

STANDARD AGREEMENT

STD. 213 (NEW 06/03)

AGREEMENT NUMBER
REGISTRATION NUMBER

1. This Agreement is entered into between the State Agency and the Contractor named below
STATE AGENCY'S NAME
State Energy Resources Conservation and Development Commission (Energy Commission)
CONTRACTOR'S NAME

2. The term of this Agreement is: **Date to Date.** The effective date of this Agreement is the start date, or the signature date this agreement was signed by the California Energy Commission representative below, or the approval date by the Dept. of General Services (if required), whichever is later. No work shall commence until the effective date.

3. The maximum amount of this Agreement is: \$

4. The parties agree to comply with the terms and conditions of the following Exhibits which are by this reference made a part of the Agreement:

Exhibit A – Scope of Work		Pages
Exhibit A - Attachments		Pages
Exhibit B – Budget Detail and Payment Provisions	10	Pages
Exhibit B - Attachments		Pages
Exhibit C* – General Terms and Conditions	GTC 04/2017 or GIA 610	
Exhibit D – Special Terms and Conditions	17	Pages
Exhibit E – Additional Provisions	8	Pages
Exhibit E - Attachment		
Exhibit F – Contacts	1	Page
Exhibit G - Definitions	5	Pages
Exhibit H - Subcontract Flow-Down Provisions	12	Pages
Exhibit I - Information Practices Act Special Terms	3	Pages

Items shown with an Asterisk (*), are hereby incorporated by reference and made part of this agreement as if attached hereto. These documents can be viewed at <http://www.dgs.ca.gov/ols/Resources/StandardContractLanguage.aspx>.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto.

CONTRACTOR		<i>California Department of General Services Use Only</i>
CONTRACTOR'S NAME (If other than an individual, state whether a corporation, partnership, etc.)		
BY (Authorized Signature)	DATE SIGNED (Do not type)	
–		
PRINTED NAME AND TITLE OF PERSON SIGNING		
ADDRESS		
STATE OF CALIFORNIA		
AGENCY NAME		
State Energy Resources Conservation and Development Commission (Commission)		
BY (Authorized Signature)	DATE SIGNED (Do not type)	
–		
PRINTED NAME AND TITLE OF PERSON SIGNING		
Rachel L. Grant Kiley, Contracts Grants and Loans Office Manager		
ADDRESS		
1516 Ninth Street, Sacramento, CA 95814		

Exempt per:

EXHIBIT B

Budget Detail and Payment Provisions

CAO - DELETE CAO instructions in red as you modify the Exhibit.

1. CONDITIONS FOR PAYMENT

- A. No payment shall be made in advance of services rendered. *(CAO confirm the accuracy of this term. If subcontractor is a Fed. Lab or State agency, advance payment to them maybe authorized)*
- B. For services satisfactorily rendered, and upon receipt and approval of invoices, the Energy Commission agrees to compensate the Contractor for actual allowable expenditures incurred in accordance with Exhibit B. The rates in Exhibit B are rate caps, or the maximum amount allowed to be billed. The Contractor can only bill for actual expenses incurred for hours worked **at the Contractor's and subcontractor's actual labor and non-labor rates**, not to exceed the rates specified in Exhibit B.
- C. The Contractor is not allowed to charge profit, fees or mark-ups on any subcontracted budget item, including lower tier subcontracted amounts. Subcontractors are not allowed to profit from their subcontractors' costs.
- D. Each invoice is subject to the Energy Commission Agreement Manager's (CAM) approval.
- E. Payments shall be made to the Contractor for undisputed invoices. An undisputed invoice is an invoice submitted by the Contractor for services rendered, and for which additional evidence is not required to determine its validity. The invoice will be disputed if all deliverables due for the billing period have not been received and approved, if the invoice is inaccurate, or if it does not comply with the terms of this Agreement. If the invoice is disputed, Contractor will be notified via a Dispute Notification Form within 15 working days of receipt of the invoice.
- F. Payment will be made in accordance with the Prompt Payment Act, Government Code Chapter 4.5, commencing with Section 927, which requires payment of properly submitted, undisputed invoices within 45 days of receipt or automatically pay late payment penalties when applicable.
- G. Final invoice must be received by the Energy Commission no later than 30 calendar days after the Agreement termination date.
- H. No payment will be made for costs identified in Contractor invoices that have or will be reimbursed by another source, including but not limited to a government entity contract or subcontract or other procurement methods.

2. PAYMENT TERMS

Check all that apply:

[CAO: Delete options that don't apply to the Agreement]

- In Arrears
 - Itemized
 - Monthly
 - Quarterly
 - One-Time Payment
 - Flat Rate

- Advance Payment to other California state agencies or federal government Not to Exceed \$_____ or _____ % of the Agreement Amount
- Reimbursement/Revenue
- Other (Explain)

3. **INVOICING PROCEDURES**

- A. Invoices shall be submitted in duplicate not more frequently than monthly. The following certification shall be included on each invoice and signed by an authorized official of the Contractor:

I certify that this invoice is correct and proper for payment, and reimbursement for these costs has not and will not be received from any other sources, including but not limited to a government entity contract, subcontract or other procurement method.

- B. The Contractor shall use the sample invoice format located on the Energy Commission's Web Site:

<http://www.energy.ca.gov/contracts/pier.html#piergeneralinfo>

- C. The Energy Commission will accept computer generated or electronically transmitted invoices, provided the Contractor sends a paper copy the same day to the Energy Commission. The date of "invoice receipt" shall be the date the Energy Commission receives the paper copy.

Send invoices to:

California Energy Commission
Accounting Office, MS-2
1516 Ninth Street
Sacramento, California 95814

- D. An invoice shall consist of, but not be limited to, the following:

- 1) Agreement number, date prepared, and billing period.
- 2) The Contractor's actual unloaded hourly labor rates by individual and number of hours worked during the reporting period. Identify actual, agreement, and billed amounts.
- 3) Non-Labor rates (fringe benefits, indirect overheads, general and administrative, profit, etc.). Identify actual, agreement, and billed amounts.
- 4) Other direct operating expenses, including equipment, travel, materials, and miscellaneous, etc.
- 5) Subcontractor expenditures.
- 6) An indication of whether a subcontractor is a California Certified Small Business or a Certified Disabled Veteran Business Enterprise.
- 7) By task and category (as specified in Budget Detail): current billing, previously billed, budgeted amounts, and balance of funds.
- 8) If applicable, the match fund expenditures.

- 9) All invoices must be accompanied by the following documentation to support the expenditure:
 - a) Subcontractor invoices which shall include items 1-8 above for corresponding information, if any, identified in the budget detail (e.g., if the budget detail lists hourly labor rates, then the subcontractor's invoice would include hourly labor rates).
 - b) Receipts for travel expenses.
 - c) Receipts for materials, miscellaneous, and/or equipment.
 - d) A report that documents the progress of the work during the billing period; and
 - e) Any other deliverables due during the billing period.

[CAO use the following for agreements with Work Authorizations, delete section C above][Delete section C, 1-11 below if not a WA agreement]

- C. An invoice shall consist of, but not be limited to, the following:
 - 1) Agreement number, date prepared, and billing period.
 - 2) The Work Authorization number.
 - 3) The Contractor's actual unloaded hourly labor rates by individual and number of hours worked during the reporting period. Identify actual, agreement, and billed amounts.
 - 4) Non-Labor rates (fringe benefits, indirect overheads, general and administrative, profit, etc.). Identify actual, agreement, and billed amounts
 - 5) Other direct operating expenses, including equipment, travel, materials and miscellaneous, etc.
 - 6) Subcontractor expenditures.
 - 7) An indication of whether a subcontractor is a California Certified Small Business or a Certified Disabled Veteran Business Enterprise.
 - 8) Identify the specific task(s) and the categories of expenditures under the applicable Work Authorization.
 - 9) Consistent with the applicable Work Authorization budget provide current billing, previously billed, budgeted amounts and balance of funds.
 - 10) If applicable, the match fund expenditures.
 - 11) All invoices must be accompanied by the following documentation to support the expenditure:
 - a) Subcontractor invoices which shall include items 1-10 above for corresponding information, if any, identified in the budget detail (e.g., if the budget detail lists hourly labor rates, then the subcontractor's invoice would include hourly labor rates).
 - b) Receipts for travel expenses.
 - c) Receipts for materials, miscellaneous, and/or equipment.
 - d) A report that documents the progress of the work during the billing period; and
 - e) Any other deliverables due during the billing period.

4. **RETENTION**

The Energy Commission shall retain from each invoice ten per cent (10%) of that invoice, excluding equipment invoices, pursuant to Public Contract Code section 10346. The retained amount shall be held and released only upon approval that work has been satisfactorily completed and the Final Report (if required) has been received and approved. The Contractor must submit a separate invoice for the retained amount. Retained funds may be withheld by the Energy Commission to compensate or credit for amounts that were paid in error, or amounts that were paid but exceed the actual allowable incurred costs.

CAO: Delete following paragraph if not applicable to Agreement or if it is a Work Authorization Agreement.

Retention may be released upon completion of tasks that are considered separate and distinct (i.e., the task is a stand-alone piece of work and could be completed without the other tasks). Tasks for administration or management of the Agreement and/or subcontractors are not considered separate and distinct tasks. The tasks for which retention may be released prior to the end of the Agreement are listed below.

- Task *(CAO insert task number, list all tasks that are applicable)*

CAO: Use the following paragraph for Work Authorization Agreements.

Retention may be released upon completion of a work authorization as each is considered a separate and distinct piece of work (i.e. the work authorization is a stand-alone piece of work and could be completed without other work authorizations). A work authorization for administration or management of the Agreement and/or subcontractors is not considered separate and distinct and retention will not be released early. Retention for the administrative/management work authorization will be released upon completion and approval of all contract final deliverables.

5. **TRAVEL AND PER DIEM RATES**

The Contractor shall be reimbursed for travel and per diem expenses using the Energy Commission Contractor Travel Rates. The Contractor must pay for travel in excess of these rates. The Contractor may obtain current rates from the Energy Commission's Web Site at: http://www.energy.ca.gov/contracts/TRAVEL_PER_DIEM.PDF

[CAO: Delete "and Commission Agreement Officer" if contract has work authorizations]

- A. Travel identified in Exhibit B, Pre-Approved Travel List is approved and does not require further authorization. ***CAO- delete this clause if this is a WA agreement.***
- B. Travel that is not included in Exhibit B, Pre-Approved Travel List shall require written authorization from the CAM and **Commission Agreement Officer** prior to travel departure. The Energy Commission will reimburse travel expenses from the Contractor's office location. For purposes of payment, the Contractor's office location shall be considered the office location where the Contractor's employees or, if applicable, the employees of a subcontractor with responsibilities for this contract are permanently assigned.
- C. Travel receipts and documentation of travel expenses, including travel meals and incidentals, shall be submitted with invoices requesting reimbursement from the Energy Commission. The documentation must be listed by trip and include dates and times of departure and return.

6. **BUDGET CONTINGENCY CLAUSE**

It is mutually agreed that if the Budget Act of the current year and/or any subsequent years covered under this Agreement does not appropriate sufficient funds for the work identified in Exhibit A, this Agreement shall be of no further force and effect. In this event, the State shall have no liability to pay any funds whatsoever to the Contractor or to furnish any other consideration under this Agreement and the Contractor shall not be obligated to perform any provisions of this Agreement.

If funding for any fiscal year is reduced or deleted by the Budget Act for purposes of this program, the State shall have the option to either: cancel this Agreement with no liability occurring to the State, or offer an Agreement amendment to the Contractor to reflect the reduced amount.

