

## EXHIBIT D

### Special Terms and Conditions

#### 1. AGREEMENT MANAGEMENT

- A. The Contractor Project Manager may not be replaced without Energy Commission Contract Manager's (CCM) prior written approval. Such approval shall not be unreasonably withheld. The Contractor Project Manager is responsible for the day-to-day Project status, decisions and communications with the CCM.
- B. The Energy Commission may change the CCM at any time and will send a written notice to the Contractor signed by the Commission Contracts Officer (CCO). The CCM is responsible for the day-to-day Agreement status, decisions and communications with the Contractor Project Manager. The CCM will review and approve all Project deliverables, reports and invoices.
- C. If the Schedule of Deliverables and Due Dates needs to be revised after the execution of the Agreement, the revised dates cannot extend beyond the term end date of the Agreement. Contractor shall work with the CCM to agree on the new deliverable due dates. The CCM shall issue the revised Schedule of Deliverables and Due Dates to the Contractor and the CCO. Although the dates can be revised, the deliverables cannot be changed through this process.

#### 2. STANDARD OF PERFORMANCE

Contractor shall be responsible in the performance of Contractor's/subcontractor's work under this Agreement for exercising the degree of skill and care required by customarily accepted good professional practices and procedures used in scientific and engineering research fields. Any costs for failure to meet these standards, or otherwise defective services, which require re-performance, as directed by CCM or its designee, shall be borne in total by the Contractor/subcontractor and not the Energy Commission. In the event the Contractor/subcontractor fails to perform in accordance with the above standard the following will apply. Nothing contained in this clause is intended to limit any of the rights or remedies that the Energy Commission may have under law.

- A. Contractor/subcontractor will re-perform, at its own expense, any task that was not performed to the reasonable satisfaction of the CCM. Any work re-performed pursuant to this clause shall be completed within the time limitations originally set forth for the specific task involved. Contractor/subcontractor shall work any overtime required to meet the deadline for the task at no additional cost to the Energy Commission.
- B. The CCM shall provide a new schedule for the re-performance of any task pursuant to this clause in the event that re-performance of a task within the original time limitations is not feasible.
- C. If the CCM directs the Contractor not to re-perform a task, the CCM and Contractor Project Manager shall negotiate a reasonable settlement for satisfactory services rendered. No previous payment shall be considered a waiver of the Energy Commission's right to reimbursement.

- D. The failure of a Project to achieve the technical or economic goals stated in the Scope of Work is not a basis for the Energy Commission to determine that the work is unacceptable, unless the work conducted by the Contractor/subcontractor is deemed by the Energy Commission to have failed the foregoing standard of performance.
- E. In the event that Contractor/subcontractor fails to perform in accordance with the foregoing standard of performance, the CCM and the Contractor Project Manager 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 Energy Commission's dispute resolution process described in the Disputes clause.

### **3. PERSONNEL AND SUBCONTRACTORS**

#### A. Key Personnel

Contractor's Key Personnel may not be substituted without the CCM's prior written approval. Such approval shall not be unreasonably withheld.

#### B. Key Subcontractors

Contractor's Key Subcontractors may not be substituted without the CCM's prior written approval. Such approval shall not be unreasonably withheld.

#### C. Agreements with Subcontractors

If subcontractors are needed to perform any portion of this Agreement, the following criteria must be met and Contractor shall manage the performance of the subcontractors.

- 1) Nothing contained in this Agreement or otherwise, shall create any contractual relationship between the State and any subcontractors, and no subcontractors and no subcontract shall relieve Contractor of his responsibilities and obligations hereunder. Contractor agrees to be as fully responsible to the State for the acts and omissions of its subcontractors and/or persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by Contractor. Contractor's obligation to pay its subcontractors is an independent obligation from the State's obligation to make payments to Contractor. As a result, the State shall have no obligation to pay or to enforce the payment of any monies to any subcontractor.
- 2) Contractor shall be responsible for establishing and maintaining contractual agreements with and the reimbursement of each of the subcontractors for work performed in accordance with the terms of this Agreement. Contractor shall be responsible for scheduling and assigning subcontractors to specific tasks in the manner described in this Agreement; coordinating subcontractor accessibility to Energy Commission staff, and submitting completed products to the CCM.
- 3) Contractor shall not allow any subcontractor to assign any portion of a subcontract related to this Agreement to a third party or subsequent tier subcontractor (lower tier subcontractor) without first obtaining the written consent of the CCM and following the procedures below "Process for New Subcontractors".

