TAXES (APR 1984)**

*Derived from DEAR 970.5204-23 (FD)*

- A. The Subcontractor agrees to notify the NREL Subcontract Administrator of any State or local tax, fee, or charge levied or purported to be levied on or collected from the Subcontractor with respect to the subcontract work, any transaction thereunder, or property in the custody or control of the Subcontractor and constituting an allowable item of cost if due and payable, but which the Subcontractor has reason to believe, or the NREL Subcontract Administrator has advised the Subcontractor, is or may be inapplicable or invalid; \* and the Subcontractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the NREL Subcontract Administrator. Any State or local tax, fee, or charge paid with the approval of the NREL Subcontract Administrator or on the basis of advice from the NREL Subcontract Administrator that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

*\*Requirement for notice may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.*

- B. The Subcontractor agrees to take such action as may be required or approved by the NREL Subcontract Administrator to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the NREL Subcontract Administrator to seek recovery of any payments made, including assignment to NREL/Government, or its designee of all rights to an abatement or refund thereof, and granting permission for NREL/Government to join with the Subcontractor in any proceedings for the recovery thereof or to sue for recovery in the name of the Subcontractor. If the NREL Subcontract Administrator directs the Subcontractor to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the Subcontractor for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the article entitled "Litigation and Claims" shall apply and the costs and expenses incurred by the Subcontractor shall be allowable items of costs, as provided in this subcontract, together with the amount of any judgment rendered against the Subcontractor.
- C. NREL/Government shall hold the Subcontractor harmless from penalties and interest incurred through compliance with this clause. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of NREL/Government.

**CLAUSE 46 - PERMITS OR LICENSES (APR 1984)**

*Derived from DEAR 970.5204-29*

Except as otherwise directed by the NREL Subcontract Administrator, the Subcontractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the work under this subcontract is performed.

**CLAUSE 47 - ACCESS TO AND OWNERSHIP OF RECORDS (JUNE 1997)**

*Derived from DEAR 970.5204-79 (FD)*

*(Applies to cost reimbursement subcontracts)*

A. Government-owned records.

Except as provided in paragraph (B) of this clause, all records acquired or generated by the Subcontractor in its performance of this subcontract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the Subcontractor either as the NREL Subcontract Administrator may from time to time direct during the process of the work or, in any event, as the NREL Subcontract Administrator shall direct upon completion or termination of the subcontract.

B. Subcontractor-owned records.

The following records are considered the property of the Subcontractor and are not within the scope of paragraph (A) of this clause. (The NREL Subcontract Administrator shall identify which of the following categories of records will be included in the clause.)

1. Employment-related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/ health-related records and similar files), except for those records described by the subcontract as being maintained in Privacy Act systems of records.
2. Confidential Subcontractor financial information, and correspondence between the Subcontractor and other segments of the Subcontractor located away from the NREL facility (i.e., the Subcontractor's corporate headquarters);
3. Records relating to any procurement action by the Subcontractor, except for records that under 48 CFR (DEAR) 970.5204-9, Accounts, Records, and Inspection, are described as the property of the Government; and
4. Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and
5. [Reserved]

C. Subcontract completion or termination.

In the event of completion or termination of this subcontract, copies of any of the Subcontractor-owned records identified in paragraph (B) of this clause, upon the request of the Government, shall be delivered to DOE or its designees, including successor Subcontractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act), as appropriate.

D. Inspection, copying, and audit of records.

All records acquired or generated by the Subcontractor under this subcontract in the possession of the Subcontractor, including those described at paragraph (B) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the Subcontractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the NREL Subcontract Administrator, the Subcontractor shall deliver such records to a location specified by the NREL Subcontract Administrator for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

E. Applicability.

Paragraphs (B), (C), and (D) of this clause apply to all records without regard to the date or origination of such records.

F. Records retention standards.

Special records retention standards, described at DOE Order 1324.5B, Records Management Program and DOE Records Schedules (version in effect on effective date of subcontract), are applicable for the classes of records described therein, whether or not the records are owned by the Government or the Subcontractor. In addition, the Subcontractor shall retain individual radiation exposure records generated in the performance of work under this subcontract until DOE authorizes disposal. The Government may waive application of these record retention schedules, if, upon termination or completion of the subcontract, the Government exercises its right under paragraph (C) of this clause to obtain copies and delivery of records described in paragraphs (A) and (B) of this clause.

