

AGREEMENT NUMBER

REGISTRATION NUMBER

1. This Funds-In 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: _____ The effective date of this Agreement is either the start date or the approval date by the Dept. of General Services, 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	Pages
Exhibit B - Attachments	Pages
Exhibit C – General Terms and Conditions	Pages
Exhibit D – Rights in Technical Data-Use of Facility	Pages
Exhibit E – Patent Rights-Use of Facilities	Pages
Exhibit E - Attachment	Page(s)
Exhibit F – Contacts	1 Page
Exhibit G – Payments to Sponsor	3 Pages

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

CONTRACTOR

CONTRACTOR'S NAME (if other than an individual, state whether a corporation, partnership, etc.)

BY (Authorized Signature)



PRINTED NAME AND TITLE OF PERSON SIGNING

ADDRESS

DATE SIGNED(Do not type)

STATE OF CALIFORNIA

AGENCY NAME

State Energy Resources Conservation and Development Commission

BY (Authorized Signature)



PRINTED NAME AND TITLE OF PERSON SIGNING

Rachel L. Grant Kiley, Contracts Grants and Loans Office Manager

ADDRESS

1516 Ninth Street, Sacramento, CA 95814

*California Department of
 General Services Use Only*

Exempt per:

Exhibit B

Budget Detail and Payment Provisions

1. Advance Payments

- a. The Sponsor shall provide sufficient funds in advance to reimburse DOE, through its Facility Operator, for costs to be incurred in performance of the work described in this Agreement, and the Facility Operator shall not perform in the absence of advance funds. For and in consideration for performance of this Agreement, Sponsor agrees to pay DOE, through its Facility Operator, an amount equal to the Facility Operator's cost of performance in accordance with the conditions listed in this Agreement. Nothing contained in this Agreement shall preclude advance payment to the Government pursuant to Title 2, Government Code Section 12425. The total amount of costs to the Sponsor shall not exceed the amount stated in Block 3 of the attached Standard Agreement.
- b. If the estimated period of performance exceeds ninety (90) days and the estimated cost exceeds \$25,000.00, the Sponsor may, with the DOE's approval, advance funds incrementally. In such a case, the Facility Operator will initially invoice the Sponsor in an amount sufficient to permit the work to proceed for one hundred and eighty (180) days and thereafter invoice the Sponsor to maintain approximately a ninety (90)-day period that is funded in advance.
- c. The Facility Operator shall submit ninety (90)-day invoices requesting payment. Each invoice is subject to Sponsor approval and payment by the State Controller's Office. The Sponsor will accept computer-generated or electronically transmitted invoices without backup documentation, provided the Facility Operator sends a hard copy the same day, correctly addressed with postage prepaid to the Sponsor address listed in this article.
- d. The Sponsor's Commission Agreement Manager will approve ninety (90)-day advance payments provided that the Sponsor's Commission Agreement Manager has received and approved the written progress reports, and any other deliverables required in the reporting period. If such information has not been provided to the Sponsor's Commission Agreement Manager, a written dispute notice specifying the reasons for dispute will be sent by the Sponsor's Commission Agreement Manager to DOE through the Facility Operator's Agreement Administrator. Such notice shall be made within fifteen (15) days of receipt of the disputed invoice for payment on a State of California Standard Form 209. If the invoice for payment is not disputed within fifteen (15) days, the invoice is presumed to be valid, but is subject to audit and verification in accordance with the audit provisions of this Agreement.
- e. The Facility Operator shall submit all invoices for payment to:

Accounting Office, MS-2
California Energy Commission
1516 9th Street, 1st Floor
Sacramento, California, 95814

f. Payment shall be made directly to the Facility Operator within 30 days of receipt of a correct invoice. The State shall make payment to the Facility Operator as promptly as fiscal procedures permit.

g. Sponsor shall enter this Agreement number on the check and mail payment to the following address:

<Choose One>

Lawrence Berkeley National Laboratory
Dept. # 34240
P.O. Box 39000
San Francisco, CA 94139
Attn: Cashier's Office Accounts Receivable

