

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

1. **DEFINITIONS.** The following terms shall have the meanings below:
 - (a) "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.
 - (b) "BSA" means Brookhaven Science Associates, LLC acting under Prime Contract No. DE-AC02-98CH10886 between BSA and the Government for the operation of Brookhaven National Laboratory, and includes the successor to, or any duly authorized representative of BSA.
 - (c) "Brookhaven", "BNL", and "the Laboratory" mean the Brookhaven National Laboratory site at Upton, New York.
 - (d) "Seller" means the person or organization that has entered into this Agreement with BSA.
 - (e) "Agreement" means the purchase order, contract, basic ordering agreement (BOA), blanket order, or modification thereof.
 - (f) The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

2. **ACCEPTANCE.** 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).

Performance by any seller 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 Seller without an executed agreement.

3. **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 text of the Agreement, (b) special terms and conditions attached thereto, (c) Supplemental Terms and Conditions, (d) General Terms and Conditions, (e) the Statement of Work, and (f) Specifications.
4. **DISPUTES.** The Seller 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 Seller 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 Seller 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 Seller further acknowledges that its agreement to the provision for this contract is voluntary. Pending settlement or a final judgment, the Seller shall proceed diligently with the performance hereof according to BSA's decisions and instructions.

5. **EXCUSABLE DELAYS.** The Seller shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Seller 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 Seller 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.
6. **TERMINATION FOR BSA'S CONVENIENCE.** BSA reserves the right to terminate this Agreement, or any part hereof, for its sole convenience. In the event of such termination, the Seller shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and sub-contractors to cease work. Subject to the terms of this Agreement, the Seller shall be paid a percentage of the agreement price reflecting the percentage of the work performed and/or items delivered and accepted prior to the notice of termination, plus reasonable charges that the Seller can demonstrate to the satisfaction of BSA using its standard record keeping system, have resulted from the termination. The Seller shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give BSA any right to audit the Seller's records. The Seller shall not be paid for any work performed or costs incurred which reasonably could have been avoided.
7. **TERMINATION FOR CAUSE.** BSA may terminate this Agreement, or any part hereof, for cause in the event of any default by the Seller, or if the Seller fails to comply with any agreement terms and conditions, or fails to provide BSA, upon request, with adequate assurances of future performance. In the event of termination for cause, BSA shall not be liable to the Seller for any amount for supplies or services not accepted, and the Seller shall be liable to BSA for any and all rights and remedies provided by law.
8. **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.

9. **INSPECTION.** The Seller 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.

10. **PAYMENT.** Payment shall be made for items accepted by BSA that have been delivered to the delivery destinations set forth in this Agreement. Invoices sent by the Seller anywhere other than to Accounts Payable, Bldg. 400, are not deemed to have been officially received for payment term purposes. Upon the submission of proper invoices or vouchers, BSA shall make payment at the prices stipulated in the Agreement by check, electronic funds, or as the parties may otherwise agree. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

11. **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.

12. **ASSIGNMENT.** Neither this Agreement nor any interest therein nor claim there under shall be assigned or transferred by the Seller except as expressly authorized in writing by BSA, provided that the Seller 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 National Laboratory.

13. **TITLE.** 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.

14. **RISK OF LOSS.** Unless the Agreement specifically provides otherwise, risk of loss or damage to the supplies provided under this Agreement shall remain with the Seller until delivery of the supplies to the destination specified in the Agreement.

15. **WARRANTY.** Seller warrants that the items under this Agreement shall be in accordance with Seller'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 (1) the manufacturer's warranty period or six months, whichever is longer, if the Seller is not the manufacturer and has not modified the item; or, (2) one year or the manufacturer's warranty period, whichever is longer, if the Seller is the manufacturer of that item or has modified it. If any nonconformity with the item appears within that time, the Seller 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 Seller'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 Seller's expense. The Seller warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this Agreement.
16. **LIMITATION OF LIABILITY.** Except as otherwise provided by an express or implied warranty, the Seller will not be liable to BSA for consequential damages resulting from any defect or deficiencies in accepted items.
17. **COMPLIANCE WITH LAWS.** The Seller shall comply with all applicable federal, state, local laws and ordinances, executive orders, all pertinent lawful orders, rules and regulations and such compliance shall be a material requirement of this Agreement. Seller 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 Seller 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.
18. **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.
19. **PATENT INDEMNITY-SUPPLIES AND SERVICES.** If the amount of this Agreement is in excess of \$10,000, the Seller 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 Seller 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 Seller.
- (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 Seller, or
- (c) A claimed infringement which is settled without the consent of the Seller, unless required by final decree of a court of competent jurisdiction.

