

<b>FIXED PRICE SUBCONTRACT</b>  <b>NO. TBD</b>	 <p>The Regents of the University of California Lawrence Berkeley National Laboratory One Cyclotron Road Berkeley, CA 94720</p>
<b>Subcontractor:</b>  Name _____ Attention: _____ Address _____ City, State, Zip _____ Phone: _____ Fax: _____ E-Mail: _____	<b>University Procurement Representative:</b>  Name: Lynn E. Rippe Title: Subcontracts Manager Phone: (510) 610-3970 E-Mail: lerippe@lbl.gov

**Introduction**

This is a fixed price subcontract (hereinafter "Subcontract") for the National Energy Research Scientific Computing Center (NERSC) 8 Computer System, as further described herein.

This Subcontract is between The Regents of the University of California, (hereinafter "University") and the party identified above as the "Subcontractor".

This Subcontract is issued under Prime Contract No. DE-AC02-05CH11231 between the University and the United States Government (hereinafter "Government"), represented by the Department of Energy (hereinafter "DOE") for the management and operation of the Lawrence Berkeley National Laboratory (hereinafter "LBNL") and the performance of research and related work.

**Agreement**

The parties agree to perform their respective obligations in accordance with the terms, conditions, and provisions of the attached SCHEDULE OF ARTICLES and the documents referenced or incorporated therein, which together with this Signature Page shall collectively constitute the entire Subcontract and shall supersede all prior negotiations, representations, or agreements, whether verbal or written.

**SUBCONTRACTOR'S NAME**

**THE REGENTS OF THE  
UNIVERSITY OF CALIFORNIA**

By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

## SCHEDULE OF ARTICLES

### ARTICLE 1 – STATEMENT OF WORK

- A. Description. The Subcontractor shall provide computer hardware comprising the National Energy Research Scientific Computing Center (NERSC) 8 Computer System (hereinafter Equipment or System). The work is more specifically described in the attached *Statement of Work*.

Subcontractor shall furnish all personnel, supervision, materials, supplies, equipment, tools, facilities, transportation, testing, and other incidental items and services necessary for performance of the work, except for Government Property specified herein to be furnished by the University. The Supplies shall conform to the original manufacturer's specifications.

The materials, supplies, equipment, tools, and other incidental items furnished or used by the Subcontractor shall meet nationally recognized safety standards or have been tested and found safe for use.

The work shall be performed by the Subcontractor at the Subcontractor's facility, at the Oakland Scientific Facility at 415 Thomas Berkley Way, Oakland CA, at LBNL, and at other locations approved by the University.

- B. Electrical Device Certification Requirement. All electrical equipment, components, conductors and other items delivered to the University of the type requiring testing by a Nationally Recognized Testing Laboratory (NRTL) recognized by the Occupational Safety and Health Administration (OSHA) shall be NRTL listed, labeled, and certified in accordance with Part 1910, *Occupational Safety and Health Standards*, of Title 29 of the Code of Federal Regulations (29 CFR 1910). The Subcontractor shall notify the University Technical Representative, in writing, of any item to be delivered that does not meet this requirement. The University reserves the right to refuse delivery of or return any such items. Information on required NRTL testing is available at <http://www.osha.gov/dts/otpca/nrtl/>.

### ARTICLE 2 - DELIVERY AND TERM

- A. This Subcontract shall become effective upon Subcontractor's signature acceptance.
- B. The Subcontractor shall deliver and install the System no later than \_\_\_\_\_. Acceptance of the System shall be accomplished no later than \_\_\_\_ days after the date of delivery and installation. The University will evidence its acceptance of each system by executing and delivering to Subcontractor an Acceptance Certificate in a form acceptable to the Subcontractor.
- C. The University is relieved from all risk of loss or damage to the Equipment during period of transportation, installation and prior to the University's written final acceptance, except when loss or damage is due to the fault or negligence of the University.
- D. This Subcontract shall continue in effect for seven (7) years after acceptance of the System, for purposes of maintenance and support.

**ARTICLE 3 – PRICE AND PAYMENT**

A. The total fixed-price of this Subcontract is \$\_\_\_\_\_.

B. The fixed price consists of the following Subcontract Line Items:

Line Item	Acceptance Date	Description	Amount
		<b>SAMPLE LINE ITEMS</b>	
001	XXX	Test System	XXXX
002	XXX	NERSC 8 Computer System	XXXX
003	XXX	Maintenance and Support Year X	XXXX
004	XXX	Maintenance and Support Year X	XXXX
005	XXX	Maintenance and Support Year X	XXXX
XXX	XXX	(Other Negotiated Features & Deliverables)	XXXX
		<b>Subcontract Total</b>	\$_____

C. Options. The University may exercise any or all of the following purchase options by the dates listed below. All pricing shall be fixed and include installation, warranty, and three (3) years maintenance. Equipment procured under these options may be located at the University's Oakland Scientific Facility or elsewhere as determined by the University.

	<b>SAMPLE LIST OF OPTIONS</b>	<b>Dates for Exercise</b>	<b>Price</b>
XX	0.5X System		
XX	1X System		
XX	2X System		
XX	5X System		
XX	Additional Memory		
XX	Additional Disk		
	Support Maintenance and Support		
XX	Subcontract year X		
XX	Subcontract year X		
	Additional Subcontractor On-Site Support Staff (Annual Rate)		
XX	Hardware Engineers		
XX	Systems Analysts		
XX	Applications Analysts		
XXX	(Other Negotiated Options)		

D. Third Party-Financed LTO Provisions

A Lease to Ownership ("LTO") Agreement between the University and \_\_\_\_\_ (Lessor) will provide for payment to the Subcontractor for Line Item(s) \_\_\_\_\_.

Title to the equipment identified as Line Item(s) \_\_\_\_\_ and purchased under this Subcontract shall pass, upon payment, directly to the Lessor, and thereafter to the Government under the provisions of the LTO Agreement. Subcontractor shall provide a bill of sale to Lessor upon payment for the equipment to evidence passage of title to Lessor.

Purchase of Line Item(s) \_\_\_\_\_ under this Subcontract shall be contingent upon the issuance of an LTO Order \_\_\_\_\_ under the LTO Agreement by the University to Lessor. The Subcontractor shall not be obligated to build or deliver such line item(s) prior to receipt of a copy of a properly executed LTO Order.

E. Optional LTO Provision

In the event the University cannot obtain a LTO Order through a third party, the Subcontractor shall provide such funding in accordance with the attached Master Lease to Ownership Agreement. The University agrees to pay to the Subcontractor lease payments for the Equipment following acceptance of the Equipment specified in Line Item(s) \_\_\_\_\_, in monthly installments. The Payment Schedule shall be established based on a simple amortization schedule calculated to repay the adjusted principal amount over a \_\_\_\_\_-month period. The annual lease rate applied to the Payment Schedule shall be the sum of the Treasury Constant Maturity Rate for a term equivalent to the lease term, as listed in the "Federal Reserve Statistical Release H.15," from the acceptance date of the Equipment, and a factor of \_\_\_\_\_ percent. The University is given the option to purchase the Equipment being leased at any time after acceptance of the Equipment by paying the balance of the purchase price.

F. Sales or Use Tax. Items purchased by the University hereunder are titled to the Government and treated as for resale, per the University's California State Resale Permit No. SR-CH 21-835970 for LBNL, and shall not be subject to any California or other State sales or use tax. Any items furnished hereunder for temporary use by the University are subject to California State sales or use tax, and such tax is included in the fixed prices/rates stated herein.

G. Invoices

1. Invoice(s) shall be emailed directly to the LBNL Accounts Payable Office at [APIInvoice@lbl.gov](mailto:APIInvoice@lbl.gov), upon acceptance of the item(s). The "subject" line of the email shall state the Subcontractor's name and the Subcontract number.
2. If unable to submit an invoice by email, the Subcontractor may submit the invoice to the following address:

Lawrence Berkeley National Laboratory  
Accounts Payable Office, Subcontract No. TBD  
One Cyclotron Road, M/S 971-AP  
Berkeley, CA 94720

3. Invoice(s) shall state the Subcontract number; clearly identify the Subcontractor (including business heading or logo); include an invoice date, unique invoice number, and remittance address; sufficiently identify the items/services being invoiced; and identify any separately payable freight charges (with receipts if available) and taxes. Invoice(s) in a spreadsheet format are not acceptable, but a spreadsheet can be used to support an invoice. The Subcontractor shall maintain records which support all invoiced amounts, and provide them to the University Procurement Representative upon request.

H. Payment Terms. All invoices except the final invoice shall be payable within 30 days of receipt, or 15 days if the Subcontractor is a small business; provided, however, that payments made thereafter shall not be subject to any penalty, interest, or late charges. Only those items/services identified in this Subcontract or a Subcontract Modification will be considered for payment. Payment amounts may be adjusted for any applicable credits, offsets, or withholds. Full payment shall not be due until any final acceptance requirements of this Subcontract have been satisfied. For inquiries about the status of an invoice, call (510) 486-6954.

I. Allocated Funding Limit

1. The funding presently allocated for payment to the Subcontractor for Line Item(s) \_\_\_\_\_ under this Subcontract is limited to \$ \_\_\_\_\_. The allocated funding amount covers the following performance milestones:

[Performance Milestones TBD]

2. It is anticipated that the University will increase this allocated funding amount up to the total fixed price of this Subcontract as funding becomes available, excluding unexercised options; however, the University shall not be obligated to do so. The allocated funding amount may be unilaterally changed by the University Procurement Representative, by issuance of a written modification to this Subcontract.
3. The allocated funding amount specified above shall be the limit of the University's liability for all costs under this Subcontract, any other provision to the contrary notwithstanding. The Subcontractor is not obligated to continue performance under this Subcontract or otherwise incur cost or expenses in excess of the allocated funding amount. The Subcontractor shall notify the University in writing at least five working days prior to stopping work to avoid exceeding the allocated funding amount.

**ARTICLE 4 – SUBCONTRACT ADMINISTRATION**

A. University Procurement Representative. The designated University Procurement Representative for this Subcontract is the person authorized to make changes in the requirements of this Subcontract or make modifications to this Subcontract, including changes or modifications to the ordered item(s). The Subcontractor shall submit all documents, notices, and requests for approval required by this Subcontract to the University Procurement Representative at the email address indicated on the signature page or at the following mail address:

Lawrence Berkeley National Laboratory  
One Cyclotron Road M/S 943-200  
Berkeley, CA 94720

Any notices and approvals required by this Subcontract from the University to the Subcontractor shall be issued by the University Procurement Representative.