Lawrence Livermore National Laboratory
Accounting–Financial Management
P.O. Box 808, L-435
Livermore, CA 94551
Attn: Cashier's Office Accounts Receivable

h. A 90-day reconciliation report for actual costs shall be submitted no later than the 30th day following the end of the previous ninety (90)-day performance period. The reconciliation report shall include but is not limited to:

1. Facility Operator's name, Federal ID number, this Agreement number, and the CEC contract number,
2. Direct labor costs,
3. Subcontractor, consultants & other services costs,
4. Travel costs,
5. Equipment and material costs,
6. Overhead costs.

i. Upon termination or completion of this Agreement, the DOE shall direct the Facility Operator to refund any excess funds to the Sponsor. The Facility Operator will reconcile total Agreement costs to total payments received in advance and any remaining advance will be refunded to the Sponsor's Accounting Office. In the event the Agreement is terminated, total project costs incurred prior to the effective date of termination (including close-out costs) will be reconciled to total project payments received in advance and any remaining advance will be refunded to the Sponsor. In either event, DOE, through its Facility Operator, shall return any balance due to the California Energy Commission within sixty (60) days.

j. Evidence of progress, deliverables, and written progress reports as detailed in the Scope of Work shall be prepared and provided by DOE through its Facility Operator's Project Manager (Principal Investigator).

2. Budget Contingency Clause

- a. 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 program, this Agreement shall be of no further force and effect. In this event, the Sponsor shall have no liability to pay any funds whatsoever to Facility Operator or to furnish any other considerations under this Agreement and Facility Operator shall not be obligated to perform any provisions of this Agreement.
- b. If funding for any fiscal year is reduced or deleted by the Budget Act for purposes of this program, the Sponsor shall have the option to either cancel this Agreement with no liability occurring to the Sponsor, or offer an agreement amendment to Facility Operator to reflect the reduced amount.

3. Prompt Payment Clause

Payment will be made in accordance with and within the time specified in California Government Code Chapter 4.5, commencing with Section 927. The State shall make payment to the Facility Operator as promptly as fiscal procedures permit.

4. Other Terms

- a. The DOE's estimated cost for the work to be performed by the Facility Operator under this Agreement is stated in block 3 of the STD 213 for this Agreement. If the Sponsor requires matching funds, the assessed value of the Federal Administrative Charge that is not charged to this project and the assessed value of any identified synergistic project(s) are stated in this Exhibit B. Specific details are found in Exhibit A, Scope of Work.
- b. The DOE has no obligation to direct the Facility Operator to continue or complete performance of the work at a cost in excess of its estimated cost, including any modification to this Agreement.
- c. The DOE, through its Facility Operator, agrees to provide at least sixty (60) days written notice to the Sponsor's Commission Agreement Manager if the actual cost to complete performance will exceed the estimated cost.
- d. The DOE, through its Facility Operator, shall provide reasonable advance notification to the Sponsor's Commission Agreement Manager of any anticipated project budget reallocation either by task or category. The Parties may reallocate a project task or category budget items of up to ten percent (10%) but deviations of more than ten percent (10%) of project task or category budget items require written approval of the Department of General Services. Approved changes in a project budget shall be sent by the Sponsor's Commission Agreement Manager to the Sponsor's Commission Agreement Officer.
- e. The Sponsor hereby warrants and represents that the funding it brings to this Agreement has been secured through the State of California and the funding is not restricted by other terms and conditions (including intellectual property) that conflict with the terms of this Agreement.

- f. Upon termination or completion of this Agreement, the DOE shall direct the Facility Operator to refund any excess funds, to the Sponsor. The Facility Operator will reconcile total Agreement costs to total payments received in advance and any remaining advance will be refunded to the Sponsor's Accounting Office. In the event the Agreement is terminated, total project costs incurred prior to the effective date of termination (including close-out costs) will be reconciled to total project payments received in advance and any remaining advance will be refunded to the Sponsor. In either event, DOE, through its Facility Operator, shall return any balance due to the Sponsor within sixty (60) days.
- g. In the event that synergistic projects are identified in Exhibit A, Scope of Work, such synergistic projects shall not be subject to the terms and conditions of this Agreement, the Sponsor shall have no rights in or privity to such projects, and failure to execute or complete such projects does not constitute a funding contribution or obligation (either cash or in-kind) on the part of the DOE or the Facility Operator. The assessed value of the synergistic projects meets the criteria for participant's value contribution established by the California Energy Commission PIER program.

