

## **INVITATION TO BID**

**26-010**

### **SANTA ROSA COUNTY ADMINISTRATION BUILDING GREEN INFRASTRUCTURE**



December 22, 2025

**OWNER:**  
**BOARD OF COUNTY COMMISSIONERS**  
**SANTA ROSA COUNTY, FLORIDA**

**BOBBY BURKETT - DISTRICT I**

**KERRY SMITH - DISTRICT II**

**RHETT ROWELL - DISTRICT III**

**RAY EDDINGTON - DISTRICT IV**

**COLTEN WRIGHT - DISTRICT V**

**26-010**

**INVITATION TO BID**

**SANTA ROSA COUNTY ADMINISTRATION BUILDING GREEN  
INFRASTRUCTURE**

---

*Solicitation advertised utilizing Santa Rosa County Procurement & Purchasing Ordinance  
2023-06 adopted June 19, 2023*

---

- I. Notice to Respondents .....
- II. Bid Instructions, Submittal Requirements, and General Requirements
- III. FEDERAL LANGUAGE .....
- IV. General Provisions .....
- V. Supplemental Provisions .....
- VI. Insurance .....
- VII. Scope of Work .....
- VIII. Pricing Table .....
- IX. Vendor Questionnaire and Submission.....

Attachments:

A - SRC Admin Complex Base Bid Plans

B - SRC Admin Complex - Alternate Bid Plans

C - SRC Admin Complex Base Bid and Alt Bid Specs rev1

D - 2022 EPA MX-02D19622 SRC Admin Complex Grant Agreement

E - Draft Contract Federal Santa Rosa County Administration Building Green Infrastructure

## 1. Notice to Respondents

### 1.1. Summary



## SANTA ROSA COUNTY BOARD OF COMMISSIONERS

Administrative Offices | 6495 Caroline Street, Suite M | Milton, Florida 32570-4592

BOBBY BURKETT, District 1

KERRY SMITH, District 2

RHETT ROWELL, District 3

RAY EDDINGTON, District 4

COLTEN WRIGHT, District 5

BRAD BAKER, County Administrator

JARED LOWE, Asst. County Administrator

THOMAS V. DANNHEISER, County Attorney

### MEMORANDUM

TO: Company Addressed

DATE: Monday, December 22, 2025

FROM: Santa Rosa County Procurement Office

SUBJECT: **26-010 Santa Rosa County Administration Building  
Green Infrastructure**

Notice is hereby given that the Santa Rosa County Board of County Commissioners will receive sealed bids for Santa Rosa County Administration Building Green Infrastructure.

A pre-bid will be held on January 12, 2026 at 10:00 a.m. at 6051 Old Bagdad Highway, Suite 301, Milton in the Engineering/Environmental Conference Room.

Specifications may be secured through the Santa Rosa County Procurement Portal at <https://procurement.opengov.com/portal/santarosaf1>. Questions concerning this request should be submitted through the procurement portal by 12:00 pm on Monday, January 26, 2026.

Please submit all proposals through the procurement portal at <https://procurement.opengov.com/portal/santarosaf1> by 10:00 am on Monday, February 2, 2026, at which time will be publicly opened.

Santa Rosa County Board of County Commissioners encourages all segments of the business community to participate in its procurement opportunities, including small businesses, minority/women owned businesses, and disadvantaged business enterprises. The Board does not discriminate on the basis of race, color, religion, national origin, disability, sex, or age in the administration of contracts.

The Board of County Commissioners reserves the right to waive irregularities in bids, to reject any or all bids for sound documented reasons, and to award the bid that it determines to be in the best interest of Santa Rosa County.

By order of the Board of County Commissioners of Santa Rosa County, Florida.

## 2. Bid Instructions, Submittal Requirements, and General Requirements

## **2.1. Pre-Bid Activity**

Except as provided in this section, respondents are prohibited from contacting or lobbying the County, County Administrator, Commissioners, County staff, or any other person authorized on behalf of the County related or involved with the solicitation. All inquiries on the scope of work, specifications, additional requirements, attachments, terms and general conditions or instructions, or any issue must be directed in writing, via the County e-Procurement Portal located at <https://procurement.opengov.com/portal/santarosaf1>.

All questions or inquiries must be received no later than the last day for questions stated in 26-010Santa Rosa County Administration Building Green Infrastructure & Legal Notice. Any addenda or other modification to the bid documents will be issued by the County prior to the date and time of bid closing, as written addenda, and will be posted to the Santa Rosa County e-Procurement Portal hosted by OpenGov. Once the bidder has completed registration, they will receive addenda notifications to their email by clicking "Follow" on this project. Ultimately, it is the sole responsibility of each bidder to periodically check the site for any addenda at <https://procurement.opengov.com/portal/santarosaf1>.

Such written addenda or modification shall be part of the bid documents and shall be binding upon each respondent. Each respondent is required to acknowledge receipt of all addenda. No respondent may rely upon any verbal modification or interpretation.

## **2.2. Preparation of Bid**

The respondent shall submit bids in accordance with the public notice. The respondent shall submit bids in accordance with bid documents and must be listed on the Division of Corporations website (Sunbiz) for the FEIN provided.

Any proposal which contains any omissions, erasures, alterations, additions, irregularities of any kind, or items not called for which shall in any manner fail to conform to the conditions of public notice may be rejected.

A bid submitted by a partnership shall be executed in the partnership name and signed by a partner (whose title must appear under the signature). The official address of the partnership shall be shown below the signature.

A bid submitted by a limited liability company shall be executed in the name of the firm by a member and accompanied by evidence of authority to sign. The state of formation of the firm and the official address of the firm must be shown below the signature.

A bid submitted by an individual shall show the respondent's name and official address.

A bid submitted by a joint venture shall be executed by each joint venture in the manner indicated on the bid form. The official address of the joint venture must be shown below the signature.

The bid shall contain an acknowledgement of receipt of all addenda, the numbers of which shall be filled in on the form. The address and telephone number for communications regarding the bid shall be shown.

If the respondent is an out-of-state corporation, the bid shall contain evidence of respondent's authority and qualification to do business as an out-of-state corporation in the State of Florida. A state contractor license number for the State of Florida shall also be included on the bid form. Respondent shall be licensed in accordance with the requirements of Chapter 489, Florida Statutes.

The bid shall be based upon the completion of the Work according to the drawings and specifications, together with all addenda thereto.

### **2.3. Submittal of Bid**

A bid shall be submitted no later than the date and time prescribed in the solicitation and shall be accompanied by the bid security and other required documents. Applicable bond documents may be uploaded, but any physical checks presented must be delivered to the Procurement Office prior to the Bid Opening. Offers by email, facsimile, or telephone will NOT be accepted.

### **2.4. Electronic Document Format Requirement**

All electronic documents submitted in response to this solicitation shall be provided in **searchable PDF format**. The County reserves the right to deem proposals that do not comply with this requirement as **non-responsive** or to require resubmission in the proper format within a specified timeframe. This requirement applies to all attachments, forms, and supporting documentation uploaded to the County's Procurement Portal or otherwise submitted electronically.

### **2.5. Integrity of Bid Documents**

Respondents shall use the original documents provided on the Santa Rosa County e-Procurement Portal and enter information only in the spaces where a response is requested. Respondents may use an attachment to the documents if sufficient space is not available. Any modifications or alterations to the original documents by the respondent, whether intentional or otherwise, will constitute grounds for rejection of a submittal. Any such modification or alteration that a respondent wishes to propose must be clearly stated in the respondent's response in the form of an addendum to the original bid documents.

### **2.6. Withdrawal of Submittals**

Any Respondent may withdraw its Submittal, either personally or by written request, at any time prior to the scheduled time for opening Submittals.

### **2.7. Interpretation**

No oral interpretation will be made to any Respondent as to the meaning of the drawings or specifications. Every interpretation made to a Respondent will be in the form of an Addendum to the specifications. Addenda will be furnished to each Respondent, but it shall be the Respondent's responsibility to make inquiry as to Addenda issued. All such addenda shall become part of the contract and all Respondents shall be bound by such Addenda whether received by the Respondent.

### **2.8. Bids to Remain Subject to Acceptance**

All responses will remain subject to acceptance or rejection by Santa Rosa County for sixty (60) calendar days after the day of the response opening. The County may, in its sole discretion, release any response and return the bid security prior to the end of this period.

### **2.9. Conditional and Incomplete Bids**

Santa Rosa County specifically reserves the right to reject any conditional response.

### **2.10. Addition/Deletion of an Item**

The County reserves the right to add or delete any item from this response or resulting contract when deemed to be in the County's best interest.

### **2.11. Specification Exceptions**

Specifications are based on the most current literature available. Respondent shall clearly list any change in the manufacturer's specifications which conflict with the proposal specifications. Respondent must also explain any deviation from the proposal specification in writing. Failure of the respondent to comply with these provisions will

result in respondents being held responsible for all costs required to bring the equipment in compliance with bid specifications.

## **2.12. Familiarity with Laws**

All applicable Federal and State laws, County and municipal ordinances, orders, rules, regulations and General Terms and Conditions of all authorities having jurisdiction over the project shall apply to the solicitation throughout, and they will be deemed to be included in the contract the same as though they were written in full therein.

## **2.13. Examination of Documents and Site**

It is the responsibility of the respondent to inspect the site, scope of the work, and to understand the relevant documents, such as drawings, specifications, addenda, and any other information that may affect the execution of the work and the resources needed. Respondents should ensure that they have a clear and comprehensive knowledge of all the conditions and requirements that may impact the performance of the work under the contract.

## **2.14. Right to Reject**

The County reserves the right to waive informalities in a submission, to reject any or all submissions with or without cause, and accept the submission that in its judgment is in the best interest of the County.

## **2.15. Disqualification of Respondents**

Any of the following reasons may be considered as sufficient for the disqualification of a respondent and the rejection of its response:

- Submission of more than one response for the same work from an individual, firm, or corporation under the same or different name. Evidence that the respondent has a financial interest in the firm of another respondent for the same work.
- Evidence of collusion among respondents. Participants in such collusion will receive no recognition as respondents for any future work of the County until such participant has been reinstated as a qualified respondent.
- Incomplete work which in the judgment of the County might hinder or prevent the respondents prompt completion of additional work if awarded.
- Failure to pay or satisfactorily settle all bills due for labor and material on contracts in effect at the time of issuing the solicitation or default under previous contract.
- Listing of the respondent by any Local, State or Federal Government/Agency on its debarred/suspended vendor list.

## **2.16. Discrimination**

An entity or affiliate who has been placed on the discriminatory vendor list may not submit a response on a contract to provide goods or services to a public entity for the construction or repair of a public building or public work, may not submit responses on leases of real property to a public entity, may not award or perform work as a contractor, supplier, subcontractor, or consultant under contract with any public entity, and may not transact business with any public entity.

## **2.17. Review of Procurement Documents**

Per Section 119.071 (1)(b)-2., Florida Statutes, sealed bids, proposals, or replies received by the County pursuant to a competitive solicitation are exempt from public disclosure until such time as the County provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.

## **2.18. Compliance with Florida Statute 119.0701**

The Respondent shall comply with all the provisions of section 119.0701, Florida Statutes relating to the public records which requires, among other things, that the Respondent: (a) Keep and maintain public records; (b) Provide the public with access to public records on the same terms and conditions that the public agency would provide the records; (c) ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law; and (d) Meet all requirements for retaining public records and transfer, at no cost, to the public agency all public records in possession of the respondent upon termination of the contract.

**IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT (850) 983-1857, [susant@santarosa.fl.gov](mailto:susant@santarosa.fl.gov); 6495 CAROLINE STREET, SUITE M, MILTON, FLORIDA 32570.**

## **2.19. Suspension or Termination for Convenience**

The County may, at any time, without cause, order Respondent in writing to suspend, delay or interrupt the work in whole or in part for such period as the County may determine, or to terminate all or a portion of the Contract for the County's convenience. Upon such termination, the Contract Price earned to the date of termination shall be paid to Respondent, but Respondent waives any claim for damages, including loss of profits arising out of or related to the early termination. Those Contract provisions which by their nature survive final acceptance shall remain in full force and effect. If the County orders a suspension, the Contract price and Contract time may be adjusted for increases in the cost and time caused by suspension, delay, or interruption. No adjustment shall be made to the extent that performance is, was or would have been so suspended, delayed or interrupted by reason for which Respondent is responsible; or that an equitable adjustment is made or denied under another provision of this Contract.

## **2.20. Failure of Performance/Delivery**

In case of default by the Vendor, the County after due notice (oral or written) may procure the necessary supplies or services from other sources and hold the Vendor responsible for difference in cost incurred. Continuous instances of default shall result in cancellation of the award and removal of the Vendor from the response list for duration of one (1) year, at the option of the County.

## **2.21. Audit**

If requested, respondent shall permit the County or an authorized, independent audit agency to inspect all data and records of respondent relating to its performance and its subcontracts under this bid from the date of the award through three (3) years after the expiration of contract.

## **2.22. Non-Collusion**

Respondent certifies that it has entered into no agreement to commit a fraudulent, deceitful, unlawful, or wrongful act, or any act which may result in an unfair advantage over other respondents. See Florida Statute 838.22.

## **2.23. Public Entity Crime Information**

Pursuant to Florida Statute 287.133, a respondent may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity; and may not transact business with any public entity more than the threshold amount provided in s. 287.017 for CATEGORY TWO for a period of 36 months following the date of being placed on the convicted vendor list.

Note: For respondent's convenience, this certification form is enclosed and is made a part of the solicitation package.

## **2.24. Investigation of Respondent**

The County may make such investigations, as it deems necessary to determine the stability of the respondent to perform the work and that there is no conflict of interest. The respondent shall furnish to the County any additional information and financial data for this purpose as the County may request.

## **2.25. Form of Agreement**

The Contract form shall be provided by the Procurement Office. The successful contractor shall, within 10 days after receipt of the Notice of Award and the contract forms or documents, sign and return to the County Procurement Office all required contract documents. The awarded contractor shall also provide the policies of insurance or insurance certificate as required. All insurance documents shall be approved by Santa Rosa County Risk Management before the successful contractor proceeds with the work.

The contractor is responsible for submitting along with their response any exceptions it has to the standard terms of contract, within the attached sample contract. Failure to submit exceptions at time of submittal of the bid will be considered a waiver by the respondent to contest or request exception to the contract provisions. Any exceptions to the standard terms of contract will be taken into consideration as part of the County's review of the response. The County reserves the right to reject bids depending on the substance of the exceptions.

## **3. FEDERAL LANGUAGE**

The following special conditions apply to the Agreement and are incorporated herein by reference:

### **3.1. Misc. Federal Requirements**

All respondents should be aware that some federal funds may be utilized in the course of services being performed under this agreement, as such, respondent agrees that it shall adhere to all necessary federal regulations and the Uniform Administrative Guidance (2 CFR 200). Further, the respondent acknowledges that the Federal government is not a party to this agreement and is not subject to any obligations or liabilities to the non-federal entity, Respondent, or any other party pertaining to any matter resulting from any award. Should a federal awarding agency require adherence to Supplemental Standard Terms and Conditions relevant to any award hereunder, such conditions will be included for review and approval as a condition of any amendment or task order.

