

PIER CONTRACT TERMS AND CONDITIONS

The format of the contract is under revision, however the following terms and conditions are not changing. So contracts for signature will be re-formatted but will be basically the same language.

1. CONTRACT CONTENTS

This contract consists of the paragraphs listed below and attached exhibits which are hereby expressly incorporated herein.

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2. CONTRACT PURPOSE

The purpose of this contract is to fund research, development and demonstration projects under the Energy Commission Public Interest Energy Research (PIER) Program. The contract will **(description)**.....
Specific tasks are detailed in the attached Exhibit A, " Statement of Work."

3. CONTRACT TERM

The term of this contract shall be from July 1, 2003 to March 30, 2007. This contract is of no force or effect until signed by both parties, and approved by the Department of General Services.

4. DEFINITIONS

- A. ***Affiliate of the Contractor*** means any natural person, corporation, partnership, joint venture, sole proprietorship or other business entity directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Contractor. The term "control" (including the terms "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management

and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. For purposes of this contract, it is presumed that ownership or control of the voting power of more than fifty percent (50%) of the voting stock or partnership interests in an entity constitutes control of that entity.

- B. **Contract Budget** refers to Commission reimbursable and Contractor's matching fund expenditures for that portion of the project covered by the contract.
- C. **Contract Period** is the length of this contract between the Energy Commission and the Contractor. The Contractor's "project" may coincide with or extend outside the "contract period."
- D. **Date** means calendar date.
 - 1) **Contract Start Date** is the date Commission reimbursable expenses can begin after the contract document is signed by the Department of General Services.
 - 2) **Contract End Date** is the last date Commission reimbursable expenses can be incurred and is the expiration date of the contract.

- E. **Economic Benefit** for a project co-funded using Energy Commission funds means the realization of economic gain or other tangible benefits by the Contractor or its affiliates (except bona fide third party purchasers of Contractor's commercial products) through the use of project-related products and rights, including but not limited to, operation, sale, distribution or manufacturing, or by any other transaction, including but not limited to, grant, rent, loan, equity, option, transfer, license or other fee, or by otherwise disposing of the project-related products and rights.

The Commission may rely upon professional accounting opinion in making a final determination of the dollar value of gross revenue, and such determination shall be the basis for calculating the royalty payment due the Commission.

- F. **Equipment** is defined as having a useful life of at least one year, having an acquisition unit cost of at least \$5,000, and purchased with Commission funds. **Equipment** means any products, objects, machinery, apparatus, implements or tools purchased, used or constructed within the project, including those products, objects, machinery, apparatus, implements or tools from which over thirty percent (30%) of the equipment is composed of materials purchased for the project.

For purposes of determining depreciated value of equipment used in the contract, the project shall terminate at the end of the normal useful life of the equipment purchased, funded and/or developed with Commission funds. The Commission may determine the normal useful life of such equipment.

- G. **Financial Statements** means balance sheets, statements of operations, statements of cash flows, and capital statements.
- H. **Gross Revenues** means the gross sales price, rentals and other amounts received by Contractor from or on account of the sale, lease, or other transfer or use of Project-Related Products and Rights, less sales tax paid. Gross Revenues shall be determined as above and in accordance with appropriate Federal cost principles and any economic benefit.
- I. **Key Personnel** are employees or consultants of the Contractor who are critical to the outcome of the project. For example, they may have expertise in the particular field, or have experience that is not available from another source. Replacing these individuals may affect the outcome of the project.
- J. **Key Subcontractors** are contractors, subcontractors or vendors to the Contractor and who are critical to the outcome of the project. As with Key Personnel, Key Subcontractors may have expertise in the particular field, or have experience that is not available from another source and replacement may significantly affect the project. An employee of the Contractor's subcontractor or vendor may also qualify as "key".
- K. **Match Fund Participant** means any party which supplies match funds to the project.
- L. **Materials** means the substances used in constructing a finished object, commodity, device, article or product.
- M. **Otherwise Disposing Of** means (1) project-related products and rights not sold but delivered by the Contractor or its affiliates to others regardless of the basis for compensation, if any, and (2) project-related products and rights put into use by the Contractor or any third party for any purpose other than testing or evaluation of the project-related products and rights.
- L. **Program** refers to the entire effort undertaken and planned by the Contractor including the work co-funded by the Commission. The project may coincide with or extend beyond the contract period.

- M. **Project** refers to the work elements of the program. Typically, there are distinct projects within the elements being paid for by the Commission under this contract.
- N. **Project-Related Products and Rights** means any and all energy inventions, discoveries, machines, designs, computer software, products, devices, mechanisms, methods, protocols, processes, algorithms, flowcharts, diagrams, trade secrets, data, copyrights, patents, trademarks, proprietary rights, and the like created or made or discovered or first reduced to practice, during the term of the contract, by the Contractor or other third party as a result, in whole or in part, of the contract award(s) and any and all updates, revisions, modification, enhancements, derivations, variations, additions, continuations, renewals, and extensions thereto and all proceeds and products therefrom.
- O. **Sale** is sale, license, lease, gift or other transfer of a project-related product or right.
- P. **Sales Price** means gross revenue, excluding normal returns and allowances such as sales tax, freight and insurance, if applicable, derived from a sale.
- Q. **Subject Invention** means any and all energy invention or discovery conceived, or first actually reduced to practice in the course of or under the Commission-funded portion of this contract (i.e., that portion of this contract for which Contractor has invoiced the Commission and received reimbursement) and includes any art, method, process, machine, manufacture design or composition of matter, or any new and useful improvement hereof, whether patented or unpatented, under the patent laws of the United States of America or any foreign country.
- R. **Technology** refers to the general subject area where the product or innovation will be used. For example, solar thermal electric generation is a technology area; direct steam generation is an innovation in this technology area. **Technology Developed** means subject invention and/or project-related products and rights.
- S. Terms Relating to Data
- 1) **Technical Data** or **Data** as used throughout this contract means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research; document experimental, developmental, demonstration, or engineering work; or be usable or used to define a design or process; or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, test specifications or related performance or design type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include manufacturing techniques and methods, machinery, devices such as tools, products, or components, research and engineering data, engineering drawings and associated lists, specifications, engineering calculations, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein does not include financial reports, cost analyses and other information incidental to contract administration.
 - 2) **Business Information** is information about the operation of a specific business. It includes information concerning the cost and pricing of goods, supply sources, cost analyses, characteristics of customers, books and records of the business, sales information including mailing lists, customer lists, business opportunities, information regarding the effectiveness and performance of personnel, and information incidental to contract administration.
 - 3) **Public Information** is information previously published, generally available from more than one source, or information in the public domain. All air monitoring and emission data included in a proposal or requested through a contract are public information. California Government Code Section 6254.7 states that all information, analyses, plans or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce, which any state or local agency requires Contractor to provide before the Contractor builds, erects, alters, replaces, operates, sells, rents, or uses such article, etc., are public records.
 - 4) **Confidential Information** is technical data or business information Contractor has satisfactorily identified and which the Commission has agreed to designate as confidential.
 - 5) **Proprietary Data** is such data as Contractor has identified in a satisfactory manner as being under Contractor's control prior to commencement of performance of this contract or produced by Contractor or its subcontractors at its own expense, and which Contractor has reasonably demonstrated as being of a proprietary nature either by reason of copyright, patent or trade secret doctrines in full force and effect at the time when performance of this contract is commenced.