5. Budget Detail (TBD)

Budget Detail is contained in the Attachment to this Exhibit.

Exhibit C

General Terms and Conditions

1. Definitions

- a. "Equipment" means any products, objects, machinery, apparatus, implements or tools, in excess of \$5,000.00, purchased or constructed under this Agreement, including those products, objects, machinery, apparatus, implements or tools, in excess of \$15,000.00, from which over thirty percent (30%) of the equipment is composed of materials purchased for the project. For the purposes of determining residual value, the Sponsor will use straight line depreciation over the equipment's useful life as determined by the Sponsor's standard accounting practices. The residual value will be calculated as of the date of the completion or termination of this Agreement.
- b. "Materials" means the substances used in constructing a finished object, commodity, device, article or product.
- c. "Participant's value contribution" means the assessed value of Federal Administrative Charges not charged to this project and assessed value of synergistic projects. The assessed value of such synergistic projects does not constitute a funding contribution or obligation (either cash or in-kind) on the part of the Department of Energy (DOE) or the Facility Operator.
- d. "Project" means the entire effort undertaken and planned by the Facility Operator under Exhibit A, Scope of Work and includes the work funded by the Sponsor.
- e. "Sale" means the sale, license, lease, gift or other transfer of a project-related product or right.

2. Performance

- a. The DOE has directed [M&O Contractor of National Laboratory], hereinafter referred to as the "Facility Operator" to perform the work set forth in Exhibit A, Scope of Work for the California Energy Commission, and hereinafter referred to as "Sponsor."
- b. It is understood by the Parties that the Facility Operator is obligated to comply with the terms and conditions of its Management and Operating (M&O) contract no. [contract number] with the United States Government (Government) represented by the DOE when providing goods, services, products, processes, materials, or information to the Sponsor under this Agreement. The obligations of the Facility Operator shall apply to any successor to the Facility Operator continuing the operation of the DOE facility involved in this Agreement.
- c. No alteration or variation of the terms of this Agreement shall be valid unless made in writing and signed by the Parties, and no oral understanding or agreement not incorporated in this Agreement shall be binding on any of the Parties and the Facility Operator. Other than as specified in this Agreement, no document or communication passing between the Parties and the Facility Operator shall be deemed part of this Agreement.
- d. In no event shall any course of dealing, custom or trade usage modify, alter, or supplement any of the terms or provisions contained herein.
- e. Governing Law. This Agreement and the legal relations among the Parties and the Facility Operator shall be governed and construed in accordance with California and Federal law. In the event of any conflict between Federal law applicable to this Agreement and California State law, Federal law shall take precedence.
- f. The DOE and Facility Operator agree to comply with all applicable Federal and State laws.
- g. Changes in the scope of work must be approved by the Sponsor and if required, by the California Department of General Services, (DGS) in the form of a formal amendment to this Agreement.
- h. Facility Operator, its subcontractors and their employees in the performance of work under this Agreement shall be responsible for using their best efforts to exercise the degree of skill and care required by customarily accepted good professional practices and procedures used in scientific and engineering research fields.

3. Term of the Agreement

The term of this Agreement is shown in section 2 of the attached Standard Form 213 and shall continue for the performance period stated. This Agreement shall be effective as of the later date of (1) the date on which it is signed by the last of the Parties, or (2) the date on which it is approved by the DGS, if approval is required. The Facility Operator will not start work under this Agreement until the date on which the Facility Operator receives advance funding from the Sponsor, if advance funding is provided for in Exhibit B. Time is of the essence in this Agreement.