### **3.2. Procurement of Recovered Materials**

Contractor and any subcontractors agree to comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and the regulatory provisions of 40 CFR Part 247. In the performance of this contract and to the extent practicable, the Contractor and subcontractors are to use products containing the highest percentage of recovered materials for items designated by the Environmental Protection Agency (EPA) under 40 CFR Part 247 whenever:

- 1) The contract requires procurement of \$10,000 or more of a designated item during the fiscal year; or

2) The contractor has procured \$10,000 or more of a designated item using Federal funding during the previous fiscal year.

The list of EPA-designated items is available at [www.epa.gov/smm/comprehensive-procurement-guidelines-construction-products](http://www.epa.gov/smm/comprehensive-procurement-guidelines-construction-products).

Section 6002(c) establishes exceptions to the preference for recovery of EPA-designated products if the contractor can demonstrate the item is:

- a) Not reasonably available within a timeframe providing for compliance with the contract performance schedule;
- b) Fails to meet reasonable contract performance requirements; or
- c) Is only available at an unreasonable price.

### **3.3. Debarment and Suspension**

Contractor as part of the procurement response, Attachment "A" has submitted to the County a certification that Contractor and its principals, if applicable, are not presently debarred or suspended by any Federal department or agency from participating in this transaction. Contractor now agrees to verify, to the extent applicable, that for each lower tier subcontractor that exceeds \$25,000 as a "covered transaction" under the Services to be provided is not presently disbarred or otherwise disqualified from participating in the federally assisted services. The Contractor agrees to accomplish this verification by:

- 1) Checking the System for Award Management at website: <http://www.sam.gov>.
- 2) Collecting a certification statement similar to the Certification of Offeror/Bidder Regarding Debarment, above.
- 3) Inserting a clause or condition in the covered transaction with the lower tier contract.

### **3.4. Minority/Women's Business Enterprises**

Contractor must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible, in accordance with 2 CFR 200.321. If subcontracts are to be let, prime contractor will require compliance by all sub-contractors. Information regarding certified M/WBE firms can be obtained from (the following list is not exhaustive):

- Florida Department of Management Services (Office of Supplier Diversity);
- Florida Department of Transportation;
- Minority Business Development Center in most large cities; and
- Local Government M/DBE programs in many large counties and cities.

### **3.5. Special Conditions - Additional Federal Requirements**

As some or all of the Services to be provided under this Agreement may be funded with federal funds. Contractor agrees to adhere to the required additional federal requirements set forth in Attachment "E" and incorporated herein by reference.

### **3.6. Grant or Agreement Requirements**

Through the course of this Agreement the County may be awarded state or federal grants that may fund some or all of the Services to be provided under this agreement. Contractor will be provided a copy of the executed grant

agreement should one be awarded for all or part of the project and agrees to comply with all the requirements of the grant agreement.

### **3.7. Access to Records. The following access to records requirements apply to this contract**

1. The Contractor agrees to provide (insert name of state agency or local or Indian tribal government), (insert name of recipient), the FEMA Administrator, the Comptroller General of the United States, or any of their authorized representatives access to any books, documents, papers, and records of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts, and transcriptions.
2. The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
3. The Contractor agrees to provide the FEMA Administrator or his authorized representatives access to construction or other work sites pertaining to the work being completed under the contract.
4. In compliance with the Disaster Recovery Act of 2018, the (write in name of the non- federal entity) and the Contractor acknowledge and agree that no language in this contract is intended to prohibit audits or internal reviews by the FEMA Administrator or the Comptroller General of the United States.

The contractor shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials without specific FEMA pre- approval.

This is an acknowledgement that FEMA financial assistance will be used to fund all or a portion of the contract. The contractor will comply with all applicable Federal law, regulations, executive orders, FEMA policies, procedures, and directives.

The Federal Government is not a party to this contract and is not subject to any obligations or liabilities to the non-Federal entity, contractor, or any other party pertaining to any matter resulting from the contract.

The Contractor acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to the Contractor's actions pertaining to this contract.

### **3.8. System of Award Management (SAM)**

All respondents must be registered with the Federal System of Award Management (SAM) and be up to date on all registration of requirements at the time of contract award. Noncompliance will result in no award of contract for this submission.

### **3.9. Procurement of Recovered Materials**

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

### **3.10. Domestic preference**

Although the County has no local preference, in accordance with 2CFR 200.322, the County may consider preference for the use of products and materials produced in the United States.

### **3.11. Contract with the Enemy**

In accordance with 2CFR 200.215, it is acknowledged that no services under this contract are to be performed outside the United States and its territories nor in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

### **3.12. Unauthorized Aliens/Patriot's Act**

Knowing employment by respondent or its subcontractors of any alien not authorized to work by the immigration laws is prohibited and shall be a default of the contract. If the respondent is notified or becomes aware of such default, the respondent shall take steps as are necessary to terminate said employment with 24 hours of notification or actual knowledge that an alien is being employed. Respondent's failure to take such steps as are necessary to terminate the employment of any said alien within 24 hours notification or actual knowledge that an alien is being employed shall be grounds for immediate termination of the contract. Respondent shall take all commercially reasonable precautions to ensure that it and its subcontractors do not employ persons who are not authorized to work by the immigration laws.

### **3.13. Protection of Resident Workers**

The Santa Rosa County Board of County Commissioners actively supports the immigration and Nationality Act (INA) which includes provisions addressing employment eligibility, employment verifications, and nondiscrimination. Under the INA, employers may hire only persons who may legally work in the United States (i.e., citizens and nationals of the U.S.) and aliens authorized to work in the U.S. The employer must verify the identity and employment eligibility of anyone hired, which includes completing the Employment Eligibility Verifications. The respondent shall establish appropriate procedures and controls so no services or products under the Contract Documents will be performed or manufactured by any worker who is not legally eligible to perform such services or employment. Santa Rosa County reserves the right to request documentation showing compliance with the requirements.

Respondents doing construction business with Santa Rosa County are required to use the Federal Government Department of Homeland Security's website and use the E-Verify Employment Eligibility Verifications System to confirm eligibility of all employees to work in the United States.

### **3.14. Buy America (Build America, Buy America Act (Public Law 117-58, 29 U.S.C. § 50101. Executive Order 14005)**

Applies to purchases of iron, steel, manufactured products and construction materials permanently incorporated into infrastructure projects, where federal grant funding agency requires it or if the grant funds which may come from any federal agency, but most commonly: the U.S. Environmental Protection Agency (EPA), the U.S. Federal Transit Administration (FTA), the US Federal Highway Administration (FHWA), the U.S. Federal Railroad Administration (FRA), Amtrack and the U.S. Federal Aviation Administration (FAA). Requirement: All iron, steel, manufactured products and construction materials used under a federally grant funded project must be produced in the United States. Additional requirements may apply depending on the Federal Granting Agency provisions. Proposers shall be required to submit a completed Buy America Certificate with this procurement, an incomplete certificate may deem the proposer's submittal non-responsive.

### **3.15. Equal Employment Opportunity (2 CFR Part 200, Appendix II(C); 41 CFR § 61-1.4; 41 CFR 61-4.3; Executive Order 11246).**

During the performance of this contract, the Contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identify, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff, or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Contractor's commitments under this section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

### **3.16. § 200.322 Domestic preferences for procurements**

(a) The recipient or subrecipient should, to the greatest extent practicable and consistent with law, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards, contracts, and purchase orders under Federal awards.

(b) For purposes of this section:

(1) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) "Manufactured products" means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

(c) Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in [2 CFR part 184](#).

### **3.17. § 200.216 Prohibition on certain telecommunications and video surveillance equipment or services.**

(a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:

(1) Procure or obtain covered telecommunications equipment or services;

(2) Extend or renew a contract to procure or obtain covered telecommunications equipment or services; or

(3) Enter into a contract (or extend or renew a contract) to procure or obtain covered telecommunications equipment or services.

(b) As described in section 889 of [Public Law 115-232](#), "covered telecommunications equipment or services" means any of the following:

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment;

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country;

(c) For the purposes of this section, "covered telecommunications equipment or services" also include systems that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

(d) In implementing the prohibition under section 889 of [Public Law 115-232](#), heads of executive agencies administering loan, grant, or subsidy programs must prioritize available funding and technical support to assist affected businesses, institutions, and organizations as is reasonably necessary for those affected entities to transition from covered telecommunications equipment or services, to procure replacement equipment or services, and to ensure that communications service to users and customers is sustained.

(e) When the recipient or subrecipient accepts a loan or grant, it is certifying that it will comply with the prohibition on covered telecommunications equipment and services in this section. The recipient or subrecipient is not required to certify that funds will not be expended on covered telecommunications equipment or services beyond

the certification provided upon accepting the loan or grant and those provided upon submitting payment requests and financial reports.

(f) For additional information, see section 889 of [Public Law 115-232](#) and [§ 200.471](#).

### **3.18. PART 401—RIGHTS TO INVENTIONS MADE BY NONPROFIT ORGANIZATIONS AND SMALL BUSINESS FIRMS UNDER GOVERNMENT GRANTS, CONTRACTS, AND COOPERATIVE AGREEMENTS**

Authority:35 U.S.C. 206; D.O.O. 30-2A.

Source:52 FR 8554, Mar. 18, 1987, unless otherwise noted.

#### **§ 401.1 Scope.**

1. (a) Traditionally there have been no conditions imposed by the government on research performers while using private facilities which would preclude them from accepting research funding from other sources to expand, to aid in completing or to conduct separate investigations closely related to research activities sponsored by the government. Notwithstanding the right of research organizations to accept supplemental funding from other sources for the purpose of expediting or more comprehensively accomplishing the research objectives of the government sponsored project, it is clear that the ownership provisions of these regulations would remain applicable in any invention “conceived or first actually reduced to practice in performance” of the project. Separate accounting for the two funds used to support the project in this case is not a determining factor.

(1) To the extent that a non-government sponsor established a project which, although closely related, falls outside the planned and committed activities of a government-funded project and does not diminish or distract from the performance of such activities, inventions made in performance of the non-government sponsored project would not be subject to the conditions of these regulations. An example of such related but separate projects would be a government sponsored project having research objectives to expand scientific understanding in a field and a closely related industry sponsored project having as its objectives the application of such new knowledge to develop usable new technology. The time relationship in conducting the two projects and the use of new fundamental knowledge from one in the performance of the other are not important determinants since most inventions rest on a knowledge base built up by numerous independent research efforts extending over many years. Should such an invention be claimed by the performing organization to be the product of non-government sponsored research and be challenged by the sponsoring agency as being reportable to the government as a “subject invention”, the challenge is appealable as described in § 401.11(d).

(2) An invention which is made outside of the research activities of a government-funded project is not viewed as a “subject invention” since it cannot be shown to have been “conceived or first actually reduced to practice” in performance of the project. An obvious example of this is a situation where an instrument purchased with government funds is later used, without interference with or cost to the government funded project, in making an invention all expenses of which involve only non-government funds.

2. (b) This part implements 35 U.S.C. 202 through 204 and is applicable to any funding agreement with a nonprofit organization or small business firm as defined by 35 U.S.C. 201, except for an agreement made primarily for educational purposes under 35 U.S.C. 212. This part also applies to any funding agreement with business firms regardless of size in accordance with section 1, paragraph (b)(4) of Executive Order 12591, as amended by Executive Order 12618, unless directed otherwise pursuant to NASA or DOE vesting statutes.

3. (c) This regulation supersedes OMB Circular A-124 and shall take precedence over any regulations or other guidance dealing with ownership of inventions made by businesses and nonprofit organizations which are inconsistent with it. Only deviations requested by a contractor and not inconsistent with Chapter 18 of Title 35, United States Code, may be made without approval of the Secretary. Modifications or tailoring of clauses as authorized by § 401.5 or 401.3, when alternate provisions are used under § 401.3(a)(1) through (6), are not considered deviations requiring the Secretary's approval.

4. (d) This part is not intended to apply to arrangements under which nonprofit organizations, small business

firms, or others are allowed to use government-owned research facilities and normal technical assistance provided to users of those facilities, whether on a reimbursable or nonreimbursable basis. This part is also not intended to apply to arrangements under which sponsors reimburse the government or facility contractor for the contractor employee's time in performing work for the sponsor. Such arrangements are not considered "funding agreements" as defined at 35 U.S.C. 201(b) and § 401.2(a).

[88 FR 17735, Mar. 24, 2023]

#### § 401.2 Definitions.

In addition to the definitions in 35 U.S.C. 201, as used in this part—

5. (a) The term funding agreement means any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph.
6. (b) The term contractor means any person, small business firm or nonprofit organization, or, as set forth in section 1, paragraph (b)(4) of Executive Order 12591, as amended, any business firm regardless of size, which is a party to a funding agreement.
7. (c) The term invention means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.).
8. (d) The term subject invention means any invention of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement; provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.
9. (e) The term practical application means to manufacture in the case of a composition of product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or government regulations, available to the public on reasonable terms.
10. (f) The term made when used in relation to any invention means the conception or first actual reduction to practice of such invention.
11. (g) The term small business firm means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this part, the size standards for small business concerns involved in government procurement and subcontracting at 13 CFR 121.5 will be used.
12. (h) The term nonprofit organization means universities and other institutions of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.
13. (i) The term Chapter 18 means Chapter 18 of Title 35 of the United States Code.
14. (j) The term Secretary means the Director of the National Institute of Standards and Technology.
15. (k) The term electronically filed means any submission of information transmitted by an electronic system.
16. (l) The term electronic system means a software-based system approved by the agency for the transmission of information.
17. (m) The term patent application or "application for patent" may be the following:
  - (1) A United States provisional application as defined in 37 CFR 1.9(a)(2) and filed under 35 U.S.C. 111(b); or
  - (2) A United States nonprovisional application as defined in 37 CFR 1.9(a)(3) and filed under 35 U.S.C. 111(a); or
  - (3) A patent application filed in a foreign country or an international patent office; or

(4) An application for a Plant Variety Protection certificate.

18. (n) The term initial patent application means, as to a given subject invention:

(1) The first United States provisional application as defined in 37 CFR 1.9(a)(2) and filed under 35 U.S.C. 111(b); or  
(2) The first United States nonprovisional application as defined in 37 CFR 1.9(a)(3) and filed under 35 U.S.C. 111(a); or

(3) The first patent application filed under the Patent Cooperation Treaty as defined in 37 CFR 1.9(b); or

(4) The first application for a Plant Variety Protection certificate.

19. (o) The term statutory period means the one-year period before the effective filing date of a claimed invention in a patent application during which exceptions to prior art exist per 35 U.S.C. 102(b) as amended by the Leahy-Smith America Invents Act, Public Law 112-29.