- 6) A **Trade Secret** is any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented and which is generally known only to certain individuals with a commercial concern and are using it to fabricate, produce or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.
- 7) **Generated Data** is that data which Contractor collects, collates, records, deduces, reads out or postulates for use in the performance of this contract. In addition, any electronic data processing program, model or software system developed or substantially modified by Contractor in the performance of this contract at Commission expense, together with complete documentation thereof, shall be treated as generated data.
- 8) **Deliverable Data** is that data which, under the terms of this contract, is required to be delivered to the Commission.

5. PAYMENTS TO CONTRACTOR

Subject to the conditions listed below, the Commission agrees to reimburse Contractor, monthly in arrears, for expenses incurred in accordance with Exhibit B, Budget. The consideration to be paid Contractor, as provided herein, shall be in compensation for Contractor's actual and allowable expenses incurred in the performance hereof, including travel, per diem, and applicable taxes, unless otherwise expressly so provided. The total amount of this contract shall not exceed \$«~~ttlkcost~~».00 («~~spellout~~»).

A. A request for payment shall consist of, but is not limited to:

- 1) An invoice that is a **list** of actual expenses incurred during the billing period, backup information is not required, see Audit clauses. The invoice list must include:
 - a) date prepared, contract number, contractor's Federal ID number and billing period,
 - b) contractor's actual hourly labor rates by individual, which may be fully loaded,
 - c) operating expenses, including equipment, travel, miscellaneous,
 - d) subcontractor invoices, identifying small business and disabled veteran business,
 - e) overheads, direct & indirect, not included in the fully loaded hourly rate,
 - f) match fund expenditures, and
 - g) by task: cumulative amounts, budgeted, billed to date, current billing, and balance of funds.
- 2) A progress report that documents evidence of progress, which includes written progress reports and deliverables prepared by the Contractor as detailed in Exhibit A and Exhibit A-1.

- B. The Commission will accept computer-generated or electronically transmitted invoices without backup documentation provided that Contractor sends a hardcopy the same day to the address in Exhibit F, Contract Contacts.
- C. Contractor shall submit all invoices to the address designated in Exhibit F.
- D. Each invoice is subject to Commission Contract Manager approval and payment by the State Controller's Office.
- E. The Commission Contract Manager may approve invoices requesting partial payment of a task if the Contractor has demonstrated sufficient evidence of progress toward preparing the deliverables required in that task. The Commission Contract Manager will dispute an invoice requesting payment of all funds remaining in that task budget, if the Commission Contract Manager has not received and approved all of the deliverables due for that task.
- F. Payments shall be made to Contractor only for undisputed invoices. An undisputed invoice is an invoice executed by Contractor for services rendered to the Commission and for which additional evidence is not required to make payment. The Commission Contract Manager shall give written notice and specify the known reasons for dispute to Contractor within 15 working days of receipt of the disputed invoice by using a State of California Standard Form 209. If the invoice is not disputed within the 15 working days, the invoice is presumed to be valid, but is subject to audit and verification.
- G. Commission shall retain from each invoice an amount equal to 10 per cent (10%) of that invoice, excluding equipment invoices. The retained amount shall be held by the Commission and released to Contractor only upon the Commission's approval that the contract work has been satisfactorily completed and the Final Report has been received and approved. Contractor must submit an invoice for the retained amount.

OR (Commission decision, specific tasks named)

- G. Retention may be released upon completion of tasks that are considered separate and distinct, i.e., the task is a stand alone piece of work and could be done without the other tasks. Tasks for administration or management of the contract and/or subcontractors are not considered separate and distinct tasks. Therefore, retention on those tasks will not be released until the termination of the contract. For all other tasks, the Commission Contract Manager shall specify and notify the Contractor Project Director in writing which tasks can be paid in full upon their completion. The procedure for releasing retention upon task completion is as follows:
- 1) Contractor must submit all deliverables required by the task and an invoice requesting payment in full for the task.
 - 2) The Commission Contract Manager must approve the submitted work. The work must be satisfactorily completed and deliverables accepted by the Commission Contract Manager.
 - 3) The Commission Contract Manager must prepare and submit to the Contracts Office, with the Contractor's invoice requesting retention payment, a copy of all approved deliverables and a Contract/Contractor Evaluation Form.
- H. Payment shall be made to Contractor no later than 30 calendar days from the date a correct, undisputed invoice is received in the Commission Accounting Office. The State shall make payment to the Contractor for performance under this contract, in accordance with applicable deliverable criteria, receipt and approval by the Commission, and in accordance with invoices submitted.
- I. Contractor is entitled to interest penalties beginning on the 46th calendar day that an undisputed invoice is not paid. Contractor is not required to submit an invoice for the interest penalties.
- J. Contractor shall retain all records relating to direct and indirect expenses reimbursed to Contractor hereunder, and to hours of employment on this contract by all employees of Contractor for which the Commission is billed. Such records shall be maintained for a period of three years after final payment of this contract, or until audited by the State, whichever occurs first, and shall be available for inspection or audit at any reasonable time by the Commission or its designee.
- K. This contract is funded through the Public Interest Energy Research (PIER) Program. Contractor may be providing matching funds identified in Contractor's proposal and as detailed in Exhibit B, Budget. Match sources may be revised subject to the requirements of Exhibit A.
- L. These (PIER) contract funds are available until <<Date>>. The Commission cannot warrant or guarantee that these funds will be extended by the State Legislature. To reflect a reduction of funds, the Commission may amend the contract to reflect any reduction of funds or cancel the contract under the Termination clause.

6. TRAVEL AND PER DIEM

- A. Travel identified in Exhibit B, Budget is approved and does not require further authorization.
- B. Travel that is not included in Exhibit B, Budget shall require prior written authorization from the Commission Contract Manager. Commission will reimburse travel expenses from the Contractor's office location where the employees assigned to the contract are permanently located.
- C. Contractor shall be reimbursed for travel and per diem on the same basis as nonrepresented State employees, Commission shall provide Contractor with current rates and updates when revised by the State or requested by Contractor. Travel expenses in excess of the State rates cannot be reimbursed.
- D. Contractor must retain documentation of travel expenses in its financial records as follows:
- expenses must be detailed using the current State rates,
 - expenses must be listed by trip including dates and times of departure and return, and
 - receipts for travel expenses claimed must be retained by Contractor (receipts are not required for travel meals or incidentals within current allowable rates).

7. PURCHASE OF EQUIPMENT

- A. Equipment, as defined in Clause 4 and identified in Exhibit B, Budget, PIER Reimbursable Expenditures, is approved for purchase.
- B. Equipment not included in Exhibit B, Budget, PIER Reimbursable Expenditures, shall be subject to prior written approval from the Commission Contract Manager.
- C. All equipment purchased with Commission funds shall be made subject to the following terms and conditions:
 - 1) The Commission Contract Officer will complete and sign a Uniform Commercial Code (UCC.1) Financing Statement and submit it to the Contractor for signature. The Commission Contract Officer will file the signed UCC.1 with the Secretary of State's Office. Invoices for equipment purchases associated with a UCC.1 will not be processed until the UCC.1 has been filed with the Secretary of State's Office.
 - 2) Title to all non-expendable equipment purchased in part or in whole with Commission funds shall remain with the Commission.
 - 3) Contractor shall assume all risk for maintenance, repair, destruction and damage to equipment while in the possession or subject to the control of Contractor. Contractor is not expected to repair or replace equipment that is intended to undergo significant modification or testing to the point of damage/destruction as part of the work described in Exhibit A, Work Statement.
- D. Upon termination of this contract, Commission may:
 - 1) if requested by the Contractor, authorize the continued use of such equipment to further Public Interest Energy Research efforts,
 - 2) by mutual agreement with the Contractor, allow the Contractor to purchase such equipment for an amount not to exceed the residual value of the equipment as of the date of termination of this contract, or
 - 3) request that such equipment be delivered to the Commission with any costs incurred for such return to be borne by the Commission.