4. Property

- a. No Federal funds will be used to purchase property or equipment under this Agreement.
- b. Equipment identified in Exhibit A, Scope of Work, and outlined in Exhibit B, Budget, Attachment 1, is approved for purchase.
- c. In the event Sponsor's funds are used to purchase equipment not identified in Exhibit A, Scope of Work, and outlined in Exhibit B, Budget, Attachment 1, the purchase of equipment with a purchase price in excess of \$5,000.00 shall be subject to prior written approval from the Sponsor's Commission Agreement Manager.
- d. All equipment with a purchase price in excess of \$5,000.00 purchased with Sponsor's funds shall remain with the Sponsor.
 - i. Title to all equipment, with a purchase price in excess of \$5,000.00 purchased with Sponsor's funds shall remain with Sponsor.
 - ii. Property or equipment produced or acquired as part of this Agreement will be accounted for during the term of the Agreement in the same manner as Sponsor's property or equipment. The Facility Operator shall inform Sponsor of maintenance, repair, destruction, or damage to equipment with a purchase price in excess of \$5,000.00 while in the possession or subject to the control of Facility Operator. At the direction and expense of Sponsor, Facility Operator will arrange for the maintenance, repair, or replacement of equipment with a purchase price in excess of \$5,000.00 while in the possession or subject to the control of Facility Operator. The Parties and the Facility Operator do not expect to repair or replace equipment that is intended to undergo significant modification or testing to the point of damage/destruction, as part of the project plan described in Exhibit A, Scope of Work.
 - iii. The Facility Operator will complete and sign an appropriate statement vesting title in the Sponsor for equipment with a purchase price in excess of \$5,000.00 and submit it to the Sponsor's Commission Agreement Manager for processing. The Sponsor's Commission Agreement Manager will review the statement vesting title in the Sponsor and file it with the California Secretary of State's Office.
- e. Upon termination of this Agreement, property or equipment with a purchase price in excess of \$5,000.00 produced and acquired with Sponsor's funds shall be disposed of as instructed by Sponsor including any one of the following:
 - i. Sponsor may request that equipment with a purchase price in excess of \$5,000.00 be returned to Sponsor with any costs incurred for such return to be borne by Sponsor.
 - ii. Sponsor may, by mutual agreement with the DOE and its Facility Operator, allow the DOE or Facility Operator to purchase such equipment for a mutually agreeable amount not to exceed the residual value of the equipment as of the date of termination of this Agreement.
 - iii. Sponsor, for separate consideration, may authorize the continued use by the DOE Facility Operator of such equipment to further Sponsor related research efforts.
 - iv. Sponsor may, if permitted by California law, and by mutual agreement with the DOE, abandon such equipment and the title to the equipment shall be in the U.S. Department of Energy.

f. The Facility Operator will notify the Sponsor in writing, before the purchase of any property or equipment (with a purchase price in excess of \$5,000.00 and produced or acquired with Sponsor's funds) that will be integrated into the facility so as to make removal impossible without damage to such facility. Upon such notice, Sponsor shall provide in writing either a rejection of the proposed equipment or property purchase or written authorization for the title of such integrated property or equipment to be vested in the Government.

5. **Publication Matters** The DOE, Facility Operator, and the Sponsor shall provide each other not less than a thirty (30) day period in which to review and comment on a proposed publication that either discloses technical developments and/or research findings generated in the course of this Agreement, or identifies Proprietary Information (as defined in Exhibit D). The DOE, Facility Operator, or the Sponsor shall not publish or otherwise disclose Proprietary Information identified by the other, except as provided by law.

6. **Legal Notice** The Parties agree that the following legal notice shall be affixed to each report furnished to the Sponsor under this Agreement and to any report or reprint resulting from this Agreement which may be distributed by the Sponsor, DOE, or the Facility Operator.

"The [name and address of National Laboratory] is a national laboratory of the DOE managed by [M&O Contractor] for the U.S. Department of Energy under Contract Number [DOE contract number]. This report was prepared as an account of work sponsored by the Sponsor and pursuant to an M&O Contract with the United States Department of Energy (DOE). Neither [M&O Contractor], nor the DOE, nor the Sponsor, nor any of their employees, contractors, or subcontractors, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe on privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise, does not necessarily constitute or imply its endorsement, recommendation, or favoring by [M&O Contractor], or the DOE, or the Sponsor. The views and opinions of authors expressed herein do not necessarily state or reflect those of [M&O Contractor], the DOE, or the Sponsor, or any of their employees, or the Government, or any agency thereof, or the State of California. This report has not been approved or disapproved by [M&O Contractor], the DOE, or the Sponsor, nor has [M&O Contractor], the DOE, or the Sponsor passed upon the accuracy or adequacy of the information in this report."