20. **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 Seller 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.

21. **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 Seller 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 Seller 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 Seller shall furnish to the Government when requested by the Government or BSA, all evidence and information in possession of the Seller pertaining to such suit or claim. Such evidence

and information shall be furnished at the expense of the Government except where the Seller has agreed to indemnify the Government or BSA.

- (c) This clause shall be included in all subcontracts.

22. 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:
- falsified product sources (counterfeits);
 - falsified or modified quality assurance records;
 - false marking as to class, type, or grade;
 - mixing of unmarked materials with marked materials;
 - false labeling as to qualification or acceptance by testing/certifying organizations and
 - used and/or refurbished products misrepresented as new products.

Types of materials, parts, and components, known to have been misrepresented include, but are not limited to:

- lifting materials such as slings, hooks, cables, and shackles;
- threaded fasteners fraudulently marked as high-strength bolts;
- refurbished electrical circuit breakers sold under false certifications;
- valves;
- piping and piping components;
- electrical devices;
- channel members, plate, bar, and flanges;
- and other structural items.

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.

- (b) 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.
- (c) 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.

- (d) The rights of BSA in this clause are in addition to any other rights provided by law or under this Agreement.

23. **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.

24. **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 Article 24, in all subcontracts issued under this Agreement.

25. **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)):
(1) Salary and bonus.

- (2) 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.
- (3) 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.
- (4) Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
- (5) Above-market earnings on deferred compensation which is not tax-qualified.
- (6) 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—**

- (1) In the Contractor's preceding fiscal year, the Contractor received—
 - (A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
 - (B) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- (2) 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.

26. **STATUTES OR EXECUTIVE ORDERS INCORPORATED BY REFERENCE.** The Seller agrees to comply with the following FAR clauses, which are incorporated in this Agreement by reference as they exist on the date of this Agreement, to implement provisions of law or executive orders applicable to acquisitions of commercial items. For FAR provisions incorporated by reference, "Government" means "BSA", "Contracting Officer" means "BSA's Division of Procurement and Property Management authorized personnel", and "Contractor" means "Seller" except where statute or regulation vests authority exclusively in specific agencies or officials. The FAR clauses may be obtained from the Superintendent, U.S. Government Printing Office, Washington, D.C. or through the General Services Administration (GSA) at <http://www.arnet.gov/far/>. To the maximum extent practicable, the Seller 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 Seller 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 Seller shall include the terms of this clause, including this statement, in subcontracts awarded under this Agreement.

- (a) FAR 52.203-13, Contractor Code of Business Ethics and Conduct (agreements greater than \$5,000,000)
- (b) FAR 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009
- (c) FAR 52.219-8, Utilization of Small Business Concerns (for orders greater than \$650,000, required flowdown to lower tier subcontracts that offer subcontracting opportunities)
- (d) FAR 52.222-26, Equal Opportunity (E.O. 11246)
- (e) FAR 52.222-35, Equal Opportunity for special Disabled Veterans, Veterans of the Vietnam Era and other Eligible Veterans (agreements of \$100,000 or more)
- (f) FAR 52.222-36, Affirmative Action for Workers with Disabilities (agreements greater than \$10,000)
- (g) FAR 52.222-37, Employment Reports on Veterans
- (h) FAR 52.222-40, Notification of Employee Rights Under the National Labor Relations Act, Paragraphs (a) to (f)
- (i) FAR 52.222-50, Combating Trafficking in Persons
- (j) FAR 52.222-54, Employment Eligibility Verification
- (k) FAR 52.223-3, Hazardous Material Identification and Material Safety Data
- (l) FAR 52.223-15, Energy Efficiency in Energy Consuming Products
- (m) FAR 52.223-18, Contractor Policy to Ban Text Messaging While Driving
- (n) FAR 52.244-6, Subcontracts for Commercial Items
- (o) FAR 52.247-64, Preference for Privately Owned U.S. Flag Commercial Vessels
- (p) DEAR 952.203-70, Whistleblower Protection for Contractor Employees
- (q) DEAR 952.223-78, Sustainable Acquisition Program