- 4) All subcontracts entered into pursuant to this Agreement shall be subject to examination and audit by the Bureau of State Audits for a period of three (3) years after final payment under the Agreement.
- 5) Upon request by the CCM or CCO, Contractor shall provide copies of all contractual agreements with subcontractors and lower tier subcontractors.
- 6) Contractors who are subcontracting with University of California may use the terms and conditions negotiated by the Energy Commission with University of California for their subcontracts. Contractors who are subcontracting with the Department of Energy's (DOE) Lawrence Livermore National Laboratory, Lawrence Berkeley National Laboratory, and the Sandia National Laboratories may use the terms and conditions negotiated with the Department of General Services. Contractors who are subcontracting with all other DOE laboratories may use the terms and conditions negotiated by the Energy Commission with DOE for their subcontracts.
- 7) Upon the termination of any subcontract or lower tier subcontract, Contractor shall notify the CCM and the CCO immediately in writing.
- 8) In addition to any other flow-down provisions required by this Agreement, all subcontracts shall contain the following: 1) the audit rights and non-discrimination provision stated in the General Terms and Conditions (Exhibit C) and in 4 above; 2) further assignments shall not be made to any lower tier subcontractor without written consent of the CCM; and 3) the confidentiality provisions in the Reports paragraph of this Agreement.

D. Process for New Subcontractors

The Energy Commission reserves the right to replace a subcontractor, request additional subcontractors, and approve additional subcontractors requested by Contractor. A replaced subcontractor and an added subcontractor are both defined as a "new" subcontractor. Such changes shall be subject to the following conditions:

- 1) The new subcontractor shall be selected using either: (a) A competitive bid process with written evaluation criteria by obtaining three or more bids and advertising the work to a suitable pool of subcontractors including without limitation: California Contracts Register; Contractor's mailing lists; mass media; professional papers or journals; posting on websites; and telephone or email solicitations; or (b) Non-competitive bid (sole source) process with a specific subcontractor.
- 2) Contractor may also need to comply with Disabled Veteran Business Enterprise requirements for the proposed subcontractor.
- 3) When a new subcontractor is proposed the CCM shall complete and submit to the CCO a "Subcontractor Addition" form. The proposed subcontract can be executed only after the CCO approves the Subcontractor Addition form. This form identifies the new subcontractor and bidding method used (competitive or non-competitive), the tasks the new subcontractor will be performing and the following shall be attached: resumes and completed Energy Commission budget forms.
- 4) Labor Rates & Classifications: Personnel of new subcontractors must fit within a classification and be equal to or less than a rate already listed in the Agreement budget and the rate cannot exceed the subcontractor's actual

rate. Adding classifications and/or higher rates for the new subcontractor other than ones currently listed in the Agreement requires a formal amendment.

- 5) Non-Labor Rates: The non-labor rates (such as fringe, indirect overhead, general and administrative, profit) charged by the new subcontractor shall be equal to or less than the existing non-labor rates already listed in the Agreement budget and cannot exceed subcontractor's actual non-labor rates. Adding higher non-labor rates for the new subcontractor than ones currently listed in the Agreement requires a formal amendment.
- 6) Other Direct Operating Expenses: The new subcontractor may charge other direct operating expenses (such as material or equipment) as already identified in the Agreement budget. No new types of operating expenses are allowed to be charged by the new subcontractor. Adding new types of operating expenses for the new subcontractor requires a formal amendment.
- 7) Flowdown provisions that shall be included in subcontracts are listed below. The language to include in each subcontract is detailed in Exhibit H.

E. List of Subcontracts:

**Insert Subcontractor Names)**

[Redacted area containing four yellow bars for subcontractor names]

**4. DISABLED VETERAN BUSINESS ENTERPRISE (DVBE) REQUIREMENTS**

A. Reporting

If Contractor made a commitment to achieve DVBE participation for this Agreement, then Contractor must within 60 days of receiving final payment under this Agreement, certify in a report to the CCO: (1) the total amount the Contractor received under this Agreement; (2) the name and address of the DVBE(s) that participated in the performance of the Agreement; (3) the amount each DVBE received from the Contractor; (4) that all payments under the Agreement have been made to the DVBE(s); and (5) the actual percentage of DVBE participation that was achieved. A person or entity that knowingly provides false information shall be subject to a civil penalty for each violation. Military & Veterans Code section 999.5(d).