[52 FR 8554, Mar. 18, 1987, as amended at 60 FR 41812, Aug. 14, 1995; 78 FR 4766, Jan. 23, 2013; 83 FR 15958, Apr. 13, 2018; 88 FR 17735, Mar. 24, 2023]

§ 401.3 Use of the standard clauses at § 401.14.

20. (a) Each funding agreement awarded to a contractor (except those subject to 35 U.S.C. 212) shall contain the clause found in § 401.14 with such modifications and tailoring as authorized or required elsewhere in this part. However, a funding agreement may contain alternative provisions—

(1) When the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government; or

(2) In exceptional circumstances when it is determined by the agency that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of Chapter 18 of Title 35 of the United States Code; or

(3) When it is determined by a government authority which is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security to such activities; or

(4) When the funding agreement includes the operation of the government-owned, contractor-operated facility of the Department of Energy primarily dedicated to that Department's naval nuclear propulsion or weapons related programs and all funding agreement limitations under this subparagraph on the contractor's right to elect title to a subject invention are limited to inventions occurring under the above two programs; or

(5) If any part of the contract may require the contractor to perform work on behalf of the Government at a Government laboratory under a Cooperative Research and Development Agreement (CRADA) pursuant to the statutory authority of 15 U.S.C. 3710a; or

(6) If the contract provides for services and the contractor is not a nonprofit organization and does not promote the commercialization and public availability of subject inventions pursuant to 35 U.S.C. 200.

21. (b) When an agency exercises the exceptions at paragraph (a)(2), (3), (5), or (6) of this section, it shall use the standard clause at § 401.14 with only such modifications as are necessary to address the exceptional circumstances or concerns which led to the use of the exception. For example, if the justification relates to a particular field of use or market, the clause might be modified along lines similar to those described in paragraph (c) of this section. In any event, the clause should provide the contractor with an opportunity to receive greater rights in accordance with the procedures at § 401.15. When an agency justifies and exercises the exception at paragraph (a)(2) of this section and uses an alternative provision in the funding agreement on the basis of national security, the provision shall provide the contractor with the right to elect ownership to any invention made under such funding agreement as provided by the Standard Patent Rights Clause found at § 401.14 if the invention is not classified by the agency within six months of the date it is reported to the agency, or within the same time period the Department of Energy does not, as authorized by regulation, law or Executive order or implementing regulations thereto, prohibit unauthorized dissemination of the invention. Contracts in support of DOE's naval nuclear propulsion program are exempted from this paragraph (b).

22. (c) When the Department of Energy (DOE) determines to use alternative provisions under paragraph (a)(4) of

this section, the standard clause at § 401.14 shall be used with the following modifications, or substitute thereto with such modification and tailoring as authorized or required elsewhere in this part:

- (1) The title of the clause shall be changed to read as follows: Patent Rights to Nonprofit DOE Facility Operators.
- (2) Add an "(A)" after "(1)" in paragraph (c)(1) of the clause in § 401.14 and add paragraphs (B) and (C) to paragraph (c)(1) of the clause in § 401.14 as follows:

(B) If the subject invention occurred under activities funded by the naval nuclear propulsion or weapons related programs of DOE, then the provisions of this paragraph (c)(1)(B) will apply in lieu of paragraphs (c)(2) and (3) of this clause. In such cases the contractor agrees to assign the government the entire right, title, and interest thereto throughout the world in and to the subject invention except to the extent that rights are retained by the contractor through a greater rights determination or under paragraph (e) of this clause. The contractor, or an employee-inventor, with authorization of the contractor, may submit a request for greater rights at the time the invention is disclosed or within a reasonable time thereafter. DOE will process such a request in accordance with procedures at 37 CFR 401.15. Each determination of greater rights will be subject to paragraphs (h) through (k) of this clause and such additional conditions, if any, deemed to be appropriate by the Department of Energy.

(C) At the time an invention is disclosed in accordance with paragraph (c)(1)(A) of this clause, or within 90 days thereafter, the contractor will submit a written statement as to whether or not the invention occurred under a naval nuclear propulsion or weapons-related program of the Department of Energy. If this statement is not filed within this time, paragraph (c)(1)(B) of this clause will apply in lieu of paragraphs (c)(2) and (3) of this clause. The contractor statement will be deemed conclusive unless, within 60 days thereafter, the Contracting Officer disagrees in writing, in which case the determination of the Contracting Officer will be deemed conclusive unless the contractor files a claim under the Contract Disputes Act within 60 days after the Contracting Officer's determination. Pending resolution of the matter, the invention will be subject to paragraph (c)(1)(B) of this clause.

(3) Paragraph (k)(3) of the clause in § 401.14 will be modified as prescribed at § 401.5(f).

23. (d) When a funding agreement involves a series of separate task orders, an agency may apply the exceptions at paragraph (a)(2) or (3) of this section to individual task orders, and it may structure the contract so that modified patent rights provisions will apply to the task order even though either the standard clause at § 401.14 or the modified clause as described in paragraph (c) of this section is applicable to the remainder of the work. Agencies are authorized to negotiate such modified provisions with respect to task orders added to a funding agreement after its initial award.

24. (e) Before utilizing any of the exceptions in § 401.3(a) of this section, the agency shall prepare a written determination, including a statement of facts supporting the determination, that the conditions identified in the exception exist. A separate statement of facts shall be prepared for each exceptional circumstances determination, except that in appropriate cases a single determination may apply to both a funding agreement and any subcontracts issued under it or to any funding agreement to which such an exception is applicable. In cases when § 401.3(a)(2) is used, the determination shall also include an analysis justifying the determination. This analysis should address with specificity how the alternate provisions will better achieve the objectives set forth in 35 U.S.C. 200. A copy of each determination, statement of facts, and, if applicable, analysis shall be promptly provided to the contractor or prospective contractor along with a notification to the contractor or prospective contractor of its rights to appeal the determination of the exception under 35 U.S.C. 202(b)(4) and § 401.4 of this part.

25. (f) Except for determinations under § 401.3(a)(3), the agency shall also provide copies of each determination, statement of fact, and analysis to the Secretary. These shall be sent within 30 days after the award of the funding agreement to which they pertain. Copies shall also be sent to the Chief Counsel for Advocacy of the Small Business Administration if the funding agreement is with a small business firm. If the Secretary believes that any individual determination or pattern of determinations is contrary to the policies and objectives of this chapter or otherwise not in conformance with this chapter, the Secretary shall so advise the head of the agency concerned and the Administrator of the Office of Federal Procurement Policy and recommend corrective actions.

26. (g) A prospective contractor may be required by an agency to certify that it is either a small business firm or a

nonprofit organization. If the agency has reason to question the status of the prospective contractor, it may require the prospective contractor to furnish evidence to establish its status.

27. (h) When an agency exercises the exception at paragraph (a)(5) of this section, replace paragraph (b) of the basic clause in § 401.14 with the following paragraphs (b)(1) and (2):

(b) Allocation of principal rights. (1) The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause, including paragraph (b)(2) of this clause, and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

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

[52 FR 8554, Mar. 18, 1987, as amended at 69 FR 17301, Apr. 2, 2004; 83 FR 15959, Apr. 13, 2018; 88 FR 17736, Mar. 24, 2023]

#### § 401.4 Contractor appeals of exceptions.

28. (a) In accordance with 35 U.S.C. 202(b)(3) a contractor has the right to an administrative review of a determination to use one of the exceptions at § 401.3(a)(1) through (6) if the contractor believes that a determination is either contrary to the policies and objectives of this chapter or constitutes an abuse of discretion by the agency. Paragraph (b) of this section specifies the procedures to be followed by contractors and agencies in such cases. The assertion of such a claim by the contractor shall not be used as a basis for withholding or delaying the award of a funding agreement or for suspending performance under an award. Pending final resolution of the claim the contract may be issued with the patent rights provision proposed by the agency; however, should the final decision be in favor of the contractor, the funding agreement will be amended accordingly and the amendment made retroactive to the effective date of the funding agreement.

29. (b)

(1) A contractor may appeal a determination by providing written notice to the agency within 30 working days from the time it receives a copy of the agency's determination, or within such longer time as an agency may specify in its regulations. The contractor's notice should specifically identify the basis for the appeal.

(2) The appeal shall be decided by the head of the agency or by his/her designee who is at a level above the person who made the determination. If the notice raises a genuine dispute over the material facts, the head of the agency or the designee shall undertake, or refer the matter for, fact-finding.

(3) Fact-finding shall be conducted in accordance with procedures established by the agency. Such procedures shall be as informal as practicable and be consistent with principles of fundamental fairness. The procedures should afford the contractor the opportunity to appear with counsel, submit documentary evidence, present witnesses and confront such persons as the agency may rely upon. A transcribed record shall be made and shall be available at cost to the contractor upon request. The requirement for a transcribed record may be waived by mutual agreement of the contractor and the agency.

(4) The official conducting the fact-finding shall prepare or adopt written findings of fact and transmit them to the head of the agency or designee promptly after the conclusion of the fact-finding proceeding along with a recommended decision. A copy of the findings of fact and recommended decision shall be sent to the contractor by registered or certified mail.

(5) Fact-finding should be completed within 45 working days from the date the agency receives the contractor's written notice.

(6) When fact-finding has been conducted, the head of the agency or designee shall base his or her decision on the facts found, together with any argument submitted by the contractor, agency officials or any other information in the administrative record. In cases referred for fact-finding, the agency head or the designee may reject only those facts that have been found to be clearly erroneous, but must explicitly state the rejection and indicate the basis for the contrary finding. The agency head or the designee may hear oral arguments after fact-finding provided that the contractor or contractor's attorney or representative is present and given an opportunity to make arguments and rebuttal. The decision of the agency head or the designee shall be in writing and, if it is unfavorable to the contractor shall include an explanation of the basis of the decision. The decision of the agency or designee shall be made within 30 working days after fact-finding or, if there was no fact-finding, within 45 working days from the date the agency received the contractor's written notice. A contractor adversely affected by a determination under this section may, at any time within sixty days after the determination is issued, file a petition in the United States Court of Federal Claims, which shall have jurisdiction to determine the appeal on the record and to affirm, reverse, remand, or modify as appropriate, the determination of the Federal agency.

[52 FR 8554, Mar. 18, 1987, as amended at 83 FR 15960, Apr. 13, 2018; 88 FR 17736, Mar. 24, 2023]

§ 401.5 Modification and tailoring of clauses.

30. (a) Agencies should complete the blank in paragraph (g)(2) of the clauses at § 401.14 in accordance with their own or applicable government-wide regulations such as the Federal Acquisition Regulation. If the funding agreement is a grant or cooperative agreement, paragraph (g)(3) of the clause may be deleted.

31. (b) Agencies should complete paragraph (l) of the clause in § 401.14, "Communication," by designating a central point of contact for communications on matters relating to the clause. Agencies may also include additional information on communications in paragraph (l) of the clause in § 401.14.

32. (c) Agencies may replace the italicized words and phrases in the clause at § 401.14 with those appropriate to the particular funding agreement. For example, "contractor" could be replaced by "grantee." Depending on its use, "agency" or "Federal agency" can be replaced either by the identification of the agency or by the specification of the particular office or official within the agency.

33. (d)

(1) When the agency head or duly authorized designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments, their nationals, or international organizations in accordance with any existing treaty or international agreement, a sentence may be added at the end of paragraph (b) of the clause at § 401.14 as follows:

This license will include the right of the government to sublicense foreign governments, their nationals, and international organizations, in accordance with the following treaties or international agreements: \_\_\_\_\_.

(2) The blank in the added text in paragraph (d)(1) of this section should be completed with the names of applicable existing treaties or international agreements, including agreements of cooperation, and military agreements relating to weapons development and production. The added language is not intended to encompass treaties or other agreements that are in effect on the date of the award but which are not listed. Alternatively, agencies may use substantially similar language relating the government's rights to specific treaties or other agreements identified elsewhere in the funding agreement. The language may also be modified to make clear that the rights granted to the foreign government, and its nationals or an international organization may be for additional rights beyond a license or sublicense if so required by the applicable treaty or other international agreement. For example, in some cases exclusive licenses or even the assignment of title to the foreign country involved might be required. Agencies may also modify the added language to provide for the direct licensing by the contractor of the foreign government or international organization.

34. (e) If the funding agreement involves performance over an extended period of time, such as the typical funding agreement for the operation of a government-owned facility, the following language may also be added:

The agency reserves the right to unilaterally amend this funding agreement to identify specific treaties or international agreements entered into or to be entered into by the government after the effective date of this funding agreement and effectuate those license or other rights which are necessary for the government to meet its obligations to foreign governments, and international organizations under such treaties or international agreements with respect to subject inventions made after the date of the amendment.

35. (f) If the contract is with a nonprofit organization and is for the operation of a government-owned, contractor-operated facility, the following will be substituted for the text of paragraph (k)(3) of the clause at § 401.14: After payment of patenting costs, licensing costs, payments to inventors, and other expenses incidental to the administration of subject inventions, the balance of any royalties or income earned and retained by the contractor during any fiscal year on subject inventions under this or any successor contract containing the same requirement, up to any amount equal to five percent of the budget of the facility for that fiscal year, shall be used by the contractor for scientific research, development, and education consistent with the research and development mission and objectives of the facility, including activities that increase the licensing potential of other inventions of the facility. If the balance exceeds five percent, 15 percent of the excess above five percent shall be paid by the contractor to the Treasury of the United States and the remaining 85 percent shall be used by the contractor only for the same purposes as described in the preceding sentence. To the extent it provides the most effective technology transfer, the licensing of subject inventions shall be administered by contractor employees on location at the facility.

36. (g) If the contract is for the operation of a government-owned facility, agencies may add paragraph (f)(5) to the clause at § 401.14 with the following text:

The contractor shall establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed and shall submit a description of the procedures to the contracting officer so that the contracting officer may evaluate and determine their effectiveness.

[83 FR 15960, Apr. 13, 2018, as amended at 88 FR 17736, Mar. 24, 2023]

#### § 401.6 Exercise of march-in rights.

37. (a) The following procedures shall govern the exercise of the march-in rights of the agencies set forth in 35 U.S.C. 203 and paragraph (j) of the clause at § 401.14:

(1) Whenever an agency receives information that it believes might warrant the exercise of march-in rights, before initiating any march-in proceeding, it shall notify the contractor in writing (including electronic means) of the information and request an informal consultation and information relevant to the matter with the contractor to understand the nature of the issue and may also consider possible alternatives other than exercising march-in rights. In the absence of response from the contractor to the agency request for informal consultation within 30 days, the agency may, at its discretion, proceed with the procedures below. If informal consultation occurs within 30 days, or later if the agency has not initiated the procedures below, then the agency shall, within 120 days after informal consultation, either notify the contractor of the initiation of the procedures below with a summary of the efforts taken, or notify the contractor, in writing, that it will not pursue march-in rights on the basis of the available information.

(2) A march-in proceeding shall be initiated by the issuance of a written notice by the agency to the contractor and its assignee or exclusive licensee, as applicable and if known to the agency, stating that the agency is considering the exercise of march-in rights. The notice shall state the reasons for the proposed march-in in terms sufficient to put the contractor on notice of the facts upon which the action would be based and shall specify the field or fields of use in which the agency is considering requiring licensing. The notice shall advise the contractor (assignee or exclusive licensee) of its rights, as set forth in this section and in any supplemental agency regulations. The determination to exercise march-in rights shall be made by the head of the agency or his or her designee.