7. **Disclaimer**

THE GOVERNMENT AND THE FACILITY OPERATOR MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT: THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. NEITHER THE GOVERNMENT NOR THE FACILITY OPERATOR SHALL BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS AGREEMENT.

8. **Insurance (OPTIONAL)**

[If both parties agree and it is appropriate, this provision may be removed. Please note that if this provision is removed, the justification for doing so, along with any required approval from the Office of Risk and Insurance Management, should be included with the contract file when it is submitted for approval to the Department of General Services.]

The performing Facility Operator shall be obligated hereunder to obtain and maintain general liability insurance during the life of this Agreement in an amount deemed sufficient by the Sponsor and approved by the Government to indemnify and hold harmless the Government, the Sponsor, and the Facility operator, their officers, agents, employees and persons acting on their behalf from all liability, including costs and expenses incurred, to any person, including the Parties and Facility Operator personnel, for injury to or death of persons or other living things or injury to or destruction of property arising out of the performance of the Agreement by the Government, the Sponsor, or the Facility Operator, or persons acting on their behalf, or arising out of the use of the services performed, materials supplied, or information given hereunder by any person. The Facility Operator's cost associated with obtaining and maintaining such liability insurance policy shall be an expense that is considered by the Parties and the Facility Operator to be allocable to this Agreement. Should the Facility Operator be unwilling or unable to obtain such general liability insurance, the Sponsor may obtain such coverage and, at its discretion, deduct the cost associated with maintaining such policy from the amount of the- successful proposal award. Should neither the performing Facility Operator nor the Sponsor choose to provide adequate insurance protection, this Agreement shall be considered null and void. Nothing herein shall preclude the Facility operator from entering into agreements to indemnify the Sponsor and the Government from the liability, costs, and expenses addressed in this clause provided that any such agreement shall not result in costs allocable or liabilities chargeable to the Government.

9. **Notice and Assistance Regarding Patent and Copyright Infringement**

The Sponsor shall report to the DOE and the Facility Operator, promptly and in reasonable written detail, each claim of patent or copyright infringement based on the performance of this Agreement of which the Sponsor has knowledge. The Sponsor shall furnish to the DOE and the Facility Operator, when requested by the DOE or the Facility Operator, all evidence and information in the possession of the Sponsor pertaining to such claim.

10. **Assignment**

Except as noted, neither this Agreement nor any interest therein or claim there under shall be assigned or transferred by either Party, except as authorized in writing by the other Party to this Agreement. Such authorization shall not be unreasonably withheld. The Parties recognize that the DOE may transfer the original Facility Operator's obligations under this Agreement to a successor Facility Operator, with notice of such transfer to the Sponsor, and the original Facility Operator shall have no further responsibilities except for the confidentiality, use, and/or nondisclosure obligations of this Agreement. The obligations of the original Facility Operator shall apply to any successor to the original Facility Operator continuing the operation of the DOE facility involved in this Agreement.

11. **Amendment**

No amendment or variation of the terms of this Agreement shall be valid unless made in writing, signed by the Parties, and approved as required. No oral understanding or agreement not incorporated into this Agreement is binding on any of the Parties.

12. **Similar or Identical Services**

The DOE, its Facility Operator, and the Sponsor shall have the right to perform similar or identical services described in the Exhibit A, Scope of Work for other sponsors as long as the Parties' and Facility Operator's Proprietary Information is not utilized.

13. **Export Control**

Each Party is responsible for its own compliance with laws and regulations governing export control.

14. Termination

- a. Performance of work under this Agreement may be terminated at any time by the Sponsor or the DOE, without liability, upon giving a forty-five (45) day written notice to the other. Such notice shall specify the termination date of the Agreement or the Parties shall negotiate a mutually satisfactory termination date.
- b. The Sponsor shall be responsible for the allowable costs under this Agreement (including closeout costs) to the extent they could not reasonably be avoided through the termination date of the Agreement, but in no event shall the Sponsor's cost responsibility exceed the total cost to the Sponsor, as described in Exhibit B. DOE agrees to use all reasonable efforts to mitigate its expenses and obligations. It is agreed that any obligations of the Parties and the Facility Operator regarding Proprietary Information or other intellectual property and payment of royalties will remain in effect, despite early termination of the Agreement.