- B. University Technical Representative. \_\_\_\_\_ is the University Technical Representative for this Subcontract. The University Technical Representative is the person designated to monitor the Subcontract work and to interpret and clarify the technical requirements, but is not authorized to make changes to the ordered item(s) or to modify this Subcontract.
- C. Closeout. The Subcontractor shall, as a condition of full payment, assist the University in accomplishing the administrative closeout of this Subcontract after the completion of performance, including, as necessary or required, the furnishing of documentation and reports, the disposition of property, the disclosure of any inventions, the execution of any required documents, the performance of any audits, and the settlement of any interim or disallowed costs.

**ARTICLE 5 – SHIPPING REQUIREMENTS**

- A. Shipping Terms. The shipping terms are F.O.B. Destination, freight included/prepaid. All shipments shall be shipped via the Subcontractor's vehicles or a licensed common carrier selected by the Subcontractor, at the Subcontractor's expense.
- B. Delivery Address. All shipments shall be delivered to the following address:  
Lawrence Berkeley National Laboratory  
Oakland Scientific Facility  
For the U.S. Department of Energy  
Attn: \_\_\_\_\_  
415 Thomas Berkley Way  
Oakland, CA 94612

**ARTICLE 6 –KEY PERSONNEL**

It is understood and agreed that the Subcontractor's key personnel designated below are considered to be essential to the Services being performed hereunder and shall not be reassigned or replaced without prior University approval, except where such circumstances are beyond the reasonable control of the Subcontractor. The Subcontractor shall notify the University Procurement Representative reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the performance of this Subcontract.

<u>NAME</u>	<u>TITLE</u>
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The Subcontractor shall not assign any incompetent, unfit, or unskilled individuals to work under this Subcontract. Should the University deem any individual(s) assigned to this Subcontract as incompetent, unfit, or unskilled and informs/ notifies the Subcontractor, the Subcontractor shall immediately remove the identified individual(s) from working under this Subcontract.

**ARTICLE 7 – LBNL SITE ACCESS REQUIREMENTS**

- A. All Subcontractor and lower-tier subcontractor employees requiring access to LBNL DOE-affiliated sites are subject to DOE restrictions.

- B. The Subcontractor shall not assign foreign national employees to work at LBNL DOE-affiliated sites who were born in, are citizens of, are employed by, or represent a government, company, institution, or other organization based in a country on the Department of State's List of State Sponsors of Terrorism without prior written approval from DOE Headquarters. Terrorist-sponsoring countries include Cuba, Iran, Sudan, and Syria. Requests for access must be submitted to LBNL at least 180 days in advance to allow time for approval from the DOE.
- C. LBNL is also required by DOE to document all foreign national employees who were born in, are citizens of, or are employed by a government, employer, institution or organization, of a sensitive country who require access to LBNL DOE-affiliated sites for 30 days or more (assignees). Such employees must identify themselves upon entry to any LBNL site. Sensitive countries include Algeria, Armenia, China, India, Israel, Libya, North Korea, Pakistan, Russia and various other former Soviet Union countries, and Taiwan. A complete list of sensitive countries and additional information on this requirement is available at <http://www.lbl.gov/ufva>.

#### **ARTICLE 8 – SUBCONTRACTOR SAFETY ASSURANCE**

The Subcontractor shall sufficiently prepare, and provide sufficiently trained personnel and resources, to perform the Services in a safe manner, and shall comply with DOE Acquisition Regulation (DEAR) 970.5223-1, *Integration of Environment, Safety, and Health into Work Planning and Execution*.

Upon award of the Subcontract, the Subcontractor shall complete and submit on-line a *Subcontractor Job Hazard Analysis and Work Authorization Form For Non-Construction* (sJHA) for all Services to be performed at any LBNL site, utilizing the internet link for the sJHA form indicated in the notification accompanying this Subcontract, unless the University accepts an existing sJHA for the Services. Instructions for completing the online sJHA are at <https://ehswprod.lbl.gov/sjha/start.aspx>.

The Subcontractor shall not commence the Services at any LBNL site until the University Technical Representative or a designee reviews the sJHA with the Subcontractor and approves the sJHA, authorizing commencement of the Services. For hazardous Services, the University may require additional authorizations before allowing performance of Services at an LBNL site. The Subcontractor may proceed with all other Services required by the Subcontract in preparation for performance of the Services at an LBNL site.

The Subcontractor shall also ensure that all personnel who will perform the Services at an LBNL site review the brochure entitled *EH&S Orientation for Non-Construction Subcontractors, Vendors, and Visitors*, which is available at <http://www.lbl.gov/ehs/ssa/assets/docs/nssa/EHS-Orientation-Subcontractors-Vendors-Guests.pdf>.

The University's review and approval of the sJHA and issuance of work authorizations will satisfy the requirement of DEAR 970.5223-1 for the Subcontractor to submit documentation of a safety management system that identifies, analyzes, and establishes controls for the hazards associated with the Services; however, it shall not be considered a determination of the adequacy of the Subcontractor's protections. Ensuring the adequacy of the protections for personnel at the work site, the public, and the environment shall at all times remain the responsibility of the Subcontractor.

**ARTICLE 9 – INSURANCE**

**A. Types of Coverage**

The Subcontractor shall at its expense obtain, keep in force, and maintain insurance to cover its performance under this Subcontract of the types and in the amounts set forth below. Such insurance shall be maintained in full force and effect during the performance of work required by this Subcontract.

**General Liability Insurance**

	<u>Minimum Limit</u>
• Per Occurrence	\$ 3,000,000
• Products/Completed Operations Aggregate	\$ 3,000,000
• Personal and Advertising Injury	\$ 3,000,000
• General Aggregate *	\$ 5,000,000

\* Not applicable to comprehensive form

**Business Automobile Liability Insurance**

	<u>Minimum Limit</u>
• Per Occurrence	\$ 3,000,000

The automobile liability insurance shall cover liability to third parties related to the Subcontractor's use of owned, scheduled, non-owned, or hired vehicles, including the Subcontractor's use of any University-furnished U.S. Government owned vehicles, and any resulting loss or destruction of, or damage to the University-furnished U.S. Government owned vehicles.

Workers' Compensation as required under California State Law, and Employer's Liability Insurance with a minimum limit of \$1,000,000 per accident and employee.

**B. Coverage Requirements**

The general liability insurance, by a valid certificate or endorsement, shall: (a) include a provision designating The Regents of the University of California and the U.S. Government as **additional insureds** with respect to performance of this Subcontract by the Subcontractor and its lower-tier subcontractors and consultants; and (b) include a **waiver of subrogation** in favor of the University and the U.S. Government.

The insurance coverage shall be primary and shall not participate with or be in excess over any other valid collectible insurance or program of self-insurance of the University or the U.S. Government.

The required insurance shall be obtained from insurance companies authorized to do business in California and satisfactory to the University. The University reserves the right to approve the form and substance of all policies issued for the required insurance.

The insurance shall not be written on a claims-made form or be subject to a self-insurance retention (SIR) or deductible of \$100,000 or more without the written approval of the University Procurement Representative. If insurance on a claims-made form is approved, it shall continue

for three years following termination of this Subcontract and provide for a retroactive date of placement prior to or coinciding with the effective date of this Subcontract.

The stipulation of required coverage and limits of insurance shall not in any way limit the liability of the Subcontractor.

C. Certificates of Insurance and Endorsements

Prior to commencing any work at a location other than the Subcontractor's or lower-tier subcontractor's facilities, the Subcontractor shall provide certificate(s) of insurance and any necessary endorsements for all of the types of required insurance, issued by properly authorized representatives, specifically confirming the required coverage. The certificate(s) of insurance and endorsements shall be submitted to the University Procurement Representative at the following address:

Lawrence Berkeley National Laboratory  
One Cyclotron Road M/S 943-200  
Berkeley, CA 94720

The Subcontractor shall provide written notification to the University Procurement Representative at least 30 days in advance of any modification, change, or cancellation of any of the insurance coverage. Any such notification by an insurance agent or other insurance company representative shall be in addition to, and shall not satisfy, the Subcontractor's obligation to provide a written notification.

D. Lower-Tier Subcontractor Indemnification and Insurance

Before permitting any lower-tier subcontractor, other than providers of standard commercial items and supplies, to perform work under this Subcontract, the Subcontractor shall require the lower-tier subcontractor, in connection with the work the lower-tier subcontractor will perform, to: (1) indemnify The Regents of the University of California and the U.S. Government from any liability for injury or damage, and (2) furnish to the Subcontractor satisfactory evidence that the lower-tier subcontractor has insurance consistent with the types and amounts specified above.

**ARTICLE 10 – APPROVAL OF TECHNICAL DATA**

If this Subcontract requires the Subcontractor to furnish any drawings, specifications, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance or test data, or other technical data for approval by the University prior to Subcontractor performance, the approval of the data by the University shall not relieve the Subcontractor from responsibility for any errors or omissions in such data or from responsibility for complying with the requirements of this Subcontract, except as specified below. Any work done prior to such approval shall be at the Subcontractor's risk.

Unless otherwise specified, the University requires a period of 10 working days from date of receipt to review and approve the data. If the University does not approve the data within the allotted time period, the parties will establish a new time period for review and approval of the data and, if necessary, the delivery schedule or completion date will be equitably adjusted.

If the data includes any variations from the Subcontract requirements, the Subcontractor shall describe such variations in writing at the time of submission of the data. If the University approves any such

variation(s), a change order to the Subcontract shall be issued by the University and, if appropriate, a bilateral modification to the Subcontract shall be negotiated.

#### **ARTICLE 11 – PRELIMINARY INSPECTION**

The University reserves the right to observe and witness all phases of the manufacturing of the items, including design, fabrication, assembly, testing, and inspection, conducted at the Subcontractor's facility or at any of its sub-tier subcontractors' facilities.