8. PROJECT BUDGET REVISIONS

- A. Budget reallocations that do not significantly affect the scope of work will be made in the following manner. Contractor shall provide reasonable advance notification to the Commission Contract Manager of any anticipated budget reallocations. Contractor may reallocate the original project budget up to 15 percent (15%), with prior written notice to the Contract Manager. Reallocations of more than 15 percent (15%) of the original project budget or 5 percent (5%) of the PIER contract amount (whichever is less) require prior written approval of the Commission Contract Manager. Any amount above 15 percent (15%) at the emphasis level or 10 percent (10%) of the PIER contract amount (whichever is less), require prior written approval of the Commission Contract Manager and the Buildings Team Lead. Commission Contract Manager will notify the Contractor Program Director in writing within 10 working days. The Commission Contract Manager shall send approved changes in a budget to the Commission Contract Office.

Significant changes in the scope of work must be approved by the Commission in the form of a formal amendment. A change is significant if it increases the project budget beyond the approved amount, results in changes in deliverables, moves due dates beyond the term of the contract or modifies the scope of work reasonably beyond that approved at the Commission business meeting.

9. CONTRACT MANAGEMENT

A. Contractor Program Director

The Program Director on behalf of Contractor is designated in Exhibit F. Contractor's Program Director may not be replaced without Commission Contract Manager's prior written approval. Such approval shall not be unreasonably withheld. The Contractor Program Director is responsible for the day to day project status, decisions and communications with the Commission Contract Manager.

B. Commission Contract Manager

The Commission Contract Manager is designated in Exhibit F. Commission may change the Contract Manager by notice given Contractor at any time signed by the Commission Contract Officer. The Commission Contract Manager is responsible for the day-to-day contract status, decisions and communications with the Contractor Program Director. Commission Contract Manager will review and approve all project deliverables, reports and invoices.

C. Within the contract term stated in contract clause 3, revisions to Exhibit B, Task Deliverables, Schedule and Gantt Chart, may be made by the Contractor Project Director and approved in writing by the Commission Contract Manager without a formal amendment to the contract.

10. PROGRAM MANAGEMENT

Program management, roles, responsibilities and interactions are described in Exhibit A, Work Statement, Element 1, Program Administration.

11. ANNUAL YEAR-END EVALUATION

During the fourth quarter after the Contract start date, the Commission will evaluate the contract for continued funding for the next year. Such evaluation shall be based on, but not limited to, the results of the contract projects/program and performance of the Contractor. The results of the evaluation will be presented for approval to the Commission Policy Committee and possible Commission business meeting. Contractor shall not begin work on subsequent years, unless and until, the Commission has approved continuation of the contract.

12. STANDARD OF PERFORMANCE

A. Contractor, its subcontractors and their employees in the performance of Contractor's work under this contract shall be responsible for exercising the degree of skill and care required by customarily accepted good professional practices and procedures used in scientific and engineering research fields.

B. The failure of a project to achieve the technical or economic goals stated in the Work Statement is not a basis for the Commission to determine that the work is unacceptable, unless the work conducted by the Contractor or subcontractors is deemed by the Commission to have failed the foregoing standard of performance.

C. In the event that Contractor or its subcontractor fail to perform in accordance with the foregoing standard of performance, the Commission Contract Manager and the Contractor Project Director shall seek to negotiate in good faith an equitable resolution satisfactory to both parties. If such a resolution cannot be reached, the parties shall work through the Commission's dispute resolution process described in Paragraph 23, Disputes herein.

D. Nothing contained in this section is intended to limit any of the rights or remedies which the Commission may have under law.

E. The Commission Contract Manager shall, upon completion of the contract and/or release of retention, prepare a performance evaluation of Contractor.

1) If the Commission Contract Manager prepares an unsatisfactory evaluation, the evaluation shall be filed with the Department of General Services and sent to the Contractor within 15 days. The Contractor shall have 30 days to prepare a response to the evaluation of the contract performance. The Contractor shall send its response to the Department of General Services, Office of Legal Services and a copy to the Commission.

2) The unsatisfactory evaluation and Contractor's response shall not be a public record and shall remain on file for a period of 36 months only.

10. PERSONNEL, SUBCONTRACTORS, DVBEs

A. Key Personnel

Contractor's key personnel, listed in Exhibit F, may not be substituted without the Commission Contract Manager's prior written approval. Such approval shall not be unreasonably withheld. Contractor may substitute all other personnel, with reasonable advance notification made to the Commission Contract Manager.

B. Key Subcontractors

Contractor's key subcontractors, listed in Exhibit F, may not be substituted without the Commission Contract Manager's prior written approval. Such approval shall not be unreasonably withheld. Contractor may substitute all other subcontractors, with reasonable advance notification made to the Commission Contract Manager. Replacement of key subcontractors is subject to the conditions of subparagraph C.

D. Agreements with Subcontractors

Nothing contained in this contract or otherwise, shall create any contractual relationship between the Commission and any subcontractors, and no subcontract shall relieve the Contractor of its responsibilities and obligations hereunder. The Contractor agrees to be as fully responsible to the Commission for the acts and omissions of its subcontractors or persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the Contractor. The Contractor's obligation to pay its subcontractors is an independent obligation from the Commission's obligation to make payments to the Contractor. As a result, the Commission shall have no obligation to pay or to enforce the payment of any monies to any subcontractor.

1) Contractor shall be responsible for establishing and maintaining contractual agreements with and reimbursement of each of the subcontractors for work performed in accordance with the terms of this contract. Contractor shall provide Commission with copies of all contractual agreements with key subcontractors promptly upon final execution thereof.

2) Flowdown provisions that should be included in subcontracts are listed below. Review each provision for applicability to each situation.

Definitions	Confidentiality
Travel & Per Diem	Intellectual Property Items Developed prior to this Contract
Purchase of Equipment	Recordkeeping, Cost Accounting & Auditing
Standard of Performance	Rights of Parties Regarding Intellectual Property
Disputes	Stop Work
Termination	General Terms & Conditions

2) [PIER contractors who are subcontracting with the University of California or a Department of Energy National Laboratory may use the current Energy Commission-negotiated terms and conditions for their subcontracts with the university or national laboratory.](#)

3) Replacement or substitution of all non-key subcontractors is permitted with reasonable advance written notification to the Commission Contract Manager and shall be subject to the provisions of subparagraphs D and E below.

4) Each subcontract shall contain provisions similar to those of Clause 18. "Rights of Parties Regarding Intellectual Property", subparagraph F. "Limitations on Contractor Disclosure of Contract Data, Information, Reports and Records," related to the confidentiality of Commission data and its nondisclosure by Contractor.

5) All subcontracts entered into pursuant to this contract shall be subject to examination and audit by the Bureau of State Audits for a period of three years after final payment under the contract.

- 6) Each subcontract to which the Commission has consented shall contain a provision that further assignments shall not be made to any third or subsequent tier subcontractor without additional advance written consent of Commission.

E. Additions, Removal, or Substitutions of Subcontractors

Any subcontractor change shall be subject to the following conditions:

- 1) Contractor shall provide the Commission with a copy of its contracting policies and procedures for selecting subcontractors. The Commission Contract Officer shall evaluate the Contractor's process to determine if it is in substantial accord with the State's process. The Commission Contract Officer will provide a written determination to the Contractor. The Commission Contract Officer will retain this set of contracting policies and procedures until the final audit of project records.
- 2) If Contractor's process is acceptable, Contractor may use its process to solicit and select subcontractors. If, however, Contractor's process does not substantially meet the State's requirements, Contractor shall solicit a minimum of three bids or provide justification, in advance, to the Contract Officer, as to why a competitive process is not appropriate.
- 3) Thirty days prior to using new policies and procedures, the Contractor shall notify the Commission Contract Officer and provide a detailed, written description of the changes. The Commission Contract Officer will provide a written determination to the Contractor stating whether the revised changes are still in substantial accord with the State's process.