15. Dispute Resolution

- a. The Parties are encouraged to use Alternative Dispute Resolution (ADR) processes to settle any differences that may arise during the performance of this Agreement, although it is not mandatory that they do so. Either Party may use formal judicial proceedings to resolve any dispute or claim under this Agreement.
- b. Negotiation.
 - i. The Parties and the Facility Operator shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement by negotiating between officials who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. The Sponsor may contact the DOE representative listed below to request immediate attention to the issue raised by the Sponsor.

[DOE representative]
[title]
[DOE Field or Operations Office]
[address, city, state, zip]
[telephone number, fax number, email address]
 - ii. Either Party may give the other Party written notice of any dispute not resolved in the normal course of business. Within fifteen(15) days after receipt of the notice, the Party receiving notice of the dispute shall submit to the other a written response. The notice and the response shall include (a) the issues in the dispute, (b) the legal authority or other basis for the Party's position, (c) the remedy sought, and (d) the name and title of the executive or official who will represent the Party and of any other person(s) who will accompany the executive or official.

Within thirty (30) days after receipt of the disputing Party's notice, the representatives of the Parties and the Facility Operator shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one Party to the other will be honored. If the matter has not been resolved within sixty (60) days of the disputing Party's notice, or if the Parties fail to meet within thirty (30) days, either Party may initiate mediation of the controversy or claim provided hereafter.
 - iii. All negotiations pursuant to this Agreement are confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and State of California rules of evidence.

- c. Mediation.
 - i. In the event the dispute has not been resolved by negotiation as provided herein, the Parties' may agree to participate in non-binding mediation, using a mutually agreed upon mediator. The mediator will not render a decision, but will assist the Parties and the Facility Operator in reaching a mutually satisfactory agreement. The Parties agree to equally split the costs of the mediation.
 - ii. The first mediation session shall commence within thirty (30) days from the agreement to mediate. The Parties may contact the DOE Office of Dispute Resolution with questions or for assistance with selection of neutrals or samples of "Agreements to Mediate." All mediations are confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and State of California rules of evidence.
- d. The Parties' performing work under this Agreement shall continue with the responsibilities under this Agreement during any dispute.
- e. In the event that the Sponsor believes the Facility Operator/subcontractor has failed or is failing to perform in accordance with the stated standard of performance in paragraph 2(g), the Sponsor and the Facility Operator shall negotiate in good faith an equitable resolution satisfactory to both parties. If such resolution cannot be reached, the Parties shall work through the Alternate Dispute Resolution process described above. In the event negotiation and the Alternate Dispute Resolution process do not provide a satisfactory resolution, Sponsor's sole remedy in the event of the Facility Operator's failure to perform in accordance with the standard of performance in paragraph 2(g) is termination of the Agreement. Nothing herein shall preclude the Facility Operator from entering into agreements of other or additional remediation with the Sponsor provided that any such agreement shall not result in costs allocable or liabilities chargeable to the Department of Energy.
- f. Nothing contained in this section 16 is intended to limit any of the rights or remedies that the Parties may have under law, or to limit exercise of any other provision of this agreement.

