

**BROOKHAVEN SCIENCE ASSOCIATES, LLC
GENERAL TERMS AND CONDITIONS
FOR COMMERCIAL ITEMS
AT
BROOKHAVEN NATIONAL LABORATORY**

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Article 1 DEFINITIONS

The following terms shall have the meanings below:

- (a) "Agreement" means the contract; or purchase order; or Basic Ordering Agreement (BOA); or Task Agreement, and any modifications thereto, including all contract documents (Contract Documents). The Agreement includes without limitation the specifications, drawings, General Terms and Conditions and any special or supplemental terms and conditions, when incorporated into this Agreement by reference or otherwise.
- (b) "BSA" means Brookhaven Science Associates, LLC acting under Prime Contract No. DE-AC02-98CH10886 between BSA and the United States Government (Government) for the operation of Brookhaven National Laboratory (referred to as Brookhaven, BNL, or Laboratory), and includes the successor to, or any duly authorized representative of BSA.
- (c) "Brookhaven", "BNL", or "the Laboratory" refers to the Brookhaven National Laboratory site at Upton, New York.
- (d) "BSA's PPM Division" means the BSA Procurement and Property Management Division (PPM).
- (e) "Contract" is the document (including but not limited to contract; or purchase order; or Basic Ordering Agreement (BOA); or Task Agreement) that is executed by both BSA and the Contractor that creates the Agreement.
- (f) "Contract Documents" means all documents that comprise this Agreement including without limitation, the specifications, drawings, the General Terms and Conditions and any special or supplemental terms and conditions, when incorporated into this Agreement by reference or otherwise. "Government" means the United States of America and includes the U.S. Department of Energy (DOE) or any duly authorized representative thereof. This Agreement does not bind nor purport to bind the Government.
- (g) "Contractor" means any person or organization that has entered into this Agreement with BSA.
- (h) "Government" means the United States of America including the U.S. Department of Energy (DOE) or any duly authorized representative(s) thereof.
- (i) "Prime Contract" means Contract No. DE-AC02-98CH10886 between BSA and the Government.
- (j) The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

Article 2 ORDER OF PRECEDENCE

In the event of an inconsistency among provisions of this Agreement, the inconsistency shall be resolved by giving precedence in the following order:

- (a) the Contract,
- (b) special terms and conditions included in or incorporated by reference in the Contract,
- (c) Supplemental Terms and Conditions,
- (d) General Terms and Conditions,
- (e) the Statement of Work,
- (f) specifications and
- (g) drawings, if any, incorporated in this Agreement by reference or otherwise.

Article 3 ACCEPTANCE OF AGREEMENT, SURVIVABILITY

- (a) Acceptance of any agreement, defined below, must be in accordance with and strictly limited to these Terms and Conditions, unless modified by Brookhaven Science Associates, LLC. (BSA)
- (b) Performance by any Contractor without an executed agreement shall be deemed to be performance in accordance with these Terms and Conditions. However, no payment or reimbursement of any kind whatsoever shall be made to the Contractor without an executed agreement.

Article 4 COMPLETE AGREEMENT

This Agreement expresses the entire agreement and understanding of the parties with respect to the subject matter hereof and supersedes any prior oral and written agreements between the parties. It may only be modified in writing executed by both BSA and the Contractor except as otherwise stated herein.

Article 5 ASSIGNMENT

Neither this Agreement nor any interest therein nor claim there under shall be assigned or transferred by the Contractor except as expressly authorized in writing by BSA, provided that the Contractor or its assignee's rights to be paid amounts due as a result of performance of this Agreement may be assigned to a bank, trust company or other financing institution, including any federal lending institution. This Agreement is assignable by BSA to the Government or to a successor contractor for the operation of Brookhaven. The Contractor agrees to look solely to the Government or to such successor contractor for payment of the part so assigned, and to execute a novation agreement so recognizing the successor contractor if requested to do so by BSA.

Article 6 DISPUTES

The Contractor agrees to submit all disputes, claims or controversies arising out of or relating to this agreement to negotiation and then mediation before bringing any action in court. The Contractor further acknowledges that, in the event it brings any such action in court, it will bring that action in a court sitting in the State of New York, and it further acknowledges that it is hereby waiving any right that it might possess to demand a jury trial for the litigation of that action. The Contractor further acknowledges that it is giving up any rights to judicial remedies and procedures to the extent that this Agreement does not specifically provide for them. The Contractor further acknowledges that its agreement to the provision for this contract is voluntary. Pending settlement or a final judgment, the Contractor shall proceed diligently with the performance hereof according to BSA's decisions and instructions.