(3) Within 30 days after the receipt of the written notice of march-in, the contractor (assignee or exclusive licensee) may submit in person, in writing, or through a representative, information or argument in opposition to the proposed march-in, including any additional specific information which raises a genuine dispute over the material

facts upon which the march-in is based. If the information presented raises a genuine dispute over the material facts, the head of the agency or designee shall undertake or refer the matter to another official for fact-finding. (4) Fact-finding shall be conducted in accordance with the procedures established by the agency. Such procedures shall be as informal as practicable and be consistent with principles of fundamental fairness. The procedures should afford the contractor the opportunity to appear with counsel, submit documentary evidence, present witnesses and confront such persons as the agency may present. A transcribed record shall be made and shall be available at cost to the contractor upon request. The requirement for a transcribed record may be waived by mutual agreement of the contractor and the agency. Any portion of the march-in proceeding, including a fact-finding hearing that involves testimony or evidence relating to the utilization or efforts at obtaining utilization that are being made by the contractor, its assignee, or licensees shall be closed to the public, including potential licensees. In accordance with 35 U.S.C. 202(c)(5), agencies shall not disclose any such information obtained during a march-in proceeding to persons outside the government except when such release is authorized by the contractor (assignee or licensee) or otherwise required by law.

(5) The official conducting the fact-finding shall prepare or adopt written findings of fact and transmit them to the head of the agency or designee promptly after the conclusion of the fact-finding proceeding along with a recommended determination. A copy of the findings of fact shall be sent to the contractor (assignee or exclusive licensee) by registered or certified mail. The contractor (assignee or exclusive licensee) and agency representatives will be given 30 days to submit written arguments to the head of the agency or designee; and, upon request by the contractor oral arguments will be held before the agency head or designee that will make the final determination.

(6) In cases in which fact-finding has been conducted, the head of the agency or designee shall base his or her determination on the facts found, together with any other information and written or oral arguments submitted by the contractor (assignee or exclusive licensee) and agency representatives, and any other information in the administrative record. The consistency of the exercise of march-in rights with the policy and objectives of 35 U.S.C. 200 shall also be considered. In cases referred for fact-finding, the head of the agency or designee may reject only those facts that have been found to be clearly erroneous, but must explicitly state the rejection and indicate the basis for the contrary finding. Written notice of the determination whether march-in rights will be exercised shall be made by the head of the agency or designee and sent to the contractor (assignee or exclusive licensee) by certified or registered mail within 90 days after the completion of fact-finding or 90 days after oral arguments, whichever is later, or the proceedings will be deemed to have been terminated and thereafter no march-in based on the facts and reasons upon which the proceeding was initiated may be exercised.

(7) An agency may, at any time, terminate a march-in proceeding if it is satisfied that it does not wish to exercise march-in rights.

38. (b) The procedures of this part shall also apply to the exercise of march-in rights against inventors receiving title to subject inventions under 35 U.S.C. 202(d) and, for that purpose, the term "contractor" as used in this section shall be deemed to include the inventor.

39. (c) An agency determination unfavorable to the contractor (assignee or exclusive licensee) shall be held in abeyance pending the exhaustion of appeals or petitions filed under 35 U.S.C. 203(b).

40. (d) For purposes of this section the term exclusive licensee includes a partially exclusive licensee.

41. (e) Agencies are authorized to issue supplemental procedures not inconsistent with this part for the conduct of march-in proceedings.

[88 FR 17736, Mar. 24, 2023]

§§ 401.7-401.8 [Reserved]

§ 401.9 Contractor and contractor employee inventor requests for rights in inventions.

42. (a) Agencies shall allow a contractor to request greater rights in an invention, including a request to return title to an invention to the contractor, when the funding agreement contains alternate provisions in accordance with § 401.3(a)(2):

(1) The agency shall consider if the circumstances which originally led the agency to invoke an exception under §

401.3(a) are currently valid and applicable to the actual subject invention.

(i) The agency shall provide the contractor the opportunity to submit information on its plans and intentions to bring the subject invention to practical application pursuant to 35 U.S.C. 200.

(ii) The agency shall assess whether government ownership of the invention will better promote the policies and objectives of 35 U.S.C. 200 than the plans and intentions submitted by the contractor.

(iii) The agency shall consider whether to allow the standard clause at § 401.14 to apply with additional conditions imposed upon the contractor's use of the invention for specific uses or applications, or with expanded government license rights in such uses or applications.

(2) The agency shall reply to the contractor with its determination within 90 days after receiving a request and any supporting information from the contractor. If a bar to patenting is sooner than 90 days from receipt of a request, the agency may either file a patent application on the subject invention or authorize the contractor to file a patent application at its own risk and expense.

(3) The Department of Energy is authorized to process deferred determinations either in accordance with its waiver regulations or this section.

43. (b) Pursuant to 35 U.S.C. 202(d), a contractor is required to obtain approval from a funding Agency before assigning rights to a subject invention made under a funding agreement to an employee/inventor. When an employee/inventor retains rights to a subject invention made under a funding agreement, either the Agency or the contractor must ensure compliance by the employee/inventor with at least those conditions that would apply under paragraphs (b), (d), (f)(4), (h), (i), and (j) of the clause at § 401.14.

[88 FR 17737, Mar. 24, 2023]

§ 401.10 Government assignment to contractor of rights in invention of government employee.

44. (a) In any case when a Federal employee is a co-inventor of any invention made under a funding agreement with a contractor:

(1) If the Federal agency employing such co-inventor transfers or reassigns to the contractor the right it has acquired in the subject invention from its employee as authorized by 35 U.S.C. 202(e), the assignment will be made subject to the patent rights clause of the contractor's funding agreement.

(2) The Federal agency employing such co-inventor, in consultation with the contractor, may submit an initial patent application, provided that the contractor retains the right to elect to retain title pursuant to 35 U.S.C. 202(a).

(3) When a Federal employee is a co-inventor of a subject invention developed with contractor-employed co-inventors under a funding agreement from another agency:

(i) The funding agency will notify the agency employing a Federal co-inventor of any report of invention and whether the contractor elects to retain title.

(ii) If the contractor does not elect to retain title to the subject invention, the funding agency must promptly provide notice to the agency employing a Federal co-inventor, and to the extent practicable, at least 60 days before any statutory bar date.

(iii) Upon notification by the funding agency of a subject invention in which the contractor has not elected to retain title, the agency employing a Federal co-inventor must determine if there is a government interest in patenting the invention and will notify the funding agency of its determination.

(iv) If the agency employing a Federal co-inventor determines there is a government interest in patenting the subject invention in which the contractor has not elected to retain title, the funding agency must provide administrative assistance (but is not required to provide financial assistance) to the agency employing a Federal co-inventor in acquiring rights from the contractor in order to file an initial patent application.

(v) The agency employing a Federal co-inventor has priority for patenting over funding agencies that do not have a Federal co-inventor when the contractor has not elected to retain title.

(vi) When the contractor has not elected to retain title, the funding agency and the agency employing a Federal co-inventor shall consult in order to ensure that the intent of the programmatic objectives conducted under the

funding agreement is represented in any patenting decisions. The agency employing a Federal co-inventor may transfer patent management responsibilities to the funding agency.

(4) Federal agencies employing such co-inventors may enter into an agreement with a contractor when an agency determines it is a suitable and necessary step to protect and administer rights on behalf of the Federal Government, pursuant to 35 U.S.C. 202(e).

(5) Federal agencies employing such co-inventors will retain all ownership rights to which they are otherwise entitled if the contractor elects to retain title to the subject invention.

45. (b) Agencies may add additional conditions as long as they are consistent with 35 U.S.C. 201-206.

46. (c) Nothing in this section shall supersede any existing inter-institutional agreements between a contractor and a Federal agency for the management of jointly-owned subject inventions.

[83 FR 15961, Apr. 13, 2018]

#### § 401.11 Appeals.

47. (a) The agency official initially authorized to take any of the following actions shall provide the contractor with a written statement of the basis for his or her action at the time the action is taken, including any relevant facts that were relied upon in taking the action.

(1) A refusal to grant an extension under paragraph (c)(5) of the standard clause at § 401.14.

(2) A request for a conveyance of title under paragraph (d)(1) of the standard clause at § 401.14.

(3) A refusal to grant a waiver under paragraph (i) of the standard clause at § 401.14.

(4) A refusal to approve an assignment under paragraph (k)(1) of the standard clause at § 401.14.

48. (b) Each agency shall establish and publish procedures under which any of the agency actions listed in paragraph (a) of this section may be appealed to the head of the agency or designee. Review at this level shall consider both the factual and legal basis for the actions and its consistency with the policy and objectives of 35 U.S.C. 200-206.

49. (c) Appeals procedures established under paragraph (b) of this section shall include administrative due process procedures and standards for fact-finding at least comparable to those set forth in § 401.6(a)(4) through (6) whenever there is a dispute as to the factual basis for an agency request for a conveyance of title under paragraph (d) of the standard clause at § 401.14, including any dispute as to whether or not an invention is a subject invention.

50. (d) To the extent that any of the actions described in paragraph (a) of this section are subject to appeal under the Contract Dispute Act, the procedures under the Act will satisfy the requirements of paragraphs (b) and (c) of this section.

[88 FR 17737, Mar. 24, 2023]

#### § 401.12 Licensing of background patent rights to third parties.

51. (a) A funding agreement with a small business firm or a domestic nonprofit organization will not contain a provision allowing a Federal agency to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless such provision has been approved by the agency head and a written justification has been signed by the agency head. Any such provision will clearly state whether the licensing may be required in connection with the practice of a subject invention, a specifically identified work object, or both. The agency head may not delegate the authority to approve such provisions or to sign the justification required for such provisions.

52. (b) A Federal agency will not require the licensing of third parties under any such provision unless the agency head determines that the use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the funding agreement and that such action is necessary to achieve practical application of the subject invention or work object. Any such determination will be on the record after an opportunity for an agency hearing. The contractor shall be given prompt notification of the determination by certified or registered mail. Any action commenced for judicial review of such determination shall be brought within sixty days after notification of such determination.

### § 401.13 Confidentiality of contractor submissions.

Pursuant to 35 U.S.C. 202(c)(5) and 205, the following procedures shall govern confidentiality of documents submitted under paragraph (c) of the standard clause found at § 401.14:

53. (a) Agencies shall not disclose to third parties pursuant to requests under the Freedom of Information Act (FOIA) any information disclosing a subject invention during the time which an initial patent application may be filed under paragraph (c) of the standard clause found at § 401.14 or such other clause in the funding agreement. This prohibition does not apply to information that has previously been published by the inventor, contractor, or otherwise.

54. (b) Agencies shall not disclose or release, pursuant to requests under the Freedom of Information Act or otherwise, copies of any document which is part of an application for patent with the U.S. Patent and Trademark Office or any foreign patent office filed by the contractor (or its assignees, licensees, or employees) on a subject invention to which the contractor has elected to retain title. This prohibition does not extend to disclosure to other government agencies or contractors of government agencies under an obligation to maintain such information in confidence. This prohibition does not apply to documents published by the U.S. Patent and Trademark Office or any foreign patent office.

55. (c) When implementing policies that encourage public dissemination of the results of work supported by the agency through government publications or other publications of technical reports, agencies shall not include copies of documents submitted by contractors pursuant to § 401.14(c) when a contractor notifies the agency that a particular report or other submission contains a disclosure of a subject invention to which it has elected title or may elect title, or such publication could create a statutory bar to obtaining patent protection.

[88 FR 17737, Mar. 24, 2023]

### § 401.14 Standard patent rights clauses.

The following is the standard patent rights clause to be used as specified in § 401.3(a):

#### Standard Patent Rights

##### (a) Definitions

(1) Invention means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

(2) Subject invention means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.

(3) Practical Application means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or government regulations, available to the public on reasonable terms.

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

(5) Small Business Firm means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.

(6) Nonprofit Organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c) and exempt from taxation under section 501(a) of the Internal Revenue Code (25 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(7) Statutory period means the one-year period before the effective filing date of a claimed invention in a patent

application during which exceptions to prior art exist per 35 U.S.C. 102(b) as amended by the Leahy-Smith America Invents Act, Public Law 112-29.

(8) Contractor means any person, small business firm, or nonprofit organization, or, as set forth in section 1, paragraph (b)(4) of Executive Order 12591, as amended, any business firm regardless of size, which is a party to a funding agreement.

(b) Allocation of Principal Rights

The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) Invention Disclosure, Election of Title and Filing of Patent Application by Contractor

(1) The contractor will disclose each subject invention to the Federal agency within two months after the inventor discloses it in writing to contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention, and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the contractor will promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the contractor. If required by the Federal agency, the contractor will provide periodic (but no more frequently than annual) listings of all subject inventions which were disclosed to the agency during the period covered by the report, and will provide a report prior to the close-out of a funding agreement listing all subject inventions or stating that there were none.

(2) The contractor will elect in writing whether or not to retain title to any such invention by notifying the Federal agency within two years of disclosure to the Federal agency. However, in any case where a patent, a printed publication, public use, sale, or other availability to the public has initiated the one year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3)(i) The contractor will file its initial patent application on a subject invention to which it elects to retain title within one year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use.

(ii) If the contractor files a provisional application as its initial patent application, it shall file a nonprovisional application within 10 months of the filing of the provisional application. So long as there is a pending patent application for the subject invention and the statutory period wherein valid patent protection can be obtained in the United States has not expired, additional provisional applications may be filed within the initial 10 months or any extension period granted under paragraph (c)(5) of this clause. If an extension(s) is granted under paragraph (c)(5) of this clause, the contractor shall file a nonprovisional patent application prior to the expiration of the extension(s) or notify the agency of any decision not to file a nonprovisional application prior to the expiration of the extension(s), or if earlier, 60 days prior to the end of any statutory period wherein valid patent protection can be obtained in the United States.

(iii) The contractor will file patent applications in additional countries or international patent offices within either ten months of the first filed patent application or six months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(iv) If required by the Federal agency, the contractor will provide the filing date, patent application number and

title; a copy of the patent application; and patent number and issue date for any subject invention in any country in which the contractor has applied for a patent.

(4) For any subject invention with Federal agency and contractor co-inventors, where the Federal agency employing such co-inventor determines that it would be in the interest of the government, pursuant to 35 U.S.C. 207(a)(3), to file an initial patent application on the subject invention, the Federal agency employing such co-inventor, at its discretion and in consultation with the contractor, may file such application at its own expense, provided that the contractor retains the ability to elect title pursuant to 35 U.S.C. 202(a).

(5) Requests for extension of the time for disclosure, election, and filing under paragraphs (1), (2), and (3) of this clause may, at the discretion of the Federal agency, be granted. When a contractor has requested an extension for filing a non-provisional application after filing a provisional application, a one-year extension will be granted unless the Federal agency notifies the contractor within 60 days of receiving the request.