Preliminary in-process and source inspections may be performed at the Subcontractor's facility or at any of its sub-tier subcontractors' facilities. The inspection shall allow the University to verify that the Subcontractor has met the requirements of this Subcontract. Prior to University inspection, the Subcontractor shall perform a complete inspection and document the results. The Subcontractor shall present this documentation to the University at the time of the preliminary inspection. Such preliminary inspection does not waive the right of the University to inspect and accept or reject at the destination. The University reserves the right to subcontract with a qualified third party to conduct on its behalf any or all of the University inspections.

#### **ARTICLE 12 – ENVIRONMENTALLY PREFERABLE PRODUCTS AND SERVICES**

In the performance of this Subcontract, the Subcontractor shall specify, furnish, and use environmentally preferable products and services (i.e., products and services with a lesser or reduced effect on human health and the environment), to the maximum possible extent consistent with the Subcontract requirements and the intended end use of the products or services. Information on environmentally preferable products and services is available at: <http://www.epa.gov/opptintr/epp/>.

#### **ARTICLE 13 – ACCESS TO LBNL COMPUTER AND NETWORK RESOURCES**

- A. Access to LBNL computer and network resources by Subcontractor personnel shall be in accordance with, and is subject to, the LBNL security policies and procedures, including, but not limited, to the policies found at <http://www.lbl.gov/ITSD/Security/guidelines/>. These policies and procedures are applicable, whether such access is at LBNL, at the Subcontractor's facility, or elsewhere. If the Subcontractor does not comply with these requirements, the University may withdraw Subcontractor's access to LBNL resources. Misuse of LBNL resources may be a violation of law and could result in appropriate action, including termination for default and/or criminal prosecution.
- B. Access to LBNL resources by Subcontractor personnel is only permitted as required to perform the Services authorized under this Subcontract. All information or data furnished by the University, obtained from a LBNL computer, or developed on a LBNL resource by Subcontractor personnel must be protected by the Subcontractor to prevent disclosure to any person other than those authorized by the University. Files which are not designated for access by Subcontractor personnel may not be accessed without specific permission from the University. The University reserves the right to monitor the use of LBNL computer resources by all appropriate means.
- C. Computer and network passwords issued to Subcontractor personnel for access to the LBNL resources must not be shared and must be protected by Subcontractor personnel to prevent disclosure to any other persons. If a password is disclosed, or disclosure is suspected, the

Subcontractor must immediately notify the University Technical Representative and arrange for replacement of the password.

#### **ARTICLE 14 - E-VERIFY PROGRAM ENROLLMENT**

Pursuant to the *Employment Eligibility Verification* clause of the General Provisions (FAR 52.222-54), the Subcontractor shall:

1. Enroll as a Federal contractor in the online E-Verify System at: <https://e-verify.uscis.gov/enroll>, and within 10 days of award of this Subcontract provide the University Procurement Representative with written verification of the enrollment, such as a copy of the Subcontractor's "Company Information" page from the E-Verify System.
2. Include the clause in each lower-tier subcontract for construction or services exceeding \$3,000, as required by the clause (excluding those with self-employed individuals), and within 10 days of award thereof provide the University Procurement Representative with written verification of the subcontractor's enrollment in the E-Verify System.

#### **ARTICLE 15 – TECHNOLOGICAL ADVANCES AND CHANGES**

- A. After Subcontract award, the University may solicit, and the Subcontractor is also encouraged to propose independently, technological changes to the Equipment or other requirements of this Subcontract. These changes may be proposed to save money, to improve performance, to save energy, or to satisfy the increased computational capability/capacity needs. If the proposed changes are acceptable to both parties, the Subcontractor shall submit a price change proposal to the University for evaluation. Those proposed technological changes that are acceptable to the University will be processed as modifications to the Subcontract.
- B. This Article applies only to those proposed changes after Subcontract award, identified by the Subcontractor as a proposal submitted pursuant to the provisions of this clause. The following information shall be submitted by the Subcontractor with each proposal:
  1. A description of the difference between the existing Subcontract requirement and the proposed change, and the comparative advantages and disadvantages of each.
  2. Itemized requirements of the Subcontract, which must be changed if the proposal is adopted, and the proposed revision to the Subcontract for each such change.
  3. An estimate of any changes in performance and cost that will result from adoption of the proposal.
  4. An evaluation of the effects the proposed change would have on collateral costs to the University, such as University-furnished property costs, costs of related items and costs of maintenance and operation.
  5. A statement of the time by which the modification adopting the proposal must be issued so as to obtain the maximum benefits of the changes during the remainder of this Subcontract. Also, any effect on the Subcontract completion time or delivery schedule shall be identified.
- C. Technological change proposals submitted to the Procurement Specialist will be processed expeditiously. The University will not be liable for proposal preparation costs or any delay in acting upon any proposal submitted pursuant to this Article. The Subcontractor has the right to withdraw, in whole or in part, any technological change proposal not accepted by the University within the period specified in the technological change proposal. The decision of the University

as to the acceptance of any such proposal under this Subcontract will not be subject to the "Disputes" paragraph of this Subcontract.

- D. The Subcontractor is requested to identify specifically any information contained in the technological change proposal which the Subcontractor considers confidential or proprietary and which the Subcontractor prefers not to be disclosed to the public. The identification of information as confidential and/or proprietary is for information purposes only and shall not be binding on the University to prevent disclosure of such information.

#### **ARTICLE 16 – SITE PREPARATION**

- A. Site preparation specifications shall be furnished in writing by Subcontractor. These specifications shall be in such detail as to ensure that the Equipment to be installed shall operate efficiently.
- B. The University shall prepare the site at its own expense prior to shipment and in accordance with the specifications furnished by the Subcontractor and shall maintain the site requirements throughout the period of this Subcontract.
- C. Subcontractor shall inspect the site and report to the University in writing the dates of the inspection, any site preparations that do not meet specifications and the reasons therefore, and the final inspection and acceptance of the site.

#### **ARTICLE 17 – SOFTWARE LICENSES**

All software licenses required under this Subcontract shall include a clause whereby the license is fully transferable and assignable to the Department of Energy (DOE) for assignment to any succeeding prime contractor to the University.

The term "Software" as used in this Subcontract shall mean all computer programs licensed under this Subcontract, including all related files, documentation, and other materials, whether in whole or in part, including any and all modifications, derivative works, and copies of the foregoing, regardless of the form or media in or on which they may exist.

#### **ARTICLE 18 - U.S. NATIONAL LABORATORIES AND AGENCIES**

The Subcontractor recognizes that work performed under this Subcontract is of interest not only to the University, but to other U.S. national laboratories and agencies as well. The Subcontractor agrees that the University may share and otherwise distribute deliverables, information, data, software, and any correspondence provided by the Subcontractor under this Subcontract with personnel at the U.S. national laboratories and agencies identified below.

- Los Alamos National Security LLC, manager and operator of Los Alamos National Laboratory (LANL)
- Sandia Corporation, manager and operator of Sandia National Laboratory (SNL)
- Lawrence Livermore National Security LLC, manager and operator of Lawrence Livermore National Laboratory (LLNL)
- UChicago Argonne LLC, manager and operator of Argonne National Laboratory (ANL)
- UT-Battelle LLC, manager and operator of Oak Ridge National Laboratory (ORNL)
- U.S. Department of Energy, National Nuclear Security Administration (NNSA)
- U.S. Department of Energy, Office of Science (DOE SC)

This Article 18 does not in any way limit or restrict the University's or the Government's rights set forth in the GENERAL PROVISIONS.

**ARTICLE 19 – INCORPORATED DOCUMENTS**

The following documents are hereby incorporated as a part of this Subcontract, and are attached hereto:

- General Provisions for Commercial Supplies & Services, dated 7/26/2013
- Statement of Work dated \_\_\_\_\_
- Master Lease to Ownership Agreement 2013-NERSC8

(END OF SCHEDULE OF ARTICLES)

SAMPLE



**GENERAL PROVISIONS FOR COMMERCIAL SUPPLIES AND SERVICES**

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**CLAUSE 1 – DEFINITIONS**

As used herein, the following terms shall have the indicated meanings:

- "CFR" means the U.S. Code of Federal Regulations.
- "DEAR" means the DOE Acquisition Regulation.
- "DOE" means the U. S. Department of Energy.
- "FAR" means the Federal Acquisition Regulation.
- "Government" means the United States Government.
- "LBNL" means the Lawrence Berkeley National Laboratory.
- "Ordered Item" or "item" or "services" means the supplies or services subcontracted for under this Subcontract.
- "Subcontract" means the subcontract or agreement between the University and the Subcontractor which includes these General Provisions.
- "Subcontractor" means the party who has entered into the Subcontract with the University, as identified in the Subcontract.
- The lower case term "subcontractor" means the Subcontractor's lower-tier subcontractor(s).
- "University" means The Regents of the University of California, acting through the LBNL.

**CLAUSE 2 – SCOPE OF SUBCONTRACT**

The scope of this Subcontract is limited to the acquisition of commercial items or commercial components, as those terms are defined in FAR 2.101, including services meeting the commercial item definition, and shall not include any construction or research work.

To the maximum practicable extent the Subcontractor and its subcontractors at all tiers shall incorporate, commercial items or nondevelopmental items, as defined in FAR 2.101, as components of items to be supplied under the Subcontract.

The Subcontract is entered into under the University's Prime Contract No. DE-AC02-05CH11231 with DOE for management and operation of LBNL and performance of research and related work.

**CLAUSE 3 – ACCEPTANCE OF SUBCONTRACT**

The Subcontractor's written acceptance of this Subcontract or the performance of any portion of this Subcontract shall constitute the Subcontractor's unqualified acceptance of this Subcontract and all of the Subcontract's terms and conditions. Any alterations made to the documents comprising this Subcontract or any conditions imposed by the Subcontractor upon its written acceptance of this Subcontract are not accepted, shall constitute a proposal for modification of the Subcontract only, and shall have no effect on the validity or the Subcontractor's acceptance of this Subcontract and its terms and conditions, anything to the contrary notwithstanding.

In the event the Subcontractor's business status indicated in the Subcontract or the Subcontractor's proposal is not accurate and current, in accordance with applicable Federal laws, executive orders, and regulations, the University may cancel this Subcontract, without further obligation.