Article 7 EXCUSABLE DELAYS

The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as acts of God or the public enemy, acts of BSA, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The

Contractor shall notify BSA in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to BSA of the cessation of such occurrence.

Article 8 TERMINATION FOR CONVENIENCE

BSA reserves the right to terminate this Agreement, or any part hereof, for its convenience or that of the Government. In the event of such termination, BSA's Procurement and Property Management Division (PPM) shall deliver a notice specifying the extent of the termination and its effective date. The Contractor shall immediately stop all work so terminated and shall immediately cause any and all of its affected suppliers and subcontractors to cease work. Subject to the terms of this Agreement, BSA shall be liable only for payment under the payment provisions of this Agreement for services rendered prior to the notice of termination, plus reasonable charges that the Contractor can demonstrate to BSA's satisfaction using its standard record keeping system, have resulted from the termination. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided. In no event shall the agreed amount exceed the total price of the Agreement.

Article 9 TERMINATION FOR DEFAULT

- (a) Ten days after giving the Contractor written notice of its intent, BSA may terminate this Agreement for default, in whole or in part, if the Contractor fails to comply with any of the terms of this Agreement, fails to make progress so as to endanger performance of this Agreement or fails to provide adequate assurance of future performance. In this event, BSA shall not be liable for any services or supplies not accepted.
- (b) If this Agreement is terminated for default, BSA may require the Contractor to deliver any supplies and materials, manufacturing materials, and manufacturing drawings that the Contractor has specifically produced or acquired for the terminated portion of this Agreement. BSA shall pay the agreed-upon price for services performed and accepted in addition to completed supplies delivered and accepted. BSA and the Contractor shall agree on the amount of payment for all other deliverables.
- (c) BSA's rights and remedies under this Article are in addition to any other rights and remedies provided by law or under this Agreement.

Article 10 PAYMENT

BSA shall make payment for accepted services performed and/or items that have been delivered to the destination(s) set forth in this Agreement. Unless otherwise provided, terms of payment shall be net 30 days from submission of the Contractor's proper invoice (unless BSA does not approve such invoice). Invoices submitted by the Contractor anywhere other than to Account Payable, Bldg. 400, unless otherwise specified in this Agreement, are not deemed to have been officially received for payment term purposes. Any offered discount shall be taken if payment is made within the discount period indicated by the Contractor. Payments may be made either by check or electronic funds transfer, at BSA's option. Payment shall be deemed to have been made as of the date of

mailing or the date on which the electronic funds transfer was made. Unless otherwise specified in this Agreement, BSA may make payment on partial deliveries which it accepts.

Article 11 CHANGES

Any changes or modifications in the Terms and Conditions of this Agreement may be made only by written agreement of the parties and with written approval of BSA's Procurement and Property Management Division Manager, or designee.

Article 12 INSPECTION

The Contractor shall only tender for acceptance those items that conform to the requirements of this Agreement. BSA reserves the right to inspect or test any supplies or services that have been tendered for acceptance. BSA may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in price. BSA must exercise its post-acceptance rights:

- (a) within a reasonable time after the defect was discovered and,
- (b) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

Article 13 TAXES

The Agreement price includes all applicable federal, state, and local taxes and duties. In determining the applicability of any tax or duty, due consideration shall be given to the relationship of the subject matter of this Agreement to the Government, and the fact that BSA is exempt from New York State and local sales and use taxes under Exempt Organization Certificate No. EX-216880.

Article 14 TITLE AND RISK OF LOSS

Unless specified elsewhere in this Agreement, title to items furnished under this Agreement shall pass to the Government upon acceptance, regardless of when or where BSA takes physical possession. If BSA makes partial or progress payments, title shall pass to the Government for the items covered by the payment. Unless the Agreement specifically provides otherwise, risk of loss or damage to the items provided under this Agreement shall remain with the Contractor until delivery of the items to the destination specified in the Agreement.