B. Substitution of DVBE

Contractor shall use each DVBE identified in its proposal or listed in this Agreement. Contractor understands and agrees that if DVBEs were identified in its proposal or listed in this Agreement, award of this Agreement is based in part on its commitment to use the DVBE subcontractor(s). If Contractor believes an identified DVBE must be replaced or substituted, Contractor shall inform CCM and CCO in writing of the reason for the DVBE replacement. A DVBE subcontractor may only be replaced by another DVBE subcontractor and must be approved by the Department of General Services (DGS). Military and Veterans

Code section 999.5 (e). Contractor shall complete revised DVBE certification forms (provided by the CCO) identifying the new DVBE.

C. Amendment

This Agreement shall be amended if: a DVBE must be substituted and DGS has given approval; or there are changes to the scope of work that impact the DVBE subcontractor(s) identified in the proposal or listed in this Agreement.

D. Grounds for Termination; Damages; Penalties

Failure of Contractor to seek substitution and adhere to the DVBE participation level identified in the proposal or listed in this Agreement may be cause for: termination of this Agreement, recovery of damages under rights and remedies due to the State; and penalties as outlined in Military and Veterans Code section 999.9 and Public Contract Code section 10115.10.

E. DVBE Name for this Agreement: **Insert DVBE name**

**5. PROCESS FOR OFFERING WORK**

If the Energy Commission or Contractor requires the replacement of a person listed in the Agreement to provide a particular service, or requires that a new person is added, the Contractor shall:

- 1) First offer the work to qualified persons already listed in this Agreement (either an employee of Contractor or a subcontractor).
- 2) If there is no available qualified person listed in this Agreement who can perform the work, then Contractor shall provide documentation from all the persons who were offered and declined the work to the CCM. Then, Contractor may request to add a new person to the Agreement in accordance with Exhibit B, Rates & Classifications: Changes in Contractor Personnel or Subcontractor Personnel. A person added to the Agreement is thereafter treated as a person listed in this Agreement and can be offered future work without first offering it to originally listed people.
- 3) If the person to be replaced or substituted was identified in the Agreement as a Disabled Veteran Business Enterprise (DVBE) firm, refer to the DVBE provision above for changes to DVBEs.
- 4) If the person added is a new subcontractor, Contractor shall use the process outlined in the Subcontracts provision, Process for New Subcontractors.

**6. CHANGES TO THE AGREEMENT**

A. Significant Changes

Significant changes to this Agreement must be approved at an Energy Commission business meeting through a formal amendment. Significant changes include, but are not limited to:

- change of Contractor's legal name
- change of Contractor
- changes in order to disencumber funds
- changes to Exhibit A that reasonably modify the purpose of the Agreement
- changes to Exhibit A that extend the due dates beyond the term of the Agreement

- changes to Exhibit B that increase the amount of the Agreement
- changes to Exhibit B that increase rates or fees

Contractor shall submit a request in writing to the CCM with a copy to the CCO for any significant change. The CCM will notify the Contractor Project Manager of the appropriate Energy Commission action within ten (10) working days.

B. Non-Significant Changes

Changes that are not significant to the Agreement do not need to be approved at an Energy Commission Business Meeting through a formal amendment. These changes shall be documented in a Letter of Agreement, signed by both parties.

7. **PERFORMANCE EVALUATION**

Consistent with Public Contract Code Sections 10367 through 10371, the Energy Commission shall, upon completion of this Agreement, prepare a performance evaluation of the Contractor. Upon filing an unsatisfactory evaluation with the Department of General Services, Office of Legal Services (DGS) the Energy Commission shall notify and send a copy of the evaluation to the Contractor within fifteen (15) days. The Contractor shall have thirty (30) days to prepare and send statements to the Energy Commission and DGS defending Contractor's performance. The Contractor's statement shall be filed with the evaluation in the Energy Commission's Contract file and with DGS for a period of thirty-six (36) months and shall not be a public record.