F. Disabled Veteran Business (DVBE) Changes

Contractor must use the DVBE subcontractors/vendors identified in its proposal for the duration of the contract. Replacement of DVBEs must be approved in advance by the Commission. Contractor must notify the Commission Contract Manager in writing. The process of replacing any subcontractor/vendor is defined in subparagraph D above. In addition, the Contractor's written request must include:

- 1) A letter from the Contractor explaining the reason for the change and the identity of the DVBE subcontractor/vendor changed; or
- 2) If the change is not a DVBE, an explanation of the Contractor's efforts (good faith) to replace the DVBE with another DVBE.

Contractor shall submit the request to the Commission Contract Manager, the Commission Contract Officer determines compliance with the DVBE. The Contractor's request and the Commission's approval or disapproval shall not be an excuse for noncompliance with any other provision of law including, but not limited to, the subletting and subcontracting fair practices act or any other contract requirements related to substitution of subcontractors.

Contractor's failure to adhere to the DVBE participation goals in its proposal may be cause for contract termination and recovery of damages under the rights and remedies due the Commission under the Termination clause.

13. REPORTING

A. All reports and deliverables shall be delivered to the person and address designated in Exhibit F.

B. Progress Reports

The Contractor shall prepare progress reports which summarize all contract activities conducted by the Contractor for the reporting period, including an assessment of the ability to complete the project within the current budget and any anticipated cost overruns. Each progress report is due to the Commission Contract Manager within 30 days after the end of the reporting period. The Commission Contract Manager will specify the report format, contents, and number of copies to be submitted, see Attachment 1, Progress Report Format.

C. Final Report and Final Meeting

At the conclusion of the contract's technical work and as provided for in Exhibit A, Work Statement, and Exhibit B, Task Deliverables Schedule, Contractor shall prepare a comprehensive written Final Report, including an Executive Summary. The Commission Contract Manager will review and approve the Final Report.

Contractor shall also meet with the Commission to present the findings, conclusions, and recommendations. Both the final meeting and the Final Report must be consummated on or before the termination date of the contract. Final Report specifications and meeting are detailed in the Exhibit A, Statement of Work.

D. All reports, including reprints, shall include the following legend:

LEGAL NOTICE

THIS REPORT WAS PREPARED AS A RESULT OF WORK SPONSORED BY THE CALIFORNIA ENERGY COMMISSION (COMMISSION). IT DOES NOT NECESSARILY REPRESENT THE VIEWS OF THE COMMISSION, ITS EMPLOYEES, OR THE STATE OF CALIFORNIA. THE COMMISSION, THE STATE OF CALIFORNIA, ITS EMPLOYEES, CONTRACTORS, AND SUBCONTRACTORS MAKE NO WARRANTY, EXPRESS OR IMPLIED, AND ASSUME NO LEGAL LIABILITY FOR THE INFORMATION IN THIS REPORT; NOR DOES ANY PARTY REPRESENT THAT THE USE OF THIS INFORMATION WILL NOT INFRINGE UPON PRIVATELY OWNED RIGHTS. THIS REPORT HAS NOT BEEN APPROVED OR DISAPPROVED BY THE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THE INFORMATION IN THIS REPORT.

15. RECORDKEEPING, COST ACCOUNTING AND AUDITING

A. Cost Accounting

Contractor agrees to keep separate, complete, and correct accounting of the costs involved in developing, installing, constructing, and testing of project-related product(s) funded under the Commission-funded portion of this contract as well as keep separate, complete, and correct account of the economic benefit(s) from project-related product(s) and right(s). The Commission shall have the right to examine Contractor's books of accounts at all reasonable times to the extent and as is necessary to verify the accuracy of Contractor's reports.

B. Accounting Procedures

The Contractor's costs shall be determined on the basis of the Contractor's accounting system procedures and practices employed as of the effective date of this contract. The Contractor's cost accounting practices used in accumulating and reporting costs during the performance of this contract shall be consistent with the practices used in estimating costs for any proposal to which this contract relates; provided that such practices are consistent with the other terms of this contract and provided, further, that such costs may be accumulated and reported in greater detail during performance of this contract. The Contractor's accounting system shall distinguish between direct costs and indirect costs. All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to costs incurred under this contract.

C. Allowability of Costs

1) Allowable Costs

The costs for which the Contractor shall be reimbursed under this contract include all costs, direct and indirect, incurred in the performance of work that are identified in the Contractor's proposal and contract Exhibit B, Element Budget.. Costs must be incurred within the term of the contract. Factors to be considered in determining whether an individual item of cost is allowable include (i) reasonableness of the item, (ii) allocability of the item to the work, (iii) the Contractor's use of applicable Federal OMB Circulars A-87, A-21, A-122 or FAR Part 31, and (iv) the other terms and conditions of this contract.

2) Unallowable Costs

The following is a description of some specific items of cost that are unallowable; provided, however, that the fact that a particular item of cost is not included shall not mean that it is allowable. Details concerning the allowability of costs are available from the Commission Accounting Office.

- a) Contingency Costs, Imputed Costs, Fines and Penalties, Losses on Contracts, and Excess Profit Taxes are unallowable.

- b) The Commission will pay for State or local sales or use taxes on the services rendered or equipment, parts or software supplied to the Commission pursuant to this Contract. The State of California is exempt from Federal excise taxes.

The State of California is exempt from Federal excise taxes and no payment shall be made for any personal property taxes levied on Contractor, or on any taxes levied on employee wages. The Commission will only pay for any State or local sales or use taxes on the services rendered for equipment, parts or software supplied to the Commission pursuant to this contract. The Contractor will execute all such documents and take all such steps as are reasonably necessary to obtain the benefits of tax exemptions for which Commission is eligible. Taxes paid for which exemptions were available but not exercised, are not allowable items of cost.

- 3) Except as provided for in this contract, Contractor shall use the Federal OMB Circulars A-87, A-21, A-122 or FAR Part 31 in determining allowable and unallowable costs.

D. Audit Rights

Contractor shall maintain books, records, documents, and other evidence, based on the procedures set forth above, sufficient to reflect properly all costs claimed to have been incurred in performing this contract. The Commission, an agency of the State or, at the Commission's option, a public accounting firm designated by Commission, may audit such accounting records at all reasonable times with prior notice by Commission. Commission shall bear the expense of such audits. It is the intent of the parties that such audits shall ordinarily be performed not more frequently than once every twelve (12) months during the performance of the work and once at any time within three (3) years following payment by Commission of the Contractor's final invoice. However, performance of any such interim audits by Commission does not preclude further audit.

Contractor agrees that the Commission, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this contract. Contractor agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. Contractor agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, Contractor agrees to include a similar right of the State to audit records and interview staff in any subcontract related to performance of this contract. (GC 8546.7, PCC 10115 et seq., CCR Title 2, Section 1896)

E. Refund to Commission

If Commission determines, pursuant to subarticle C or otherwise, that any invoiced and paid amounts exceed the actual allowable incurred costs and earned fixed fee (if any), Contractor shall repay such amounts to Commission within thirty (30) days of request or as otherwise agreed by the Commission and Contractor. If such repayments are not received by Commission, Commission shall be entitled to withhold further payments to the Contractor.