G. Flow down.

The Subcontractor shall include the requirements of this clause in all lower-tier subcontracts that are of a cost-reimbursement type if any of the following factors is present:

1. The value of the lower-tier subcontract is greater than \$2 million (unless specifically waived by the NREL Subcontract Administrator);
2. The NREL Subcontract Administrator determines that the lower-tier subcontract is, or involves, a critical task related to the subcontract; or
3. The lower-tier subcontract includes 48 CFR (DEAR) 970.5204-2, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

**CLAUSE 48 - ACCESS SECURITY (SPECIAL)(APR 1999)**

- A. Access to NREL operated facilities is controlled in accordance with the DOE's requirements. The Subcontractor shall ensure that any of its, or its lower-tier subcontractors, officers, employees, or agents be specifically authorized site access by an NREL employee, and identified, badged, and registered by NREL Security prior to entering any NREL operated facility.

- B. The Subcontractor shall further ensure that any of its, or its lower-tier subcontractors, officers, employees, or agents who are not U.S. citizens or U.S. permanent residents and who will perform subcontract work on NREL operated facilities for a total of thirty (30) calendar days or greater, or who are citizens of a DOE designated sensitive country, or who work for a company based in a sensitive country, or who are stateless persons, submit a completed DOE Form IA 473 to NREL six to eight weeks before access is required. Access shall be subject to DOE approval. Any such person denied access by DOE shall not be assigned by the Subcontractor to work at NREL operated facilities.
- C. The Subcontractor shall provide to the Subcontract Administrator, prior to the initiation of work, evidence, including visa types and expiration dates, that legally sufficient work permits have been obtained from the U.S. Immigration and Naturalization Service, and such permits are properly maintained, for any of its, or its lower-tier subcontractors officers, employees, or agents who are not U.S. citizens or U.S. permanent residents and who will perform subcontract work at NREL operated facilities.
- D. Further, after the Subcontractor, or its lower-tier subcontractors, has commenced subcontract work, the Subcontractor shall provide to the Subcontract Administrator similar advance notice, including visa types and expiration dates, for all subsequently assigned individuals who are not U.S. citizens or U.S. permanent residents who will perform subcontract work at NREL operated facilities.
- E. NREL reserves the right to revoke site access authorization for any person violating NREL or DOE safety and security policies and procedures.
- F. As a condition of entry to NREL premises, the Subcontractor agrees to permit NREL security personnel to search its, and its lower-tier subcontractors, officers, employees, or agents vehicles, packages, tool boxes, or other containers for the purpose of preventing prohibited articles access to NREL premises or to detect or deter the unauthorized removal of Government property from NREL.
- G. Prohibited articles include cameras, copying machines, reproduction devices, recording devices, radio transmitters, firearms, explosive devices, incendiary devices, dangerous weapons or materials, controlled substances (illegal drugs), or alcoholic beverages.
- H. The Subcontractor shall include this article, including this Paragraph H, in all lower-tier subcontracts involving work at NREL operated facilities.



# **APPENDIX C - 2**

## **INTELLECTUAL PROPERTY PROVISIONS**

### **FOR**

#### **DOMESTIC SMALL BUSINESS, EDUCATIONAL INSTITUTIONS, AND OTHER NONPROFIT ORGANIZATIONS (RESEARCH, DEVELOPMENT, OR DEMONSTRATION)**



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## CLAUSES

### CLAUSE 1 -- AUTHORIZATION AND CONSENT (JUL 1995)

*Derived from FAR 52.227-1*

- A. The Government authorizes and consents to all use and manufacture, in performing this subcontract or any subcontract at any tier, of any invention described in and covered by a United States patent
1. Embodied in the structure or composition of any article the delivery of which is accepted by the Government through NREL under this subcontract or;
  2. Used in machinery, tools, or methods whose use necessarily results from compliance by the Subcontractor or a lower-tier subcontractor with--
    - (i) Specifications or written provisions forming a part of this subcontract or
    - (ii) Specific written instructions given by the DOE through NREL directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this subcontract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.
- B. The Subcontractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all subcontracts at any tier for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed the simplified acquisition threshold); however, omission of this clause from any lower-tier subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

### ALTERNATE I (APR 1984)

*Alternate I of this clause is applicable if this award is for the conduct of research, development, or demonstration*

The following is substituted for paragraph (A) of the clause:

- A. The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this subcontract or any subcontract at any tier.