**CLAUSE 4 – SHIPMENTS FOR UNIVERSITY'S ACCOUNT**

Except as otherwise provided in the Subcontract, all shipments by the Subcontractor for the University's account shall be (1) shipped FOB Origin or Shipping Point and marked as shipped "For the U. S. Department of Energy;" (2) shipped at the maximum declared value for the lowest applicable transportation rate or classification, and the bill of lading shall so note; and (3) self-insured by the University and not insured by the Subcontractor. Airway bills shall be marked with the appropriate "Government Package" entry. Shipping costs in excess of those per the shipping instructions specified in the Subcontract shall be deducted from the Subcontractor's invoice(s).

**CLAUSE 5 – TITLE AND RISK OF LOSS**

Unless otherwise provided in the Subcontract, title to items purchased under the Subcontract shall pass directly to the Government, and the risk of loss or damage to the items shall remain with the Subcontractor and shall pass to the University, upon completion of delivery and unloading at the delivery point.

However, if the Subcontract requires formal acceptance of any items by the University, then title to such items shall pass directly to the Government upon such formal acceptance; and the title and risk of loss or damage to non-conforming items shall remain with the Subcontractor until acceptance of the items by the University as conforming.

**CLAUSE 6 – PACKAGING INSTRUCTIONS**

The Subcontractor shall suitably package items for shipment to prevent damage during handling and shipping. Any damage resulting from improper packaging, containerizing, or lack thereof shall be the liability of the Subcontractor, anything to the contrary notwithstanding. The Subcontractor shall indicate the University Subcontract number on each container or package. An itemized packing list shall be affixed to the outermost cover of each container or package.

The University encourages the use of biodegradable packaging materials. The Subcontractor is requested to use every reasonable effort to use biodegradable packaging materials for shipments to the University.

**CLAUSE 7 – INSPECTION**

The University reserves the right to inspect all and every part of the items and services furnished under the Subcontract, during and after completion of performance. The University shall not be obligated to inspect the items or services, and neither the inspection nor the lack of inspection by the University shall relieve the Subcontractor of its responsibility for providing the items and services in accordance with the terms and conditions of the Subcontract. The inspection of or payment for an item or service under the Subcontract, either wholly or in part, shall not be construed as an acceptance.

If any item or service or any part thereof is not in accordance with the terms and conditions of the Subcontract, the University shall notify the Subcontractor that the item or service is rejected. Thereupon, the Subcontractor shall, at its own expense, take the necessary corrective action. The University shall reject, or revoke its acceptance of, an item

or service: (1) within a reasonable time after a defect is discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item or service, unless the change is due to a defect in the item or service.

#### **CLAUSE 8 – INVOICES**

Invoices shall be submitted at the time of final shipment or completion, unless otherwise provided in the Subcontract. All invoices shall comply with the invoice requirements specified in the Subcontract. Failure to comply with any of these requirements may result in a delay in payment or non-payment of the invoices.

#### **CLAUSE 9 – PAYMENT**

Unless otherwise provided in the Subcontract, payment shall be due 30 days after receipt of a properly prepared and submitted invoice, for Items delivered and accepted or services performed and accepted. Any offered discount may be taken if payment is made within the discount period indicated by the Subcontractor. Payments may be made electronically or by check, at the University's option, and shall be deemed to have been made as of the date the electronic payment was made or the check was mailed.

Information on electronic payments is available at:

[http://www.lbl.gov/Workplace/CFO/co/disbursement\\_svcs\\_proj\\_costing/a/p/index.html](http://www.lbl.gov/Workplace/CFO/co/disbursement_svcs_proj_costing/a/p/index.html).

#### **CLAUSE 10 – QUALITY OF MATERIALS AND SUPPLIES**

(a) The Ordered Item(s), including any materials and supplies furnished by the Subcontractor in performance of any services, shall as a minimum: (1) conform to the requirements of this Subcontract and be as warranted; (2) be new and not of such age or so deteriorated as to impair their usefulness or safety; and (3) not contain any counterfeit or suspect materials, parts, or components. The furnishing of reconditioned items must be specified in the Subcontract or approved by the University Procurement Representative, and shall be warranted the same as new items.

(b) The University will not accept any Ordered Items, including any services involving the furnishing of materials or supplies, that do not meet these minimum requirements, notwithstanding any inspection or acceptance of delivery by the University, unless such condition is specifically approved in writing by the University Procurement Representative. The Subcontractor shall promptly replace such items with conforming items at its expense.

(c) The University may impound any suspect/counterfeit items furnished or used under this Subcontract and provide such items to the appropriate authorities for investigation. The University reserves the right to withhold payment for the suspect/counterfeit items pending the results of any such investigation.

(d) A suspect item is any material, part, or component that visual inspection, testing, or other information indicates may not conform to established Government or industry-accepted specifications or national consensus standards. A counterfeit item is a suspect item that is a copy or substitute made without legal right or authority or whose material, performance, or characteristics are misrepresented by the Subcontractor, supplier, distributor, or manufacturer. Types of known suspect or counterfeit items include, but are not limited to: fasteners, circuit breakers, valves, piping components, electrical devices, plate, bar, shapes, and channel members. Such items may be falsely labeled as a different class of part, or be used or refurbished parts that are falsely represented as new parts.

#### **CLAUSE 11 – WARRANTY**

Subcontractor warrants that Ordered Item(s) will be merchantable and fit for use for the particular purpose described in the Subcontract, will be as specified in the descriptions or specifications of this Subcontract, and will be free from defects in workmanship, material, and Subcontractor's design or engineering contributions. The Subcontractor shall correct any warranty nonconformance discovered within one year after acceptance or initial use of the items or services.

Except as otherwise provided by an express warranty, the Subcontractor shall not be liable to the University for any consequential damages resulting from any defect or deficiencies in accepted Ordered Item(s).

#### **CLAUSE 12 – FORCED, CONVICT, AND INDENTURED LABOR**

(a) By signing or accepting this Subcontract, the Subcontractor hereby certifies that no equipment, materials, supplies, or services furnished to the University pursuant to this Subcontract will be produced in whole or

in part by forced labor, convict labor, or indentured labor under penal sanction.

(b) If the Subcontractor subcontracts with the University and knew or should have known that the equipment, materials, supplies, or services furnished to the University were produced in whole or in part by forced labor, convict labor, or indentured labor under penal sanction, any or all of the following sanctions may be imposed:

(1) The Subcontract may be voided at the option of the University.

(2) The Subcontractor may be removed from consideration for University contracts or subcontracts for a period not to exceed 360 days.

#### **CLAUSE 13 – LAWS AND REGULATIONS**

All delivered items and all services performed under this Subcontract shall be in compliance with all applicable laws, regulations, and orders, including but not limited to those relating to wages, hours, employment, discrimination, immigration, and safety (including worker safety and health), export control, and environmental protection.

#### **CLAUSE 14 – CHANGES**

The University may direct the Subcontractor to make changes within the general scope of this Subcontract to (1) any Ordered Item(s) to be manufactured or assembled specifically for the University, or the method of shipment, packaging, or place of delivery; and (2) any services to be performed or their time and place of performance.

If any such change causes an increase or decrease in the cost of, or the time required for, performance of the Subcontract, the University Procurement Representative shall make an agreed-upon equitable adjustment in the Subcontract price, delivery schedule, or both, by a written modification to the Subcontract. Any price adjustment shall be consistent with FAR 31.2, *Contracts with Commercial Organizations*, (48 CFR 31.2), as supplemented by DEAR 931.2 (48 CFR 931.2), in effect as of the date of award of this Subcontract. The University reserves the right to review the Subcontractor's records to verify that a price adjustment conforms to this requirement.

The Subcontractor shall submit any claim for an equitable adjustment within 30 days from receipt of a directed change, or by such other time as the University Procurement Representative may permit.

Changes to the terms and conditions of the Subcontract may be made only by the written agreement of the parties.

#### **CLAUSE 15 – NOTIFICATIONS**

(a) Subcontractor shall immediately notify the University Procurement Representative in writing of: (1) any action, including any proceeding before an administrative agency, filed against the Subcontractor arising out of the performance of this Subcontract; and (2) any claim made against the Subcontractor, the cost of which is reimbursable hereunder.

(b) Subcontractor agrees to notify the University of any government tax, fee or charge levied or purported to be levied on or collected from the Subcontractor in connection with this Subcontract which the Subcontractor has reason to believe may be inapplicable or invalid, and which would be reimbursable or the University has claimed an exemption hereunder. Subcontractor also agrees to refrain from paying any such tax, fee, or charge, unless otherwise authorized by the University, and to take such steps as may be required by the University to cause such tax, fee, or charge to be paid under protest and, if so directed by the University, to cause to be assigned to the University or its designee any and all rights to the abatement or refund of any such tax, fee, or charge, and to permit the University or its designee to join with the Subcontractor in any proceedings for the recovery thereof or to sue for recovery in the Subcontractor's name.

(c) If, at any time during the performance of this Subcontract, the Subcontractor becomes aware of any circumstances which may jeopardize its performance of all or any portion of the Subcontract, it shall immediately notify the University Procurement Representative in writing of such circumstances, and the Subcontractor shall take whatever action is reasonably necessary to resolve such circumstances within the shortest possible time.

#### **CLAUSE 16 – ASSIGNMENTS**

This Subcontract is assignable by the University to the Government or a successor-in-interest for management and operation of LBNL.

Except as to assignment of payment due hereunder, the Subcontractor shall have no right, power or authority to sell, mortgage, transfer or

assign this Subcontract, any portion hereof, any interest herein or any claim hereunder, nor allow or permit any other party or parties to have any interest in or use any part of the rights or obligations granted hereunder for any purpose whatsoever without the prior written consent of the University.

#### **CLAUSE 17 – DISPUTES**

Except as otherwise provided in the Subcontract, any claim under the Subcontract not resolved in the ordinary course of business shall be referred in writing to the University Procurement Representative and the executive management representative of the Subcontractor with the authority to settle the dispute. The representatives of the parties, or their designees, shall then attempt in good faith to resolve the dispute by negotiations. All negotiations shall be confidential and shall be treated as compromise and settlement negotiations, for the purposes of application of rules of evidence. Pending resolution of the dispute, the Subcontractor shall proceed diligently with the performance of the Subcontract, in accordance with its terms and conditions.