(6) In the event a subject invention is made under funding agreements of more than one agency, at the request of the contractor or on their own initiative the agencies shall designate one agency as responsible for administration of the rights of the government in the invention.

(d) Conditions When the Government May Obtain Title

(1) A Federal agency may require the contractor to convey title to the Federal agency of any subject invention—

(i) If the contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title.

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

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

(2) A Federal agency, at its discretion, may waive the requirement for the contractor to convey title to any subject invention.

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

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

(2) The contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and agency licensing regulations (if any). This license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent the contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency will furnish the contractor a written notice of its intention to revoke or modify the license, and the contractor will be allowed thirty days (or such other time as may be authorized by the funding Federal agency for good cause shown by the contractor) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in

accordance with applicable regulations in 37 CFR part 404 and agency regulations (if any) concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

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

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

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

(3) For each subject invention, the contractor will, no less than 60 days prior to the expiration of the statutory deadline, notify the Federal agency of any decision: Not to continue the prosecution of a non-provisional patent application; not to pay a maintenance, annuity or renewal fee; not to defend in a reexamination or opposition proceeding on a patent, in any country; to request, be a party to, or take action in a trial proceeding before the Patent Trial and Appeals Board of the U.S. Patent and Trademark Office, including but not limited to post-grant review, review of a business method patent, inter partes review, and derivation proceeding; or to request, be a party to, or take action in a non-trial submission of art or information at the U.S. Patent and Trademark Office, including but not limited to a pre-issuance submission, a post-issuance submission, and supplemental examination.

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

(g) Subcontracts

(1) The contractor will include this clause, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental or research work to be performed by a subcontractor.. The subcontractor will retain all rights provided for the contractor in this clause, and the contractor will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) The contractor will include in all other subcontracts, regardless of tier, for experimental developmental or research work the patent rights clause required by (cite section of agency implementing regulations or FAR).

(3) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (but not a grant or cooperative agreement), the agency, subcontractor, and the contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(h) Reporting on Utilization of Subject Inventions

The Contractor agrees to submit or request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial

sale or use, gross royalties received by the contractor, and such other data and information as the agency may reasonably specify. The contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), the agency agrees it will not disclose such information to persons outside the government without permission of the contractor.

(i) Preference for United States Industry

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

(j) March-in Rights

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

- (1) Such action is necessary because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use.
- (2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee or their licensees;
- (3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the contractor, assignee or licensees; or
- (4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) Special Provisions for Contracts with Nonprofit Organizations

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

- (1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions, provided that such assignee will be subject to the same provisions as the contractor;
- (2) The contractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;
- (3) The balance of any royalties or income earned by the contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education; and
- (4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms and that, when appropriate, it will give a preference to a small business firm when licensing a subject invention;
- (5) The Federal agency may review the contractor's licensing program and decisions regarding small business applicants, and the contractor will negotiate changes to its licensing policies, procedures, or practices with the Federal agency when the Federal agency's review discloses that the contractor could take reasonable steps to more

effectively implement the requirements of paragraph (k)(4) of this clause; and

(6) The Federal agency may take into consideration concerns presented by small businesses in making such determinations in paragraph (k)(5) of this clause.

(l) Communication

[Complete according to instructions at § 401.5(b)]

(m) Electronic Filing

(1) Unless otherwise requested or directed by the Federal agency—

(i) The written disclosure required in (c)(1) of this clause shall be electronically filed;

(ii) The written election required in (c)(2) of this clause shall be electronically filed; and

(iii) If required by the agency to be submitted, the close-out report in paragraph (c)(1) of this clause and the patent information and periodic reporting identified in paragraph (c)(3) of this clause shall be electronically filed.

(2) Other written notices required in this clause may be electronically delivered to the agency or the contractor through an electronic database used for reporting subject inventions, patents, and utilization reports to the funding agency.

[52 FR 8554, Mar. 18, 1987, as amended at 69 FR 17301, Apr. 2, 2004; 83 FR 15961, Apr. 13, 2018; 88 FR 17738, Mar. 24, 2023]

§ 401.15 [Reserved]

§ 401.16 Federal agency reporting requirements.

Federal agencies will report annually to the Secretary on data pertaining to reported subject inventions under a funding agreement, including—

56. (a) Number of subject inventions reported to the Federal agency;

57. (b) Patent applications filed on subject inventions;

58. (c) Issued patents on subject inventions;

59. (d) Number of requests and number of requests granted for extension of the time for disclosures, election, and filing per 37 CFR 401.14(c)(5);

60. (e) Number of subject inventions conveyed to the Government in accordance with 37 CFR 401.14(d);

61. (f) Number of waivers requested and waivers granted per 37 CFR 401.14(i);

62. (g) Number of requests for assignment of invention rights; and

63. (h) Summary of utilization information provided by contractors. Such information will be received by the Secretary no later than the last day of October of each year.

[88 FR 17739, Mar. 24, 2023]

§ 401.17 Submissions and inquiries.

All submissions or inquiries should be directed to the Chief Counsel for NIST, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1052, Gaithersburg, Maryland 20899-1052; telephone: (301) 975-2803; email: [nistcounsel@nist.gov](mailto:nistcounsel@nist.gov). Information about and procedures for electronic filing under this part are available at the Interagency Edison website and service center, <http://www.iedison.gov>.

[83 FR 15963, Apr. 13, 2018, as amended at 88 FR 17739, Mar. 24, 2023]

§ 401.18 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in effect.

[88 FR 17739, Mar. 24, 2023]

## 4. General Provisions

### 1.1 BASIC DEFINITIONS

#### 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary, and other Conditions), Drawings/maps/sketches, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Engineer. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements).

#### **1.1.2 THE CONTRACT**

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Engineer and Contractor, (2) between the Owner and a Subcontractor or Sub-Subcontractor, (3) between the Owner and Engineer or (4) between any persons or entities other than the Owner and Contractor. The Engineer shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Engineer's duties.

#### **1.1.3 THE WORK**

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

#### **1.1.4 THE PROJECT**

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate Contractors.

#### **1.1.5 THE DRAWINGS**

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location, and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

#### **1.1.6 THE SPECIFICATIONS**

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

#### **1.1.7 THE PROJECT MANUAL**

The Project Manual is a volume assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

### **1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS**

1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.3 Unless otherwise stated in the Contract Documents, words which have well-known technical, or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

### **1.3 CAPITALIZATION**

1.3.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document.

### **1.4 INTERPRETATION**

1.4.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an", but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

### **1.5 EXECUTION OF CONTRACT DOCUMENTS**

1.5.1 The Contract Documents shall be signed by the Owner and Contractor. If either the Owner or Contractor or both do not sign all the Contract Documents, the Engineer shall identify such unsigned Documents upon request.

1.5.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

### **1.6 OWNERSHIP AND USE OF DRAWINGS/MAPS/SKETCHES, SPECIFICATIONS, AND OTHER INSTRUMENTS OF SERVICE**

1.6.1 The Drawings/maps/sketches, Specifications, and other documents, including those in electronic form, prepared by the Engineer and the Engineer's consultants are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-Subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Engineer or the Engineer's consultants, and unless otherwise indicated the Engineer and the Engineer's consultants shall be deemed the authors of them and will retain all common law, statutory and other reserved rights, in addition to the copyrights. All copies of Instruments of Service, except the Contractor's record set, shall be returned or suitably accounted for to the Engineer, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Engineer and the Engineer's consultants, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub- Subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Engineer, and the Engineer's consultants. The Contractor, Subcontractors, Sub-Subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Engineer and the Engineer's consultants appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Engineer and the Engineer's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Engineer's or Engineer's consultants' copyrights or other reserved rights.

## **ARTICLE 2: OWNER**

## **2.1 GENERAL**

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Subparagraph 4.2.1, the Engineer does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

## **2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER**

2.2.1 The Owner shall, at the written request of the Contractor, prior to commencement of the Work and thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

2.2.2 Except for permits and fees, including those required under Subparagraph 3.7.1, which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments, and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations, and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

2.2.4 Information or services required of the Owner by the Contract Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Contractor's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Contractor of a written request for such information or services.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

## **2.3 OWNER'S RIGHT TO STOP THE WORK**

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.3.

## **2.4 OWNER'S RIGHT TO CARRY OUT THE WORK**

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period

give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Engineer's additional services made necessary by such default, neglect, or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Engineer. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

## ARTICLE 3: CONTRACTOR

### 3.1 GENERAL

3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Engineer in the Engineer's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

### 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Engineer as a request for information in such form as the Engineer may require.

3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Engineer, but it is recognized that the Contractor's review is made in the Contractor's capacity as a Contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Engineer.

3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Engineer in response to the Contractor's notices or requests for information pursuant to Subparagraphs 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Engineer for damages resulting from errors, inconsistencies, or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission, or difference and knowingly failed to report it to the Engineer.

### **3.3 SUPERVISION AND CONSTRUCTION PROCEDURES**

3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences, or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Engineer and shall not proceed with that portion of the Work without further written instructions from the Engineer. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.

3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

### **3.4 LABOR AND MATERIALS**

3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether incorporated or to be incorporated in the Work.

3.4.2 The Contractor may make substitutions only with the consent of the Owner, after evaluation by the Engineer and in accordance with a Change Order.

3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

### **3.5 WARRANTY**

3.5.1 The Contractor warrants to the Owner and Engineer that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Engineer, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

### **3.6 TAX**

3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether yet effective or merely scheduled to go into effect.

### **3.7 PERMITS, FEES, AND NOTICES**

3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract, and which are legally required when bids are received, or negotiations concluded.

3.7.2 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities applicable to performance of the Work.

3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Engineer and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Engineer and Owner, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

### **3.8 ALLOWANCES**

3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

1 Allowance shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts.

2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances.

3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.1 and (2) changes in Contractor's costs under Clause 3.8.2.2.

3.8.3 Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.

### **3.9 SUPERINTENDENT**

3.9.1 The Contractor shall employ competent superintendent and necessary assistants who shall attend the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

### **3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES**

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare, and submit for prior approval by Owner and Engineer Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of

the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Engineer's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Engineer reasonable time to review submittals.

3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Engineer.

### **3.11 DOCUMENTS AND SAMPLES AT THE SITE**

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders, and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Engineer and shall be delivered to the Engineer for submittal to the Owner upon completion of the Work.

### **3.12 SHOP DRAWINGS, PRODUCT DATA, AND SAMPLES**

3.12.1 Shop Drawings are drawings, diagrams, schedules, and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-Subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Engineer is subject to the limitations of Subparagraph 4.2.7. Informational submittals upon which the Engineer is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Engineer without action.

3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Engineer Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate Contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the Engineer without action.

3.12.6 By approving and submitting Shop Drawings, Product Data, Samples, and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples, or similar submittals until the respective submittal has been approved by the Engineer.

3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Engineer's approval of Shop Drawings, Product Data, Samples, or similar submittals unless the Contractor has specifically informed the Engineer in writing of such deviation at the time of submittal and (1) the Engineer has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals by the Engineer's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples, or similar submittals, to revisions other than those requested by the Engineer on previous submittals. In the absence of such written notice the Engineer's approval of a resubmission shall not apply to such revisions.

3.12.10 The Contractor shall not be required to provide professional services which constitute the practice of Engineered or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Engineer will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Engineer. The Owner and the Engineer shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Engineer have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Engineer will review, approve, or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

### **3.13 USE OF SITE**

3.13.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

### **3.14 CUTTING AND PATCHING**

3.14.1 The Contractor shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate Contractors by cutting, patching, or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate Contractor except with written consent of the Owner and of such separate Contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate Contractor the Contractor's consent to cutting or otherwise altering the Work.

### **3.15 CLEANING UP**

3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery, and surplus materials.

3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so, and the cost thereof shall be charged to the Contractor.

### **3.16 ACCESS TO WORK**

3.16.1 The Contractor shall provide the Owner and Engineer access to the Work in preparation and progress wherever located.

### **3.17 ROYALTIES, PATENTS, AND COPYRIGHTS**

3.17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Engineer harmless from loss on account thereof but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Engineer. However, if the Contractor has reason to believe that the required design, process, or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Engineer.

### **3.18 INDEMNIFICATION**

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Article 11, the Contractor shall indemnify and hold harmless the Owner, Engineer, Engineer's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

## **ARTICLE 4: ADMINISTRATION OF THE CONTRACT**

### **4.1 ENGINEER**

4.1.1 The Engineer is the person lawfully licensed to practice Engineering or an entity lawfully practicing Engineering identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Engineer" means the Engineer or the Engineer's authorized representative.

4.1.2 Duties, responsibilities, and limitations of authority of the Engineer as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of the Owner, Contractor, and Engineer. Consent shall not be unreasonably withheld.

4.1.3 If the employment of the Engineer is terminated, the Owner shall employ a new Engineer against whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the former Engineer.

## **4.2 ENGINEER'S ADMINISTRATION OF THE CONTRACT**

4.2.1 The Engineer will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2. The Engineer will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

4.2.2 The Engineer, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor's operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Engineer will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Engineer will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences, or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Subparagraph 3.3.1.

4.2.3 The Engineer will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Engineer will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

4.2.4 Communications Facilitating Contract Administration. Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Engineer about matters arising out of or relating to the Contract. Communications by and with the Engineer's consultants shall be through the Engineer. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate Contractors shall be through the Owner.

4.2.5 Based on the Engineer's evaluations of the Contractor's Applications for Payment, the Engineer will review and certify the amounts due to the Contractor and will issue Certificates for Payment in such amounts.

4.2.6 The Engineer will have authority to reject Work that does not conform to the Contract Documents. Whenever the Engineer considers it necessary or advisable, the Engineer will have authority to require inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether such Work is fabricated, installed, or completed. However, neither this authority of the Engineer nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Engineer to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

4.2.7 The Engineer will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Engineer's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor, or separate Contractors, while allowing sufficient time in the Engineer's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract

Documents. The Engineer's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Engineer's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Engineer, of any construction means, methods, techniques, sequences, or procedures. The Engineer's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.8 The Engineer will prepare Change Orders and Construction Change Directives and may authorize minor changes in the Work as provided in Paragraph 7.4.

4.2.9 The Engineer will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

4.2.10 If the Owner and Engineer agree, the Engineer will provide one or more project representatives to assist in carrying out the Engineer's responsibilities at the site. The duties, responsibilities, and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

4.2.11 The Engineer will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Engineer's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Engineer shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Engineer to furnish such interpretations until 15 days after written request is made for them.

4.2.12 Interpretations and decisions of the Engineer will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and initial decisions, the Engineer will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

4.2.13 The Engineer's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

### **4.3 CLAIMS AND DISPUTES**

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate claims shall rest with the party making the Claim.

4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Engineer and the other party.