8. **REPORTS, DELIVERABLES, AND INFORMATION DISCLOSURE**

A. Reports and Deliverables

- 1) All **public** reports and deliverables shall be delivered to the Energy Commission Accounting Office address listed in Exhibit F.
- 2) All **confidential** reports and deliverables shall be delivered to the Contracts Officer listed in Exhibit F in a sealed envelope marked "Confidential Deliverable."

B. Legal and Copyright Notices

All documents prepared for this Agreement that will be released to the public in hard copy, electronic, or Web Site format including but not limited to reports, deliverables, articles submitted for publication, and all reprints, shall include the following:

**LEGAL NOTICE**

**This report was prepared as a result of work sponsored by the California Energy Commission (Energy Commission). It does not necessarily represent the views of the Energy Commission, its employees, or the State of California. The Energy 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**

**Energy Commission nor has the Energy Commission passed upon the accuracy or adequacy of the information in this report.**

**COPYRIGHT NOTICE**

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

**C. Limitations on Contractor Disclosure of Agreement Information**

- 1) Contractor must receive approval from the CCM before disclosing to any third party the contents of any draft deliverable or report.
- 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 document, and shall include the legal and copyright notices required above.
- 3) In the event any public statement is made by the Energy Commission as to the role of Contractor or the content of any deliverable or report, the 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 Energy Commission to Contractor for Contractor's use in performing this Agreement and which has been designated as Confidential Information, or is the subject of a pending application for confidential designation, except as provided in Title 20, CCR section 2505 and following (and amendments), shall be disclosed by Contractor, unless disclosure is ordered by a court of competent jurisdiction (Title 20 CCR section 2507.). At the election of the CCM, the Contractor, its employees and any subcontractor shall execute a confidentiality agreement, supplied by the CCM or CCO.
- 5) Contractor acknowledges that each of its officers, employees, and subcontractors who are involved in the performance of this Agreement will be informed of these restrictions and be directed to abide by the above terms.

**D. Limitations on Energy Commission Disclosure of Information Contractor Considers Confidential**

- 1) Data provided to the Energy Commission by Contractor, which Data the Energy Commission has not already designated as Confidential Information 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 Energy Commission except as provided in Title 20 CCR Sections 2506 and 2507 (and amendments), unless disclosure is ordered by a court of competent jurisdiction.
- 2) It is the Energy 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 Energy Commission agrees not to disclose information that Contractor considers confidential, without first providing a copy of the disclosure document for review and comment by Contractor. Contractor shall have no less than ten (10) working days for review and comment and, if appropriate,

to make an application for confidential designation pursuant to Title 20 CCR section 2505 (and amendments) on some or all of the information. The Energy Commission shall consider the comments of Contractor and use professional judgment in revising the disclosure document accordingly.

**9. PUBLIC HEARINGS**

If public hearings on the Scope of Work are held during the period of the Agreement, Contractor will make available to testify the personnel assigned to this Agreement. The Energy Commission will reimburse Contractor for compensation and travel of the personnel at the Agreement rates for the testimony which the Energy Commission requests.

**10. DISPUTES**

In the event of an Agreement dispute or grievance between Contractor and the Energy Commission, both parties shall follow the procedure below. Contractor shall continue with the responsibilities under this Agreement during any dispute.

**A. Commission Dispute Resolution**

- 1) The Contractor shall first discuss the problem informally with the CCM. If the problem cannot be resolved at this stage, the Contractor must direct the grievance together with any evidence, in writing, to the CCO. The grievance must state the issues in the dispute, the legal authority or other basis for the Contractor's position and the remedy sought. The CCO and the Program Office Manager must make a determination on the problem within ten (10) working days after receipt of the written communication from the Contractor. The CCO shall respond in writing to the Contractor, indicating a decision and explanation for the decision. Should the Contractor disagree with the decision, the Contractor may appeal to the second level.
- 2) The Contractor must prepare a letter indicating why the decision is unacceptable, attaching to it the Contractor's original statement of the dispute with supporting documents, along with a copy of the CCO's response. This letter shall be sent to the Energy Commission's Executive Director within ten (10) working days from receipt of the decision. The Executive Director or designee shall meet with the Contractor to review the issues raised. A written decision signed by the Executive Director or designee shall be returned to the Contractor within twenty (20) working days of receipt of the Contractor's letter. The Executive Director may inform the Energy Commission of the decision at an Energy Commission business meeting. Should the Contractor disagree with the Executive Director's decision, the Contractor may appeal to the Energy Commission at a regularly scheduled business meeting. Contractor will be provided with the current procedures for placing the appeal on an Energy Commission business meeting agenda.