Any unresolved dispute with a value under \$100,000 relating to the Subcontract (whether contract, tort, or both), or the breach of the Subcontract shall be arbitrated by and in accordance with the then existing commercial arbitration rules of the American Arbitration Association (AAA). Judgment on the award rendered by the arbitrator may be entered in any court in Alameda County, CA having jurisdiction.

The following modifications are made to the AAA rules: (1) the arbitrator shall be neutral and appointed by the AAA; (2) the location for all arbitrations shall be in Alameda County; and (3) each party to the arbitration shall pay its pro rata share of the arbitrator's fees not including counsel fees or witness fees or other expenses incurred by a party for its own benefit.

The parties shall consider the use of a form of alternate disputes resolution (ADR), including non-binding mediation and binding arbitration, for any unresolved dispute with a value of \$100,000 or more. In the event that ADR fails or is not used for such disputes, the parties may thereafter pursue any remedy they may have, at law or in equity, in a court of competent jurisdiction, in accordance with the provision of these General Provisions entitled *GOVERNING LAW AND VENUE*.

#### **CLAUSE 18 – BANKRUPTCY**

If the Subcontractor enters into any proceeding related to bankruptcy, it shall give written notice to the University Procurement Representative via certified mail within five days of initiation of the proceeding. The notification shall include the date on which the proceeding was filed, the identity and location of the court, and a listing of the LBNL purchase orders, subcontracts, or agreements affected.

#### **CLAUSE 19 – EXCUSABLE DELAYS**

The Subcontractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Subcontractor and without its fault or negligence, such as acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, flood, epidemics quarantine, restrictions, strikes, unusually severe weather, and delays of common carriers. The Subcontractor shall notify the University in writing as soon as reasonably possible after commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give the University written notice of the cessation of such occurrence.

#### **CLAUSE 20 – TERMINATION**

The University may terminate this Subcontract for convenience in whole or in part, at any time, by written notice to the Subcontractor, stating the extent and effective date of the termination.

In the event of a termination for convenience by the University, the Subcontractor shall be paid, subject to the terms and conditions of the Subcontract, a portion of the Subcontract price reflecting the portion of the Subcontract performed and accepted prior to the termination, plus a reasonable amount for direct charges resulting from the termination and not otherwise recoverable by the Subcontractor, which the Subcontractor can substantiate to the satisfaction of the University; provided, however, that the total thereof shall not cause the total Subcontract price to be exceeded. The Subcontractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

If a default occurs under the Subcontract, and if within 30 calendar days after the non-defaulting party has given the defaulting party notice of the

event of default the defaulting party has not cured the default or, if the default cannot be reasonably cured within such time period, if the defaulting party has not commenced to cure the default within such time period, diligently continued to pursue such cure, and completed it within 45 days after such notice, the non-defaulting party may, at its option, terminate the Subcontract at any time thereafter upon written notice to the defaulting party. In the event of a termination for default, the non-defaulting party may thereafter pursue any remedy they may have, at law or in equity, in a court of competent jurisdiction, in accordance with the provision of these General Provisions entitled *GOVERNING LAW AND VENUE*.

#### **CLAUSE 21 – WORK ON UNIVERSITY OR GOVERNMENT**

**PREMISES** (Applicable to Subcontracts involving Subcontractor's performance at University or Government sites or facilities.)

(a) **Liens.** The Subcontractor agrees that, at any time upon the request of the University, it will submit a sworn statement setting forth the services performed or goods furnished by lower-tier subcontractors and the amount due and to become due to each, and that before the final payment called for hereunder, it will, if requested, submit to the University a complete set of vouchers showing what payments have been made for goods and labor used in connection with the work called for hereunder.

(b) **Indemnify, Defend and Hold Harmless.**

(1) The Subcontractor shall indemnify, defend and hold harmless the University and the Government from all claims, demands, causes of action, or suits, of whatever nature, arising out of the services, labor, and goods furnished by the Subcontractor or its lower-tier subcontractors under the subcontract, and from all laborers', material provider's, and mechanics' liens upon the real property upon which the work is located or any other property of the University or the Government; and

(2) Promptly notify the University, in writing, of any such claims, demands, causes of action, or suits brought to its attention. The Subcontractor shall forward with such notification copies of all pertinent papers received by the Subcontractor with respect to any such claims, demands, causes of action, suits, or liens and, at the request of the University, shall do all things and execute and deliver all appropriate documents and assignments in favor of the University or the Government of all the Subcontractor's rights and claims growing out of such asserted claims as will enable the University and the Government to protect their respective interests by litigation or other means. The final payment shall not be made until the Subcontractor, if required, shall deliver to the University a complete release of all liens arising out of the subcontract or receipts in full in lieu thereof, as the University may require, and if required in either case, an affidavit that as far as it has knowledge or information, the receipts include all the labor and goods for which a lien could be filed; but the Subcontractor may, if any lower-tier subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the University to indemnify it against any claim by lien or other means. If any lien or claim remains unsatisfied after all payments are made, the Subcontractor shall refund to the University all moneys that the latter may be compelled to pay in discharging such lien or claim, including all costs and reasonable attorney's fees.

(c) **Clean Up.** The Subcontractor shall at all times keep University or Government premises and adjoining premises where the work is performed free from accumulations of waste material or rubbish caused by its work or the work of any of its lower-tier subcontractors; and shall remove all such waste material and rubbish at the completion of the work and shall leave the work area "broom clean" or its equivalent, unless more exactly specified. If the waste material and rubbish is not promptly removed as herein required, the University may remove the rubbish and charge the cost to the Subcontractor.

(d) **Employees.**

(1) The Subcontractor shall not employ for the work any unfit person or anyone not skilled in the work assigned to the person and shall devote only its best qualified personnel to work under the subcontract. Should the University deem anyone employed on the work incompetent or unfit for duty and so inform the Subcontractor, the Subcontractor shall remove such person from the work under the subcontract, and that person shall not again, without written permission of the University, be assigned to work under the subcontract.

(2) It is understood that if employees of the University perform any acts for the purpose of discharging the responsibility undertaken by the Subcontractor hereunder at the request of the Subcontractor, such employees of the University while performing such acts shall be

considered the agents and servants of the Subcontractor subject to the exclusive control of the Subcontractor.

(e) **Insurance.** The Subcontractor shall maintain with reputable companies insurance in amounts required under the Subcontract sufficient to protect the University and the Government from any and all public liability and Workers' Compensation claims at all times during the performance of the subcontract. If requested, the Subcontractor shall supply the University with one copy of certificates of insurance covering policies required hereunder and shall obtain satisfactory evidence of lower-tier subcontractors' compliance with these provisions before their participation in the work. In the absence of more specific direction from the University, the Subcontractor shall maintain additional insurance to the extent consistent with sound business practice.

(f) **Environment, Safety, and Health.**

(1) The Subcontractor shall take all reasonable precautions in the performance of the work under this Subcontract to protect the health and safety of employees and members of the public, to minimize danger from all hazards to life and property, and to prevent injury to any of its employees or other persons; and shall comply with all applicable environmental, safety, health, and fire protection regulations and requirements, including those of the University and DOE (including reporting requirements).

(2) The Subcontractor shall immediately take action to correct any noncompliance with the requirements of this clause. In the event that the Subcontractor fails to comply with said regulations or requirements of the University or the DOE, the University may, without prejudice to any other legal or contractual rights of the University, issue a stop-work order stopping all or any part of the work; thereafter, a start order for resumption of the work may be issued at the discretion of the University. The Subcontractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage.

**CLAUSE 22 – WORKER SAFETY AND HEALTH**

*(Applicable if the subcontract involves performance at an LBNL site.)*

The Subcontractor and its lower-tier subcontractors performing work at an LBNL worksite are subject to the DOE *Worker Safety and Health Program* regulation of Title 10, Part 851 of the U.S. Code of Federal Regulations (10 CFR 851), and shall perform the work in compliance with the *LBNL Health and Safety Manual*, available at <http://www.lbl.gov/ehs/pub3000/>, which implements the requirements of 10 CFR 851, and in compliance with their Cal/OSHA mandated Injury and Illness Prevention Plan (IIPP) or equivalent and all other LBNL safety procedures and policies communicated to the Subcontractor. The Subcontractor is responsible for ensuring that its lower tier subcontractors comply with these requirements. Violations of these requirements may subject the Subcontractor and its lower tier subcontractors to civil penalties.

The Subcontractor shall ensure that all workers requiring unescorted/badged access to an LBNL site complete the *General Employee Radiation Training (GERT)*. A GERT booklet and the on-line training are available at <http://www.lbl.gov/ehs/training/>. The GERT booklet is also available at the Site Access Office in Building 65B.

**CLAUSE 23 – INJURY REPORTING**

*(Applicable if the Subcontract involves performance by ten or more Subcontractor employees at LBNL sites.)*

(a) Subcontractor shall report all injuries to Subcontractor's employees that qualify for inclusion on Subcontractor's Cal-OSHA log to the University within 10 days of occurrence of the injury. Subcontractor shall furnish a copy of its supplemental injury report form (OSHA form 101 or equivalent) for each such case. This report shall be mailed to the LBNL SAAR Office, Health Services, MS 26-109. In addition, serious injuries resulting in death or hospitalization shall be reported by telephone immediately to the LBNL Health Services Receptionist, (510) 486-6266.

(b) Subcontractor shall report to the University the hours worked by Subcontractor's employees on the LBNL Site on a quarterly basis. For each quarter, the hours worked shall be reported in writing no later than the 10th day of the month following the end of the quarter. This report shall be mailed to the LBNL SAAR Office, Health Services, MS 26-109.

**CLAUSE 24 – RELEASE OF INFORMATION**

The Subcontractor agrees that all information regarding this Subcontract and the name of the University, LBNL, or the Government shall not be used, in any publications, news releases, advertising, speeches, technical papers, photographs and other releases of information, without prior written approval from the University Procurement Representative.

**CLAUSE 25 – ENTIRE AGREEMENT AND ORDER OF PRECEDENCE**

This Subcontract shall consist of the Subcontract document (including any signature page and schedule of articles), these General Provisions, and any other referenced or incorporated clauses, provisions, and documents, which is the entire agreement between the parties concerning the subject matter hereof and supersedes all prior proposals, representations, negotiations, or agreements, whether written or oral.