4.3.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract

Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before Conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Engineer will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Engineer determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Engineer shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such a determination must be made within 21 days after the Engineer has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Engineer for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

**4.3.5 Claims for Additional Cost.** If the Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

**4.3.6** If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Engineer, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Engineer, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

#### **4.3.7 CLAIMS FOR ADDITIONAL TIME**

**4.3.7.1** If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of the probable effect of delay on the progress of the Work. In the case of a continuing delay only one Claim is necessary.

**4.3.7.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

**4.3.8 Injury or Damage to Person or Property.** If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

**4.3.9** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

**4.3.10 Claims for Consequential Damages.** The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- A. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business, and reputation, and for loss of management or employee productivity or of the services of such persons; and
- B. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business, and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

#### **4.4 RESOLUTION OF CLAIMS AND DISPUTES**

4.4.1 The Engineer will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant; (2) submit a schedule to the parties indicating when the Engineer expects to take action; (3) reject the: Claim in whole or in part stating reasons for rejection; (4) recommend approval of the Claim by the other party; or (5) suggest a compromise. The Engineer may also, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim.

4.4.2 If a Claim has been resolved, the Engineer will prepare or obtain appropriate documentation.

4.4.3 If a Claim has not been resolved, the party making the Claim shall, within ten days after the Engineer's preliminary response take one or more of the following actions: (1) submit additional supporting data requested by the Engineer; (2) modify the initial Claim; or (3) notify the Engineer that the initial Claim stands.

4.4.4 If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Engineer, the Engineer will notify the parties in writing that the Engineer's decision will be made within seven days, which decision shall be final and binding on the parties. Upon expiration of such time, the: Engineer will render to the parties the Engineer's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Engineer may, but is not obligated to, notify the surety, and request the surety's assistance in resolving the: controversy.

### **ARTICLE 5: SUBCONTRACTORS**

#### **5.1 DEFINITIONS**

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate Contractor or Subcontractors of a separate Contractor.

5.1.2 A Sub-Subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub Subcontractor or an authorized representative of the Sub-Subcontractor.

#### **5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK**

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Engineer the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design)

proposed for each principal portion of the Work. The Engineer will promptly reply to the Contractor in writing stating whether the Owner or the Engineer, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Engineer to reply promptly shall constitute notice of no reasonable objection.

5.2.2 The Contractor shall not contract with the proposed person or entity to whom the Owner or Engineer has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

5.2.3 If the Owner or Engineer has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Engineer has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

5.2.4 The Contractor shall not change a Subcontractor, person, or entity previously selected if the Owner or Engineer makes reasonable objection to such substitute.

### **5.3 SUBCONTRACTUAL RELATIONS**

5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Engineer. Each subcontract agreement shall preserve and protect the rights of the Owner and Engineer under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub Subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub Subcontractors.

### **5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS**

5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- A. assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- B. assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

## ARTICLE 6: CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

### 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially like these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate Contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate Contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate Contractors, and the Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

### 6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Engineer apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate Contractor because of delays, improperly timed activities, or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work, or defective construction of a separate Contractor.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to complete or partially completed construction or to property of the Owner or separate Contractors as provided in Subparagraph 10.2.5.

6.2.5 The Owner and each separate Contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Subparagraph 3.14.

### 6.3 OWNER'S RIGHT TO CLEAN UP

6.3.1 If a dispute arises among the Contractor, separate Contractors, and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Engineer will allocate the cost among those responsible.

## **ARTICLE 7: CHANGES IN THE WORK**

### **7.1 GENERAL**

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive, or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor, and Engineer; a Construction Change Directive requires agreement by the Owner and Engineer and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Engineer alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

### **7.2 CHANGE ORDERS**

7.2.1 A Change Order is a written instrument prepared by the Engineer and signed by the Owner, Contractor, and Engineer, stating their agreement upon all the following:

- A. change in the Work;
- B. the amount of the adjustment, if any, in the Contract Sum; and 3 the extent of the adjustment, if any, in the Contract Time.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

### **7.3 CONSTRUCTION CHANGE DIRECTIVES**

7.3.1 A Construction Change Directive is a written order prepared by the Engineer and signed by the Owner and Engineer, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- A. mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- B. unit prices stated in the Contract Documents or subsequently agreed upon;
- C. cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

D. as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Engineer of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such an agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Engineer based on reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Engineer may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- A. costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- B. costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- C. rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- D. costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- E. additional costs of supervision and field office personnel are directly attributable to the change.

7.3.7. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Engineer. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured based on net increase, if any, with respect to that change.

7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all such costs. For any portion of such cost that remains in dispute, the Engineer will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

7.3.9 When the Owner and Contractor agree with the determination made by the Engineer concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order. MUTUAL RESPONSIBILITY

#### **7.4 MINOR CHANGES IN THE WORK**

17.4.1 The Engineer will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be affected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

## **ARTICLE 8: TIME**

### **8.1 DEFINITIONS**

8.1.1 Unless otherwise provided, Contract Time is the period, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

8.1.2 The date of commencement of the Work is the date established in the Agreement. The date shall not be postponed by the failure to act of the Contractor or of persons or entities for whom the Contractor is responsible.

8.1.3 The date of Substantial Completion is the date certified by the Engineer in accordance with Paragraph 9.8.

8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

### **8.2 PROGRESS AND COMPLETION**

8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the work.

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens, and other security interests.

8.2.3 The Contractor shall proceed with the project expeditiously and continuously with adequate forces and shall achieve Substantial Completion within the Contract Time. Contractor shall progress with and maintain continuous construction even if construction is ahead of the approved construction schedule.

If the percentage dollar value of the completed work is 15% or more below the dollar value of work that should have been completed in accordance with the approved construction schedule, further payment under this contract to Contractor shall be suspended until the percentage dollar value of completed work is within 5% of the dollar value of work that should have been completed in accordance with the approved construction schedule.

### **8.3 DELAYS AND EXTENSIONS OF TIME**

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Engineer, or of an employee of either, or of a separate

Contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries; unavoidable casualties or other causes beyond the Contractor's control, then the Contract Time shall be extended by Change Order for such reasonable time as the Engineer may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

## **ARTICLE 9: PAYMENTS AND COMPLETION**

## **9.1 CONTRACT SUM**

9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

## **9.2 SCHEDULE OF VALUES**

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Engineer a schedule of values allocated to various portions of the Work, prepared in such form, and supported by such data to substantiate its accuracy as the Engineer may require. This schedule, unless objected to by the Engineer, shall be used as a basis for reviewing the Contractor's Applications for Payment. ITY

## **9.3 APPLICATION FOR PAYMENT**

9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Engineer an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Engineer may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for in the Contract Documents.

9.3.1.1 As provided in Subparagraph 7.3.8, such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives, or by interim determination of the Engineer, but not yet included in Change Orders.

9.3.1.2 Such applications may not include requests for payment for portions of the Work for which the Contractor does not intend to pay to a Subcontractor or material supplier unless such Work has been performed by others whom the Contractor intends to pay.

9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

## **9.4 CERTIFICATES FOR PAYMENT**

9.4.1 The Engineer will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Engineer determines is properly due or notify the Contractor and Owner in writing of the Engineer's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1.

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Engineer to the Owner, based on the Engineer's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Engineer's knowledge, information and belief, the

quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Engineer. The issuance of a Certificate of Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Engineer has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

## **9.5 DECISIONS TO WITHHOLD CERTIFICATION**

9.5.1 The Engineer may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Engineer's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Engineer is unable to certify payment in the amount of the Application, the Engineer will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Engineer cannot agree on a revised amount, the Engineer will promptly issue a Certificate for Payment for the amount for which the Engineer is able to make such representations to the Owner. The Engineer may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Engineer's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Subparagraph 3.3.2, because of:

- A. defective Work not remedied;
- B. third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- C. failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- D. reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- E. damage to the Owner or another Contractor;
- F. reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- G. persistent failure to carry out the Work in accordance with the Contract Documents.

9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

## **9.6 PROGRESS PAYMENTS**

9.6.1 After the Engineer has issued a Certificate of Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents and shall so notify the Engineer.

9.6.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said

Subcontractor is entitled, reflecting percentages retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-Subcontractors in a similar manner.

9.6.3 The Engineer will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Engineer and Owner on account of portions of the Work done by such Subcontractor.

9.6.4 Neither the Owner nor Engineer shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

9.6.5 Payment to material suppliers shall be treated in a manner like that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

## **9.7 FAILURE OF PAYMENT**

9.7.1 If the Engineer does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Engineer or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Engineer, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately, and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents

## **9.8 SUBSTANTIAL COMPLETION**

9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Engineer a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such a list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

9.8.3 Upon receipt of the Contractor's list, the Engineer will inspect to determine whether the Work or designated portion thereof is substantially complete. If the Engineer's inspection discloses any item, whether included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the

Engineer. In such a case, the Contractor shall then submit a request for another inspection by the Engineer to determine Substantial Completion.

9.8.4 When the Work or designated portion thereof is substantially complete, the Engineer will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate, Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

## **9.9 PARTIAL OCCUPANCY OR USE**

9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Article 11 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Engineer as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Engineer.

9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor, and Engineer shall jointly inspect the area to be occupied or portion of the Work to be used to determine and record the condition of the Work.

9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

## **9.10 FINAL COMPLETION AND FINAL PAYMENT**

9.10.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Engineer will promptly make such inspection and, when the Engineer finds the Work acceptable under the Contract Documents and the Contract fully performed, the Engineer will promptly issue a final Certificate for Payment stating that to the best of the Engineer's knowledge, information and belief, and on the basis of the Engineer's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Engineer's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Engineer (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected

with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Engineer so confirms, the Owner shall, upon application by the Contractor and certification by the Engineer, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Engineer prior to certification of such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

- A. liens, claims, security interests or encumbrances arising out of the Contract and unsettled;
- B. failure of the Work to comply with the requirements of the Contract Documents; or 3 terms of special warranties required by the Contract Documents.

9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

## **ARTICLE 10: PROTECTION OF PERSONS AND PROPERTY**

### **10.1 SAFETY PRECAUTIONS AND PROGRAMS**

10.1.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract.

### **10.2 SAFETY OF PERSONS AND PROPERTY**

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to:

- A. employees on the Work and other persons who may be affected thereby;
- B. the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-Subcontractors; and

C. other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on the safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying owners and users of adjacent sites and utilities.

10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Engineer or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.

10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Engineer.

10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded to endanger its safety.

### **10.3 EMERGENCIES**

10.3.1 In an emergency affecting the safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

## **ARTICLE 11: INSURANCE AND BONDS**

### **11.1 CONTRACTOR'S LIABILITY INSURANCE**

11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

- A. claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
- B. claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

- C. claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- D. claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- E. claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- F. claims for bodily injury or property damage arising out of completed operations; and
- G. claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage on account.

of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

## **11.2 INDEMNIFICATION AND INSURANCE**

11.2.1. Contractor agrees to save harmless, indemnify, and defend Owner and its, agents, officers and employees from any and all claims, losses, penalties, interest, demands, judgments, and costs of suit, including attorney's fees and paralegals' fees, for any expense, damage or liability incurred by any of them, whether for personal injury, death, property damage, direct or consequential damages, or economic loss, including environmental impairment, arising directly or indirectly on account of or in connection with the work done by Contractor under this agreement or by any person, firm or corporation (including but not limited to the Engineer/engineer) to whom any portion of the work is subcontracted by Contractor or resulting from the use by Contractor, or by any one for whom Contractor is legally liable, of any materials, tools, machinery or other property of Owner. Owner and Contractor agree the first \$100.00 of the contract amount paid by Owner to Contractor shall be given as separate consideration for this indemnification, and any other indemnification of Owner by Contractor provided for within the Contract Documents, the sufficiency of such separate consideration being acknowledged by Contractor by Contractor's acceptance and execution of the agreement. The Contractor's obligation shall not be limited by, or in any way to, any insurance coverage or by any provision in or exclusion or omission from any policy of insurance. The Contractor agrees to pay on behalf of Santa Rosa County, as well as provide a legal defense for the Owner, both of which will be done only when requested by the Owner, for all claims made. Such payment on behalf of the Owner shall be in addition to all other legal remedies available to the Owner and shall not be the Owner's exclusive remedy.

11.2.2. The contractor shall obtain and carry, always during its performance under the Contract Documents, insurance of the types and in the amounts set forth in Article 11. All insurance policies shall be from responsible companies duly authorized to do business in the State of Florida and/or responsible risk retention group insurance companies or trusts which are registered with the State of Florida. Foreign or offshore insurance carriers are not acceptable for work under this contract unless admitted to the State of Florida. All commercial insurance carriers providing the Contractor with required insurance shall be "A" (excellent) rated with a minimum financial size category of "IX", according to the A. M. Best Key Rating Guide, latest edition. Within ten (10) calendar days after notice of award is received by Contractor and prior to the commencement of work, Contractor shall provide Owner with properly executed certificates of insurance to evidence Contractor's compliance with the insurance requirements of the Contract Documents. Said certificates of insurance shall be on forms approved by Owner, such as "Acord Form 25". The certificates of insurance shall be personally, manually signed by the authorized representatives of the insurance company/companies shown on the certificates of insurance, with proof that they are authorized representatives thereof. Certificates of insurance shall be mailed to Santa Rosa County Board of County Commissioners in care of: Brad Baker, County Administrator, 6495 Caroline Street, Suite D, Milton, Florida 32570. In addition, true and exact copies of all insurance policies required hereunder shall be provided to the Owner, on a timely basis, when requested by the Owner.

11.2.3. The certificates of insurance and required insurance policies shall contain provisions that thirty (30) days prior written notice by registered or certified mail shall be given Owner of any cancellation, intent not to renew, or reduction in the policies or coverages, except in the application of the aggregate limits provisions. In the event of a reduction in the aggregate limit of any policy, Contractor shall immediately take steps to have the aggregate limit reinstated to the full extent permitted under such policy.

11.2.4. All insurance coverages of the Contractor shall be primary to any insurance or self-insurance program carried by the Owner applicable to this project. The acceptance by Owner of any certificate of insurance does not constitute approval or agreement by the Owner that the insurance requirements have been satisfied or that the insurance policy shown on the certificate of insurance follows the requirements of the Contract Documents. No work shall commence at the project site unless and until the required certificates of insurance are received by the Owner.

11.2.5. Contractor shall require each of its Subcontractors to procure and maintain, until the completion of the Subcontractor's work, insurance of the types and to the limits specified in Article 11, unless such insurance requirements for the Subcontractor is expressly waived in writing by the Owner. All liability insurance policies, other than professional liability, worker's compensation, and employer's liability policies, obtained by Contractor to meet the requirements of the Contract Documents shall name the Santa Rosa County Board of County Commissioners as an additional insured and shall contain severability of interest provisions. The Board of County Commissioners shall also be designated as certificate holder with the address of 6495 Caroline Street, Suite M, Milton, Florida 32570. If any insurance provided pursuant to the Contract Documents expires prior to the completion of the work, renewal certificates of insurance and, if requested by Owner, certified, true copies of the renewal policies, shall be furnished by Contractor within thirty (30) days prior to the date of expiration. Upon expiration of an insurance policy term during work under the contract, succeeding insurance policies shall be consecutive to the expiring policy.