**ALTERNATE II (APR 1984)**

*Alternate II of this clause is applicable if this award includes an order or lower-tier subcontract for communication services and facilities*

The following is substituted for paragraph (A) of the clause:

- A. The Government authorizes and consents to all use and manufacture in the performance of any order at any tier or subcontract at any tier placed under this subcontract for communication services and facilities for which rates, charges, and tariffs are not established by a government regulatory body, of any invention described in and covered by a United States patent
  - 1. Embodied in the structure or composition of any article the delivery of which is accepted by the Government through NREL under this subcontract or
  - 2. Used in machinery, tools, or methods whose use necessarily results from compliance by the Subcontractor or a lower-tier subcontractor with specifications or written provisions forming a part of this subcontract or with specific written instructions given by the DOE through NREL directing the manner of performance.

**CLAUSE 2 -- NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (AUG 1996)**

*Derived from FAR 52.227-2*

*The provisions of this clause shall be applicable only if the amount of this award exceeds \$100,000, and the award is for the conduct of construction, research, development, or demonstration*

- A. The Subcontractor shall report to the DOE through NREL, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this subcontract of which the Subcontractor has knowledge.
- B. In the event of any claim or suit against the Government or NREL on account of any alleged patent or copyright infringement arising out of the performance of this subcontract or out of the use of any supplies furnished or work or services performed under this subcontract, the Subcontractor shall furnish to the Government, when

requested by the DOE through NREL, all evidence and information in possession of the Subcontractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Subcontractor has agreed to indemnify the Government.

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

**CLAUSE 3 -- RIGHTS IN DATA - GENERAL (JUN 1987), AS MODIFIED BY DEAR 927.409 (EFFECTIVE APR 1998)**

*Derived from FAR 52.227-14*

*If this award requires the use or delivery of limited rights data and/or restricted computer software, Alternates II and/or III are incorporated, unless modified upon recommendation of Patent Counsel.*

A. Definitions.

1. "Computer data bases," as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.
2. "Computer software," as used in this clause, means--
  - (i) Computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and
  - (ii) Data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.
3. "Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. For the purposes of this clause, the term does not include data incidental to the administration of this subcontract, such as financial, administrative, cost and pricing, or management information.

4. "Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.
5. "Limited rights data," as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (G)(2) of this section if included in this clause.
6. "Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of subparagraph (G)(3) of this section if included in this clause.
7. "Technical data," as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.
8. "Unlimited rights," as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

B. Allocation of rights.

1. Except as provided in paragraph (C) below regarding copyright, the Government shall have unlimited rights in:
  - (i) Data first produced in the performance of this subcontract;
  - (ii) Form, fit, and function data delivered under this subcontract;

- (iii) Data delivered under this subcontract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair items, components, or processes delivered or furnished for use under this subcontract; and
- (iv) All other data delivered under this subcontract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (G) below.

2. The Subcontractor shall have the right to:

- (i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this subcontract, unless provided otherwise in paragraph (D) below;
- (ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (G) below;
- (iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (E) and (F) below; and
- (iv) Establish claim to copyright subsisting in data first produced in the performance of this subcontract to the extent provided in subparagraph (C)(1) below.

C. Copyright.

- 1. Data first produced in the performance of this subcontract. Unless provided otherwise in subparagraph (D) below, the Subcontractor may establish, without prior approval of the DOE, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this subcontract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, express written permission of the DOE is required to establish claim to copyright subsisting in all other data first produced in the performance of this subcontract. When claim to copyright is made, the Subcontractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including subcontract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the

Subcontractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Subcontractor grants to the Government and others acting in its behalf, a paid-up nonexclusive, irrevocable worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government.

2. Data not first produced in the performance of this subcontract. The Subcontractor shall not, without prior written permission of the DOE, incorporate in data delivered under this subcontract any data not first produced in the performance of this subcontract and which contains the copyright notice of 17 U.S.C. 401 and 402, unless the Subcontractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph (G)(3) below if included in this subcontract or as otherwise may be provided in a collateral agreement incorporated in or made part of this subcontract.
3. Removal of copyright notices.

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

D. Release, publication and use of data.

1. The Subcontractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this subcontract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided below in this paragraph or expressly set forth in this subcontract.
2. The Subcontractor agrees that to the extent it receives or is given access to data necessary for the performance of this subcontract which contain restrictive markings, the Subcontractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the DOE.
3. The Subcontractor agrees not to assert copyright in computer software first produced in the performance of this subcontract without prior written permission of the DOE Patent Counsel assisting the subcontracting activity. When such