F. Audit Cost

The cost of the audit shall be borne by the Commission provided that if the results of the audit reveal an error detrimental to Commission exceeding more than ten percent (10%) or \$5,000 (whichever is greater) of the amount audited or, if a royalty audit, the total royalties due in the period audited, Contractor agrees to reimburse Commission for reasonable costs and expenses incurred by Commission in conducting such audit.

16. BUSINESS ACTIVITY REPORTING

A. Contractor shall promptly notify the Commission Contract Manager of the occurrence of each of the following:

- 1) A change of address.
- 2) A change in the business name or ownership
- 3) The existence of any litigation or other legal proceeding affecting the project.
- 4) The occurrence of any casualty or other loss to project personnel, equipment or third parties of a type commonly covered by insurance.
- 5) Contractor's receipt of notice of any claim or potential claim against Contractor for patent, copyright, trademark, service mark and/or trade secret infringement that could affect the Commission's rights.

B. Contractor shall not change or reorganize the type of business entity under which it does business except upon prior written notification to the Commission. A change of business entity or name change requires an amendment

assigning or novating the contract to the changed entity. In the event the Commission is not satisfied that the new entity can perform as the original Contractor, the Commission may terminate this contract as provided in the termination paragraph. (See also Paragraph 26)

17. REVIEW AND NOTICE OF CONFLICTING TERMS

Contractor warrants and attests that it has conducted a detailed review of the terms and conditions of its existing project related third party agreements and has identified all known or reasonably foreseeable conflicts with this contract's terms and conditions and has disclosed the conflicts in writing to the Commission prior to executing this contract. In the event further conflicts are identified, Contractor and Commission agree that these conflicts shall be addressed using the procedure described in the "Disputes" clause found at Paragraph 23. Nothing in this contract is intended to nullify or obviate any prior third party agreements executed by Contractor. However, the Commission is free to terminate this agreement if the conflict impairs or diminishes the value of this agreement.

18. CONFIDENTIALITY

- A. The Commission agrees to keep confidential the items listed in Exhibit E.

The Commission Executive Director makes the final determination of confidentiality. In the event there is a disagreement over the items to be delivered under the contract, the parties shall use the "Disputes" clause found at Section 23. Those items to be delivered as confidential shall be subject to the Commission Executive Director's determination of confidentiality. If the Contractor wishes to appeal the Executive Director's determination, the appeal shall be made to the full Commission. If the Contractor disagrees with this determination, the Contractor may seek judicial review as per Title 20 CCR 2506, et seq.

- B. Public and Confidential Deliverables

All deliverables including, but not limited to, progress reports, task deliverables and the Final Report shall not contain confidential information except when the Commission Contract Manager and the Contractor deem it necessary to include confidential information in a deliverable. In such event, the Contractor shall prepare the deliverable in two separate volumes, one for public distribution and one to be maintained in the Commission's confidential records. Only those items specifically listed in Exhibit E or in a subsequent determination of confidentiality qualify as confidential deliverables.

- C. Identifying and Submitting Confidential Information

All confidential information submitted by the Contractor shall be marked "Confidential" on each document containing the confidential information and delivered in a sealed package to the Commission Contract Officer.

- D. Future Confidential Information

The Contractor and the Commission agree that during this contract, it is possible that the Contractor may develop additional data or information that the Contractor considers to be protectable as confidential information. The Commission Contract Manager shall provide a copy of the Commission Application for Confidential Designation to the Contractor Program Director. Contractor must list all items and information along with justification for confidentiality and submit the application to the Commission Contract Manager. The Commission Executive Director makes the final determination of confidentiality. Such subsequent determinations will be added to Exhibit E.

19. INTELLECTUAL PROPERTY ITEMS DEVELOPED PRIOR TO THIS CONTRACT

- A. The Commission makes no claim to intellectual property that existed prior to this contract and was developed without Commission funding.

- B. The Contractor gives notice that the items listed in Exhibit E have been developed without Commission funding and prior to the start of this contract. This list represents a brief description of the prior developed intellectual property. A detailed description of the intellectual property, as it exists on the effective date of this contract, may be necessary if Commission funds are used to further develop the listed intellectual property. This information will assist the parties make an informed decision regarding intellectual property rights and possible repayment obligations.

20. RIGHTS OF PARTIES REGARDING INTELLECTUAL PROPERTY

A. Commission's Rights in Deliverables

Deliverables and reports specified for delivery to the Commission under this contract shall become the property of the Commission. The Commission may use, publish, and reproduce the deliverables and reports subject to the provisions of subparagraph C.

B. Rights in Technical, Generated, and Deliverable Data

1) Contractor's Rights

All data (i.e., technical, generated and deliverable data) produced under this contract shall be the property of the Contractor, limited by the license retained by the Commission in 2) below, and the rights the Commission has in deliverables specified above in A).

2) Commission's Rights

Contractor shall provide the Commission with a copy of all technical, generated and deliverable data produced under the contract. Contractor does not have to copy and submit data the Commission Contract Manager has identified as being unusable to the Commission and the PIER program. For instance, some data may not warrant routine copying and shipping because the raw data is too disaggregated or voluminous for practical application. Retention of such data at the Contractor's facility for inspection, review and possible copying by the Contract Manager is expected to be a more efficient use of Commission staff and the Contractor's time and efforts.

For all data (technical, generated and deliverable) produced under this contract, the Commission retains a no-cost, non-exclusive, non-transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, produce and to authorize others to produce, translate, publish and use the data, subject to the provisions of subparagraph C.

C. Limitations on Commission Disclosure of Contractor's Confidential Records

1) Data provided to the Commission by Contractor, which data the Commission has not already agreed to keep confidential and which Contractor seeks to have designated as confidential, or is the subject of a pending application for confidential designation, shall not be disclosed by the Commission except as provided in Title 20 CCR Sections 2506 and 2507 (or as they may be amended), unless disclosure is ordered by a court of competent jurisdiction.

2) It is the Commission's intent to use and release project results such as deliverables and data in a manner calculated to further PIER while protecting proprietary or patentable interests of the parties. Therefore, the Commission agrees not to disclose confidential data or the contents of reports containing data considered by Contractor as confidential, without first providing a copy of the disclosure document for review and comment by Contractor. Contractor shall have no less than 10 working days for review and comment and, if appropriate, to make an application for confidential designation on some or all of the data. The Commission shall consider the comments of Contractor and use professional judgment in revising the report, information or data accordingly.

D. Exclusive Remedy

In the event the Commission intends to publish or has disclosed data the Contractor considers confidential, the Contractor's exclusive remedy is a civil court action for injunctive relief. Such court action shall be filed in Sacramento County, Sacramento, California.

E. Waiver of Consequential Damages

IN NO EVENT WILL THE ENERGY COMMISSION BE LIABLE FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BASED ON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT TORT, OR ANY OTHER LEGAL THEORY FOR THE DISCLOSURE OF CONTRACTOR'S CONFIDENTIAL RECORDS, EVEN IF THE ENERGY COMMISSION HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. DAMAGES THAT THE ENERGY COMMISSION WILL NOT BE RESPONSIBLE FOR INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFIT; LOSS OF SAVINGS OR REVENUE; LOSS OF GOODWILL; LOSS OF USE OF THE

PRODUCT OR ANY ASSOCIATED EQUIPMENT; COST OF CAPITAL; COST OF ANY SUBSTITUTE EQUIPMENT, FACILITIES, OR SERVICES; DOWNTIME; THE CLAIMS OF THIRD PARTIES INCLUDING CUSTOMERS; AND INJURY TO PROPERTY.