**B. Binding Arbitration**

- 1) Should the Energy Commission's Dispute Resolution procedure above fail to resolve an Agreement dispute or grievance to the satisfaction of either party, the Contractor and Energy Commission mutually may elect

to have the dispute or grievance resolved through binding arbitration. If one party does not agree, the matter shall not be submitted to 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 AAA commercial arbitration rules. If arbitration is mutually decided by the parties, arbitration is in lieu of any court action and the decision rendered by the arbitrator shall be final and may not be appealed to a court through the civil process. However, judgment may be entered upon the arbitrator's decision and is enforceable in accordance with the applicable law in any court having jurisdiction over this Agreement. The demand for arbitration shall be made no later six (6) months after the date of the Agreement's termination, despite when the dispute or grievance arose, and despite the applicable statute of limitations for a suit based on the dispute or grievance. If the parties do not mutually agree to arbitration, the parties agree that the sole forum to resolve a dispute is California state court.

- 2) The cost of arbitration shall be borne by the parties as follows:
  - a) The AAA's administrative fees shall be borne equally by the parties;
  - b) The expense of a stenographer shall be born by the party requesting a stenographic record;
  - c) Witness expenses for either side shall be paid by the party producing the witness;
  - d) Each party shall bear the cost of its own travel expenses;
  - e) All other expenses shall be borne equally by the parties, unless the arbitrator apportions or assesses the expenses otherwise as part of the award.

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

## 11. **TERMINATION**

### A. Purpose

The parties agree that because the Energy Commission is a state entity, it is necessary for the Energy Commission to be able to terminate, at once, upon the default of Contractor and to proceed with the work required under the Agreement in any manner the Energy Commission deems proper. Contractor specifically acknowledges that the termination of the Agreement by the Energy Commission under the terms set forth below is an essential term of the Agreement, without which the Energy Commission would not enter into the Agreement. Contractor further agrees that upon any of the events triggering the termination of the Agreement by the Energy Commission, the Energy Commission has the right to terminate the Agreement, and it would constitute bad faith of the Contractor to

interfere with the immediate termination of the Agreement by the Energy Commission.

B. Breach

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

C. For Cause

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

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 Energy Commission;
- Retention or hiring of subcontractors, or replacement or addition of Key Personnel that fail to perform to the standards and requirements of this Agreement;
- Failure to utilize the DVBE subcontractors/vendors in this Agreement and/or 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 Agreement;
- Significant change in State or Energy Commission policy such that the work or product being funded would not be supported by the Energy Commission; or
- In the case of a technical support Agreement, changes in Energy Commission staff such that Energy Commission staff can do the work or product being funded.

D. Without Cause

The Energy Commission may, at its option, terminate this Agreement without cause in whole or in part, upon giving thirty (30) days advance notice in writing to the Contractor. In such event, the Contractor agrees to use all reasonable efforts

to mitigate the Contractor's expenses and obligations hereunder. Also, in such event, the Energy Commission shall pay the Contractor for all satisfactory services rendered and expenses incurred within 30 days after notice of termination which could not by reasonable efforts of the Contractor have been avoided, but not in excess of the maximum payable under this Agreement.

**12. WAIVER**

No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this Agreement shall be taken and construed as cumulative, that is, in addition to every other remedy provided therein or by law. The failure of the Energy Commission to enforce at any time any of the provisions of this Agreement, or to require at any time performance by Contractor of any of the provisions, shall in no way be construed to be a waiver of those provisions, nor in any way affect the validity of this Agreement or any part of it or the right of the Energy Commission to thereafter enforce each and every such provision.

**13. CAPTIONS**

The clause headings appearing in this Agreement have been inserted for the purpose of convenience and ready reference and do not define, limit, or extend the scope or intent of the clauses.

**14. PRIOR DEALINGS, CUSTOM OR TRADE USAGE**

In no event shall any prior course of dealing, custom or trade usage modify, alter, or supplement any of these terms.