11.2.6 All liability policies shall be underwritten on an "occurrence" basis, unless otherwise approved in writing by the county division of risk management. "Claims made" policies, if approved by the risk manager, and subsequent insurance certificates shall provide a "retro date" which shall include the effective date of the contract. "Claims-made" renewals or carrier and policy replacements shall reflect the original "retro-date."

11.2.7 Should at any time the Contractor does not maintain the insurance coverages required herein, the Owner may terminate the agreement or at its sole discretion shall be authorized to purchase such coverages and charge

the Contractor for such coverages purchased. The Owner shall be under no obligation to purchase such insurance, nor shall it be responsible for the coverage purchased or the insurance company or companies used. The decision of the Owner to purchase such insurance coverages shall in no way be construed to be a waiver of any of its rights under the Contract Documents.

11.2.8 Contractor shall submit to Owner a copy of all accident reports arising out of any personal injuries or property damage arising or alleged to have arisen on account of any work by Contractor or Subcontractor under the Contract Documents.

11.2.9 Duty to Provide Legal Defense. The Contractor agrees to pay, to Santa Rosa County, as well as provide a legal defense for the Owner, which shall include attorneys' fees and costs, both of which will be done only when requested by the Owner, for all claims as described in paragraph 13.1. Such payment on the behalf of the Owner shall be in addition to all other legal remedies available to the Owner and shall not be the Owner's exclusive remedy.

### **11.3 PERFORMANCE BOND AND PAYMENT BOND**

11.3.1.1 Contractor shall provide performance and payment bonds, in the form prescribed in Exhibit B, in the amount of 100% of the contract amount, the costs of which to be paid by Contractor. The performance and payment bonds shall be underwritten by a surety authorized to do business in the State of Florida and otherwise acceptable to Owner; provided; however, the surety shall be rated as "A" or better and Class XII or higher rating as to financial size category and the amount required shall not exceed 2% of the reported policy holders' surplus, all as reported in the most current best key rating guide, published by A.M. Best Company, Inc. of 75 Fulton Street, New York, New York 10038.

11.3.1.2 If the surety for any bond furnished by Contractor is declared bankrupt, becomes insolvent, its right to do business is terminated in the State of Florida, or it ceases to meet the requirements imposed by the Contract Document, the Contractor shall, within five (5) calendar days thereafter, substitute another bond and surety, both of which shall be subject to the Owner's approval.

11.3.1.3 As per Florida Statutes, Section 255.05, the Contractor shall be required to execute and record the performance and payment bonds. The bonds must state the name and principal business address of both the principal and the surety and a description of the project sufficient to identify it.

## **ARTICLE 12: UNCOVERING AND CORRECTION OF WORK**

### **12.1 UNCOVERING OF WORK**

12.1.1 If a portion of the Work is covered contrary to the Engineer's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Engineer, be uncovered for the Engineer's examination and be replaced at the Contractor's expense without change in the Contract Time.

12.1.2 If a portion of the Work has been covered which the Engineer has not specifically requested to examine prior to its being covered, the Engineer may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate Contractor in which event the Owner shall be responsible for payment of such costs.

### **12.2 CORRECTION OF WORK**

#### **12.2.1 BEFORE SUBSTANTIAL COMPLETION**

12.2.1.1 The Contractor shall promptly correct Work rejected by the Engineer or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether fabricated, installed or completed. The costs of correcting such rejected Work, including additional testing and inspections and compensation for the Engineer's services and expenses made necessary thereby, shall be at the Contractor's expense.

### **12.2.2 AFTER SUBSTANTIAL COMPLETION**

12.2.2.1 In addition to the Contractor's obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one- year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Engineer, the Owner may correct it in accordance with Paragraph 2.4.

12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period between Substantial Completion and the actual performance of the Work.

12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Paragraph 12.2.

12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate Contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.2.5 Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

### **12.3 ACCEPTANCE OF NONCONFORMING WORK**

12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such an adjustment shall affect whether the final payment has been made.

## **ARTICLE 13: MICELLANEOUS PROVISIONS**

### **13.1 GOVERNING LAW**

13.1.1 The Contract shall be governed by the law of the place where the Project is located.

## **13.2 SUCCESSORS AND ASSIGNS**

13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

13.2.2 The Owner may, without the consent of the Contractor, assign the Contract to an institutional lender providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

## **13.3 WRITTEN NOTICE**

13.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

## **13.4 RIGHTS AND REMEDIES**

13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.

13.4.2 No action or failure to act by the Owner, Engineer or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

## **13.5 TESTS AND INSPECTIONS**

13.5.1 Tests, inspections, and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations, or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall decide for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. The Contractor shall give the Engineer timely notice of when and where tests and inspections are to be made so that the Engineer may be present for such procedures. The Owner shall bear the costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

13.5.2 If the Engineer, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Engineer will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Engineer of when and where tests and inspections are to be made so that the Engineer may be present for such procedures. Such costs, except as provided in Subparagraph 13.5.3, shall be at the Owner's expense.

13.5.3 If such procedures for testing, inspection, or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made

necessary by such failure including those of repeated procedures and compensation for the Engineer's services and expenses shall be at the Contractor's expense.

13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor, and promptly delivered to the Engineer.

13.5.5 If the Engineer is to observe tests, inspections or approvals required by the Contract Documents, the Engineer will do so promptly and, where practicable, at the normal place of testing.

13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

### **13.6 INTEREST**

13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

### **13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD**

13.7.1 As between the Owner and Contractor:

- A. Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run, and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
- B. Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run, and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
- C. After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last. HTS AND REMEDI

## **ARTICLE 14: TERMINATION OR SUSPENSION OF THE CONTRACT**

### **14.1 TERMINATION BY THE CONTRACTOR**

14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub Subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons.

- A. issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;

- B. an act of government, such as a declaration of national emergency which requires all Work to be stopped.
- C. because the Engineer has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- D. The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-Subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 180 days in any 365-day period, whichever is less.

14.1.3 If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Engineer, terminate the Contract and recover from the Owner only as provided in Subparagraph 14.3.1.

14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Engineer, terminate the Contract and recover from the Owner only as provided in Subparagraph 14.3.1.

## **14.2 TERMINATION BY DEFAULT**

14.2.1 Contractor shall be considered in material default of the agreement and such default shall be considered cause for Owner to terminate the agreement, in whole or in part, as further set forth in this section, if Contractor: (1) fails to begin the work under the Contract Documents within the time specified herein; or (2) fails to properly and timely perform the work as directed by the Owner or as provided for in the approved progress schedule; or (3) performs the work unsuitably or neglects or refuses to remove materials or to correct or replace such work as may be rejected as unacceptable or unsuitable; or (4) discontinues the prosecution of the work; or (5) fails to resume work which has been suspended within a reasonable time after being notified to do so; or (6) becomes insolvent or is declared bankrupt, or commits any act of bankruptcy; or (7) allows any final judgment to stand against it unsatisfied for more than ten (10) days; or (8) makes an assignment for the benefit of creditors; or (9) fails to obey any applicable codes, laws, ordinances, rules or regulations with respect to the work; or (10) materially breaches any other provision of the Contract Documents.

14.2.2 Owner shall notify Contractor in writing of Contractor's default(s). If Owner determines that Contractor has not remedied and cured the default(s) within seven (7) calendar days following receipt by Contractor of said written notice, then Owner, at its option, without releasing or waiving its rights and remedies against the Contractor's sureties and without prejudice to any other right or remedy it may be entitled to hereunder or by law, may terminate Contractor's right to proceed under the agreement, in whole or in part, and take possession of all or any portion of the work and any materials, tools, equipment, and appliances of Contractor, take assignments of any of Contractor's subcontracts and purchase orders, and complete all or any portion of Contractor's work by whatever means, method or agency which Owner, in its sole discretion, may choose.

14.2.3 If Owner deems any of the foregoing remedies necessary, Contractor agrees that it shall not be entitled to receive any further payments hereunder until after the project is completed. All monies expended and all of the

costs, losses, damages and extra expenses, including all management, administrative and other overhead and other direct and indirect expenses (including attorneys' fees) or damages incurred by Owner incident to such completion, shall be deducted from the contract amount, and if such expenditures exceed the unpaid balance of the contract amount, Contractor agrees to pay promptly to Owner on demand the full amount of such excess, including costs of collection, attorney's fees (including appeals) and interest thereon at the maximum legal rate of interest until paid. If the unpaid balance of the contract amount exceeds all such costs, expenditures and damages incurred by the Owner to complete the work, such excess shall be paid to the Contractor. The amount to be paid to the Contractor or Owner and this obligation for payment shall survive termination of the agreement.

14.2.4. The liability of Contractor hereunder shall extend to and include the full amount of any and all sums paid, expenses and losses incurred, damages sustained, and obligations assumed by Owner in good faith under the belief that such payments or assumptions were necessary or required, in completing the work and providing labor, materials, equipment, supplies, and other items therefor or re-letting the work, in settlement, discharge or compromise of any claims, demands, suits, and judgments pertaining to or arising out of the work hereunder.

14.2.5 If, after notice of termination of Contractor's right to proceed pursuant to this section, it is determined for any reason that Contractor was not in default, or that its default was excusable, or that Owner is not entitled to the remedies against Contractor provided herein, then Contractor's remedies against Owner shall be the same as and limited to those afforded Contractor below under subsection 14.3.1, termination for convenience.

### **14.3 TERMINATION FOR CONVENIENCE AND RIGHT OF SUSPENSION**

14.3.1. The owner shall have the right to terminate this agreement without cause upon seven (7) calendar days written notice to Contractor. In the event of such termination for convenience, Contractor's recovery against Owner shall be limited to that portion of the contract amount earned through the date of termination, together with any retainage withheld and reasonable termination expenses incurred, but Contractor shall not be entitled to any other or further recovery against Owner, including, but not limited to, damages or any anticipated profit on portions of the work not performed.

14.3.2. Owner shall have the right to suspend all or any portions of the work upon giving Contractor two (2) calendar days' prior written notice of such suspension. If all or any portion of the work is so suspended, Contractor's sole and exclusive remedy shall be to seek an extension of time to its schedule in accordance with the procedures set forth in the Contract Documents. In no event shall the Contractor be entitled to any additional compensation or damages. Provided, however, if the ordered suspension exceeds three (3) months, the Contractor shall have the right to terminate the agreement with respect to that portion of the work which is subject to the ordered suspension.

## **5. Supplemental Provisions**

### **ARTICLE 1: SUPPLEMENTAL PROVISIONS**

#### **Santa Rosa County Board of County Commissioners Supplemental Provisions**

#### **1.0 GENERAL CONDITIONS**

The following conditions supplement, modify, change, delete from or add to the General Provisions of the Contract, Articles 1 through 14. Where an Article of the General Provisions is modified or a Paragraph, Subparagraph, or Clause thereof is modified or deleted by these supplements, the unaltered provisions of that Article, Paragraph, Subparagraph, or Clause shall remain in effect.

#### **2.0 FORM OF CONTRACT AND BONDS**

The contract form as furnished by Santa Rosa County shall be utilized. Performance and Payment Bond forms as approved by Santa Rosa County shall be utilized.

### **3.0 MATERIALS**

Whenever "or approved equal" is indicated, items proposed for use shall be submitted for Engineer's approval. Wherever an item or class of material is specified exclusively by trade name or by name of the maker or by catalog reference, only such items shall be used unless previously approved through addenda by the Engineer. Should the Contractor desire to substitute another material for one or more specified by name they shall state the credit or extra involved using such material, in their bid. No such materials shall be used unless approved in writing by the Engineer.

### **4.0 PROGRESS CHART**

Within ten (10) days after receipt of signed Contract the Contractor shall file with the Engineer a progress chart showing the order in which the Contractor proposes to accomplish the work, the dates on which he proposes to begin the various parts of the work and the dates he contemplates completing them.

### **5.0 TIME FOR COMPLETION**

Time for completion of all work included in this contract shall not exceed 180 days from date of written Notice to proceed. The number of days allowed does not include an allowance for calendar days missed due to weather. Extension of time will be allowed for delays due to weather if properly documented and reported to the Engineer.

### **6.0 PRECONSTRUCTION CONFERENCE**

Within ten (10) days after the effective date of the agreement, but before Contractor starts the work at the Project site, a conference will be held for review and acceptance of the schedules referred to in paragraph 4.0, to establish procedures for processing applications for payment, and to establish a working understanding among the parties as to the work.

### **7.0 RECORD KEEPING**

The Contractor shall maintain all relevant project records for three years after the Owner has made final payment to the Contractor.

## **6. Insurance**

Vendor/Contractor agrees to carry and keep in force for the entire term of the contract with Santa Rosa County, and any extensions thereof, the following minimum levels of insurance coverage for any claims that may result from or relate to the services or products provided by Vendor/Contractor.

**Workers' Compensation:** The contractor shall provide a workers' compensation insurance policy that meets the statutory requirements of the Florida Workers' Compensation Law. The policy shall also include employer's liability coverage with a minimum limit of \$100,000 per accident, \$500,000 per policy for occupational disease, and \$100,000 per employee for occupational disease. The contractor shall furnish a certificate of insurance as evidence of such coverage before commencing work under this contract.

**Commercial General Liability:** The business shall maintain a commercial general liability insurance policy with minimum limits of \$1,000,000 for each occurrence and \$2,000,000 in the aggregate, covering bodily injury and property damage. The policy shall include the following coverages:

- a. Premises/operations liability

- b. Products/completed operations liability
- c. Contractual liability
- d. Liability for independent contractors

**Business Auto Liability:** The Contractor shall maintain a minimum amount of \$500,000 for each occurrence of bodily injury and property damage liability. This amount may be provided by a Combined Single Limit policy or a Split limit policy with at least \$500,000 per person, \$500,000 per accident and \$500,000 for property damage.

This policy shall cover the following types of vehicles:

- a. Vehicles owned by the Contractor or its employees
- b. Vehicles rented or leased by the Contractor for the performance of the contract
- c. Vehicles operated by the Contractor or its employees but not owned, rented, or leased by them

Additionally, the Contractor shall obtain a Special endorsement to extend the coverage to any contractual liability arising from the contract.

Before signing any contract or agreement, the contractor must provide certificates of insurance that meet the following criteria:

- a. Santa Rosa County must be included as an additional insured on all coverages related to the contractor's work.
- b. Santa Rosa County must receive a written notice at least 30 days before any cancellation or change of any insurance policy.
- c. The contractor is responsible for ensuring that all subcontractors comply with the same insurance requirements.
- d. These are the minimum requirements that may be modified depending on the nature and risk of the work.

If there are any exceptional circumstances, the county administrator or his designee has the authority to adjust these requirements.