F. Limitations on Contractor Disclosure of Contract Data, Information, Reports and Records

- 1) Contractor will not disclose the contents of the final or any preliminary deliverable or report without first providing a copy of the disclosure document for review and comment to the Commission Contract Manager. The Contractor shall consider the comments of the Commission Contract Manager and use professional judgment in revising the reports, information or data accordingly.
- 2) After any document submitted has become a part of the public records of the State, Contractor may, if it wishes to do so at its own expense, publish or utilize the same, but shall include the legal notice stated in Paragraph 14.D.
- 3) Notwithstanding the foregoing, in the event any public statement is made by the Commission as to the role of Contractor or the content of any preliminary or Final Report of Contractor hereunder, Contractor may, if it believes such statement to be incorrect, state publicly what it believes is correct.
- 4) No record that is provided by the Commission to Contractor for Contractor's use in executing this contract and which has been designated as confidential, or is the subject of a pending Application for Confidential Designation, except as provided in Title 20, CCR Sections 2506 and 2507, shall be disclosed, unless disclosure is ordered by a court of competent jurisdiction (Title 20 CCR Section 2501, et seq.). At the election of the Commission Contract Manager, the Contractor, its employees and any subcontractor shall execute a "Confidentiality Agreement," supplied by the Commission Contract Manager.
 - 6) Contractor acknowledges that each of its officers, employees, and subcontractors who are involved in the performance of this contract will be informed about the restrictions contained herein and to abide by the above terms.

G. Proprietary Data

Proprietary data owned by the Contractor shall remain with the Contractor throughout the term of this contract and thereafter. The extent of Commission access to the same and the testimony available regarding the same shall be limited to that reasonably necessary to demonstrate, in a scientific manner to the satisfaction of scientific persons, the validity of any premise, postulate or conclusion referred to or expressed in any deliverable hereunder.

H. Preservation of Data

Any data which is reserved to the Contractor by the express terms hereof, and pre-existing proprietary or confidential data which has been utilized to support any premise, postulate or conclusion referred to or expressed in any deliverable hereunder, shall be preserved by the Contractor at the Contractor's own expense for a period of not less than three years after receipt and approval by the Commission of the Final Report herein.

I. Destruction of Data

Before the expiration of three years and before changing the form of or destroying any such data, the Contractor shall notify Commission of any such contemplated action and Commission may, within thirty (30) days after said notification, determine whether it desires said data to be further preserved. If Commission so elects, the expense of further preserving said data shall be paid for by the Commission. Contractor agrees that Commission may at its own expense, have reasonable access to said data throughout the time during which said data is preserved. Contractor agrees to use its best efforts to identify competent witnesses to testify in any court of law regarding said data or, at Commission's expense, to furnish such competent witnesses.

J. Patent Rights

Patent rights for subject inventions will be the property of Contractor, subject to the Commission retaining a no-cost, nonexclusive, nontransferable, irrevocable royalty-free, worldwide perpetual license to use or have practiced for or on behalf of the State of California the subject invention(s) for governmental purposes. Contractor must obtain agreements to effectuate this clause with all persons or entities, except for the U.S. Department of Energy (DOE), obtaining ownership interest in the patented subject invention(s). Previously documented (whether patented or unpatented under the patent laws of the United States of America or any foreign country) inventions are exempt from this provision.

K. March-In Rights

The Contractor shall forfeit and assign to the Commission, at the Commission's request, all rights on a subject invention if either: 1) Contractor fails to apply for a patent on subject invention(s) developed under this contract within six months of conceiving or first actually reducing to practice the technology or 2) Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention. In this event, the Contractor agrees to relinquish all rights, subject to DOE reserved rights, on the subject invention to the Commission. The Commission will have the unfettered right to use and/or dispose of the rights in whatever manner it deems most suitable to help transfer the technology into the market place, including but not limited to, seeking patent protection, or licensing the invention.

L. Commission's Rights to Invention.

Contractor and all persons and/or entities obtaining an ownership interest in subject invention(s) shall include within the specification of any United States patent application, and any patent issuing thereon covering a subject invention, the following statement:

"THIS INVENTION WAS MADE WITH STATE OF CALIFORNIA SUPPORT UNDER CALIFORNIA ENERGY COMMISSION CONTRACT NUMBER (CONTRACT #). THE ENERGY COMMISSION HAS CERTAIN RIGHTS TO THIS INVENTION."

M. Commission's Interest in Inventions.

Upon the perfecting of a patent application on any subject invention, Contractor will complete and sign a Uniform Commercial Code (UCC.1) Financing Statement and submit it to the Commission Contract Manager for complete processing. The Commission Contract Manager will review the UCC.1 for complete information and file the satisfactory UCC.1 with the Secretary of State's Office.

N. Copyrights

- 1) Copyrightable material first produced under this contract shall be owned by the Contractor, limited by the license granted to the Commission in 2) below.
- 2) Contractor agrees to grant the Commission a royalty-free, no-cost nonexclusive, irrevocable, nontransferable worldwide, perpetual license to produce, translate, publish, use and dispose of, and to authorize others to produce, translate, publish, use and dispose of all copyrightable material first produced or composed in the performance of this contract.
- 3) Contractor will apply copyright notices to all deliverables using the following form or such other form as may be reasonably specified by Commission.

“©[YEAR OF FIRST PUBLICATION OF DELIVERABLE], [THE COPYRIGHT HOLDER'S NAME].
ALL RIGHTS RESERVED.”

- 4) Software

In the event software is developed that is not a deliverable under the contract, Contractor shall have the right to copyright and/or patent such software and grants the Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable, worldwide, perpetual license to produce and use the software, its derivatives and upgrades for governmental purposes.

O. Intellectual Property Indemnity

Contractor warrants that Contractor will not, in its supplying of the work under this contract's work statement, knowingly infringe or misappropriate any intellectual property right of a third party, and that it will conduct a reasonable investigation of the intellectual property rights of third parties to avoid such infringement. Contractor will defend and indemnify Commission from and against any claim, lawsuit or other proceeding, loss, cost, liability or expense (including court costs and reasonable fees of attorneys and other professionals) to the extent arising out of: (i) any third party claim that a deliverable infringes any patent, copyright, trade secret or other intellectual property right of any third party, or (ii) any third party claim arising out of the negligent or other tortious act(s) or omission(s) by the Contractor, its employees, subcontractors or agents, in connection with or related to the deliverables or the Contractor's performance thereof under this contract.

21. ROYALTY PAYMENTS TO COMMISSION

- A. In consideration of Commission providing funding to Contractor, Contractor agrees to pay Commission royalties on the terms and conditions hereinafter set forth.
- Contractor agrees to pay Commission a royalty of 1.5% (one and one-half percent) of the Sale Price on the sale of each and every project-related product or right.
- B. Contractor's obligation to make payments to Commission shall commence from the date project related products or rights are first sold and shall extend for a period of fifteen years thereafter. Payments are payable in annual installments and are due the first day of March in the calendar year immediately following the year during which Contractor receives gross revenues.
- C. Early Buyout. Contractor has the option of paying its royalty obligations to Commission without a pre-payment penalty, provided Contractor makes the payment within two years from the date at which royalties are first due to Commission, in the lump sum amount equal to two (2) times the amount of funds drawn down on the contract.
- D. Contractor agrees not to make any sale, license, lease, gift or other transfer of any Project-Related Products and Rights with the intent of, or for the purpose of, depriving Commission of royalties hereunder. Generally, this means that Contractor will not make any sale, license, lease or other transfer of Project-Related Products and Rights for consideration other than fair market value. Further, Contractor agrees that such activity constitutes breach of this contract and that Contractor agrees to repay within 60 days the amount due under subparagraph C above (Early Buyout).
- E. Contractor acknowledges that a late payment of royalties owed to the Commission will cause the Commission to incur costs not contemplated by the parties. If a royalty payment is not paid when due, Contractor agrees to pay the Commission a late fee equal to two percent (2%) of the payment due. Additionally, Contractor agrees that royalty payments not paid within fifteen (15) days of the due date shall thereupon become debt obligations of Contractor to the Commission, due upon demand and bearing interest at the maximum interest rate allowed by law.
- F. Contractor shall maintain separate accounts within its financial and other records for purposes of tracking components of sales and royalties due to Commission under this contract.
- G. Payments to Commission are subject to audit as provided for under Paragraph 15. "Recordkeeping, Cost Accounting and Auditing".
- H. In the event of default hereunder, Commission shall be free to exercise all rights and remedies available to it herein, and under law and at equity. The occurrence of any of the following events or conditions shall cause default under this contract:
- 1) Contractor's failure to pay when due, any amount due and payable under the terms of this contract.