Any inconsistencies in the terms and conditions comprising the Subcontract shall be resolved by giving precedence in the following order: (a) the Subcontract document; (b) these General Provisions, including the FAR and DEAR clauses listed in the clause entitled *Clauses Incorporated by Reference*; (c) any specifications; (d) other documents listed in the Subcontract Article entitled *Incorporated Documents*, if any, in the order in which they are listed; and (e) any other referenced or incorporated clauses, provisions, and documents.

**CLAUSE 26 – DOCUMENTS OF SUBCONTRACTOR**

The provisions of any quotation or other documents of the Subcontractor referenced in or incorporated as a part of this Subcontract are referenced or incorporated only for the purpose of further describing the Ordered Item(s) and the price and/or the delivery thereof, and any terms and conditions contained in such referenced or incorporated documents shall not apply.

**CLAUSE 27 – GOVERNING LAW AND VENUE**

The Subcontract shall be interpreted in accordance with the substantive and procedural laws of the State of California. Any action at law or judicial proceeding instituted by either party pertaining to the Subcontract shall be instituted in the State of California in the Superior Court of Alameda County.

**CLAUSE 28 – CLAUSES INCORPORATED BY REFERENCE**

The FAR and DEAR clauses listed below, which are located in Chapters 1 and 9 of CFR Title 48 and available at <http://www.gpo.gov/fdsys/>, are hereby incorporated by reference as a part of these General Provisions, as prescribed below. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

As used in the clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean the entity (hereinafter "Subcontractor") who entered into this Subcontract with the University; the term "subcontractor" shall mean the Subcontractor's subcontractor; and the terms "Government" and "Contracting Officer" shall mean the University, except in FAR clauses 52.227-1, 52.227-2, 52.227-3, 52.227-14, and 52.227-19, in which clauses "Government" shall mean the U. S. Government and "Contracting Officer" shall mean the DOE Contracting Officer for Prime Contract DE-AC02-05CH11231 with the University. As used in FAR clause 52.245-1, the terms "Government" and "Contracting Officer" shall mean the University, except with respect to title. As used in DEAR clauses 952.227-9, the term "DOE" shall mean DOE and the University. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

**THE FOLLOWING CLAUSES APPLY TO ALL SUBCONTRACTS:**

- |                 |   |
|-----------------|---|
| DEAR 952.203-70 | WHISTLEBLOWER PROTECTION FOR CONTRACTOR EMPLOYEES (DEC 2000). Applies if the Subcontract involves any work at a DOE-owned or leased facility.   |
| DEAR 952.204-71 | SENSITIVE FOREIGN NATIONS CONTROLS (MAR 2011). Applies if any nuclear technology information will be made available to foreign nationals of sensitive foreign nations. See list of sensitive foreign nations at: <a href="http://www.lbl.gov/ufva">www.lbl.gov/ufva</a> . |
| DEAR 952.204-77 | COMPUTER SECURITY (AUG 2006). Applies if the Subcontractor has access to any computers owned, leased or operated by or on behalf of LBNL or DOE.  |
| DEAR 970.5208-1 | PRINTING (DEC 2000). Applies if printing is   |

	specified under the Subcontract.		of paragraph (a) of the Limited Rights Notice:
FAR 52.219-8	UTILIZATION OF SMALL BUSINESS CONCERNS (JAN 2011). Applies if the Subcontract involves any further subcontracting opportunities.		1. Use (except for manufacture) by support services contractors or subcontractors;
FAR 52.222-21	PROHIBITION OF SEGREGATED FACILITIES (FEB 1999)		2. Evaluation by non-government evaluators;
FAR 52.222-26	EQUAL OPPORTUNITY (MAR 2007) (Note: Download the required EEO Poster at: <a href="http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm">http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm</a> )		3. Use (except for manufacture) by other contractors or subcontractors participating in the Government's program of which the specific subcontract is a part;
FAR 52.222-35	EQUAL OPPORTUNITY FOR VETERANS (SEP 2010)		4. Emergency repair or overhaul work; and
FAR 52.222-36	AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES (OCT 2010)		5. Release to a foreign government, or its instrumentalities, if required to serve the interests of the U.S. Government, for information or evaluation or for emergency repair or overhaul work.
FAR 52.222-50	COMBATING TRAFFICKING IN PERSONS (FEB 2009)		If delivery of Restricted Computer Software is required, then ALTERNATE III shall apply.
FAR 52.223-3	HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA (JAN 1997), with ALTERNATE I (JUL 1995). Applies if the Subcontract involves the delivery or on-site use of any hazardous materials.	FAR 52.227-19	COMMERCIAL COMPUTER SOFTWARE LICENSE (DEC 2007). Applies if the Subcontract involves the acquisition of commercial computer software.
FAR 52.223-11	OZONE-DEPLETING SUBSTANCES (MAY 2001). Applies if the Subcontract involves the delivery or use of ozone-depleting substances or supplies that may contain or be manufactured with ozone depleting substances	FAR 52.242-15	STOP-WORK ORDER (AUG 1989)
FAR 52.223-12	REFRIGERATION EQUIPMENT AND AIR CONDITIONERS (MAY 1995). Applies if the Subcontract is for services involving the maintenance, repair, or disposal of any equipment or appliance using ozone-depleting substances, as a refrigerant, such as air conditioners (including motor vehicles), refrigerators, chillers, or freezers.	FAR 52.244-2	SUBCONTRACTS (OCT 2010), with ALTERNATE I (JUN 2007). Paragraph (d) insert regarding consent is: "Any subcontract or purchase order that: (1) is for work at an LBNL site; (2) exceeds \$150,000 and is for other than a "commercial item," as defined in FAR 2.101; or (3) provides for the reimbursement of costs."
FAR 52.223-15	ENERGY EFFICIENCY IN ENERGY-CONSUMING PRODUCTS (DEC 2007). Applies if the Subcontract involves furnishing, specifying the use of, or using at an LBNL Site any energy-consuming product listed in the ENERGY STAR® Program or DOE's Federal Energy Management Program (FEMP). For information on listed energy-consuming products see: <a href="http://www.energystar.gov/products">http://www.energystar.gov/products</a> and <a href="http://www1.eere.energy.gov/femp/technologies/eep_purchasingspecs.html">http://www1.eere.energy.gov/femp/technologies/eep_purchasingspecs.html</a> .	FAR 52.244-6	SUBCONTRACTS FOR COMMERCIAL ITEMS (DEC 2010)
FAR 52.223-16	IEEE 1680 STANDARD FOR THE ENVIRONMENTAL ASSESSMENT OF PERSONAL COMPUTER PRODUCTS (DEC 2007). Applies if the Subcontract involves the furnishing or use at an LBNL Site of any personal computer products (as defined). Requires personal computer products that are EPEAT Bronze Registered or higher. For information about the standard, see <a href="http://www.epeat.net">http://www.epeat.net</a> .	FAR 52.245-1	GOVERNMENT PROPERTY (APR 2012), with ALTERNATE I
FAR 52.225-13	RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (JUN 2008)	FAR 52.246-1	CONTRACTOR INSPECTION REQUIREMENTS (APR 1984)
DEAR 952.227-9	REFUND OF ROYALTIES (MAR 1995). Applies if "royalties" are paid under the Subcontract by the Subcontractor, or by a subcontractor at any tier.	FAR 52.247-64	PREFERENCE FOR PRIVATELY OWNED U.S.- FLAG COMMERCIAL VESSELS (FEB 2006). Applies only as described in paragraph (e)(4) of the clause.
FAR 52.227-14	RIGHTS IN DATA-GENERAL (DEC 2007), with ALTERNATE V and DEAR 927.409(d)(3), and substituting paragraph (a) with DEAR 927.409(a). Applies if any "data" will be produced, furnished, or acquired under the Subcontract.  If delivery of Limited Rights Data is required, then ALTERNATE II shall apply, with the following disclosure purposes added to the end		
			<b>THE FOLLOWING CLAUSES APPLY IF THE SUBCONTRACT EXCEEDS \$2,500:</b>
		FAR 52.222-41	SERVICE CONTRACT ACT OF 1965, AS AMENDED (NOV 2007). Applies if the Subcontract is principally for the furnishing of services through the use of "service employees", unless the Subcontract qualifies for an exemption.
		FAR 52.222-43	FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT-PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (SEP 2009). Applies if FAR clause 52.222-41 is applicable and the Subcontract is for multiple years or has an option to renew.
		FAR 52.222-44	FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT (SEP 2009). Applies if FAR clause 52.222-41 is applicable and FAR clause 52.222-43 does not apply.
			<b>THE FOLLOWING CLAUSES APPLY IF THE SUBCONTRACT EXCEEDS \$3,000:</b>
		FAR 52.222-54	EMPLOYMENT ELIGIBILITY VERIFICATION (JUL 2012). Applies if the Subcontract is for construction or services in the U.S., except for commercial services that are part of the purchase of a 'commercially available off-the-shelf' (COTS) item, or a COTS item with minor modifications, normally provided for that COTS item and performed by the COTS provider.
		FAR 52.225-1	BUY AMERICAN ACT-SUPPLIES (FEB 2009)

**THE FOLLOWING CLAUSE APPLIES IF THE SUBCONTRACT IS FOR \$25,000 OR MORE:**

DEAR 970.5223-4 WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (DEC 2010). Applies if the Subcontract involves any of the hazardous activities stipulated in 10 CFR 707.2.

**THE FOLLOWING CLAUSE APPLIES IF THE SUBCONTRACT IS FOR \$100,000 OR MORE:**

FAR 52.222-37 EMPLOYMENT REPORTS ON VETERANS (SEP 2010)

**THE FOLLOWING CLAUSES APPLY IF THE SUBCONTRACT EXCEEDS \$150,000:**

FAR 52.203-6 RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (SEP 2006), with ALTERNATE I (OCT 1995)

FAR 52.203-10 PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY (JAN 1997).

FAR 52.203-12 LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (OCT 2010)

DEAR 952.209-72 ORGANIZATIONAL CONFLICTS OF INTEREST (AUG 2009), with ALTERNATE I. Applies if the Subcontract involves advisory and assistance services, as defined in FAR 2.101. The period of ineligibility shall be five years.