7. **RATES & CLASSIFICATIONS: CHANGES IN CONTRACTOR PERSONNEL OR SUBCONTRACTOR PERSONNEL**

This section contains provisions allowing rate and classification changes without a formal amendment. Exhibit D contains the rules for adding or replacing personnel and subcontractors listed in the Agreement. When a Contractor makes personnel and subcontractor changes in accordance with Exhibit D that do not require a formal amendment, the following rules explain the rates and classifications for which the Contractor can invoice. Changes outside of these rules require a formal amendment to the Agreement.

A. **New Personnel**

If Contractor or a subcontractor adds new personnel after the Agreement has been executed, the Contractor shall submit the new personnel's resume and proposed job classification/rate, consistent with classifications/rates within the respective budget, to CAM for review and approval. If the Agreement budget includes a job classification with the person identified as "To Be Determined", and a person is later identified, this person is considered to be new personnel. The new personnel shall not provide services until the CAM approves the new personnel request in writing and notifies the Commission Agreement Officer (CAO). Any work performed by these new personnel prior to CAM approval is at Contractor's expense; the Energy Commission will not reimburse Contractor for work performed by these new personnel that occurs prior to CAM approval.

B. **Labor Rates & Classifications**

The Agreement budget identifies individuals and/or job classifications and the maximum rates that the Contractor can invoice for them. The Contractor shall only invoice for the actual rates up to the maximum amount listed. Contractor can only increase rates or add new job classifications to the Agreement through a formal amendment to this Agreement.

1. **Contractor Changes: Addition or Replacement of Personnel**

a) **Labor Rates**

If the Contractor adds a new person to a job classification listed in the Contractor's budget or replaces a person listed in the Contractor's budget, the Contractor can only invoice for the new person's actual rate up to the maximum amount listed for that classification in the Contractor's budget. The Contractor cannot use for its personnel a rate of a subcontractor.

b) Classifications

Additions or replacement of personnel can only be made within existing job classifications identified in the Contractor's budget. The Contractor cannot use for its personnel a job classification of a subcontractor. The new person must be invoiced within job classifications that already exist in the budget for the Contractor. If the Contractor wishes to add a new job classification to the Agreement (for instance to bring in a new person or possibly promote a person) this will require a formal amendment to the Agreement.

c) Promotions

Contractor personnel listed in the Contractor's budget can be moved to a higher-paying job classification listed in the Contractor's budget with prior written approval of the CAM and the appropriate Division Deputy Director. The written approval must be submitted to the CAO.

2. Subcontractor Changes: Addition or Replacement of Personnel

a) Labor Rates

If a subcontractor adds a new person to a job classification listed in the subcontractor's budget or replaces a person listed in the subcontractor's budget for that subcontractor, the subcontractor can only invoice for the new person's actual rate up to the maximum amount listed for that classification in the subcontractor's budget. The subcontractor cannot use for its personnel a rate of another subcontractor or of the Contractor.

b) Classifications

Additions or replacement of personnel can only be made within existing job classifications identified in the subcontractor's budget. The subcontractor cannot use for its personnel a job classification of another subcontractor or of the Contractor. The new person must be invoiced within job classifications that already exist in the budget for the subcontractor. If the subcontractor wishes to add a new job classification to the Agreement (for instance to bring in a new person or possibly promote a person) this will require a formal amendment to the Agreement.

c) Promotions

Subcontractor personnel listed in the subcontractor's budget can be moved to a higher-paying job classification listed in the subcontractor's budget with prior written approval of the CAM and the appropriate Division Deputy Director. The written approval must be submitted to the CAO.

C. Changes in Assigned Personnel Hours

Contractor may move hours allocated for a specific person (employee or subcontractor) to another person listed in the Agreement, upon written notification to the CAM. However such changes cannot change the amount of the budget for the task or labor category. If a change in personnel will result in a change in the dollar amount of the task or in the labor category, then refer to the Budget Reallocation provision in this Exhibit B.

8. **BUDGET REALLOCATIONS**

A. The Energy Commission, through its CAM and CAO, and the Contractor can agree upon and make certain budget reallocations without a formal amendment to this Agreement as long as ALL of the following conditions are met:

- 1) For agreements without work authorizations, the total of all budget reallocations cannot exceed ten percent (10%) with a cap amount of \$150,000 of the Agreement Amount. For purposes of this provision, "Agreement Amount" means the total amount of Energy Commission funds being paid to Contractor under this Agreement. It does not include any match funds provided by Contractor.

For example, if under an agreement the Energy Commission agrees to pay a contractor \$100,000 and the contractor is supplying \$500,000 in match funding, the ten percent (10%) limitation applies to the \$100,000. Only up to \$10,000 of Energy Commission funds can be reallocated without a formal amendment. If under an agreement the Energy Commission agrees to pay a contractor \$1,750,000, ten percent would be \$175,000, but the cap is \$150,000, so the most that could be reallocated without a formal amendment is \$150,000.

For agreements with work authorizations, budget reallocations up to ten percent (10%) with a cap of \$150,000 of the entire agreement can be made. Budget reallocations up to ten percent (10%) of each work authorization can be made so long as the total amount of all work authorization budget reallocations does not exceed 10 percent of the agreement amount and is within the cap of \$150,000. For example, assume an Agreement Amount is \$175,000 and the agreement has two work authorizations, WA1 and WA2. WA1 has a budget of \$100,000, and WA2 has a budget of \$50,000. \$10,000 (10% of \$100,000) can be moved within WA1. \$5,000 (10% of \$50,000) can be moved within WA2. In addition to this, \$2,500 (10% of \$25,000, the Agreement Amount of \$175,000 minus the combined work authorization budgets of \$150,000) can be made to the portion of the Agreement Amount not associated with work authorizations. The total of these budget reallocations does not exceed ten percent of the total agreement amount or the \$150,000 cap.

- 2) The budget reallocation cannot substantially change the Scope of Work. Examples of budget reallocations that do not substantially change the Scope of Work include, but are not limited to, the following:
 - Increasing or decreasing the overall travel budget. This does not mean an increase to the allowed per diem rates under this Agreement.
 - Increasing or decreasing the equipment budget.
 - Increasing or decreasing the number of personnel assigned to complete tasks. This does not include increasing the hourly rates of the personnel and classifications listed in the budget. Increasing hourly rates requires a formal amendment. The addition of personnel also requires a formal amendment unless there is already an identified classification of rates in the budget that the new personnel will be filling.

- 3) The budget reallocation only involves moving funds between tasks or categories. The total Agreement Amount and the total budget of any work authorizations must remain unchanged. Increasing the total amount of the Agreement requires a formal amendment.
 - 4) The budget reallocation does not increase the percentage rate of Indirect Overhead, Direct Overhead, Fringe Benefits, General and Administrative Costs, Profit, or any other rates listed in the budget. For example, if an agreement budget lists the Indirect Overhead percentage rate as 25% of Direct Labor, the 25% cannot be changed without a formal amendment. Another example is that if a contractor listed that its profit rate is 8% of the total agreement, to increase this rate would require a formal amendment.
- B. To effectuate a budget reallocation under this section, the Contractor must make a request in writing to both the CAM and the CAO. Both the CAM and CAO will then approve or disapprove the request in writing; the approval or disapproval is not effective or binding unless signed by both the CAM and the CAO. Oral communications cannot be used or relied upon. If the request is approved, the CAM shall revise the Budget Attachments to reflect the changes and send them to the CAO and Contractor.
 - C. Any desired budget reallocations that do not meet the four criteria in this section must be made through a formal amendment. For purposes of this provision, a “formal amendment” means that all of the following must occur: approval by the Energy Commission at a Commission Business Meeting, a written amendment signed by both parties, and approval by the California Department of General Services.
 - D. Attempted budget reallocations that do not meet the requirements of this section are not legally binding upon the parties.

9. **RECORDKEEPING, COST ACCOUNTING AND AUDITING**

A. Cost Accounting

The Contractor agrees to keep separate, complete, and correct accounting of the costs involved in developing, installing, constructing, and testing of Project-Related Products and Rights funded under the Energy Commission-funded portion of this Agreement.

The Contractor also agrees to keep separate, complete, and correct account of the Economic Benefits from Project-Related Products and Rights.

B. Accounting Procedures

The Contractor’s costs shall be determined on the basis of the Contractor’s accounting system procedures and practices employed as of the effective date of this Agreement. The Contractor’s cost accounting practices used in accumulating and reporting costs during the performance of this Agreement shall be consistent with the practices used in estimating costs for any proposal to which this Agreement relates; provided that such practices are consistent with the other terms of this Agreement and provided, further, that such costs may be accumulated and reported in greater detail during performance of this Agreement.

The Contractor’s accounting system shall distinguish between direct costs and indirect costs. All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to costs incurred under this Agreement.

C. Allowability of Costs

Except as provided for in this Agreement, the Contractor shall use the applicable Federal Office of Management and Budget (OMB) Circulars A-87, A-21, A-122, or Federal Acquisition Regulations (FAR) Part 31 in determining allowable and unallowable costs. In the event of a conflict, this Agreement takes precedence over the OMB Circulars and/or FAR. Factors to be considered in determining whether an individual item of cost is allowable include: (i) reasonableness of the item; (ii) allowability of the item to the work; (iii) the appropriate use of applicable Federal OMB Circulars or FAR; and (iv) the terms and conditions of this Agreement. Applicable OMB circulars and FAR may be found at www.whitehouse.gov/omb and <https://www.acquisition.gov/far/>.

1) Allowable Costs

Allowable costs may include all costs, direct and indirect, incurred in the performance of work identified in the Contractor's proposal, if applicable and if capped as specified in Exhibit B, Budget Attachment. Costs must be incurred within the term of the Agreement. The Energy Commission will pay for State or local sales or use taxes on the services rendered or equipment, parts or software supplied to the Energy Commission pursuant to this Agreement.

2) Unallowable Costs

Examples of unallowable costs include: contingency costs, imputed costs, fines and penalties, losses on agreements, excess profit taxes, and increased rates and fees for this Agreement.

The Contractor is not allowed to profit from its subcontractors' costs. Subcontractors are not allowed to profit from their subcontractors' costs.

The State of California is exempt from Federal excise taxes, and no payment will be made for any taxes levied on employee's wages.

D. Audit Rights

The Contractor shall maintain books, records, source documents, and other evidence, based on the procedures set forth above, sufficient to reflect properly all costs claimed to have been incurred in performing this Agreement. The Energy Commission, an agency of the State or, at the Energy Commission's option, a public accounting firm designated by the Energy Commission, may audit such accounting records at all reasonable times with prior notice by the Energy Commission. The Energy Commission shall bear the expense of such audits. It is the intent of the parties that such audits shall ordinarily be performed not more frequently than once every twelve (12) months during the performance of the work and once at any time within three (3) years following payment by the Energy Commission of the Contractor's final invoice. However, performance of any such interim audits by the Energy Commission does not preclude further audit.

E. Audit Cost

The cost of the audit shall be borne by the Energy Commission except when the results of the audit reveal an error detrimental to the Energy Commission that exceeds ten percent (10%) of the amount audited, or \$5,000 (whichever is greater); or if a royalty audit, ten percent (10%) of the total royalties due in the period audited. In this event, the Contractor agrees to reimburse the Energy Commission for reasonable costs and expenses incurred by the Energy Commission in conducting such audit.

F. Refund to the Energy Commission

If the Energy Commission determines that any invoiced and paid amounts exceed the actual allowable and incurred costs, the Contractor shall repay such amounts to the Energy Commission within thirty (30) days of request or as otherwise agreed to in writing by the Energy Commission and the Contractor. If the Energy Commission does not receive such repayments, the Energy Commission shall be entitled to withhold further payments to the Contractor.