**15. NOTICE**

Legal notice must be given using any of the following delivery methods: U.S. Mail, overnight mail, or personal delivery, providing evidence of receipt to the person identified in Exhibit F of this Agreement for legal notices. Delivery by fax or e-mail is not considered legal notice for the purpose of this clause. This clause is not intended to apply to normal, daily communication between the parties related to progress of the work. This clause applies to situations where notice is required to be given by this Agreement or the parties are asserting their legal rights and remedies.

Notice shall be effective when received, unless a legal holiday for the State commences on the date of the attempted delivery. In which case, the effective date shall be postponed until the next business day.

**16. STOP WORK**

The CCO may, at any time, by written notice to Contractor, require Contractor to stop all or any part of the work tasks in this Agreement. 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 Energy

Commission based upon a written request by Contractor. Such adjustment request must be made by Contractor within thirty (30) days from the date of the stop work order.

- C. Canceling a Stop Work Order. Contractor shall resume the work only upon receipt of written instructions from the CCO.

**17. RIGHTS OF PARTIES REGARDING DELIVERABLES, DATA, AND INTELLECTUAL PROPERTY**

A. Energy Commission's Rights in Deliverables

Deliverables and reports specified for delivery to the Energy Commission under this Agreement shall become the property of the Energy Commission. The Energy Commission may use, publish, and reproduce the deliverables and reports subject to the provisions of the Reports clause, "Limitations on Energy Commission Disclosure of Information."

B. Rights in Technical, Generated, and Deliverable Data

1) Contractor's Rights

All Data (Technical, Generated and Deliverable Data) produced under this Agreement shall be the property of the Contractor, limited by the license retained by the Energy Commission in 2) below, and the rights the Energy Commission has in deliverables specified above in Clause A.

2) Energy Commission's Rights

Contractor shall provide the CCM and any designated reviewer(s) with a copy of all Technical, Generated and Deliverable Data produced under the Agreement, when requested. Contractor is not required to copy and submit Data the CCM has identified as being unusable to the Energy Commission and the PIER program such as raw data that is too disaggregated or voluminous for practical application. Such Data shall be retained at the Contractor's facility for inspection, review and possible copying by the CCM for a minimum of three (3) years after final payment unless a longer period of records retention is stipulated.

Upon request by CCM, Contractor shall provide the CCM and any designated reviewer(s) access to review Technical and Generated Data produced in the course of this Agreement that is not requested to be delivered to the Energy Commission.

For all Data (Technical, Generated and Deliverable) produced under this Agreement, the Energy 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 the Reports clause "Limitation on Energy Commission Disclosure of Information."

C. Exclusive Remedy

In the event the Energy 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, California.

D. 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 CONFIDENTIAL INFORMATION OR INFORMATION CONTRACTOR CONSIDERS CONFIDENTIAL, 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.

E. Proprietary Data

Proprietary Data owned by the Contractor shall remain with the Contractor throughout the term of this Agreement and thereafter. The extent of Energy Commission's 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 or to establish a baseline for repayment purposes. Upon request by the CCM, Contractor shall provide the CCM and any designated reviewer(s) access to review Contractor's Proprietary Data produced in the course of this Agreement that is not requested to be delivered to the Energy Commission. The Energy Commission shall not disclose any Contractor Proprietary Data accessed or reviewed to any third party.

F. Preservation of Data

Any Data that is reserved to the Contractor by the express terms hereof, and Proprietary Data and Trade Secrets that have 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 minimum of three (3) years after final payment, unless a longer period of records retention is stipulated.

G. Destruction of Data

Before the expiration of three (3) years or the stipulated records retention period and before changing the form of or destroying any Data (including Technical, Generated, Deliverable and Proprietary) or Trade Secrets, the Contractor shall notify Energy Commission of any such contemplated action and Energy Commission may, within thirty (30) days after said notification, determine whether it desires said Data to be further preserved. If Energy Commission so elects, the expense of further preserving said Data shall be paid for by the Energy Commission. Contractor agrees that Energy 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 Energy Commission's expense, to furnish such competent witnesses.

H. Patent Rights

Patent rights for Subject Inventions will be the property of Contractor, subject to the Energy 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 sub clause.

I. March-In Rights

The Contractor shall forfeit and assign to the Energy Commission, at the Energy Commission's request, all rights to a Subject Invention if either: 1) Contractor fails to apply for a patent on Subject Inventions(s) developed under this Agreement within six (6) months of conceiving or first actually reducing the technology to practice, 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, to the Subject Invention to the Energy Commission. The Energy 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 Subject Invention.