FAR 52.227-1 AUTHORIZATION AND CONSENT (DEC 2007)

FAR 52.227-2 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (DEC 2007)

FAR 52.227-3 PATENT INDEMNITY (APR 1984)

FAR 52.229-3 FEDERAL, STATE AND LOCAL TAXES (APR 2003)

**THE FOLLOWING CLAUSE APPLIES IF THE SUBCONTRACT EXCEEDS \$5,000,000:**

FAR 52.203-13 CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (APR 2010). Applies if the Subcontract has a performance period of more than 120 days. All disclosures of violation of the False Claims Act or of Federal criminal law shall be directed to the DOE Inspector General, with a copy to the LBNL DOE Contracting Officer.

**END OF GENERAL PROVISIONS**

**MASTER LEASE TO OWNERSHIP AGREEMENT 2013-NERSC8**

**between**

**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA**

**LAWRENCE BERKELEY NATIONAL LABORATORY**

**and**

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**INTRODUCTION**

This MASTER LEASE TO OWNERSHIP AGREEMENT (Agreement) is made and entered into by and between \_\_\_\_\_ (Seller or Lessor), and The Regents of the University of California, (University). This Agreement is in furtherance of Contract DE-AC02-05CH11231 with the United States Government, (Government), represented by the U.S. Department of Energy, (DOE) for the management and operation of the Lawrence Berkeley National Laboratory (hereinafter called "LBNL") and the performance of certain research and development work.

**AGREEMENT**

Whereas, the University has determined that it is necessary to acquire computer equipment in order to perform work at the LBNL, and

Whereas, from time to time the University will define such equipment as necessary for performance of the University's work, and

Whereas, the Seller has agreed to provide funds for the purchase of equipment to be leased under this Agreement, and

Whereas, the Seller is willing to lease to the University equipment that will be identified in accordance with this Agreement; and

NOW, THEREFORE, the parties, in consideration of the exchange of mutual promises contained herein, agree as follows.

**1. LEASE OF EQUIPMENT**

The Seller shall lease to the University and the University shall lease from the Seller the equipment mutually determined acceptable for lease under Subcontract \_\_\_\_\_ as executed between the University and the Seller under the provisions of this Agreement. Subcontract \_\_\_\_\_ between the University and Seller shall include the equipment descriptions, hereinafter referred to collectively as Equipment. The University will evidence its acceptance of the Equipment by executing and delivering to the Seller an Acceptance Certificate in a form acceptable to the Seller.

2. TERM

This Agreement shall become effective upon the Seller's signature acceptance of the University-executed Subcontract \_\_\_\_\_ and will expire on \_\_\_\_\_. The term of this Agreement will continue for such time as required to complete the University's obligations to make payments under this Agreement, subject to default and cancellation provisions herein. The term of any payment schedule under this Agreement shall be selected by the University and shall be limited in duration to a minimum of 18 months and a maximum of 60 months.

3. PAYMENTS

The Seller will provide funds for the purchase of equipment to be leased to the University under Subcontract \_\_\_\_\_ executed between the University and the Seller pursuant to this Agreement. The Seller covenants that the funding to be provided under this Agreement is based solely on the financial merit of the University and does not nor will not affect or limit the ability of The Regents of the University of California, or its related campuses, universities, and laboratories, to obtain credit from the Seller for any other purpose whatsoever.

In consideration of the promises and the agreements on the part of the Seller herein, the University hereby agrees to pay to the Seller lease payments for the Equipment beginning within 45 days after acceptance of the Equipment. A Payment Schedule shall be established based on the purchase price of the corresponding Equipment, adjusted for accrual of any progress payments. Each Payment Schedule shall be established based on a simple amortization schedule calculated to repay the adjusted purchase price during the period of the specified term. The annual lease rate applied to each Payment Schedule shall be calculated to be the sum of the Treasury Constant Maturity Rate for the equivalent payment term, as listed in the "Federal Reserve Statistical Release H.15" for the acceptance date of the Equipment, and selection of a factor that will be determined at the time of execution of the Subcontract.

The University hereby agrees to make lease payments in accordance with the Payment Schedules, payable in arrears. The Payment Schedules for shall show the Option Payment, which is the outstanding balance (which shall be simply calculated without the addition of prepayment penalties or fees) for each payment period. The University shall make all payments at the address of the Seller, set forth below, or at such other address as the Seller may, from time to time, designate in writing. The time of payment shall be of the essence in this Agreement.

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If any lease payment is not paid within 10 days of the due date, on the 11th day, interest shall accrue on the late payment, until paid, at the lease rate specified for the corresponding

Payment Schedule. The Seller shall invoice the University at least 21 days prior to the due date of the current lease payment.

In the event the University elects to make payments, other than purchase option payments described in Section 4 below, in addition to scheduled lease payments, such payments shall either reduce the amounts of subsequent lease payments, be applied against future individual lease payments, or reduce the term of the lease, or any combination of these actions, as mutually agreed between the Seller and the University.

4. PURCHASE OPTION

The University is hereby given the option (provided the University is not in default in the performance of any of its obligations hereunder) to purchase the Equipment at any time after acceptance of the Equipment by paying the Option Payment related to the last completed lease payment of the corresponding Payment Schedule, plus a per diem charge for payments received after the due date reflected on that Schedule, plus any outstanding late charges. The per diem rate will be based on the lease rate stated in the corresponding Payment Schedule and calculated on a 360 day per year basis.

The University shall exercise such option to purchase the Equipment by notifying the Seller of the University's intention to do so, in writing, not less than 30 days before the proposed purchase date. Such notice may be delivered or mailed to the Seller's office.

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\_\_\_\_\_  
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The Seller shall keep the University advised of any change of the Seller's address for the purpose of such notice.

5. DEFAULT

The Seller shall provide the University Procurement Representative with written notice of any defaults or non-performance and offer a cure period of at least 30 days to remedy the default or non-performance before the Seller's default rights are exercised.

The University shall be in default upon the occurrence of any one of the following events: failure to pay the lease payments, or any additions thereto, within 10 days of the due date thereof except for cancellation in accordance with Section 8; failure to observe or perform any other term, condition or covenant of the Agreement and such failure shall continue for a period of 30 days after notice; if the University ceases the conduct of active business; if a receiver or trustee shall be appointed for the University or any of the University's assets or properties; if any of the Equipment shall be attached, levied upon, encumbered, pledged, seized or taken under any judicial process and such proceedings shall not be vacated, or fully stayed, within 20 days thereof; if the University shall make an assignment for the benefit of creditors; institute or have instituted by, for or against it any bankruptcy, reorganization,

arrangement or insolvency proceedings; or become unable or admit in writing its inability to pay its debts as they become due; or if any warranty or representation made or furnished to the Seller by or on behalf of the University which shall be, or which shall be proven to have been knowingly, false in any material respect when made or furnished.

Upon any event of default, and at any time following the 30 day cure period above during which the defect has not been cured or from time to time thereafter, the Seller may, at its option and after notice to, or demand upon, the University declare due and payable the aggregate amounts of any lease payments, including any late charges thereon, and any other sums that are then accrued and unpaid and any amounts specified herein as items of additional rent, which shall be accrued and owing. The Seller shall have the further right to terminate all or any of the University's rights under the Agreement and thereupon the University shall forthwith surrender and return the Equipment of any such terminated lease to the Seller and to enter upon any premises where the Equipment may be located only with the consent of the University's Security Officer (in conformance with all security regulations and requirements of the DOE, which shall not be unreasonably withheld), and take immediate possession of the Equipment without court order or other process of law, in which event the Seller shall not be liable for damages resulting from any such entry and repossession except for any willful or gross negligence of the Seller. All of the Seller's rights and remedies herein are cumulative and may be exercised concurrently or separately. These rights afforded the Seller shall be in addition to any rights or remedies available in law or at equity.

In the event the Seller defaults in the performance of any of the terms and conditions herein all of the Seller's rights hereunder, at the option of the University, shall terminate and the Seller shall become liable for any reprocurement costs incurred by the University, including, but not limited to, any costs associated with securing a higher lease rate from a new financing source.

## 6. TAXES

The University shall, subject to the below listed conditions, reimburse the Seller for all license fees, assessments, and sales, use, property and other taxes lawfully imposed during the term hereof upon any Equipment by any state, federal or local government, based upon the ownership, leasing, renting, sale, possession or use of the Equipment, together with any penalties or interest in connection therewith not due to the fault or negligence of the Seller excepting state, federal, or local taxes or payments in lieu thereof imposed upon or measured by the income of the Seller.

All sums reimbursed to the Seller under this Section shall be remitted by the Seller to the appropriate taxing agency and shall fully discharge the University's obligations as provided in this Section. The rights under this Section 6 shall survive until such time as claims by the applicable taxing authority are barred by the applicable Statute of Limitations.

The Seller agrees to cooperate with the University and do all acts reasonably necessary and appropriate to secure and maintain tax exemption of the property leased hereunder pursuant to Article XIII, Section 3 of the California Constitution.

## Conditions

- A. The University shall have the right to conduct all administrative and judicial proceedings with respect to the charges to be reimbursed pursuant to this paragraph or, at its option, the University shall have the right to direct such a defense and bear the costs thereof.
- B. No reimbursement shall be made if: the Seller or its assignee makes any agreement without the University's consent with the applicable taxing authority in the course of settlement, compromise or negotiation that was known, or that reasonably should have been known, by the Seller or its assignee, to impair or foreclose the effective exercise by the University of its rights under subparagraph A, above; or the Seller or its assignee fails to cooperate fully with the University at the University's expense in any proceeding undertaken or directed in accordance with subparagraph A., above, including but not limited to, personnel availability for interviews, affidavits, testimony and/or consultation, and document availability for inspection and/or copying relating to this Agreement, including those accounting records describing the treatment of funds provided by the University pursuant to this Agreement.
- C. The Seller and its assignee shall use best efforts to refer all inquiries regarding the use and location of the Equipment subject to this Agreement to the University.
- D. The Seller and its assignee shall use best efforts to give prompt written notice to the University of any inquiry or notice regarding the charges to be reimbursed pursuant to this paragraph from the applicable taxing authority whether written or oral.
- E. No reimbursement shall be made for penalties if such penalties are assessed against the Seller for any reason other than the failure to file returns, on the advice of the University, with the applicable taxing authority and pay any charges assessed in accordance with law. None of the preceding conditions shall be deemed waived by the University unless such a waiver expressly references this paragraph, is in writing, and is signed either by The Regents of the University of California or any attorney-in-fact of The Regents.