10. **BUDGET DETAIL**

Budget Detail is contained in the Attachment to this Exhibit.

EXHIBIT D

Special Terms and Conditions

1. AGREEMENT MANAGEMENT

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

2. STANDARD OF PERFORMANCE

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

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

- D. The failure of a Project to achieve the technical or economic goals stated in the Scope of Work is not a basis for the Energy Commission to determine that the work is unacceptable, unless the work conducted by the Contractor/subcontractor is deemed by the Energy Commission to have failed the foregoing standard of performance.
- E. In the event that Contractor/subcontractor fails to perform in accordance with the foregoing standard of performance, the CAM and the Contractor Project Manager shall seek to negotiate in good faith an equitable resolution satisfactory to both parties. If such a resolution cannot be reached, the parties shall work through the Energy Commission's dispute resolution process described in the Disputes clause.

3. PERSONNEL AND SUBCONTRACTORS

A. Key Personnel

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

B. Key Subcontractors

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

C. Agreements with Subcontractors

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

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

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

D. Process for New Subcontractors

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

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

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

E. List of Subcontracts:

Insert Subcontractor Names)

4. DISABLED VETERAN BUSINESS ENTERPRISE (DVBE) REQUIREMENTS

A. Reporting

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

B. Substitution of DVBE

Contractor shall use each DVBE identified in its proposal or listed in this Agreement. Contractor understands and agrees that if DVBEs were identified in its proposal or listed in this Agreement, award of this Agreement is based in part on its commitment to use the DVBE subcontractor(s). If Contractor believes an identified DVBE must be replaced or substituted, Contractor shall inform CAM and CAO in writing of the reason for the DVBE replacement. A DVBE subcontractor may only be replaced by another DVBE subcontractor and must be approved by the Department of General Services (DGS). Military and Veterans Code section 999.5 (e). Contractor shall complete revised DVBE certification forms (provided by the CAO) identifying the new DVBE.

C. Amendment

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

D. Grounds for Termination; Damages; Penalties

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

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

5. PROCESS FOR OFFERING WORK

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

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

6. CHANGES TO THE AGREEMENT

A. Procedure for Requesting Changes

The Recipient must submit a written request to the CAM for any change to the Agreement. The request must include:

- A brief summary of the proposed change;
- A brief summary of the reason(s) for the change; and
- The revised section(s) of the contract, with changes made in underline/ strikeout format.

B. Significant Changes

Significant changes to the Agreement must be approved by the Commission through a formal amendment. Examples of significant changes include:

- Change of Contractor.

- Changes to Exhibit A that significantly modify the scope or purpose of the Agreement.
- Changes to Exhibit A that extend the due dates beyond the term of the Agreement.
- Changes to Exhibit B that increase the amount of the Agreement.
- Changes to Exhibit B that increase rates or fees.

C. Non-Significant Changes

Changes that are not significant to the Agreement do not require approval through a formal amendment. However, if these changes are not formally approved they must be documented in a Letter of Agreement signed by both parties. Examples of non-significant changes include:

- Budget revisions among tasks or budget categories that do not affect the scope of the project or the overall Agreement amount, and adhere to the budget reallocation requirements discussed in Exhibit B.
- Corrections of grammatical or other minor errors.
- Revised deliverable due dates, if the revised dates are within the approved term of the Agreement and are agreed to in writing by the CAM.
- Designation of Project Managers.
- Revised contact information.
- An increase of the Contractor's match share.
- Selection of a new demonstration site, if the site change does not affect the Energy Commission's determination that the funded work is exempt from or not a project under the California Environmental Quality Act.

7. **PERFORMANCE EVALUATION**

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

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

A. Reports and Deliverables

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

B. Legal and Copyright Notices

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

LEGAL NOTICE

This report was prepared as a result of work sponsored by the California Energy Commission (Energy Commission). It does not necessarily represent the views of the Energy Commission, its employees, or the State of California. The Energy Commission, the State of California, its employees, contractors, and subcontractors make no warranty, express or implied, and assume no legal liability for the information in this report; nor does any party represent that the use of this information will not infringe upon privately owned rights. This report has not been approved or disapproved by the Energy Commission nor has the Energy Commission passed upon the accuracy or adequacy of the information in this report.

COPYRIGHT NOTICE

©[YEAR OF FIRST PUBLICATION OF DELIVERABLE],

[THE COPYRIGHT HOLDER'S NAME]

ALL RIGHTS RESERVED.

C. Limitations on Contractor Disclosure of Agreement Information

- 1) Contractor must receive approval from the CAM before disclosing to any third party the contents of any draft deliverable or report.
- 2) After any document submitted has become a part of the public records of the State, Contractor may, if it wishes to do so at its own expense, publish or utilize the document, and shall include the legal and copyright notices required above.
- 3) In the event any public statement is made by the Energy Commission as to the role of Contractor or the content of any deliverable or report, the Contractor may, if it believes such statement to be incorrect, state publicly what it believes is correct.
- 4) No record that is provided by the Energy Commission to Contractor for Contractor's use in performing this Agreement and which has been designated as Confidential Information, or is the subject of a pending application for confidential designation, except as provided in Title 20, CCR section 2505 and following (and amendments), shall be disclosed by Contractor, unless disclosure is ordered by a court of competent jurisdiction (Title 20 CCR section 2507.). At the election of the CAM, the Contractor, its employees and any subcontractor shall execute a confidentiality agreement, supplied by the CAM or CAO.
- 5) Contractor acknowledges that each of its officers, employees, and subcontractors who are involved in the performance of this Agreement will be informed of these restrictions and be directed to abide by the above terms.

- D. Limitations on Energy Commission Disclosure of Information Contractor Considers Confidential
- 1) Data provided to the Energy Commission by Contractor, which Data the Energy Commission has not already designated as Confidential Information and which Contractor seeks to have designated as confidential, or is the subject of a pending application for confidential designation, shall not be disclosed by the Energy Commission except as provided in Title 20 CCR Sections 2506 and 2507 (and amendments), unless disclosure is ordered by a court of competent jurisdiction.
 - 2) It is the Energy Commission's intent to use and release Project results such as deliverables and Data in a manner calculated to further PIER while protecting proprietary or patentable interests of the parties. Therefore, the Energy Commission agrees not to disclose information that Contractor considers confidential, without first providing a copy of the disclosure document for review and comment by Contractor. Contractor shall have no less than ten (10) working days for review and comment and, if appropriate, to make an application for confidential designation pursuant to Title 20 CCR section 2505 (and amendments) on some or all of the information. The Energy Commission shall consider the comments of Contractor and use professional judgment in revising the disclosure document accordingly.

9. PUBLIC HEARINGS

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

10. DISPUTES

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

A. First Level Dispute Resolution

The Contractor shall first discuss the problem informally with the CAM. If the problem cannot be resolved at this stage, the Contractor must direct the grievance together with any evidence, in writing, to the CAO. The grievance must state the issues in the dispute, the legal authority or other basis for the Contractor's position and the remedy sought. The CAO and the Program Office Manager must make a determination on the problem within ten (10) working days after receipt of the written communication from the Contractor. The CAO shall respond in writing to the Contractor, indicating a decision and explanation for the decision. Should the Contractor disagree with the decision, the Contractor may appeal to the second level.

B. Second Level Dispute Resolution

The Contractor must prepare a letter indicating why the decision is unacceptable, attaching to it the Contractor's original statement of the dispute with supporting documents, along with a copy of the CAO's response. This letter shall be sent to the Energy Commission's Executive Director within ten (10) working days from receipt of the decision. The Executive Director or designee shall meet with the Contractor to review the issues raised. A written decision signed by the Executive Director or designee shall be returned to the Contractor within twenty (20) working days of receipt of the Contractor's letter. The Executive Director may inform the Energy Commission of the decision at an Energy Commission business meeting. Should the Contractor disagree with the Executive Director's decision, the Contractor may appeal to the Energy Commission at a regularly scheduled business meeting. Contractor will be provided with the current procedures for placing the appeal on an Energy Commission business meeting agenda.

11. **TERMINATION**

A. Purpose

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

B. Breach

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

C. For Cause

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

The term "for cause" includes, but is not limited to, the following reasons:

- Partial or complete loss of Match Funds;
- Reorganization to a business entity unsatisfactory to the Energy Commission;
- Retention or hiring of subcontractors, or replacement or addition of Key Personnel that fail to perform to the standards and requirements of this Agreement;
- Failure to utilize the DVBE subcontractors/vendors in this Agreement and/or Contractor's proposal;
- Contractor is not able to pay its debts as they become due and/or Contractor is in default of an obligation that impacts Contractor's ability to perform under this Agreement;
- Significant change in State or Energy Commission policy such that the work or product being funded would not be supported by the Energy Commission; or
- In the case of a technical support Agreement, changes in Energy Commission staff such that Energy Commission staff can do the work or product being funded.

D. Without Cause

The Energy Commission may, at its option, terminate this Agreement without cause in whole or in part, upon giving thirty (30) days advance notice in writing to the Contractor. In such event, the Contractor agrees to use all reasonable efforts to mitigate the Contractor's expenses and obligations hereunder. Also, in such event, the Energy Commission shall pay the Contractor for all satisfactory services rendered and expenses incurred within 30 days after notice of termination which could not by reasonable efforts of the Contractor have been avoided, but not in excess of the maximum payable under this Agreement.

12. WAIVER

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

13. CAPTIONS

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

14. PRIOR DEALINGS, CUSTOM OR TRADE USAGE

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

15. NOTICE

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

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

16. STOP WORK

The CAO may, at any time, by written notice to Contractor, require Contractor to stop all or any part of the work tasks in this Agreement. Stop work orders may be issued for reasons such as a Project exceeding budget, standard of performance, out of scope work, delay in Project schedule, misrepresentations and the like.

- A. Compliance. Upon receipt of such stop work order, Contractor shall immediately take all necessary steps to comply therewith and to minimize the incurrence of costs allocable to work stopped.
- B. Equitable Adjustment. An equitable adjustment shall be made by Energy Commission based upon a written request by Contractor. Such adjustment request must be made by Contractor within thirty (30) days from the date of the stop work order.
- C. Canceling a Stop Work Order. Contractor shall resume the work only upon receipt of written instructions from the CAO.

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

A. Energy Commission's Rights in Deliverables

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

B. Rights in Technical, Generated, and Deliverable Data

1) Contractor's Rights

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

2) Energy Commission's Rights

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

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

For all Data (Technical, Generated and Deliverable) produced under this Agreement, the Energy Commission retains a no-cost, non-exclusive, non-transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, produce and to authorize others to produce, translate, publish and use the Data, subject to the provisions of the Reports clause "Limitation on Energy Commission Disclosure of Information."

C. Exclusive Remedy

In the event the Energy Commission intends to publish or has disclosed Data the Contractor considers confidential, the Contractor's exclusive remedy is a civil court action for injunctive relief. Such court action shall be filed in Sacramento County, California.

D. Waiver of Consequential Damages

IN NO EVENT WILL THE ENERGY COMMISSION BE LIABLE FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BASED ON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT TORT, OR ANY OTHER LEGAL THEORY FOR THE DISCLOSURE OF CONFIDENTIAL INFORMATION OR INFORMATION CONTRACTOR CONSIDERS CONFIDENTIAL, EVEN IF THE ENERGY COMMISSION HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. DAMAGES THAT THE ENERGY COMMISSION WILL NOT BE RESPONSIBLE FOR INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFIT; LOSS OF SAVINGS OR REVENUE; LOSS OF GOODWILL; LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT; COST OF CAPITAL; COST OF ANY SUBSTITUTE EQUIPMENT, FACILITIES, OR SERVICES; DOWNTIME; THE CLAIMS OF THIRD PARTIES INCLUDING CUSTOMERS; AND INJURY TO PROPERTY.