## 7. Scope of Work

### 7.1. Santa Rosa County Administration Building Complex Construction of Upgrades to Stormwater Treatment using Green Infrastructure

This construction project consists of upgrades to the existing stormwater treatment to demonstrate the effective design, implementation, and maintenance of green infrastructure (GI), that includes tree boxes(planter), biofiltration systems and permeable surfaces throughout the 8.6-acre Santa Rosa County Administrative Complex. The project has 100% fully designed and engineered plans. A federal grant has been awarded to be applied toward this project, thus this construction project will have two pricing proposals. One as a whole project for the entire 8.6 acres as a Base Bid and a second one as an Alternative Bid for a partial portion of the 8.6 acres as indicated in the alternative plans attached.

The Bid and Bid Alternative as in 100% plan drawings as designed allows for runoff to store within a depression and filter through a media to reduce pollutants. Once filtered, the tree box planters and permeable surfaces will use

storage tanks that can store the treated runoff for a period of time while the underground piping network conveys to the existing stormwater system.

Bid specifications described are in the attachments. Clearing and Grubbing of the areas required for the installation of the works of upgrading as is shown on the plan drawings. Clearing and Grubbing shall be limited only to those areas designated in drawings. All other areas shall be left undisturbed. County will be responsible for purchasing select plants and trees and will coordinate with selected contractor regarding delivery and installation.

## 8. Pricing Table

### Lump Sum Bid Statement

The quantities and bid item descriptions included in the bid tab are the engineer's **ESTIMATE ONLY** and are to be used as a guide. All quantities are in-place measures unless otherwise stated. The contractor shall provide their price for each item, which shall include incidentals, labor, transportation, compaction, etc. The schedule of unit prices must be included in the bid package. If bid items are not included in the bid tab, it will be the contractor's responsibility to identify the items and include the item with a unit price in the bid package. Scrivener errors or other bid tab errors must be brought to the attention of the County during the open question period. No adjustments will be made to the bid tab after the question period closes.

The contractor shall provide a bid price based on the plans and specifications. The unit prices provided by the contractor in the bid tab are for informational purposes only and will be used for change orders and progress payments.

**BASE BID PRICING TABLE**

| Line Item | Description                                      | Quantity | Unit of Measure | Unit Cost | Total |
|-----------|--|----------|-----------------|-----------|-------|
| 1         | Clearing and Grubbing                            | 1        | Job             |           |       |
| 2         | Structure Removal                                | 1        | Job             |           |       |
| 3         | Pollution Control                                | 1        | Job             |           |       |
| 4         | Construction Surveys                             | 1        | Job             |           |       |
| 5         | Mobilization and Demobilization                  | 1        | Job             |           |       |
| 6         | Traffic Control                                  | 1        | Job             |           |       |
| 6         | Water for Construction                           | 1        | Lump Sum        |           |       |
| 7         | Removal of Water                                 | 1        | Lump Sum        |           |       |
| 7         | Biofilters-Focal Point 1-9 Complete and In Place | 1        | Lump Sum        |           |       |

| Line Item | Description   | Quantity | Unit of Measure | Unit Cost | Total |
|-----------|---|----------|-----------------|-----------|-------|
| 7         | Excavation-Focal Point 1-9 Per Plans                          | 1        | Lump Sum        |           |       |
| 7         | Earthfill-Placement of Earth Material                         | 1        | Lump Sum        |           |       |
| 8         | Earthfill-Focal Point 1-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 9         | Earthfill-Focal Point 2-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 10        | Earthfill-Focal Point 3-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 11        | Earthfill-Focal Point 4-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 12        | Earthfill-Focal Point 5-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 13        | Earthfill-Focal Point 6-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 14        | Earthfill-Focal Point 7-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 15        | Earthfill-Focal Point 8-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 16        | Earthfill-Focal Point 9-Complete and In Place                 | 1        | Lump Sum        |           |       |
| 17        | Earthfill-Urban Forest Tree Boxes-Complete and In Place       | 1        | Lump Sum        |           |       |
| 17        | Excavation-Urban Forest Tree Boxes Per Plans                  | 1        | Lump Sum        |           |       |
| 17        | Drainfill-Within Focal Point and Urban Forest Systems         | 1        | Lump Sum        |           |       |
| 18        | Topsoiling  | 1        | Job             |           |       |
| 19        | Structure Concrete-Inlets,FDOT Type C(Doghouse/Cast in Place) | 3        | Each            |           |       |
| 20        | Structure Concrete-Curbng-Replace Standup Curbs               | 1        | Job             |           |       |

| Line Item | Description   | Quantity | Unit of Measure | Unit Cost | Total |
|-----------|---|----------|-----------------|-----------|-------|
| 21        | Structure Concrete-Ribbon Curb Border At Pervious Pavers And Riprap Channels                            | 2,400    | Linear Feet     |           |       |
| 22        | Asphalt-Subgrade, Base, and Asphalt Surface at New Pipe Crossings                                       | 1        | Job             |           |       |
| 23        | Asphalt-Thermoplastic Striping  | 1        | Job             |           |       |
| 23        | Steel Reinforcement-For Concrete Structures   | 1        | Lump Sum        |           |       |
| 24        | Plastic Pipe-4" Diam. HDPE Pipe   | 316      | Linear Feet     |           |       |
| 25        | Plastic Pipe-12" Diam. HDPE Pipe  | 392      | Linear Feet     |           |       |
| 26        | Rock Riprap-FDOT No. 57 Crushed Aggregate Beneath Class 1 Riprap  | 100      | Ton             |           |       |
| 27        | Rock Riprap-FDOT No. 57 Crushed Aggregate Beneath Pavers  | 1,000    | Ton             |           |       |
| 28        | Rock Riprap-Drainage Swales within Landscape Islands  | 300      | Ton             |           |       |
| 29        | Metal Fabrication and Installation-Street Signs, Handicap Parking Signs, and Stop Signs                 | 10       | Each            |           |       |
| 30        | Contractor Quality Control-Testing Etc.   | 1        | Job             |           |       |
| 30        | Geotextile-within Focal Point and Urban Forest Systems  | 1        | Lump Sum        |           |       |
| 31        | Vegetative Measures-Focal Point 1-9 Planting-Per Plans(plants and trees will be supplied by county)     | 1        | Lump Sum        |           |       |
| 32        | Vegetative Measures-sodding-centipede   | 800      | Square Yards    |           |       |
| 32        | Underground Storage Tanks-R-tanks as Specified by Manufacturer(or approved equal)-Complete and In Place | 1        | Lump Sum        |           |       |

| Line Item    | Description   | Quantity | Unit of Measure | Unit Cost | Total |
|--------------|---|----------|-----------------|-----------|-------|
| 33           | Excavation-PowerBlock Permeable Pavers Per Plans  | 1        | Lump Sum        |           |       |
| 33           | Pervious Pavers-PowerBlock as Specified by Manufacturer (or approved equal) Complete and In Place | 30,150   | Square Yards    |           |       |
| <b>TOTAL</b> |   |          |                 |           |       |

#### **ALTERNATE BID PRICING TABLE**

| Line Item | Description                                   | Quantity | Unit of Measure | Unit Cost | Total |
|-----------|---|----------|-----------------|-----------|-------|
| 1         | Clearing and Grubbing                         | 1        | Lump Sum        |           |       |
| 2         | Structure Removal                             | 1        | Lump Sum        |           |       |
| 3         | Pollution Control                             | 1        | Lump Sum        |           |       |
| 4         | Construction Surveys                          | 1        | Lump Sum        |           |       |
| 5         | Mobilization and Demobilization               | 1        | Lump Sum        |           |       |
| 6         | Traffic Control                               | 1        | Lump Sum        |           |       |
| 6         | Water for Construction                        | 1        | Lump Sum        |           |       |
| 7         | Removal of Water                              | 1        | Lump Sum        |           |       |
| 7         | Excavation-Focal Point 1,2,3,4,9 Per Plans    | 1        | Lump Sum        |           |       |
| 7         | Earthfill-Placement of Earth Material         | 1        | Lump Sum        |           |       |
| 8         | Earthfill-Focal Point 1-Complete and In Place | 1        | Lump Sum        |           |       |
| 9         | Earthfill-Focal Point 2-Complete and In Place | 1        | Lump Sum        |           |       |
| 10        | Earthfill-Focal Point 3-Complete and In Place | 1        | Lump Sum        |           |       |

| Line Item | Description  | Quantity | Unit of Measure | Unit Cost | Total |
|-----------|--|----------|-----------------|-----------|-------|
| 11        | Earthfill-Focal Point 4-Complete and In Place                                | 1        | Lump Sum        |           |       |
| 16        | Earthfill-Focal Point 9-Complete and In Place                                | 1        | Lump Sum        |           |       |
| 17        | Excavation-Urban Forest Tree Boxes Per Plans                                 | 1        | Lump Sum        |           |       |
| 17        | Earthfill-Urban Forest Tree Boxes- provide and install                       | 1        | Lump Sum        |           |       |
| 17        | Drainfill-Within Focal Point and Urban Forest Systems                        | 1        | Lump Sum        |           |       |
| 18        | Topsoiling   | 1        | Job             |           |       |
| 19        | Structure Concrete-Inlets,FDOT Type C(Doghouse/Cast in Place)                | 3        | Lump Sum        |           |       |
| 20        | Structure Concrete-Curbng-Replace Standup Curbs                              | 1        | Lump Sum        |           |       |
| 21        | Structure Concrete-Ribbon Curb Border At Pervious Pavers And Riprap Channels | 2,400    | Linear Feet     |           |       |
| 22        | Asphalt-Subgrade, Base, and Asphalt Surface at New Pipe Crossings            | 1        | Lump Sum        |           |       |
| 23        | Asphalt-Thermoplastic Striping   | 1        | Lump Sum        |           |       |
| 23        | Steel Reinforcement-For Concrete Structures                                  | 1        | Lump Sum        |           |       |
| 24        | Plastic Pipe-4" Diam. HDPE Pipe  | 316      | Linear Feet     |           |       |
| 25        | Plastic Pipe-12" Diam. HDPE Pipe   | 392      | Linear Feet     |           |       |
| 26        | Rock Riprap-FDOT No. 57 Crushed Aggregate Beneath Class 1 Riprap             | 100      | Ton             |           |       |
| 27        | Rock Riprap-FDOT No. 57 Crushed Aggregate Beneath Pavers                     | 1,000    | Ton             |           |       |
| 28        | Rock Riprap-Drainage Swales within Landscape Islands                         | 300      | Ton             |           |       |

| Line Item    | Description  | Quantity | Unit of Measure | Unit Cost | Total |
|--------------|--|----------|-----------------|-----------|-------|
| 29           | Metal Fabrication and Installation-Street Signs, Handicap Parking Signs, and Stop Signs                        | 10       | Each            |           |       |
| 30           | Contractor Quality Control-Testing Etc.  | 1        | Job             |           |       |
| 30           | Geotextile-within Focal Point and Urban Forest Systems   | 1        | Lump Sum        |           |       |
| 31           | Vegetative Measures-Installation Focal Points 1-4 and 9-Per Plans(plants and trees will be supplied by county) | 1        | Job             |           |       |
| 32           | Vegetative Measures-sodding-centipede  | 800      | Square Yards    |           |       |
| 32           | Underground Storage Tanks-R-tanks as Specified by Manufacturer(or approved equal)                              | 1        | Lump Sum        |           |       |
| 33           | Excavation-PowerBlock Permeable Pavers Per Plans   | 1        | Lump Sum        |           |       |
| 33           | Pervious Pavers-PowerBlock as Specified by Manufacturer (or approved equal)                                    | 14,697   | Square Yards    |           |       |
| <b>TOTAL</b> |  |          |                 |           |       |

## 9. Vendor Questionnaire and Submission

All electronic documents submitted in response to this solicitation shall be provided in **searchable PDF format**. The County reserves the right to deem proposals that do not comply with this requirement as **non-responsive** or to require resubmission in the proper format within a specified timeframe. This requirement applies to all attachments, forms, and supporting documentation uploaded to the County's Procurement Portal or otherwise submitted electronically.

### 9.1. Please provide Federal Identification Number (FEIN)\*

\*Response required

### 9.2. Solicitation Requirements\*

I certify that I have read through the solicitation, in its entirety, and verify that I understand all materials provided.

Please confirm

\*Response required

### **9.3. Scrutinized Company Certification\***

I certify this respondent is not participating in a boycott of Israel, is not on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, and it does not have business operations in Cuba or Syria.

Please confirm

\*Response required

### **9.4. Contract Execution and Payment/Performance Bond\***

I certify, if selected, the contract shall be executed and returned, along with the Payment/Performance Bond (if required), to Santa Rosa County Procurement within 10 days of respondent's receipt of draft contract. Failure to do so shall be just cause for forfeiture of the respondents guaranty.

Please confirm

\*Response required

### **9.5. Human Trafficked Labor\***

I certify this respondent does not utilize human trafficked labor, in compliance with Section 787.06, Florida Statute.

Please confirm

\*Response required

### **9.6. Drug-Free Workplace Certification\***

I certify this respondent complies fully with Drug-Free Workplace Section 287.087, Florida Statutes.

Please confirm

\*Response required

### **9.7. Certificate of Insurance\***

Please upload a copy of current required insurance declaration page with Santa Rosa County named interest or Letter of Insurability from carrier stating the the levels of coverage will be obtained.

\*Response required

### **9.8. Certificate of Authority to do business from the State of Florida (SunBiz)\***

Please upload Certificate of Authority to do business here.

\*Response required

### **9.9. Bid Guarantee\***

Each bid shall be accompanied by a certified cashier's check, or bid bond, in the amount of 5% of the total bid price, payable to Santa Rosa County, as the guarantee that the respondent, if the bid is accepted, will promptly execute the Agreement. The respondent shall guarantee the total bid price for a period of 60 days from the date of the bid opening.

Please upload your Bid Bond.

\*Response required

### **9.10. System of Award Management (SAM)\***

Please upload certification of active SAM status.

\*Response required

## **9.11. Sworn Statement Pursuant to Section 287.133(3)(A), Florida Statutes on Entity Crimes.\***

Please download the below documents, complete and have notarized. An online notarization option will be provided for you when responding.

- [Sworn Statement.pdf](#)

\*Response required

## **9.12. References\***

Please download the below document, complete, and upload.

- [REFERENCES.pdf](#)

\*Response required

## **9.13. Conflict of Interest\***

Please download the below document, complete, and upload.

- [Conflict of Interest.pdf](#)

\*Response required

## **9.14. Debarment Form\***

Please download the below document, complete, and upload.

- [Debarment form.pdf](#)

\*Response required

## **9.15. Work Hours and Safety Standards Certification\***

Please download the below documents, complete, and upload.

- [Work Hours and Safety Stand...](#)

\*Response required

## **9.16. Byrd Anti-Lobbying Amendment Certificate\***

Please download the below documents, complete, and upload.

- [20-0909\\_Attachment3-ByrdAnt...](#)

\*Response required

## **9.17. Proposed Subcontractors**

Please provide names and addresses for any proposed subcontractors to be utilized for work on this project. (if applicable)

## **9.18. Any additional attachments.**

Please upload any additional documents for your submission.