J. Energy 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 AGREEMENT NUMBER 500-xx-xxx. THE ENERGY COMMISSION HAS CERTAIN RIGHTS TO THIS INVENTION.

K. Energy Commission's Interest in Inventions

If Contractor or any subcontractor perfects a patent application on any Subject Invention, Contractor shall notify the CCM and the CCO. The CCO will complete and file a Uniform Commercial Code (UCC.1) Financing Statement with the Secretary of State's Office.

L. Copyrights

- 1) Copyrightable work first produced under this Agreement shall be owned by the Contractor, limited by the license granted to the Energy Commission in 2) below.
- 2) Contractor agrees to grant the Energy 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 work first produced or composed in the performance of this Agreement.

- 3) Contractor will apply copyright notices to all documents prepared for this Agreement that will be released to the public including reports, deliverables, articles submitted for publication, and all reprints, using the following form or such other form as may be reasonably specified by Energy 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 Agreement, but is first produced or composed in the performance of the Agreement, Contractor shall have the right to copyright and/or patent such software and grants the Energy 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.

M. Intellectual Property Indemnity

Contractor warrants that Contractor will not, in supplying work under this Agreement's Scope of Work, 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 Energy 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 Agreement.

**18. BUSINESS ACTIVITY REPORTING**

- A. Contractor shall promptly notify the CCM of the occurrence of any 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 this Agreement.
- 4) The occurrence of any casualty or other loss to Project personnel, equipment or third parties.
- 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 Energy 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 Energy Commission. A change of business entity or name change requires an amendment assigning or

novating the Agreement to the changed entity. In the event the Energy Commission is not satisfied that the new entity can perform as the original Contractor, the Energy Commission may terminate this Agreement as provided in the Termination clause.

**19. 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 related third-party agreements and has identified all known or reasonably foreseeable conflicts with this Agreement's terms and conditions and has disclosed the conflicts in writing to the Energy Commission prior to executing this Agreement. In the event further conflicts are identified, Contractor and Energy Commission agree that these conflicts shall be addressed using the procedure described in the Disputes clause. Nothing in this Agreement is intended to nullify or obviate any prior third-party agreements executed by Contractor. However, the Energy Commission may terminate this Agreement if the conflict impairs or diminishes the value of this Agreement.

**20. ACCESS TO SITES AND RECORDS**

The Energy Commission staff or its representatives shall have reasonable access to all Project sites and to all records related to this Agreement.

**21. ASSURANCES**

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

**22. SURVIVAL**

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

- Recordkeeping, Cost Accounting and Auditing
- Indemnification
- Disputes
- Termination
- Rights of Parties Regarding Deliverables, Data, and Intellectual Property
- Purchase of Equipment
- Business Activity Reporting
- Access to Sites and Records
- Royalty Payments to Energy Commission

**23. INTERPRETATION OF TERMS**

This Agreement shall be conducted in accordance with the terms and conditions of the solicitation, if applicable. The Contractor's proposal is not attached, but is expressly incorporated by reference into this Agreement. In the event of conflict or inconsistency between the terms of this Agreement and the solicitation or proposal, this Agreement shall be considered controlling.

**24. AMENDMENTS**

This Agreement may be amended through a formal amendment process to make changes, including without limitation;

- Increases in total Agreement amount,
- Extending the Agreement end date,
- Adding or modifying tasks,
- Adding or modifying terms and conditions.

Amendments may be made without competitively bidding, so long as the amendment is exempt from competitive bidding pursuant to Public Contract Code section 10335, Government Code section 11010.5 and the State Contract Manual.

**25. DISCRIMINATION AND HARASSMENT TRAINING**

All employees of Contractor and any subcontractor who provide service under this Agreement and maintain work space at the Energy Commission shall take annual training on the prevention of discrimination and harassment. The Energy Commission shall provide the online training course at no charge to Contractor or subcontractors. However, Contractor and subcontractors shall not invoice for the time spent taking the course. Contractor shall ensure that all employees of Contractor and any subcontractor who provide service under this Agreement and represent the Energy Commission in public hearings and workshops, but do not maintain office space at the Energy Commission, receive training on prevention of discrimination and harassment.