E. Proprietary Data

Proprietary Data owned by the Contractor shall remain with the Contractor throughout the term of this Agreement and thereafter. The extent of Energy Commission's access to the same and the testimony available regarding the same shall be limited to that reasonably necessary to demonstrate, in a scientific manner to the satisfaction of scientific persons, the validity of any premise, postulate or conclusion referred to or expressed in any deliverable or to establish a baseline for repayment purposes. Upon request by the CAM, Contractor shall provide the CAM and any designated reviewer(s) access to review Contractor's Proprietary Data produced in the course of this Agreement that is not requested to be delivered to the Energy Commission. The Energy Commission shall not disclose any Contractor Proprietary Data accessed or reviewed to any third party.

F. Preservation of Data

Any Data that is reserved to the Contractor by the express terms hereof, and Proprietary Data and Trade Secrets that have been utilized to support any premise, postulate or conclusion referred to or expressed in any deliverable hereunder, shall be preserved by the Contractor at the Contractor's own expense for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated.

G. Destruction of Data

Before the expiration of three (3) years or the stipulated records retention period and before changing the form of or destroying any Data (including Technical, Generated, Deliverable and Proprietary) or Trade Secrets, the Contractor shall notify Energy Commission of any such contemplated action and Energy Commission may, within thirty (30) days after said notification, determine whether it desires said Data to be further preserved. If Energy Commission so elects, the expense of further preserving said Data shall be paid for by the Energy Commission. Contractor agrees that Energy Commission may at its own expense, have reasonable access to said Data throughout the time during which said Data is preserved. Contractor agrees to use its best efforts to identify competent witnesses to testify in any court of law regarding said Data or, at Energy Commission's expense, to furnish such competent witnesses.

H. Patent Rights

Patent rights for Subject Inventions will be the property of Contractor, subject to the Energy Commission retaining a no-cost, nonexclusive, nontransferable, irrevocable, royalty-free, worldwide perpetual license to use or have practiced for or on behalf of the State of California the Subject Invention(s) for governmental purposes. Contractor must obtain agreements to effectuate this clause with all persons or entities, except for the U.S. Department of Energy (DOE), obtaining ownership interest in the patented Subject Invention(s). Previously documented (whether patented or unpatented under the patent laws of the United States of America or any foreign country) inventions are exempt from this sub clause.

I. March-In Rights

The Contractor shall forfeit and assign to the Energy Commission, at the Energy Commission's request, all rights to a Subject Invention if either: 1) Contractor fails to apply for a patent on Subject Inventions(s) developed under this Agreement within six (6) months of conceiving or first actually reducing the technology to practice, or, 2) Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the Subject Invention. In this event, the Contractor agrees to relinquish all rights, subject to DOE reserved rights, to the Subject Invention to the Energy Commission. The Energy Commission will have the unfettered right to use and/or dispose of the rights in whatever manner it deems most suitable to help transfer the Technology into the market place, including but not limited to, seeking patent protection, or licensing the Subject Invention.

J. Energy Commission's Rights to Invention

Contractor and all persons and/or entities obtaining an ownership interest in Subject Invention(s) shall include within the specification of any United States patent application, and any patent issuing thereon covering a Subject Invention, the following statement:

THIS INVENTION WAS MADE WITH STATE OF CALIFORNIA SUPPORT UNDER CALIFORNIA ENERGY COMMISSION AGREEMENT NUMBER 500-xx-xxx. THE ENERGY COMMISSION HAS CERTAIN RIGHTS TO THIS INVENTION.

K. Energy Commission's Interest in Inventions

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

L. Copyrights

- 1) Copyrightable work first produced under this Agreement shall be owned by the Contractor, limited by the license granted to the Energy Commission in 2) below.
- 2) Contractor agrees to grant the Energy Commission a royalty-free, no-cost, nonexclusive, irrevocable, nontransferable, worldwide, perpetual license to produce, translate, publish, use and dispose of, and to authorize others to produce, translate, publish, use and dispose of all copyrightable work first produced or composed in the performance of this Agreement.

- 3) Contractor will apply copyright notices to all documents prepared for this Agreement that will be released to the public including reports, deliverables, articles submitted for publication, and all reprints, using the following form or such other form as may be reasonably specified by Energy Commission.

©[YEAR OF FIRST PUBLICATION OF DELIVERABLE],

[THE COPYRIGHT HOLDER'S NAME].

ALL RIGHTS RESERVED.

- 4) Software

In the event software is developed that is not a deliverable under the Agreement, but is first produced or composed in the performance of the Agreement, Contractor shall have the right to copyright and/or patent such software and grants the Energy Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable, worldwide, perpetual license to produce and use the software, its derivatives and upgrades for governmental purposes.

M. Intellectual Property Indemnity

Contractor warrants that Contractor will not, in supplying work under this Agreement's Scope of Work, knowingly infringe or misappropriate any intellectual property right of a third party, and that it will conduct a reasonable investigation of the intellectual property rights of third parties to avoid such infringement.

Contractor will defend and indemnify Energy Commission from and against any claim, lawsuit or other proceeding, loss, cost, liability or expense (including court costs and reasonable fees of attorneys and other professionals) to the extent arising out of: (i) any third party claim that a deliverable infringes any patent, copyright, trade secret or other intellectual property right of any third party, or (ii) any third party claim arising out of the negligent or other tortious act(s) or omission(s) by the Contractor, its employees, subcontractors or agents, in connection with or related to the deliverables or the Contractor's performance thereof under this Agreement.

18. BUSINESS ACTIVITY REPORTING

- A. Contractor shall promptly notify the CAM of the occurrence of any of the following:
 - 1) A change of address.
 - 2) A change in the business name or ownership.
 - 3) The existence of any litigation or other legal proceeding affecting this Agreement.
 - 4) The occurrence of any casualty or other loss to Project personnel, equipment or third parties.
 - 5) Contractor's receipt of notice of any claim or potential claim against Contractor for patent, copyright, trademark, service mark and/or trade secret infringement that could affect the Energy Commission's rights.

- B. Contractor shall not change or reorganize the type of business entity under which it does business except upon prior written notification to the Energy Commission. A change of business entity or name change requires an amendment assigning or novating the Agreement to the changed entity. In the event the Energy Commission is not satisfied that the new entity can perform as the original Contractor, the Energy Commission may terminate this Agreement as provided in the Termination clause.

19. REVIEW AND NOTICE OF CONFLICTING TERMS

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

20. ACCESS TO SITES AND RECORDS

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

21. ASSURANCES

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

22. SURVIVAL

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

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

23. INTERPRETATION OF TERMS

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

24. AMENDMENTS

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

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

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

25. DISCRIMINATION AND HARASSMENT TRAINING

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

EXHIBIT E

Additional Provisions

1. **CONFIDENTIALITY**

A. Information Considered Confidential

All Contractor information considered confidential at the commencement of this Agreement is designated in the Attachment to this Exhibit.

B. Confidential Deliverables: Labeling and Submitting Confidential Information

Prior to the commencement of this Agreement, the parties have identified in the Attachment to this Exhibit, specific Confidential Information to be provided as a deliverable. All such confidential deliverables shall be marked, by the Contractor, as "Confidential" on each page of the document containing the Confidential Information and presented in a sealed package to the Commission Agreement Officer (CAO). (Non-confidential deliverables are submitted to the Accounting Office.) All Confidential Information will be contained in the "confidential" volume: no Confidential Information will be in the "public" volume.

C. Submittal of Unanticipated Confidential Information as a Deliverable

The Contractor and the Energy Commission agree that during this Agreement, it is possible that the Contractor may develop additional data or information not originally anticipated as a confidential deliverable. In this case, Contractor shall follow the procedures for a request for designation of Confidential Information specified in 20 CCR 2505. The Energy Commission's Executive Director makes the determination of confidentiality. Such subsequent determinations may be added to the list of confidential deliverables in the Attachment to this Exhibit.

D. Disclosure of Confidential Information

Disclosure of Confidential Information by the Energy Commission may only be made pursuant to 20 CCR 2506 and 2507. All confidential data, records or deliverables that are legally disclosed by the Contractor or any other entity become public records and are no longer subject to the above confidentiality designation.

2. **INTELLECTUAL PROPERTY ITEMS DEVELOPED PRIOR TO THIS AGREEMENT**

A. Intellectual property information is designated in the Attachment to this Exhibit.

B. The Energy Commission makes no claim to intellectual property that existed prior to this Agreement and was developed without Energy Commission funding.

C. The Contractor gives notice that the items listed in the Attachment to this Exhibit have been developed without Energy Commission funding and prior to the start of this Agreement. This list represents a brief description of the prior developed intellectual property. A detailed description of the intellectual property, as it exists on the effective date of this Agreement, may be necessary if Energy Commission funds are used to further develop the listed intellectual property. This information will assist the parties to make an informed decision regarding intellectual property rights and possible repayment obligations.

3. **ROYALTY PAYMENTS TO ENERGY COMMISSION**

In consideration of Energy Commission providing funding to Contractor, Contractor agrees to pay Energy Commission royalties under the following terms and conditions.

- A. Contractor agrees to pay Energy Commission a royalty of one and one-half percent (1.5%) of the Sale Price on Sales of all Project-Related Products and Rights that the Contractor receives.
- B. Contractor's obligation to make payments to Energy Commission shall commence from the date Project-Related Products and Rights are first sold and shall extend for a period of fifteen (15) years thereafter. Payments are payable in annual installments and are due the first day of March in the calendar year immediately following the year during which Contractor receives Gross Revenues.
- C. Early Buyout. Contractor has the option of paying its royalty obligations to Energy Commission without a pre-payment penalty, provided Contractor makes the royalty payment within two (2) years from the date at which royalties are first due to the Energy Commission. Royalty payment must be in a lump sum amount equal to two (2) times the amount of funds drawn down on the Agreement.
- D. Contractor agrees not to make any Sale, license, lease, gift or other transfer of any Project-Related Products and Rights with the intent of, or for the purpose of, depriving Energy Commission of royalties hereunder. Generally, this means that Contractor will not make any Sale, license, lease or other transfer of Project-Related Products and Rights for consideration other than fair market value. Further, Contractor agrees that such activity constitutes breach of this Agreement and that Contractor agrees to repay within sixty (60) days the amount due under C above (Early Buyout).
- E. Contractor acknowledges that a late payment of royalties owed to the Energy Commission will cause the Energy Commission to incur costs not contemplated by the parties. If a royalty payment is not paid when due, Contractor agrees to pay the Energy Commission a late fee equal to two percent (2%) of the payment due. Additionally, Contractor agrees that royalty payments not paid within fifteen (15) days of the due date shall thereupon become debt obligations of Contractor to the Energy Commission, due upon demand and bearing interest at the maximum interest rate allowed by law.
- F. Contractor shall maintain separate accounts within its financial and other records for purposes of tracking components of Sales and royalties due to Energy Commission under this Agreement.
- G. Payments to Energy Commission are subject to audit as provided for under the Recordkeeping, Cost Accounting and Auditing clause.
- H. In the event of default hereunder, Energy Commission shall be free to exercise all rights and remedies available to it herein, and under law and at equity. The Contractor's failure to pay when due, any amount due and payable shall cause default under this Agreement.