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

E. Unauthorized marking of data.

1. Notwithstanding any other provisions of this subcontract concerning inspection or acceptance, if any data delivered under this subcontract are marked with the notices specified in subparagraphs (G)(2) or (G)(3) below and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this subcontract, the DOE may at any time either return the data to the Subcontractor, or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.
  - (i) The DOE shall make written inquiry to the Subcontractor affording the Subcontractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;
  - (ii) If the Subcontractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the DOE for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will not longer be made subject to any disclosure prohibitions.
  - (iii) If the Subcontractor provides written justification to substantiate the propriety of the markings within the period set in subdivision (i) above, the DOE shall consider such written justification and determine whether or not the markings are to be canceled or ignore. If the DOE determines that the markings are authorized, the Subcontractor shall be so notified in writing. If the DOE determines, with concurrence of the Head of the Contracting Activity, that the markings are not authorized, the DOE shall furnish the Subcontractor a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Subcontractor files suit in a court of competent jurisdiction within 90 days of receipt of the DOE's decision. The Government shall continue to abide by the markings under this subdivision (iii) until final resolution of the matter either by the DOE's determination becoming final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no

longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

2. The time limits in the procedures set forth in subparagraph (1) above may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.
3. This paragraph (E) does not apply if this subcontract is for a major system or for support of a major system by a civilian agency other than NASA and the U.S. Coast Guard subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949.
4. Except to the extent the Government's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Subcontractor is not precluded by this paragraph (E) from bringing a claim under the Contract Disputes Act, including pursuant to the Disputes clause of this subcontract, as applicable, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this subcontract.

F. Omitted or incorrect markings.

1. Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (G) below, or the copyright notice required by paragraph (C) above, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Subcontractor may request, within 6 months (or a longer time approved by the DOE for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Subcontractor's expense, and the DOE may agree to do so if the Subcontractor:
  - (i) Identifies the data to which the omitted notice is to be applied;
  - (ii) Demonstrates that the omission of the notice was inadvertent;
  - (iii) Establishes that the use of the proposed notice is authorized; and
  - (iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

2. The DOE may also

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

G. Protection of limited rights data and restricted computer software.

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

H. Lower-tier subcontracting.

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

I. Relationship to patents.

Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

J. The Subcontractor agrees, except as may be otherwise specified in this subcontract for specific data items listed as not subject to this paragraph, that the DOE or an authorized representative may, up to three years after acceptance of all items to be delivered under this subcontract, inspect at the Subcontractor's facility any data withheld pursuant to

paragraph (g)(1) above, for purposes of verifying the Subcontractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Subcontractor whose data are to be inspected demonstrates to the DOE that there would be a possible conflict of interest if the inspection were made by a particular representative, the DOE shall designate an alternate inspector.

### ALTERNATE II

(G)(2) Notwithstanding subparagraph (G)(1) of this clause, the subcontract may identify and specify the delivery of limited rights data, or the DOE may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Subcontractor may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, subject to the provisions of paragraphs (E) and (F) of this clause, in accordance with such Notice:

#### LIMITED RIGHTS NOTICE (JUN 1987)

- A. These data are submitted with limited rights under Government Subcontract No.(identify the subcontract) (and lower-tier subcontract No. , if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Subcontractor, be used for purposes of manufacture nor disclosed outside the Government or NREL; except that the Government may disclose these data outside the Government through NREL for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

*[Agencies may list additional purposes as set forth in 27.404(d)(1) or if none, so state]*

- B. This Notice shall be marked on any reproduction of these data, in whole or in part.

### ALTERNATE III

(G)(3)(i) Notwithstanding subparagraph (G)(1) of this clause, the subcontract may identify and specify the delivery of restricted computer software, or the Government may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Subcontractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (E) and (F) of this clause, in accordance with the Notice:

## RESTRICTED RIGHTS NOTICE (JUN 1987)

- A. This computer software is submitted with restricted rights under Government Subcontract No. (identify the subcontract) (and lower-tier subcontract No. , if appropriate). It may not be used, reproduced, or disclosed by the Government or NREL except as provided in paragraph (B) of this Notice or as otherwise expressly stated in the subcontract.
- B. This computer software may be:
1. Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;
  2. Used or copied for use in a backup computer if any computer for which it was acquired is inoperative;
  3. Reproduced for safekeeping (archives) or backup purposes;
  4. Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software are made subject to the same restricted rights;
  5. Disclosed to and reproduced for use by support service Subcontractors in accordance with subparagraphs (B)(1) through (4) of this clause, provided the Government and NREL makes such disclosure or reproduction subject to these restricted rights; and
  6. Used or copied for use in or transferred to a replacement computer.
- C. Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (B) of this clause.
- D. Any others rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the subcontract.
- E. This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(G)(3)(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

**RESTRICTED RIGHTS NOTICE SHORT FORM (JUN 1987)**

Use, reproduction, or disclosure is subject to restrictions set forth in Subcontract No. (identify the subcontract) (and lower-tier subcontract No. , if appropriate) with (name of Subcontractor and lower-tier subcontractor)."