22. NOTICES TO PARTIES

Notice to either party may be given by certified mail properly addressed, postage fully prepaid, to the address designated in Exhibit F for each respective party or to such other address as either party shall notify the other in accordance with this section. Such notice shall be effective when received, as indicated by post office records, or if deemed undeliverable by post office, such notice shall be effective nevertheless fifteen (15) days after mailing.

Alternatively, notice may be given by personal delivery to the party at the address designated in Exhibit F. Such notice shall be deemed effective when delivered unless a legal holiday for State offices commences during said 24-hour period, in which case the effective time of the notice shall be postponed 24 hours for each such intervening day.

23. DISPUTES

In the event of a contract dispute or grievance between the Contractor Project Director and Commission Contract Manager, any or all of the following procedures shall be used by the parties:

A. Commission Dispute Resolution

If the Commission Contract Manager and the Contractor Program Director cannot resolve a contract dispute or grievance, Contractor Program Director and Commission Contract Manager shall each prepare a package in writing stating the issues in dispute, the legal authority or other basis for their respective positions and the remedy sought. The packages must be submitted to the Commission Dispute Resolution Committee. The Commission Contract Manager

will notify the Contractor Program Director of the current Committee members. The Committee shall make a determination on the problem within ten (10) working days after receipt of the package

Should Contractor disagree with the Committee's decision, Contractor may appeal to the full Commission at a regularly scheduled business meeting. The Committee will provide the Contractor with the current procedures for placing the appeal on a Commission Business Meeting Agenda.

Contractor shall continue with its responsibilities under this contract during any dispute.

B. Binding Arbitration

Should the Commission's Dispute Resolution procedure identified in Paragraph A. above fail to resolve a contract dispute or grievance to the satisfaction of the Contractor, the parties must mutually agree to have the dispute or grievance resolved through binding arbitration. The arbitration proceeding shall take place in Sacramento County, California, and shall be governed by the commercial arbitration rules of the American Arbitration Association (AAA) in effect on the date the arbitration is initiated. The dispute or grievance shall be resolved by one (1) arbitrator who is an expert in the particular field of the dispute or grievance. The arbitrator shall be selected in accordance with the aforementioned commercial arbitration rules. The decision rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof. The demand for arbitration shall be made no later than six (6) months after the date of the contract's termination, irrespective of when the dispute or grievance arose, and irrespective of the applicable statute of limitations for a suit based on the dispute or grievance.

The cost of arbitration shall be borne by the parties as follows:

- 1) The AAA's administrative fees shall be borne equally by the parties;
- 2) The expense of a stenographer shall be borne by the party requesting a stenographic record;
- 3) Witness expenses for either side shall be paid by the party producing the witness;
- 4) Each party shall bear the cost of its own travel expenses;
- 5) All other expenses shall be borne equally by the parties, unless the arbitrator apportions or assesses the expenses otherwise as part of his or her award.

At the option of the parties, any or all of these arbitration costs may be deducted from any balance of contract funds. Both parties must agree, in writing, to utilize contract funds to pay for arbitration costs.

24. STOP WORK

The Commission Contract Officer may, at any time, by written notice to Contractor, require Contractor to stop all or any part of the contract's work tasks. Stop Work Orders may be issued for reasons such as a project exceeding budget, standard of performance, out of scope work, delay in project schedule, misrepresentations and the like.

A. Compliance

Upon receipt of such stop work order, Contractor shall immediately take all necessary steps to comply therewith and to minimize the incurrence of costs allocable to work stopped.

B. Equitable Adjustment

An equitable adjustment shall be made by Commission based upon a written request by Contractor for an equitable adjustment. Such adjustment request must be made by Contractor within thirty (30) days from the date of receipt of the stop work notice.

C. Canceling a Stop Work Order

Contractor shall resume the stopped work only upon receipt of written instructions from the Commission Contract Officer canceling the stop work order.

25. TERMINATION

A. Purpose

The parties agree that because the Commission is a state entity and contracts on behalf of all Californian ratepayers, it is necessary for the Commission to be able to terminate, at once, upon the default of Contractors and to proceed with the work required under the Contract in any manner the

Commission deems proper. Contractor specifically acknowledges that the termination of the Contract by the Commission under the terms set forth below is an essential term of the Contract, without which the Commission would not enter into the Contract. Contractor further agrees that upon any of the events triggering the termination the Contract by the Commission, the Commission has the right to terminate the Contract, and it would constitute bad faith of the Contractor to interfere with the immediate termination of the Contract by the Commission.

B. Breach

The Commission shall provide the Contractor written notice of intent to terminate due to Contractor's breach. Contractor will have 15 calendar days to fully perform or cure the breach. In the event Contractor does not cure the breach within 15 days, the Commission may, without prejudice to any of its other remedies, terminate this contract upon five (5) calendar days written notice to Contractor. In such event, Commission shall pay Contractor only the reasonable value of the satisfactorily performed services theretofore rendered by Contractor, as may be agreed upon by the parties or determined by a court of law, but not in excess of the contract maximum payable.

C. For Cause

The Commission may, for cause, and at its option, terminate this contract upon giving thirty calendar (30) days, advance written notice to Contractor. In such event, Contractor agrees to use all reasonable efforts to mitigate its expenses and obligations. **Commission will pay Contractor for services rendered and expenses incurred within 30 days after notice of termination which could not by reasonable efforts of Contractor have been avoided, but not in excess of contract maximum payable.** Contractor agrees to relinquish possession of equipment purchased for this project with Commission funds to Commission, or Contractor may, with approval of Commission, purchase said equipment as provided by the terms of this contract.

The term "for cause" includes, but is not limited to, the following reasons:

- Partial or complete loss of match funds;
- Reorganization to a business entity unsatisfactory to the Commission;
- Retention or hiring of subcontractors, or replacement or addition of Key Personnel that fail to perform to the standards and requirements of this contract;
- Failure to utilize the DVBE subcontractors/vendors in Contractor's proposal,
- **Contractor is not able to pay its debts as they become due and/or Contractor is in default of an obligation that impacts Contractor's ability to perform under this Contract,**
- Significant change in State or Energy Commission policy such that the work or product being funded would not be supported by the Commission; or
- **In the case of a technical support contract, changes in Commission staff such that Commission staff can do the work or product being funded.**

NOTE: C. BANKRUPTCY DELETED.

D. Gratuities

The Commission may, by written notice to Contractor, terminate the right of Contractor to proceed under this contract if it is found, after notice and hearing by Commission or by Executive Director of the Energy Commission or his duly authorized representative, that gratuities were offered or given by Contractor, or any agent or representative of Contractor, to any officer or employee of the Commission, with a view toward securing a contract or securing favorable treatment with respect to awarding or amending or making a determination with respect to performance of such contract.