4. **CONFLICT OF INTEREST**

- A. Contractor agrees to continuously review new and upcoming projects in which members of the Contractor team may be involved for potential conflicts of interest. Contractor shall inform the Commission Agreement Manager (CAM) as soon as a question arises about whether a potential conflict may exist. The CAM and Commission's Chief Counsel's Office shall determine what constitutes a potential conflict of interest. The Energy Commission reserves the right to redirect work and funding on a project if the Commission's Chief Counsel's Office determines that there is a potential conflict of interest.
- B. The Contractor shall submit an economic interest statement (Fair Political Practices Commission's Form 700) from each employee or subcontractor whom the Energy Commission's Chief Counsel's Office, in consultation with the CAM, determines is a consultant under the Political Reform Act and, thus, subject to the requirements and restrictions of the Act. Such determination will be based on the nature and duration of the work to be performed by the employee or subcontractor. The determination as to who is a consultant under the Political Reform Act shall be requested by the CAM before work by the employee or subcontractor begins. Each employee and subcontractor determined to be a consultant under the Political Reform Act shall be subject to the same disclosure category or categories applicable to the Energy Commission staff who perform the same nature and scope of work as the consultant.
- C. No person, firm, or subsidiary thereof who has been awarded a consulting services agreement may submit a bid for, nor be awarded an agreement for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services agreement. This does not apply to any person, firm, or subsidiary thereof who is awarded a subcontract of a consulting services agreement which amounts to no more than ten percent (10%) of the total monetary value of the consulting services agreement.

5. **PURCHASE OF EQUIPMENT**

- A. Equipment identified in this Agreement is approved for purchase.
- B. Equipment not identified in this Agreement shall be subject to prior written approval from the CAM.
- C. All Equipment purchased with Energy Commission funds is subject to the following terms and conditions:
 - 1) The Commission Agreement Officer will complete and file a Uniform Commercial Code (UCC.1) Financing Statement with the Secretary of State's Office. Invoices for Equipment purchases associated with a UCC.1 will not be processed until the UCC.1 has been filed with the Secretary of State's Office.
 - 2) Title to all non-expendable Equipment purchased in part or in whole with Energy Commission funds shall remain with the Energy Commission.
 - 3) Contractor shall assume all risk for maintenance, repair, destruction and damage to Equipment while in the possession or subject to the control of Contractor. Contractor is not expected to repair or replace Equipment that is intended to undergo significant modification or testing to the point of damage/destruction as part of the work described in Exhibit A, Scope of Work.

- D. Upon termination or completion of this Agreement, the Energy Commission may:
- 1) if requested by the Contractor, authorize the continued use of such Equipment to further energy research in the public interest;
 - 2) request that such Equipment be delivered to the Energy Commission with any costs incurred for such return to be borne by the Energy Commission.

6. **PREVAILING WAGE**

Public Work -- Payment of Prevailing Wages Generally Required by Law

Projects that receive an award of public funds from the Energy Commission often involve construction, alteration, demolition, installation, repair or maintenance work over \$1,000.

NOTE: Therefore projects that receive an award of public funds from the Energy Commission are likely to be considered public works under the California Labor Code. See Chapter 1 of Part 7 of Division 2 of the California Labor Code, commencing with Section 1720 and Title 8, California Code of Regulations, Chapter 8, Subchapter 3, commencing with Section 16000.

Accordingly, the Energy Commission assumes that all projects it funds are public works. Projects deemed to be public works require among other things the payment of prevailing wages.

NOTE: Prevailing wage rates can be significantly higher than non-prevailing wage rates.

By accepting this contract, Contractor as a material term of this agreement shall be fully responsible for complying with all California public works requirements including but not limited to payment of prevailing wage. Therefore, as a material term of this contract, Contractor must either:

- (a) Proceed on the assumption that the project is a public work and ensure that:
- (i) prevailing wages are paid; and
 - (ii) the project budget for labor reflects these prevailing wage requirements; and
 - (iii) the project complies with all other requirements of prevailing wage law including but not limited to keeping accurate payroll records, and complying with all working hour requirements and apprenticeship obligations;

or,

- (b) Timely obtain a legally binding determination from DIR or a court of competent jurisdiction before work begins on the project that the proposed project is not a public work.

NOTE: Only the California Department of Industrial Relations (DIR) and courts of competent jurisdiction have jurisdiction to issue legally binding determinations that a particular project is or is not a public work.

If the Contractor is unsure whether the project receiving this award is a “public work” as defined in the California Labor Code, it may wish to seek a timely determination from the California Department of Industrial Relations (DIR) or an appropriate court.

NOTE: Such processes can be time consuming and therefore it may not be possible to obtain a timely determination before the date for performance of the award commences.

If the Contractor does not timely obtain a binding determination from DIR or a court of competent jurisdiction that the project is not a public work, before the contract agreement from the Commission is executed, the Contractor shall assume that the project is a public work and that payment of prevailing wages is required and shall pay prevailing wages unless and until such time as the project is subsequently determined to not be a public work by DIR or a court of competent jurisdiction.

NOTE: California Prevailing Wage law provides for substantial damages and financial penalties for failure to pay prevailing wages when payment of prevailing wages is required.

Subcontractors and Flow-down Requirements. Contractor shall ensure that its subcontractors, if any, also comply with above requirements with respect to public works/prevailing wage. Contractor shall ensure that all agreements with its contractors/subcontractors to perform work related to this Project contain the above terms regarding payment of prevailing wages on public works projects. Contractor shall be responsible for any failure of Contractor’s subcontractors to comply with California prevailing wage and public works laws.

Indemnification and breach. Any failure of Contractor or its subcontractors to comply with the above requirements shall constitute a breach of this agreement that excuses the Commission’s performance of this contract agreement at the Commission’s option, and shall be at Contractor’s/Contractor’s sole risk. In such a case, Commission may refuse payment to Contractor of any amount under this award and Commission shall be released, at its option, from any further performance of this award or any portion thereof. By accepting this contract award, as a material term of this agreement, Contractor agrees to indemnify the Energy Commission and hold the Energy Commission harmless for any and all financial consequences arising out of or resulting from the failure of Contractor and/or any of Contractor’s subcontractors to pay prevailing wages or to otherwise comply with the requirements of prevailing wage law.

Budget. Contractor’s budget on public works projects must indicate which job classifications are subject to prevailing wage. For detailed information about prevailing wage and the process to determine if the proposed project is a public work, Contractor may wish to contact the California Department of Industrial Relations (DIR) or a qualified labor attorney of their choice for guidance.

Covered Trades. For public works projects, Contractor may contact DIR for a list of covered trades and the applicable prevailing wage.

Questions. If Contractor has any questions about this contractual requirement or the wage, record keeping, apprenticeship or other significant requirements of California prevailing wage law, it is recommended that Contractor consult DIR and/or a qualified labor attorney of its choice before accepting the award for this contract.

Certification. Contractor shall certify to the Energy Commission on each Payment Request Form, either that (a) prevailing wages were paid to eligible workers who provided labor for work covered by the payment request and that the Contractor and all contractors and subcontractors otherwise complied with all California prevailing wage laws, or (b) that the project is not a public work requiring the payment of prevailing wages. In the latter case, Contractor shall provide competent proof of a DIR or court determination that the project is not a public work requiring the payment of prevailing wages.

Prior to the release of any retained funds under this Agreement, the Contractor shall submit to the Energy Commission the above-described certificate signed by the Contractor and all contractors and subcontractors performing public works activities on the project. Absent such certificate, Contractor shall have no right to any funds under this contract, and Commission shall be relieved of any obligation to pay said funds.

CAO to decide whether the following clauses are appropriate for this specific Agreement.

7. **WORK AUTHORIZATIONS**

A. Process

- 1) The CAM, with the assistance of the Contractor shall prepare Work Authorizations (WAs) directing the work of the Contractor. The CAM will provide the WA format.
- 2) The WA shall be signed by the Contractor's authorized individual and by the CAM. The CAM shall sign after the Contractor. In addition to the CAM, the WA may also be signed by Energy Commission staff serving as Project Manager for the individual WA.
- 3) The CAM shall submit the signed WA to the Commission Agreement Officer. The WA will be submitted to the Department of General Services (DGS) for review and final approval. No work shall begin until the WA is approved by DGS. The effective date of the WA is the DGS approval date.
- 4) DGS returns the approved WA to the Contracts Office for final distribution.

B. Content of WA

Each WA shall include:

Each WA shall include:

- 1) Agreement Number
- 2) WA Number
- 3) WA Title
- 4) Effective Date (date approved by The Department of General Services)
- 5) End Date

- 6) Funding Source
- 7) Objective or goal of the WA
- 8) What task the WA falls within in the Agreement
- 9) Detailed scope of work and tasks
- 10) Schedule of Due Dates and Deliverables
- 11) Contact Information
- 12) Contractor and Subcontractor personnel who will perform the work
- 13) Identification of DVBE, if applicable
- 14) Detailed Budget
 - Hours and unloaded hourly rates by person or job classification, as allowed by Agreement budget
 - Fringe benefits rates, indirect overhead rates, general & administrative rates and profit rates.
 - Travel and per diem, as allowed by Agreement budget
 - Other direct operating expenses, as allowed by Agreement budget
- 15) Other items as required by CAM

C. Amendments.

- 1) An amendment is required for the following changes, including but not limited to:
 - Changes to the scope of work (i.e. new or changed work)
 - Adding Funds
 - Extending the Term
- 2) Amendments shall be approved and signed using the same process as the original WA.
- 3) Amendments must be made prior to the termination date of the original WA or as amended.
- 4) WA budget reallocations in accordance with the Budget Reallocation provision in Exhibit B.

D. Changes without Amendment

The CAM may make the following changes to the WA without an amendment upon written notification to Contractor:

- 1) Changes to deliverable due dates, as long as the due dates do not go beyond the end term of the WA.
- 2) Minor scope of work changes that only correct grammatical errors or reference mistakes.
- 3) Changes to add or replace persons providing service as directed by the CAM. The process for adding, replacing or substituting persons providing service on a WA is included in Exhibit D, Subcontracts paragraph.
- 4) WA budget reallocations in accordance with the Budget Reallocation provision in Exhibit B.

E. Stop Work

The Energy Commission reserves the right to require the Contractor to stop or suspend work on any WA. The CAM, in consultation with the CAO, shall provide notice in writing to the Contractor of the date work is stopped or suspended. Costs incurred up to that date shall be reimbursed in accordance with the Stop Work clause in Exhibit D.

F. Termination of WA

The CAM, in consultation with the CAO, may terminate the WA without cause with 30 days written notice to Contractor. Costs incurred up to that date shall be reimbursed in accordance with the termination clause in Exhibit D.

G. Incorporated into Agreement

Each WA shall be incorporated into this Agreement. However, it is understood and agreed by both parties that all of the terms and conditions of this Agreement shall remain in force with the inclusion of any such WA. A WA shall in no way constitute an independent Agreement, nor in any way amend or supersede any of the other provisions of this Agreement.

H. Payment

Payment for services is based upon an approved budget in each WA. Any costs or expenses incurred by the Contractor or any subcontractor that have not been identified in the WA shall be borne by the Contractor.

I. Costs

The actual cost of an approved, completed WA shall not exceed the authorized amount of the WA budget. If, in the performance of the WA, the Contractor or CAM determines that the total cost might exceed the WA budget amount, Contractor or CAM shall immediately notify the other. Upon such notification, the CAM may:

- 1) Amend the WA scope of work to accomplish the work within the budget; or
- 2) Amend the WA to augment the budget; or
- 3) Direct the Contractor to complete the work for the budgeted amount without changes to the scope of work;
- 4) Terminate the WA.