## 7. TITLE

Upon acceptance of the Equipment under the Subcontract the Seller covenants that it is the sole owner of said Equipment, and that no other person, party, firm or corporation has any right, title, interest in or to same and that, during the term of the lease, said Seller will not sell or encumber said property, or any interest therein, except subject to the rights given the University by virtue of this Agreement; and except that the Seller may sell, assign and transfer its interest in the lease and the property covered hereby to its successors and assigns pursuant to Section 10.

8. NONAVAILABILITY OF FUNDS

The Seller understands that funding of any LTO placed under this Agreement is subject to the future availability of annually appropriated, apportioned, and allotted funds under Contract DE-AC02-05CH11231 or a successor prime operating contract, and that this Agreement must be made and administered consistent with 31 United States Code (U.S.C.) 1341 and 41 U.S.C. 11. Accordingly, funding of lease costs for the LTO placed under this Agreement shall be provided on a fiscal year basis, subject to a determination by the University that sufficient appropriated and apportioned funds are available to be allotted for such costs. The University agrees to give written notice, not later than 30 days before the beginning of each successive fiscal year, indicating that funds for the next fiscal year, which may be lawfully applied to an LTO, are available. Such funds shall be applied to continue the LTO, subject to the availability of funds. In the event that no funds are appropriated and/or apportioned, or a determination is not made by the University that sufficient funds are available to continue an LTO and no written notice of availability of funds is made within the time prescribed, then the affected LTO shall end on the last day of the current fiscal year without penalty or expense of any kind to the University. If funding previously available for an LTO is withdrawn during the current fiscal year as a result of budgetary action by the Office of Management and Budget or by Congress, the University will notify the Seller of this occurrence and may cancel the LTO upon two weeks notice to the Seller. Such cancellation shall be without penalty to the University. Upon cancellation of an LTO and upon written direction from the Seller, the University shall deliver the Equipment to the Seller within the Continental United States consistent with the terms and conditions described in Section 15 of this Agreement.

9. PAYMENT OBLIGATION

Subject only to Section 8 of this Agreement, the University's obligation to make all payments that shall or may become due hereunder, including but not limited to lease payments or other sums due as additional rent, shall not be affected by any defect in condition, operation, fitness for use, damage or destruction of or to the Equipment or any interruption or cessation of use or possession thereof for any reason whatsoever or any insolvency, bankruptcy, reorganization or similar proceedings instituted by or against the University.

10. ASSIGNMENT

This Agreement or any right, remedy or obligation hereunder is assignable in whole or in part by the University to Government or a successor in interest. This Agreement, and any interest in it, is not assignable by the Seller, in whole or in part, without prior written approval of the University.

11. POSSESSION OF EQUIPMENT

The University shall not relinquish its possession of the Equipment nor shall the University assign (except to a successor in interest as the Government's operating contractor for the LBNL) or sublet the Agreement, any unit of the Equipment, or any interest in either, unless

any such assignee is of equivalent credit rating as the University or the remaining payments are revised accordingly to account for such change in credit rating, by amendment hereto, and assumes all of the obligations under this Agreement, and the Seller shall have given its prior written consent, which consent shall not be unreasonably withheld.

12. **PASSAGE OF TITLE TO THE GOVERNMENT**

In the event that the University shall comply with all the provisions of this Agreement (including Section 3) on its part to be kept and performed, and upon the completion of the payment obligations for the LTO, all the right, title and interest of said Seller in and to said Equipment shall vest in and become the property of the U.S. Government, and said Lessor covenants that it will thereupon execute and tender to the University, for further consideration of one dollar, a bill of sale of all its right, title and interest in and to said property as evidence of said transfer of title, anything in this Agreement to the contrary notwithstanding.

13. **RISK OF LOSS: DAMAGE TO PERSONS AND PROPERTY**

The University assumes all risk of loss of or damage to the Equipment from any cause whatsoever until the Equipment is returned to the Seller, and no such loss of or damage to the Equipment nor defect therein nor unfitness or obsolescence thereof shall relieve the University of the obligation to make lease payments or to perform any other obligation under this Agreement. The University is self-insured.

This provision in no way relieves the University to make payments in accordance with Section 9. The University agrees that the Seller shall not be liable to the University for any liability, claim, loss, damage, injury, or expense of any kind or nature caused, or alleged to be caused, directly or indirectly, by the negligence of the University, its agents, servants and invitees, the inadequacy of any unit of the Equipment for any purpose, any deficiency or defect in any unit of the Equipment, the use or performance of any unit of the Equipment, delays in delivery, failure to deliver, interruption or loss of service in the use or performance of any unit of the Equipment, the seizure of the Equipment by any governmental authority or person, any hostile or warlike action by any governmental authority or person, any insurrection, rebellion, revolution, civil war, usurped power or action taken by any authority against the same, any radiation or radioactive contamination, or any loss of business, profits or other indirect, special or consequential damages, of any nature, whether or not resulting from any of the foregoing.

14. **EQUIPMENT TO REMAIN PERSONAL PROPERTY**

The University will not permanently attach the Equipment to any personal or real property and asserts that it will keep the Equipment as personal property and not permit it to become a fixture.

## 15. INSTALLATION AND USE OF EQUIPMENT

All Equipment shall, at the University's expense, except as provided in purchase orders for the Equipment, be installed, operated and disconnected in accordance with any applicable installation and operation manuals or instructions of the manufacturer of the Equipment, by competent and duly qualified personnel in the University's direct employment or under the University's direct supervision with the assistance, as applicable, of the field service and systems engineering representatives of the manufacturer. The University agrees to have any installation site prepared in accordance with the manufacturer's installation instructions.

The University shall retain the Equipment at the LBNL unless the Seller consents, in writing, to its removal. In the event that the University relocates the Equipment from its LBNL locations, the University agrees that all details of the move shall be arranged and supervised in accordance with manufacturer standards for movement of the Equipment. The University agrees that the University will use said Equipment for the ordinary and sole purpose for which it is designed. It is further stipulated and agreed that, during the term of this Agreement, the University shall be responsible for and shall pay all charges for upkeep and/or storage of said Equipment and shall make, at its own expense, any and all repairs and supply and pay for any and all materials needed to maintain said Equipment in proper condition.

All repairs, alterations and replacements, which shall include all engineering changes prescribed by the manufacturer, excluding any operating software, shall become the Seller's property and shall be subject to this Agreement when incorporated into or attached to any unit of the Equipment. The University shall have the option, upon any return of the Equipment to the Seller, either to remove any and all attachments and additions, subject to the condition that each unit is restored to its original condition, less normal wear and tear; or to allow such additions and attachments to become the property of the Seller unless the Seller shall request that the attachments and additions be removed; in which case the unit for which such request is made shall be restored to its original condition, less normal wear and tear, prior to redelivery to the Seller.

All costs incurred in connection with the operation of each unit, including but not limited to labor, materials, energy and supplies shall be borne by the University. All materials, supplies and accessories used to operate the Equipment are to meet the manufacturer's standard specifications.

The University shall, at the University's sole expense, install, use, operate and maintain the Equipment in full compliance with all applicable laws, ordinances, rules and regulations or of any regulatory or other governmental bodies having jurisdiction; and shall without limiting the foregoing, duly apply for, obtain and maintain in full force and effect all permits and licenses necessary for such installation, use, operation and maintenance, and shall further prepare and timely file, or deliver to the Seller in time for such filing, if the same may only be filed by the owner of the Equipment involved, any and all applications, certifications and reports required to be filed.

16. MANUFACTURER'S WARRANTY

The Seller hereby assigns to the University for and during the Term of any LTO, any and all of the manufacturer's warranties, expressed or implied, issued on or applicable to each unit of the Equipment hereunder and hereby authorizes the University to obtain all warranties and services furnished in connection therewith by the manufacturer. During this Agreement, the Seller shall execute such documents of assignment as the University may reasonably request and will otherwise use its best efforts to make available to the University all of its rights under any of the manufacturer's warranties on the Equipment.

17. NOTICES

All notices shall be in writing and sent by prepaid, overnight, registered or certified mail addressed to the party to whom notice is intended to be given at such address as is specified herein or such other address as shall have been subsequently given in writing by such party for the purpose of notice. Any notice complying with the above provisions shall be deemed to have been received by such party on the fifth day after deposit in the mail.

- A. Seller: At such address as is specified under Section 4, Purchase Option of this Agreement.
- B. University: University of California  
Lawrence Berkeley National Laboratory  
Attention: Lynn Rippe, Mail Stop 943-200  
One Cyclotron Road  
Berkeley, CA 94720

18. WAIVER BY LESSOR

The Seller's failure at any time to require strict performance by the University of any of the provisions hereof shall not waive or diminish the Seller's right thereafter to demand strict compliance therewith or with any other provisions. In the event the University fails to comply with any provision of this Agreement, the Seller shall have the right, but shall not be obligated, to effect such compliance in whole or in part. The University shall forthwith reimburse any allowable payments and expenses of the Seller, along with any applicable late charges, as items of additional rent hereunder. No waiver by the Seller of any of its rights hereunder shall be effective unless express and in writing. No effective waiver by the Seller of any of its rights shall be effective to waive any other rights.

19. WAIVER BY UNIVERSITY

The University's failure at any time to require strict performance by the Seller of any of the provisions hereof shall not waive or diminish the University's right thereafter to demand strict compliance therewith or with any other provisions. In the event the Seller fails to comply with any provision of this Agreement, the University shall have the right, but shall not be obligated, to effect such compliance in whole or in part. No waiver by the University

of any of its rights hereunder shall be effective unless express and in writing. No effective waiver by the University of any of its rights shall be effective to waive any other rights. No obligation of the University, except as otherwise specified herein, shall survive the Agreement.

20. MODIFICATION

The Seller and the University agree that any modifications or changes to this Agreement hereto must be in writing and must be signed by both parties.

21. QUIET ENJOYMENT

The Seller covenants that the University shall have quiet enjoyment of the Equipment during the term of this Agreement so long as the University is not in default thereunder.

SAMPLE