(G)(3)(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Subcontractor includes the following statement with such copyright notice: "Unpublished-rights reserved under the Copyright Laws of the United States."

**CLAUSE 4 -- ADDITIONAL DATA REQUIREMENTS (JUN 1987)**

*Derived from FAR 52.227-16*

*This clause does not apply to this award if the award is for the conduct of basic or applied research, as set out elsewhere in this award, to be performed solely by a college or university, and the estimated cost is not in excess of \$500,000*

- A. In addition to the data (as defined in the clause at 52.227-14, Rights in Data-General clause or other equivalent included in this subcontract) specified elsewhere in this subcontract to be delivered, the DOE may, at any time during subcontract performance or within a period of 3 years after acceptance of all items to be delivered under this subcontract, order any data first produced or specifically used in the performance of this subcontract.
- B. The Rights in Data-General clause or other equivalent included in this subcontract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Subcontractor to deliver any data the withholding of which is authorized by the Rights in Data-General or other equivalent clause of this subcontract, or data which are specifically identified in this subcontract as not subject to this clause.
- C. When data are to be delivered under this clause, the Subcontractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.
- D. The DOE may release the Subcontractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in paragraph (A) of this clause.

**CLAUSE 5 -- RIGHTS TO PROPOSAL DATA (TECHNICAL) (JUN 1987)**

*Derived from FAR 52.227-23*

*(As prescribed in 27.409(s), the following clause has been completed and inserted in the Schedule of the subcontract:)*

Except for data contained on pages \_\_\_\_\_, it is agreed that as a condition of award of this subcontract, and notwithstanding the conditions of any notice appearing thereon, the Government shall have unlimited rights (as defined in the "Rights in Data--General" clause contained in this subcontract) in and to the technical data contained in the proposal dated \_\_\_\_\_, upon which this subcontract is based.

**CLAUSE 6 -- REFUND OF ROYALTIES (FEB 1995)**

*Derived from DEAR 952.227-9*

- A. The subcontract price includes certain amounts for royalties payable by the Subcontractor or lower-tier subcontractors or both, which amounts have been reported to the DOE through NREL.
- B. The term "royalties," as used in this clause, refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this subcontract or any lower-tier subcontract here-under. The term also includes any costs or charges associated with the access to, use of, or other right pertaining to data that is represented to be proprietary and is related to the performance of this subcontract or the copying of such data or data that is copyrighted.
- C. The Subcontractor shall furnish to the DOE through NREL, before final payment under this subcontract, a statement of royalties paid or required to be paid in connection with performing this subcontract and lower-tier subcontracts hereunder together with the reasons.
- D. The Subcontractor will be compensated for royalties reported under paragraph (C) of this clause, only to the extent that such royalties were included in the subcontract price and are determined by the DOE to be properly chargeable to the Government and allocable to the subcontract. To the extent that any royalties that are included in the subcontract price are not, in fact, paid by the Subcontractor or are determined by the DOE not to be properly chargeable to the Government and allocable to the subcontract, the subcontract price shall be reduced. Repayment or credit to the Government shall be made as the DOE directs. The approval by DOE of any individual payments or royalties shall not prevent the Government from contesting at any time the enforceability, validity, scope of, or title to, any patent or the proprietary nature of data pursuant to which a royalty or other payment is to be or has been made.

- E. If, at any time within 3 years after final payment under this subcontract, the Subcontractor for any reason is relieved in whole or in part from the payment of the royalties included in the final subcontract price as adjusted pursuant to paragraph (D) of this clause, the Subcontractor shall promptly notify the DOE of that fact and shall reimburse the Government in a corresponding amount.
- F. The substance of this clause, including this paragraph (F), shall be included in any lower-tier subcontract in which the amount of royalties reported during negotiation of the lower-tier subcontract exceeds \$250.

**CLAUSE 7 -- PATENT RIGHTS-RETENTION BY THE SUBCONTRACTOR  
(SHORT FORM) (FEB 1995)**

*Derived from DEAR 952.227-11*

*This clause applies only if the awardee is a domestic small business or domestic nonprofit organization at the time of award, and the award is for the conduct of research, development, or demonstration*

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. "Made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.
3. "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 (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.
4. "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.
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