8. **MULTI-YEAR FUNDING**

Commission Agreement Officer to customize—use this term when the termination date is after the expiration date of the first year's funding.

Funding for this Agreement is from two (change number if more than two) fiscal years (FY), \$100,000 from FY 2008-09 and \$100,000 from FY 2009-10. Funding for FY 2008-09, expires on June 30, 2011. To make payments from FY 2008-09 prior to the expiration date, all contract services, products, deliverables and invoices using these funds must be received by the Energy Commission by April 30, 2011. The Energy Commission does not warrant or guarantee that payment will be made for services, products or deliverables performed if invoices are received after April 30, 2011.

EXHIBIT G

Definitions

1. **Affiliate of the Contractor** means any natural person, corporation, partnership, joint venture, sole proprietorship or other business entity directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Contractor. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by agreement, or otherwise. For purposes of this Agreement, it is presumed that ownership or control of the voting power of more than fifty percent (50%) of the voting stock or partnership interests in an entity constitutes control of that entity.
2. **Agreement Budget** refers to the Energy Commission reimbursable and Contractor's Matching Fund expenditures for that portion of the Project covered by the Agreement.
3. **Agreement Period** is the length of this Agreement between the Energy Commission and the Contractor. The Contractor's Project may coincide with or extend outside the Agreement Period.
4. **Date** means calendar date.
5. **Agreement Start Date** is the date the Contractor may begin work that incurs expenses for which the Energy Commission will reimburse the Contractor. No work may begin until Department of General Services (DGS) approves the Agreement, if required.
6. **Agreement End Date** is the date the Contractor must stop work that incurs expenses for which the Energy Commission will reimburse the Contractor.
7. **Confidential Information** is information Contractor has submitted to the Energy Commission and has satisfactorily identified and which the Energy Commission has agreed to designate as confidential pursuant to Title 20 CCR 2501 and following (and amendments).
8. **Economic Benefit** for a Project co-funded using Energy Commission funds means the realization of economic gain or other tangible benefits by the Contractor or Affiliate of the Contractor (except bona fide third party purchasers of Contractor's commercial products) through the use of Project-Related Products and Rights, including but not limited to, operation, sale, distribution or manufacturing; or by any other transaction, including but not limited to, grant, rent, loan, equity, option, transfer, license or other fee; or by Otherwise Disposing of the Project-Related Products and Rights. The Energy Commission may rely upon professional accounting opinion in making a final determination of the dollar value of Gross Revenues, and such determination shall be the basis for calculating the royalty payment due the Energy Commission.
9. **Equipment** is defined as having a useful life of at least one year, having an acquisition unit cost of at least \$5,000, and purchased with Energy Commission funds. **Equipment** means any products, objects, machinery, apparatus, implements or tools purchased, used or constructed within the Project, including those products, objects, machinery, apparatus, implements or tools from which over thirty percent (30%) of the equipment is composed of Materials purchased for the Project. For purposes of determining depreciated value of equipment used in the Agreement, the Project shall terminate at the end of the normal useful life of the equipment purchased, funded and/or developed with Energy Commission funds. The Energy Commission may determine the normal useful life of such equipment.

10. **Gross Revenues** means the gross Sales Price, rentals and other amounts received by Contractor from or on account of the Sale, lease, or other transfer or use of Project-Related Products and Rights, less sales tax paid. Gross Revenues shall be determined as above and in accordance with appropriate Federal cost principles and any Economic Benefit.
11. **Key Partners** are participants in the Project who are not receiving PIER funds or are not providing Match Funds but are integral to the outcome of the Project. Key Partners may be providing space, testing facilities, demonstration sites or a manufacturer or other implementer of the Project results.
12. **Key Personnel** are employees or consultants of the Contractor who are critical to the outcome of the Project. For example, they may have expertise in the particular field, or have experience that is not available from another source. Replacing these individuals may affect the outcome of the Project.
13. **Key Subcontractors** are contractors, subcontractors or vendors to the Contractor and who are critical to the outcome of the Project. As with Key Personnel, Key Subcontractors may have expertise in the particular field, or have experience that is not available from another source and replacement may significantly affect the Project. An employee of the Contractor's subcontractor or vendor may also qualify as "key."
14. **Match Fund Participant** means any party that supplies Match Funds to the Project.
15. **Match Funds** means cash or in-kind (non-cash) contributions provided by Contractor, subcontractors or other parties that will be used in performance of this Agreement.
16. **Materials** means the substances used in constructing a finished object, commodity, device, article or product.
17. **Otherwise Disposing Of** means (1) Project-Related Products and Rights not sold but delivered by the Contractor or Affiliate of the Contractor to others regardless of the basis for compensation, if any; and (2) Project-Related Products and Rights put into use by the Contractor or any third party for any purpose other than testing or evaluation of the Project-Related Products and Rights.
18. **Project** refers to the entire effort undertaken and planned by the Contractor and consisting of the work co-funded by the Energy Commission. The Project may coincide with or extend beyond the Agreement period.
19. **Project-Related Products and Rights** means any and all inventions, discoveries, machines, designs, computer software, products, devices, mechanisms, methods, protocols, processes, algorithms, flowcharts, diagrams, trade secrets, data, copyrights, patents, trademarks, proprietary rights, and the like created or made or discovered or first reduced to practice by the Contractor or other third party as a result, in whole or in part, of the Agreement award(s) and any and all updates, revisions, modification, enhancements, derivations, variations, additions, continuations, renewals, and extensions thereto and all proceeds and products therefrom.
20. **Sale** is sale, license, lease, gift or other transfer of Project-Related Products and Rights.
21. **Sales Price** means Gross Revenues, excluding normal returns and allowances such as sales tax, freight and insurance, if applicable, derived from a Sale.

22. **Subject Invention** means any and all invention or discovery conceived, or first actually reduced to practice in the course of or under the Energy Commission-funded portion of this Agreement (i.e., that portion of this Agreement for which Contractor has invoiced the Energy Commission and received reimbursement) and includes any art, method, process, machine, manufacture design or composition of matter, or any new and useful improvement thereof, whether patented or unpatented, under the patent laws of the United States of America or any foreign country.
23. **Technology** refers to the general subject area where the product or innovation will be used. For example, solar thermal electric generation is a Technology area; direct steam generation is an innovation in this Technology area.
24. **Terms Relating to Data**
- A. **Technical Data** or **Data** as used throughout this Agreement means recorded information regardless of form or characteristic, of a scientific or technical nature and used in the performance of this Agreement. It may, for example, document research; document experimental, developmental, demonstration, or engineering work; or be usable or used to define a design or process; or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, test specifications or related performance or design type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of Technical Data include manufacturing techniques and methods, machinery, devices such as tools, products, or components, research and engineering data, engineering drawings and associated lists, specifications, engineering calculations, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical Data as used herein does not include financial reports, cost analyses and other information incidental to administration of this Agreement.
- B. **Proprietary Data** is such data as Contractor has identified in a satisfactory manner as being under Contractor's control prior to commencement of performance of this Agreement, and which Contractor has reasonably demonstrated as being of a proprietary nature either by reason of copyright, patent or trade secret doctrines in full force and effect at the time when performance of this Agreement is commenced. Proprietary Data also includes data of a proprietary nature produced during the course of this Agreement that is produced by Contractor or its subcontractors at their own expense.
- C. **Generated Data** is that data that the Contractor collects, collates, records, deduces, reads out or postulates for use in the performance of this Agreement. In addition, any electronic data processing program, model or software system developed or substantially modified by the Contractor in the performance of this Agreement at Energy Commission expense, together with complete documentation thereof, shall be treated as Generated Data.
- D. **Deliverable Data** is that data which, under the terms of this Agreement, is required to be delivered to the Energy Commission.
25. A **Trade Secret** is any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented and which is generally known only to certain individuals with a commercial concern and are using it to fabricate, produce or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

26. **Government Entity** is a governmental agency from California or any state or a state college or state university from California or any state. A local governmental entity or agency, including those created as a Joint Powers Authority. An auxiliary organization of the California State University, or a California community college. The Federal government. A foundation organized to support the Board of Governors of the California Community Colleges or an auxiliary organization of the Student Aid Commission established under Education Code 69522.

EXHIBIT H
Public Interest Energy Research (PIER) Subcontract Flow-Down Provisions

The following language must be included in all subcontracts executed by PIER contractors. This language is the minimum that must be contained in subcontracts. Contractor may include other provisions as well. Contractor should use this template and fill in the name of the Contractor and Subcontractor as appropriate in each place where there is a _____ blank.

=====

This Agreement is funded by or funded in part by the California Energy Commission (Energy Commission) Public Interest Energy Research (PIER) Program. _____ [Contractor] entered into a prime contract with the Energy Commission. This Agreement between _____ [Contractor] and _____ [Subcontractor] is a subcontract to the prime contract.

1. STANDARD OF PERFORMANCE

_____ [Subcontractor] shall be responsible in the performance of _____'s [Subcontractor] work under this Agreement for exercising the degree of skill and care required by customarily accepted good professional practices and procedures used in scientific and engineering research fields. Any costs for failure to meet these standards, or otherwise defective services, which require re-performance, as directed by _____ [Contractor], shall be borne in total by the _____ [Subcontractor] and not the Energy Commission or _____ [Contractor]. In the event the _____ [Subcontractor] fails to perform in accordance with the above standard the following will apply:

- A. _____ [Subcontractor] will re-perform, at its own expense, any task, that was not performed to the reasonable satisfaction of _____ [Contractor]. Any work re-performed pursuant to this clause shall be completed within the time limitations originally set forth for the specific task involved. _____ [Subcontractor] shall work any overtime required to meet the deadline for the task at no additional cost to _____ [Contractor].
- B. _____ [Contractor] shall provide a new schedule for the re-performance of any task pursuant to this clause in the event that re-performance of a task within the original time limitations is not feasible.
- C. In the event _____ [Subcontractor] fails to perform in accordance with the foregoing standard of performance, _____ [Contractor] and _____ [Subcontractor] shall seek to negotiate in good faith an equitable resolution satisfactory to both parties.

2. RECORDKEEPING, COST ACCOUNTING AND AUDITING

- A. Recordkeeping. _____ [Subcontractor] shall maintain all records, documents or other evidence relating to direct and indirect expenses reimbursed to _____ [Subcontractor] hereunder, and to hours of employment on this Agreement by all employees of _____ [Subcontractor] for which _____ [Contractor] is billed. These records shall be sufficient to reflect all costs claimed to have been incurred in performing this Agreement.

- B. Accounting Procedures. _____'s [Subcontractor] costs shall be determined on the basis of the _____'s [Subcontractor] accounting system procedures and practices employed as of the effective date of this Agreement. _____'s [Subcontractor] accounting system shall distinguish between direct costs and indirect costs. All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to costs incurred under this Agreement.
- C. Allowability of Costs.
- 1) Allowable Costs. Allowable costs may include all costs, direct and indirect, incurred in the performance of work and capped as identified in the budget for this Agreement. Costs must be incurred within the term of the Agreement. Factors to be considered in determining whether an individual item of cost is allowable include (i) reasonableness of the item, (ii) allowability of the item to the work, and (iii) the terms and conditions of this Agreement.
 - 2) Unallowable Costs. Some examples of unallowable costs include: contingency costs, imputed costs, fines and penalties, losses on contracts, excess profit taxes, and increased contract rates and fees for this Agreement.