In the event this contract is terminated as provided herein, Commission shall be entitled to (1) pursue the same remedies against Contractor as it could pursue in the event of the breach of the contract by Contractor, and (2) exemplary damages in an amount which shall be not less than three nor more than ten times the cost incurred by Contractor in providing any such gratuities to any such officer or employee, as a penalty, in addition to any other damages to which it may be entitled by law.

The rights and remedies of Commission provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

E. Advantage

Contractor, team member or subcontractors shall not hire, contract with, or otherwise commit themselves to an advantageous economic contract with the Commission's Contractor/subcontractor who evaluated Contractor's proposal. The Commission reserves the right to cancel the contract.

26. GENERAL TERMS & CONDITIONS

A. It is understood and agreed that certain contract provisions shall survive the completion or termination date of this contract for any reason. The contract provisions include, but are not limited to:

- "Payments to Contractor" Section 5
- "Purchase of Equipment" Section 7
- "Recordkeeping, Cost Accounting and Auditing" Section 15
- "Business Activity Reporting" Section 16
- "Rights of Parties Regarding Intellectual Property" Section 20
- "Royalty Payments to Commission" Section 21
- "Disputes" Section 23
- "Termination" Section 25
- "Site Access" Section 26. D
- "Indemnification" Section 26. L

B. The clause headings appearing in this contract have been inserted for the purpose of convenience and ready reference. They do not purport, and shall not be deemed, to define, limit, or extend the scope or intent of the clauses to which they appertain.

C. If public hearings on the subject matter dealt with in this contract are held during the period of the contract, and if requested by the Commission, Contractor will make available to testify the personnel assigned to this contract. Commission will reimburse Contractor for labor and travel of said personnel at the contract rates for such work.

D. The Energy Commission staff or its representatives shall have reasonable access to the construction site or R&D laboratory, and all project records.

E. This contract shall be conducted in accordance with the terms and conditions of California Energy Resources Conservation and Development Commission (hereafter "Commission") Request for Proposal number <<RFP#>>. Contractor's proposal, dated <propstdate>, this contract, and the attached exhibits listed below. Contractor's proposal is not attached hereto, but is expressly incorporated by reference into this contract. In the event of conflict or inconsistency between the terms of this contract and Contractor's proposal, this contract and its exhibits shall be considered controlling.

F. In the interpretation of this contract, any inconsistencies between the terms hereof and the exhibits shall be resolved in favor of the terms hereof.

G. The Commission reserves the right to seek further written assurances from the Contractor and its team that the work of the project under the contract will be performed consistent with the terms of the contract.

H. No alteration or variation of the terms of this contract shall be valid unless made in writing and signed by the parties hereto, and no oral understanding or agreement not incorporated herein, shall be binding on any of the parties hereto. Other than as specified herein, no document or communication passing between the parties hereto shall be deemed as part of this contract.

I. This contract is not assignable by the Contractor, either in whole or in part, without the consent of the State. Consent consists of a formal written contract amendment approved by the Commission and DGS. Such consent shall not be unreasonably withheld.

J. It is hereby understood and agreed that this contract shall be governed by the laws of the State of California as to interpretation and performance.

K. Time is of the essence in this contract.

- L. Contractor agrees to indemnify, defend and save harmless the State, its officers, agents and employees from any and all claims and losses accruing or resulting to any and all contractors, subcontractors, suppliers, laborers, and any other person, firm or corporation furnishing or supplying work services, materials, or supplies in connection with the performance of this contract, and from any and all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by Contractor in the performance of this contract.
- M. Contractor warrants, represents and agrees that it and its subcontractors, employees and representatives shall at all times comply with all applicable State contracting laws, codes, rules and regulations in the performance of this contract.
- N. Contractor, and the agents and employees of Contractor, in the performance of this contract, shall act in an independent capacity and not as officers or employees or agents of the State.
- O. No waiver of any breach of this contract shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this contract shall be taken and construed as cumulative, that is, in addition to every other remedy provided therein or by law. The failure of Commission to enforce at any time any of the provisions of this contract, or to require at any time performance by Contractor of any of the provisions therefore, shall in no way be construed to be a waiver of such provisions, nor in any way affect the validity of this contract or any part thereof or the right of Commission to thereafter enforce each and every such provision.
- P. If any provision of this contract or the application thereof is held invalid, that invalidity shall not affect other provisions of the contract.
- Q. In no event shall any course of dealing, custom or trade usage modify, alter, or supplement any of the terms or provisions contained herein.
- R. The Contractor under the performance of this contract has been fully informed of its duties, obligations, and rights under Public Contract Code, Sections 10355 through 10382, and any additional Contractor's rights and obligations that should be included. A copy of the applicable sections of the Public Contract Code shall be provided to the Contractor upon request.
- S. During the performance of this Agreement, Contractor and its subcontractors shall not unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical contract, Contractor and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex. Contractors and subcontractors shall insure that the evaluation and treatment of their employees condition(cancer), age (over 40), marital status, and denial of family care leave. Contractor and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. Contractor and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code Section 12990 (a-f) et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations, are incorporated into this Agreement by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other Agreement.
- Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the Agreement.
- T. The Contractor shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of recycled content, both post consumer waste and secondary waste as defined in the Public Contract Code, Sections 12161 and 12200, in materials, goods, or supplies offered or products used in the performance of this Agreement, regardless of whether the product meets the required recycled product percentage as defined in the Public Contract Code, Sections 12161 and 12200. Contractor may certify that the product contains zero recycled content. (PCC 10233, 10308.5, 10354)
- U. For any contract in excess of \$100,000, the contractor acknowledges in accordance with, that:
- 1) the contractor recognizes the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but

not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with section 5200) of Part 5 of Division 9 of the Family Code; and

- 2) the contractor, to the best of its knowledge is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department."

V. Contractor shall give priority consideration in filling vacancies in positions funded by the Contract, and during the term of the Contract to qualified recipients of aid under Chapter 2, commencing with Section 11200 of the Welfare and Institutions Code, in accordance with Article 3.9, commencing with Section 11349, of the Welfare and Institutions Code

W. The Government Code Chapter on Antitrust claims contains the following definitions:

- "Public purchase" means a purchase by means of competitive bids of goods, services, or materials by the State or any of its political subdivisions or public agencies on whose behalf the Attorney General may bring an action pursuant to subdivision (c) of Section 16750 of the Business and Professions Code).
- "Public Purchasing Body" means the State or the subdivision or agency making a public purchase. Government Code Section 4550 (b).

1) In submitting a bid to a public purchasing body, the bidder offers and agrees that if the bid is accepted, it will assign to the purchasing body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, materials, or services by the bidder for sale to the purchasing body pursuant to the bid. Such assignment shall be made and become effective at the time the purchasing body tenders final payment to the bidder. Government Code Section 4552.

2) If an awarding body or public purchasing body receives, either through judgment or settlement, a monetary recovery for a cause of action assigned under this chapter, the assignor shall be entitled to receive reimbursement for actual legal costs incurred and may, upon demand, recover from the public body any portion of the recovery, including treble damages, attributable to overcharges that were paid by the assignor but were not paid by the public body as part of the bid price, less the expenses incurred in obtaining that portion of the recovery. Government Code Section 4553.

3) Upon demand in writing by the assignor, the assignee shall, within one year from such demand, reassign the cause of action assigned under this part if the assignor has been or may have been injured by the violation of law for which the cause of action arose and (a) the assignee has not been injured thereby, or (b) the assignee declines to file a court action for the cause of action. Government Code Section 4554.

X. In the event that any provision of this Contract is unenforceable or held to be unenforceable, then the parties agree that all other provisions of this Contract have force and effect and shall not be effected thereby.