Article 15 WARRANTY

Contractor warrants that the items under this Agreement shall be in accordance with Contractor's affirmation, description, sample, or model and compliant with all requirements of this Agreement. The warranty shall begin upon acceptance and extend for a period of

- (a) the manufacturer's warranty period or six months, whichever is longer, if the Contractor is not the manufacturer and has not modified the item; or,
- (b) one year or the manufacturer's warranty period, whichever is longer, if the Contractor is the manufacturer of that item or has modified it.

If any nonconformity with the item appears within that time, the Contractor shall promptly repair or replace such items or re-perform services. Transportation of

replacement items and return of nonconforming items and repeat performance of services shall be at the Contractor's expense. If repairs or replacement items or reperformance of services is not timely, BSA may elect to return the nonconforming items or repair or replace them or reprocur the services at the Contractor's expense. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this Agreement.

Article 16 LIMITATION OF LIABILITY

Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to BSA for consequential damages resulting from any defect or deficiencies in accepted items.

Article 17 COMPLIANCE WITH LAWS

- (a) The Contractor shall comply with all applicable federal, state, local laws and ordinances, executive orders, all pertinent lawful orders, rules and regulations, including those applicable by reason of the fact that this Agreement is issued under the Prime Contract and such compliance shall be a material requirement of this Agreement. If the Contractor is required to obtain licenses and/or permits to comply with this Article, it will do so without additional expense to BSA.
- (b) The Contractor warrants that each chemical substance constituting or contained in items furnished by this Agreement is on the list of substances published by the Administrator of the Environmental Protection Agency pursuant to the Toxic Substances Control Act, as amended. With each delivery the Contractor shall provide BSA any applicable Material Safety Data Sheet as required by the Occupational Safety and Health Act and applicable regulations including, without exception, 29 CFR 1910.1200.

Article 18 COMPLIANCE WITH INTERNET PROTOCOL VERSION 6 (IPv6) IN ACQUIRING INFORMATION TECHNOLOGY

This clause is applicable if this contract involves the acquisition of Information Technology (IT) that uses Internet Protocol (IP) technology. The Contractor agrees that

- (a) all deliverables that involve (IT) that uses (IP) (products, services, software, etc.) comply with IPv6 standards and interoperate with both IPv6 and IPv4 systems and products; and
- (b) it has IPv6 technical support for fielded product management, development and implementation available.

If the Contractor plans to offer a deliverable that offers IT that is not initially compliant, the Contractor agrees to

- (c) obtain BSA's approval before starting work on the deliverable; and
- (d) have IPv6 technical support for fielded product management, development and implementation available.

Should the Contractor find that the Statement of Work or specifications of this contract do not conform to IPv6 standards, it must notify BSA of such nonconformance and act in accordance with BSA's instructions.

Article 19 AUTHORIZATION AND CONSENT

The Government has given its authorization and consent for all use and manufacture of any invention described in and covered by a patent of the United States in the performance of this Agreement or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract) which is expected to exceed \$100,000.

Article 20 PATENT INDEMNITY-SUPPLIES AND SERVICES

If the amount of this Agreement is in excess of \$10,000, the Contractor shall indemnify BSA, the Government, and their officers, agents, and employees against liability, including costs, for infringement of any United States letters patent (except U.S. letters patent issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) arising out of the manufacture or delivery of supplies or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this Agreement, or out of the use or disposal by or for the account of the Government or BSA of such supplies or construction work. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government (with notice to BSA) of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof, and further, such indemnity shall not apply to:

- (a) An infringement resulting from compliance with specific written instructions of BSA or the Government directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the Agreement not normally used by the Contractor.
- (b) An infringement resulting from addition to, or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the Contractor, or
- (c) A claimed infringement which is settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

Article 21 REPORTING OF ROYALTIES

If this Agreement is in an amount which exceeds \$10,000 and if any royalty payments totaling more than \$250 are directly involved in the Agreement or are reflected in the Agreement price to BSA, the Contractor agrees to report in writing to the Government through BSA during the performance of this Agreement and prior to its completion or final settlement the amount of any royalties or other payments paid or to be paid by it directly to others in connection with the performance of this Agreement together with the names and addresses of licensors to whom such payments are made and either the patent numbers involved or such other information as will permit identification of the patents or other basis on which royalties are to be paid. The approval of DOE or BSA of any individual payments or royalties shall not stop the Government at any time from contesting the enforceability, validity or scope of, or title to, any patent under which a royalty or payments are made.

Article 22 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

The provisions of this clause shall be applicable only if the amount of this Agreement exceeds \$100,000.