3. **AUDIT**

_____ [Subcontractor] agrees that the Energy Commission, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this Agreement. _____ [Subcontractor] agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. _____ [Subcontractor] agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, _____ [Subcontractor] agrees to include a similar right of the State to audit records and interview staff in any subcontract between _____ [Subcontractor] and a third party related to performance of this Agreement ("lower tier subcontracts").

4. **PURCHASE OF EQUIPMENT**

If equipment is purchased with Energy Commission funds, the following applies:

- A. Equipment is defined as having a useful life of at least one year, having an acquisition unit cost of at least \$5,000, and purchased with Energy Commission funds. Equipment means any products, objects, machinery, apparatus, implements or tools purchased, used or constructed within the Project, including those products, objects, machinery, apparatus, implements or tools from which over thirty percent (30%) of the equipment is composed of materials purchased for the Project. For purposes of determining depreciated value of equipment used in the Agreement, the Project shall terminate at the end of the normal useful life of the equipment purchased, funded and/or developed with Energy Commission funds. The Energy Commission may determine the normal useful life of such equipment.
- B. Materials means the substances used in constructing a finished object, commodity, device, article or product.

- C. Title to all non-expendable equipment purchased in part or in whole with Energy Commission funds shall remain with the Energy Commission. The Energy Commission will complete and file a UCC.1 with the Secretary of State's Office for all such equipment.
- D. _____ [Subcontractor] shall assume all risk for maintenance, repair, destruction and damage to equipment while in the possession or subject to the control of _____ [Subcontractor]. _____ [Subcontractor] is not expected to repair or replace equipment that is intended to undergo significant modification or testing to the point of damage/destruction.
- E. Upon termination of this Agreement, the Energy Commission may:
 - 1) if requested by _____ [Contractor], authorize _____'s [Subcontractor] continued use of such equipment to further energy research in the public interest,
 - 2) by mutual agreement with _____ [Contractor], allow _____ [Subcontractor] to purchase such equipment for an amount not to exceed the residual value of the equipment as of the date of termination of this Agreement, or
 - 3) request that such equipment be delivered to the Energy Commission with any costs incurred for such return to be borne by the Energy Commission.

5. **RIGHTS OF PARTIES REGARDING DELIVERABLES, DATA & INTELLECTUAL PROPERTY**

A. Energy Commission's Rights in Deliverables

Deliverables and reports specified for delivery to the _____ [Contractor] for the Energy Commission's use under this Agreement shall become the property of the Energy Commission. The Energy Commission may use, publish, and reproduce the deliverables and reports subject to the provisions of clause 6 below.

B. Rights in Technical, Generated, and Deliverable Data

- 1) _____'s [Subcontractor's] Rights. All technical, generated and deliverable data produced under this Agreement shall be limited by the license retained by the Energy Commission in 2) below, and the rights the Energy Commission has in deliverables specified above in A).
- 2) Energy Commission's Rights. _____ [Subcontractor] shall provide Energy Commission Agreement Manager (through _____ [Contractor]), with a copy of all technical, generated and deliverable data produced under this Agreement when requested by the Energy Commission. _____ [Subcontractor] is not required to copy and submit data the Energy Commission Agreement Manager has identified as being unusable to the Energy Commission and the PIER program such as raw data that is too disaggregated or voluminous for practical application. Such Data shall be retained at _____'s [Subcontractor's] facility for inspection, review and possible copying by the Commission Agreement Manager for a minimum of three (3) years after final payment unless a longer period of records retention is stipulated.

Upon request by Contractor or Commission Agreement Manager, _____ [Subcontractor] shall provide the Energy Commission Agreement Manager and any designated reviewer(s), access to review technical and generated data produced in the course of this Agreement that is not requested to be a deliverable.

For all technical, generated and deliverable data produced under this Agreement, the Energy Commission retains a no-cost, non-exclusive, non-transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, produce and to authorize others to produce, translate, publish and use the data, subject to the provisions of clause 6 below.

- C. Exclusive Remedy. In the event the Energy Commission intends to publish or has disclosed data _____ [Subcontractor] considers confidential, _____'s [Subcontractor's] exclusive remedy is a civil court action for injunctive relief. Such court action shall be filed in Sacramento County, Sacramento, California.
- D. Waiver of Consequential Damages.

IN NO EVENT WILL THE ENERGY COMMISSION BE LIABLE FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BASED ON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT TORT, OR ANY OTHER LEGAL THEORY FOR THE DISCLOSURE OF _____'s [SUBCONTRACTOR'S] CONFIDENTIAL RECORDS, EVEN IF THE ENERGY COMMISSION HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. DAMAGES THAT THE ENERGY COMMISSION WILL NOT BE RESPONSIBLE FOR INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFIT; LOSS OF SAVINGS OR REVENUE; LOSS OF GOODWILL; LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT; COST OF CAPITAL; COST OF ANY SUBSTITUTE EQUIPMENT, FACILITIES, OR SERVICES; DOWNTIME; THE CLAIMS OF THIRD PARTIES INCLUDING CUSTOMERS; AND INJURY TO PROPERTY.

- E. Proprietary Data. Proprietary data owned by _____ [Subcontractor] shall remain with _____ [Subcontractor] throughout the term of this Agreement and thereafter. The extent of _____ [Contractor] or the Energy Commission access to the same and the testimony available regarding the same shall be limited to that reasonably necessary to demonstrate, in a scientific manner to the satisfaction of scientific persons, the validity of any premise, postulate or conclusion referred to or expressed in any deliverable hereunder. Upon request by _____ [Contractor] or the Energy Commission Agreement Manager, _____ [Subcontractor] shall provide the Energy Commission Agreement Manager and any designated reviewer(s) access to review _____ [Subcontractor's] proprietary data produced in the course of this Agreement that is not requested to be a deliverable. Neither _____ [Contractor] nor the Energy Commission shall disclose any _____'s [Subcontractor] proprietary data access or reviewed to any third party.
- F. Preservation of Data. Any data that is reserved to _____ [Subcontractor] by the express terms hereof, and pre-existing proprietary or confidential data that have been utilized to support any premise, postulate or conclusion referred to or expressed in any deliverable hereunder, shall be preserved by _____ [Subcontractor] at _____'s [Subcontractor] own expense for a period of not less than three years after final payment, unless a longer period of records retention is stipulated.

- G. Destruction of Data. Before the expiration of three years or the stipulated records retention period and before changing the form of or destroying any technical, generated or deliverable data or trade secrets, _____ [Subcontractor] shall notify _____ [Contractor] of any such contemplated action and the Energy Commission may, within thirty (30) days after said notification, determine whether it desires said data to be further preserved. If the Energy Commission so elects, the expense of further preserving said data shall be paid for by the Energy Commission. _____ [Subcontractor] agrees that the Energy Commission may at its own expense, have reasonable access to said data throughout the time during which said data is preserved. _____ [Subcontractor] agrees to use its best efforts to identify competent witnesses to testify in any court of law regarding said data or, at the Energy Commission's expense, to furnish such competent witnesses.
- H. Patent Rights. Ownership of patent rights between ____ [Contractor] and _____ [Subcontractor] is not addressed in this paragraph. However, the Energy Commission retains certain patent rights in its prime contract with _____ [Contractor]. ____ [Subcontractor] acknowledges the following minimum Energy Commission patent rights for subject inventions: The Energy Commission retains a no-cost, nonexclusive, nontransferable, irrevocable, royalty-free, worldwide perpetual license to use or have practiced for or on behalf of the State of California subject invention(s) for governmental purposes. The owner of subject invention(s) must obtain agreements to effectuate this clause with all persons or entities, except for the U.S. Department of Energy (DOE), obtaining ownership interest in the patented subject invention(s). Previously documented (whether patented or unpatented under the patent laws of the United States of America or any foreign country) inventions are exempt from this provision.
- I. March-In Rights. If _____ [Subcontractor] is the owner of a subject invention, _____ [Subcontractor] shall forfeit and assign to the Energy Commission, at the Energy Commission's request, all rights on a subject invention if either: 1) _____ [Subcontractor] fails to apply for a patent on subject inventions(s) developed under this Agreement within six months of conceiving or first actually reducing to practice the technology; or 2) _____ [Subcontractor] or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention. In this event, _____ [Subcontractor] agrees to relinquish all rights, subject to DOE reserved rights, on the subject invention to the Energy Commission. The Energy Commission will have the unfettered right to use and/or dispose of the rights in whatever manner it deems most suitable to help transfer the technology into the market place, including but not limited to, seeking patent protection, or licensing the invention.
- J. Energy Commission's Rights to Invention. _____ [Subcontractor] and all persons and/or entities obtaining an ownership interest in subject invention(s) shall include within the specification of any United States patent application, and any patent issuing thereon covering a subject invention, the following statement:

THIS INVENTION WAS MADE WITH STATE OF CALIFORNIA SUPPORT UNDER CALIFORNIA ENERGY COMMISSION AGREEMENT NUMBER 500-xx-xxx. THE ENERGY COMMISSION HAS CERTAIN RIGHTS TO THIS INVENTION.

K. Energy Commission's Interest in Inventions. If _____ [Subcontractor] perfects a patent application on any subject invention, _____ [Subcontractor] shall notify Contractor in order for the Energy Commission to prepare and file a Uniform Commercial Code (UCC.1) Financing Statement with the Secretary of State's Office.

L. Copyrights.

- 1) If _____ [Subcontractor] is the owner of a copyright, _____ [Subcontractor] agrees to grant the Energy Commission a royalty-free, no-cost nonexclusive, irrevocable, nontransferable worldwide, perpetual license to produce, translate, publish, use and dispose of, and to authorize others to produce, translate, publish, use and dispose of all copyrightable material first produced or composed in the performance of this Agreement.
- 2) _____ [Subcontractor] will apply copyright notices to all documents prepared for this Agreement that will be released to the public including reports, deliverables, articles submitted for publication and all reprints using the following form or such other form as may be reasonably specified by _____ [Contractor].

©[YEAR OF FIRST PUBLICATION OF DELIVERABLE],

[THE COPYRIGHT HOLDER'S NAME].

ALL RIGHTS RESERVED.

- 3) In the event _____ [Subcontractor] develops software that is not a deliverable under the Agreement, but is first produced or composed in the performance of the Agreement, and if _____ [Subcontractor] is the owner of the software, _____ [Subcontractor] shall grant the Energy Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable, worldwide, perpetual license to produce and use the software, its derivatives and upgrades for governmental purposes.

M. Intellectual Property Indemnity. _____ [Subcontractor] warrants that _____ [Subcontractor] will not, in its supplying of the work under this Agreement, knowingly infringe or misappropriate any intellectual property right of a third party, and that it will conduct a reasonable investigation of the intellectual property rights of third parties to avoid such infringement. _____ [Subcontractor] will defend and indemnify _____ [Contractor] and Energy Commission from and against any claim, lawsuit or other proceeding, loss, cost, liability or expense (including court costs and reasonable fees of attorneys and other professionals) to the extent arising out of: (i) any third party claim that a deliverable infringes any patent, copyright, trade secret or other intellectual property right of any third party, or (ii) any third party claim arising out of the negligent or other tortious act(s) or omission(s) by _____ [Subcontractor], its employees, lower tier subcontractors or agents, in connection with or related to the deliverables or the _____'s [Subcontractor's] performance thereof under this Agreement.

6. **LIMITATION ON DISCLOSURE OF INFORMATION**

- A. _____ [Subcontractor] must receive approval from _____ [Contractor] before disclosing to any third party the contents of any draft deliverable or report.
- B. After any document submitted has become a part of the public records of the State, _____ [Subcontractor] may, if it wishes to do so at its own expense, publish or utilize the same, and shall include the Legal and Copyright notices required above.