- (a) The Contractor shall report to the Government through BSA promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this Agreement of which the Contractor has knowledge.
- (b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this Agreement or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government when requested by the Government or BSA, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government or BSA.
- (c) This clause shall be included in all subcontracts.

Article 23 SUSPECT/ COUNTERFEIT ITEMS

- (a) "Suspect Items" are items, for which there is an indication by visual inspection, testing, or other information that it may not conform to established Government- or industry-accepted specifications or national consensus standards. "Counterfeit Items" are suspect items that are a copy or substitute without legal authority to do so or whose material, performance, or characteristics are knowingly misrepresented by the supplier, distributor, or manufacturer. Forms of misrepresentation include, but are not limited to, the following:
 - (b) falsified product sources (counterfeits);
 - (c) falsified or modified quality assurance records;
 - (d) false marking as to class, type, or grade;
 - (e) mixing of unmarked materials with marked materials;
 - (f) false labeling as to qualification or acceptance by testing/certifying organizations and
 - (g) used and/or refurbished products misrepresented as new products.
- (h) Types of materials, parts, and components, known to have been misrepresented include, but are not limited to:
 - (i) lifting materials such as slings, hooks, cables, and shackles;
 - (j) threaded fasteners fraudulently marked as high-strength bolts;
 - (k) refurbished electrical circuit breakers sold under false certifications;
 - (l) valves;
 - (m) piping and piping components;
 - (n) electrical devices;
 - (o) channel members, plate, bar, and flanges;
 - (p) and other structural items.
 - (i) See the BNL Suspect / Counterfeit Items, Subject Area Exhibits, found at: https://sbms.bnl.gov/sbmsearch/subjarea/72/72_SA.cfm?parentID=72, for

more information on identifying suspect/counterfeit items. S/CIs may pose immediate and potential threats to the safety of DOE and contractor workers, the public, and the environment. Failure of a safety or mission critical system due to an S/CI could also have security implications at DOE facilities.

- (q) Items furnished to BSA under this Agreement shall not include suspect/counterfeit parts nor shall such parts be used in performing any work under this Agreement whether on or off the Laboratory site.
- (r) If suspect/counterfeit parts are furnished under this Agreement and are found on the Laboratory site, such parts shall be impounded by BSA or they shall be removed by the Contractor as directed by BSA. The Contractor shall promptly replace such parts with supplies acceptable to BSA and the Contractor shall be liable for all costs relating to impoundment, removal, and replacement. BSA may turn such parts over to the U.S. Office of the Inspector General for investigation and reserves the right to withhold payment pending the outcome of any investigation.
- (s) The rights of BSA in this clause are in addition to any other rights provided by law or under this Agreement.

Article 24 APPLICABLE LAW

The parties agree that the federal common law of government contracts will govern the construction and interpretation of this Agreement and all claims arising under or related to this Agreement or work performed under this Agreement or claims of breach of this Agreement, regardless of the forum in which any party to this Agreement brings action. For purposes of this Agreement, the federal common law of government contracts will consist of the interpretation of contract clauses and the law enunciated and applied to government contracts by the Boards of Contract Appeals, the Comptroller General (CG), and Federal Courts having jurisdiction over the Boards or the CG. The term "Board of Contract Appeals" means those established under the Contract Disputes Act of 1978, 41 U.S.C. 607(a)(1), and successor bodies.

Article 25 PRESS RELEASES AND OTHER PUBLIC DISSEMINATION OF CONTRACT INFORMATION

Press releases through print, broadcast or other media concerning the award, performance, results or conclusions from the work under this Contract shall not be made or otherwise distributed to the public without prior written consent by BSA. Any material proposed to be released shall be submitted to the BSA Contractual Representative no later than two weeks prior to the intended press release.

Article 26 REPORTING EXECUTIVE COMPENSATION (Agreements valued at \$25,000 or more)

In accordance with FAR 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, and as a condition of award of this Agreement, the Contractor will be required to provide to the BSA's PPM Division information relative to executive total compensation as directed below. This requirement does not apply to Agreements with individuals.

For purposes of this Article, “executive” means officers, managing partners, or any other employees in management positions. “Total Compensation” means the cash and noncash dollar value earned by the executive during the Contractor’s preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)):

- (a) Salary and bonus.
- (b) Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.
- (c) Earnings for services under non-equity incentive plans. This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
- (d) Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
- (e) Above-market earnings on deferred compensation which is not tax-qualified.
- (f) Other compensation, if the aggregate value of all such other compensation (e.g., severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

The Contractor agrees to report, by the end of the month following award of the Agreement, and annually thereafter, the names and total compensation of each of the five most highly compensated executives for the Contractor’s preceding completed fiscal year, if—

- (a) In the Contractor’s preceding fiscal year, the Contractor received—
 - (i) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
 - (ii) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- (b) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

Article 27 IDENTIFICATION OF EMPLOYEES

FAR 52.222-54 Employment Eligibility Verification, which is included in this Agreement, requires the Contractor to use an electronic Employment Eligibility Verification (E-Verify) system designated by the Secretary of Homeland Security to verify the eligibility of:

- (a) all persons hired during the Agreement term by the Contractor to perform duties within the United States; and
- (b) all persons assigned by the Contractor to perform work within the United States on the Federal Contract.

The Contractor agrees to incorporate FAR 52.222-54 and the substance of this clause in all subcontracts issued under this Agreement.

Article 28 CLAUSES INCORPORATED BY REFERENCE

This Agreement incorporates the following Federal Acquisition Regulation (FAR) and Department of Energy Acquisition Regulation (DEAR) clauses by reference, as they exist on the effective date of this Agreement, with the same force and effect as if they were in full text. The FAR clauses are available through the General Services Administration (GSA) at <http://www.arnet.gov/far/>, and the DEAR clauses are available at <http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation>, or they may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. Whenever necessary to make the context of the clauses applicable to this Agreement, the term “Contractor” shall mean the Contractor, the term “Contract” shall mean this Agreement, and where noted or where necessary to derive proper meaning in a subcontract situation the terms “DOE”, “Government” and “Contracting Officer” shall mean BSA, except the terms “DOE”, “Government” and “Contracting Officer” do not change:

- (a) in the phrases “Government Property”, “Government-Furnished Property”, “Government Equipment” and “Government-Owned Equipment”, or, where otherwise intended that title, ownership or rights are to remain with the Government; or
- (b) where statute or regulation vests authority exclusively in specific agencies or officials; or
- (c) where otherwise specifically modified in this Agreement.

To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors, divisions, subsidiaries, or affiliates at all tiers to incorporate commercial items or non-developmental items as components of items to be supplied under this Agreement. The Contractor is not required to include any FAR provisions or clauses other than those listed below to the extent that they are applicable and as may be required to establish the reasonableness or prices under FAR Part 15, in a subcontract at any tier for commercial items or components. The Contractor shall include the terms of this clause, including this statement, in subcontracts awarded under this Agreement.

Article	Title of Clause	FAR Ref.
Article 29	Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009	52.203-15
Article 30	Personal Identity Verification of Contractor Personnel	52.204-9
Article 31	Utilization of Small Business Concerns	52.219-8
Article 32	Contract Work Hours and Safety Standards Act – Overtime Compensation	52.222-4
Article 33	Equal Opportunity	52.222-26
Article 34	Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans (agreements of \$100,000 or more)	52.222-35
Article 35	Affirmative Action for Workers with Disabilities	52.222-36

	(agreements greater than \$10,000)	
Article 36	Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans (agreements of \$100,000 or more)	52.222-37
Article 37	Notification of Employee Rights Under the National Labor Relations Act, Paragraphs (a) to (f)	52.222-40
Article 38	Combating Trafficking in Persons	52.222-50
Article 39	Employment Eligibility Verification	52.222-54
Article 40	Hazardous Material Identification and Material Safety Data	52.223-3
Article 41	Energy Efficiency in Energy Consuming Products	52.223-15
Article 42	Contractor Policy to Ban Text Messaging While Driving	52.223-18
Article 43	Subcontracts for Commercial Items	52.244-6
Article 44	Preference for Privately-Owned U.S. Flag Commercial Vessels	52.247-64
		DEAR. Ref
Article 45	Whistleblower Protection for Contractor Employees	952.203-70
Article 46	Sustainable Acquisition Program	952.223-78
The following clauses are applicable to agreements over \$650,000:		
Article	Title of Clause	FAR Ref.
Article 47	Contractor Code of Business Ethics and Conduct (agreements greater than \$5,000,000)	52.203-13