- C. In the event any public statement is made by the Energy Commission as to the role of _____[Subcontractor] or the content of any deliverable or report, _____ [Subcontractor] may, if it believes such statement to be incorrect, state publicly what it believes is correct.
- D. No record that is provided to _____ [Subcontractor] by the Energy Commission or _____ [Contractor] for _____'s [Subcontractor's] use in performing this Agreement and which has been designated as confidential information, or is the subject of a pending application for confidential designation, except as provided in Title 20, CCR Section 2505 and following (and amendments), shall be disclosed by _____ [Subcontractor], unless disclosure is ordered by a court of competent jurisdiction. At the election of _____ [Contractor] or the Energy Commission Agreement Manager, _____ [Subcontractor], its employees and any lower tier subcontractor shall execute a confidentiality agreement supplied by _____ [Contractor] or the Energy Commission.
- E. _____ [Subcontractor] acknowledges that each of its officers, employees, and lower tier subcontractors who are involved in the performance of this Agreement will be informed about these restrictions and be directed to abide by the above terms.
- F. Data provided to the Energy Commission by _____ [Subcontractor], which data the Energy Commission has not already agreed to keep confidential and which _____ [Subcontractor] seeks to have designated as confidential, or is the subject of a pending application for confidential designation, will not be disclosed by the Energy Commission except as provided in Title 20 CCR Sections 2506 and 2507 (and amendments), unless disclosure is ordered by a court of competent jurisdiction.

7. **NO FURTHER ASSIGNMENTS**

_____ [Subcontractor] shall not make any assignment of this Agreement to any third party without advance written consent of the _____ [Contractor].

8. **NON-DISCRIMINATION**

During the performance of this Agreement, _____ [Subcontractor] and any of its lower tier subcontractors shall not unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (cancer), age (over 40), marital status, and denial of family care leave. _____ [Subcontractor] shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. _____ [Subcontractor] shall comply with the provisions of the Fair Employment and Housing Act (Government Code Section 12990 (a-f) et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285 et seq.). The applicable regulations of the Fair Employment and Housing Energy Commission implementing Government Code Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations, are incorporated into this Agreement by reference and made a part hereof as if set forth in full. _____ [Subcontractor] shall give written notice of its obligations under this clause to labor organizations with which they have a collective bargaining or other Agreement. _____ [Subcontractor] shall include the nondiscrimination and compliance provisions of this clause in all subcontracts between _____ [Subcontractor] and a lower tier subcontractor to perform work under this Agreement.

9. **STOP WORK**

_____ [Contractor] may, at any time, by written notice to _____ [Subcontractor], require _____ [Subcontractor] to stop all or any part of the work tasks in this Agreement. Stop work orders may be issued for reasons such as a Project exceeding budget, standard of performance, out of scope work, delay in Project schedule, misrepresentations and the like.

- A. Compliance. Upon receipt of such stop work order, _____ [Subcontractor] shall immediately take all necessary steps to comply therewith and to minimize the incurrence of costs allocable to work stopped.
- B. Equitable Adjustment. An equitable adjustment shall be made by _____ [Contractor] based upon a written request by _____ [Subcontractor].
- C. Canceling a Stop Work Order. _____ [Subcontractor] shall resume the work only upon receipt of written instructions from the _____ [Contractor].

10. **TERMINATION**

[NOTE: SUBCONTRACT MUST CONTAIN TERMINATION RIGHTS OF THE CONTRACTOR SIMILAR TO THE CAUSE/FOR CAUSE OPTIONS BELOW. Contractor may use its own standard termination language as long as Contractor retains the right to terminate with and without cause. Contractor may use the language below if it does not have standard termination language. Contractor may add a right of Subcontractor to terminate, but Subcontractor's right to terminate is not encouraged, so sample language is not included here.]

This Agreement may be terminated as follows:

- A. In the event of breach by _____ [Subcontractor] of the conditions in this Agreement, _____ [Contractor] may, without prejudice to any of its legal remedies, terminate this Agreement for cause, upon five days written notice to _____ [Subcontractor].
- B. _____ [Contractor], may at its option, terminate this Agreement without cause, upon giving 30 days written notice to _____ [Subcontractor]. In such event, _____ [Subcontractor] agrees to use all reasonable efforts to mitigate its expenses and obligations under this Agreement.

11. **ACCESS TO SITES & RECORDS**

_____ [Contractor] and Energy Commission staff or its representatives shall have reasonable access to all Project sites and all records related to this Agreement. _____ [Subcontractor] shall ensure the same access rights for all lower tier subcontractors.

12. **CONFLICT OF INTEREST**

- A. Conflicts in General. _____ [Subcontractor] agrees to continuously review new and upcoming Projects in which members of the _____ [Subcontractor] team may be involved for potential conflicts of interest and report potential conflicts to _____ [Contractor].

NOTE: Section B applies to subcontracts under PIER Tech support contracts:

B. Contracting.

- 1) Bidding Activities. _____ [Subcontractor] agrees not to bid as an independent consultant on the following:
 - a) A request for proposal (RFP) or Project on which _____ [Contractor] or _____ [Subcontractor] has provided assistance under this Agreement.
 - b) Every related RFP or subject that currently receives assistance or receives assistance during this Agreement under the PIER Program or intends to apply for such assistance under the PIER Program and makes that fact known to _____ [Contractor] or _____ [Subcontractor].
- 2) Reviewing, Evaluation & Assistance Activities. _____ [Subcontractor] shall be disqualified from participating in the review, evaluation, or assistance of:
 - a) Any Project seeking assistance under the PIER Program for which _____ [Subcontractor] has become an independent consultant in a situation not covered by 1) above; or,
 - b) Any Project for which, within twelve (12) months prior to the start date of this Agreement or at any time during this Agreement, _____ [Subcontractor] has provided assistance under a separate agreement to the Project proponent that is seeking assistance for the same Project under the PIER Program.
- 3) Lower Tier Subcontractors
_____ [Subcontractor] shall require each of its lower tier subcontractors who will be involved in the performance of this Agreement to agree to the above terms. The terms of this paragraph shall remain in effect for the duration of this Agreement.

13. LEGAL NOTICE

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

LEGAL NOTICE

THIS REPORT WAS PREPARED AS A RESULT OF WORK SPONSORED BY THE CALIFORNIA ENERGY COMMISSION (ENERGY COMMISSION). IT DOES NOT NECESSARILY REPRESENT THE VIEWS OF THE ENERGY COMMISSION, ITS EMPLOYEES, OR THE STATE OF CALIFORNIA. THE ENERGY COMMISSION, THE STATE OF CALIFORNIA, ITS EMPLOYEES, CONTRACTORS, AND SUBCONTRACTORS MAKE NO WARRANTY, EXPRESS OR IMPLIED, AND ASSUME NO LEGAL LIABILITY FOR THE INFORMATION IN THIS REPORT; NOR DOES ANY PARTY REPRESENT THAT THE USE OF THIS INFORMATION WILL NOT INFRINGE UPON PRIVATELY OWNED RIGHTS. THIS REPORT HAS NOT BEEN APPROVED OR DISAPPROVED BY THE ENERGY COMMISSION NOR HAS THE ENERGY COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THE INFORMATION IN THIS REPORT.

14. **SURVIVAL**

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

- Recordkeeping, Cost Accounting and Auditing
- Audit
- Purchase of Equipment
- Rights of Parties Regarding Deliverables, Data and Intellectual Property
- Access to Sites and Records

EXHIBIT I
INFORMATION PRACTICES ACT
SPECIAL TERMS AND CONDITIONS

<CAO – Only include these terms if the contractor/recipient will collect or obtain personal information as part of its activities. (delete these instructions)>

1. Priority of these Special Terms

In the event of a conflict between these Special Terms and other terms in this Agreement, these Special Terms shall govern.

2. Recipient and All Subcontractors shall comply with the Information Practices Act

The Information Practices Act (“IPA”) is codified at California Civil Code sections 1798 et seq. Personal Information is defined in the IPA at Civil Code section 1798.3(a). **<Insert Recipient Name>** (“Recipient”), shall comply and ensure that all of its subcontractors and project partners shall comply with the IPA relative to the activities under this Agreement. This includes but is not limited to complying with Section 1798.16 (Personal Information; maintaining sources of information) and Section 1798.17 (Notice; periodic provision; contents). For example:

- A. Sources of information. Recipient, and Recipient’s subcontractors and project partners, shall maintain a record of the source of an individual’s Personal Information in accordance with § 1798.16. Per IPA § 1798.16, this requirement does not apply if the data subject is the source of the Personal Information.
- B. Use of information. Pursuant to IPA § 1798.14, the Recipient, and Recipient’s subcontractors and project partners shall only use Personal Information for the purposes of this Agreement. Recipient, and Recipient’s subcontractors and project partners shall not disclose any Personal Information to any person or entity other than the Energy Commission and Energy Commission employees.
- C. Security. Pursuant to IPA § 1798.21, Recipient, and Recipient’s subcontractors and project partners, shall employ appropriate and reasonable safeguards to ensure the security and confidentiality of Personal Information and to protect against anticipated threats or hazards to their security or integrity which could result in any injury.
- D. Notice. On or with any form used to collect Personal Information from individuals, the Recipient, and Recipient’s subcontractors and project partners, shall provide the notice required in § 1798.17. At the time of executing this agreement, § 1798.17 requires the following:
 - (a) The name of the agency and the division within the agency that is requesting the information.
 - (b) The title, business address, and telephone number of the agency official who is responsible for the system of records and who shall, upon request, inform an individual regarding the location of his or her records and the categories of any persons who use the information in those records.
 - (c) The authority, whether granted by statute, regulation, or executive order which authorizes the maintenance of the information.
 - (d) With respect to each item of information, whether submission of such information is mandatory or voluntary.

(e) The consequences, if any, of not providing all or any part of the requested information.

(f) The principal purpose or purposes within the agency for which the information is to be used.

(g) Any known or foreseeable disclosures which may be made of the information pursuant to subdivision (e) or (f) of Section 1798.24.

(h) The individual's right of access to records containing personal information which are maintained by the agency.

3. Recipient has no Ownership or other Rights to the Personal Information

The Recipient has, and the Recipient shall ensure that its subcontractors and project partners have, no ownership, license, or other rights in Personal Information or in any form in which it is used (e.g., Products). In this regard, the Personal Information shall NOT be treated like Data, Products, Intellectual Property, or other provisions in the Agreement that may indicate that Recipient has ownership, license, or other rights.

4. Rights to Anonymized Information Derived from Personal Information

To the extent that the Recipient uses Personal Information to derive anonymized information that no longer meets the definition of Personal Information, the rights to derived anonymized information follow the rights in Exhibit C. For example, if the Recipient uses Personal Information to derive anonymized figures that are included in a Product, and the Product contains no Personal Information, the rights to the Product flow from Exhibit C, Section 5, like they do for all other Products.

5. Retention and Destruction of Personal Information

Upon the request of the Energy Commission, or upon termination of this Agreement, whichever is earlier, the Recipient and all subcontractors and project partners shall promptly deliver to the Energy Commission or destroy all Personal Information, regardless of form (e.g., written or electronic) and all copies, abstracts, media, and backups thereof, however stored in Recipient's and all of its subcontractors' and project partners' possession. No Personal Information shall remain with Recipient, its subcontractors, or its project partners upon request of the Energy Commission or after the termination of this Agreement, whichever occurs first.

6. Survival

The terms of this Exhibit shall remain in full force and effect in perpetuity.

7. Flow-down

The Recipient shall flow-down the terms in this Exhibit to its subcontractors and project partners.