16. Subcontractors and Subcontractor Agreements

- a. DOE oversight of Facility Operator's agreements with subcontractors. The Facility Operator shall be responsible to the DOE for establishing and maintaining contractual agreements with and reimbursement of each of the subcontractors for work performed in accordance with the terms of this Agreement. Upon request, the Facility Operator shall provide the Sponsor with copies of all subcontract agreements resulting from this Agreement promptly upon final execution thereof.
- b. Replacement of key subcontractors. The key subcontractors listed in Exhibit A, Scope of Work cannot be replaced or substituted without prior written concurrence of the Sponsor's Commission Agreement Manager. Such concurrence shall be timely and not unreasonably withheld.
- c. Replacement or substitution of all other subcontractors. The Facility Operator shall notify the Sponsor in writing of any replacement or substitution of subcontractors not listed as key subcontractors in the Exhibit A, Scope of Work.
- d. Termination of subcontracts. Upon the termination of any subcontract, the Sponsor's Commission Agreement Manager shall be immediately notified in writing.
- e. DOE oversight of Facility Operator's procurement processes. The Facility Operator shall use DOE approved and regulated procurement policies, processes, and procedures to achieve the subcontract obligations under this Agreement. The DOE shall ensure that Facility Operator's purchasing system and methods shall be fully documented, consistently applied, and acceptable to the Department of Energy. Federally-approved policies, processes, and procedures regarding competitive selection, sole-source justification, intellectual property rights, assignment, and flow-down shall be maintained for all subcontracts under this Agreement.

17. Public Hearings

If public hearings on the subject matter dealt with in this Agreement are held during the period of the Agreement, the DOE shall ensure that the Facility Operator makes available to testify the personnel assigned to this Agreement if requested by the Sponsor. The Sponsor will reimburse, by advance payment, the labor and travel costs of testifying personnel assigned to this Agreement at the Facility Operator's rates for such work. Any terms and conditions will be contained in the Scope of Work. If the need for witness(es) arises during the contract performance, the parties shall negotiate the details of any necessary appearances.

18. Site Access for Project Review

The Parties acknowledge that the DOE enforces strict requirements regarding security, safety, and access to the DOE National Laboratories' sites and facilities. To the extent permitted by DOE and Facility Operator security, safety, and access requirements, the Sponsor staff or its representatives shall have reasonable access to the construction site or Research & Development laboratory and all project records related to performance under this Agreement.

19. Notice to Parties and Facility Operator

Notice to the Parties to this Agreement may be given by certified mail properly addressed, postage fully prepaid, to this address:

Sponsor: [insert address]
DOE: [insert address]
Facility Operator: [insert address]

Notice may be given to such other address as either Party or the Facility Operator shall provide to the other in accordance with this section. Such notice shall be effective when received, as indicated by post office records, or if deemed undeliverable by post office, such notice shall be effective nevertheless fifteen (15) days after mailing.

Alternatively, notice may be given by personal delivery at the address designated or to such other address as either Party or the Facility Operator shall notify the other in accordance with this section. Such notice shall be deemed effective when delivered unless a legal holiday for State or Federal offices commences during the 24-hour period, in which case the effective time of the notice shall be postponed 24 hours for each such intervening day.

20. Business Activity Reporting

- a. The DOE shall give Sponsor prior written notice of any change of address or name change.
- b. Facility Operator shall not change or reorganize the type of business entity under which it does business except upon prior written notification to the Sponsor, except that the Department of Energy can change the successor to the Facility Operator to continue the operation of the DOE facility without prior written notification to the Sponsor. Once notified of this change and in the event the Sponsor is not satisfied that the new entity can perform as the original Facility Operator would have, the Sponsor may terminate this Agreement as provided in the Termination paragraph.
- c. Facility Operator shall promptly notify Sponsor of the occurrence of each of the following:
 - i. The existence of any litigation or other legal proceeding affecting the Project;
 - ii. The occurrence of any casualty or other loss to project personnel, equipment, with a purchase price in excess of \$5,000.00, or third parties of a type commonly covered by insurance; and

- iii. Facility Operator's receipt of notice of any claim or potential claim against Facility Operator for patent, copyright, trademark service mark and/or trade secret infringement that could affect the Sponsor's rights. The Facility Operator shall report to the Sponsor in reasonable written detail, each claim of patent or copyright infringement based on the performance of this Agreement of which the Facility Operator has knowledge. The Facility Operator shall furnish to the Sponsor, when requested by the Sponsor, all evidence and information in the possession of the Sponsor pertaining to such claim.

21. Travel and Per Diem

- a. Travel will be in accordance with the Federal Travel Regulations as modified by the Facility operator's DOE-approved rates.
- b. Travel identified in Exhibit A, Scope of Work does not require prior authorization.
- c. Travel that is not included in Facility Operator's Scope of Work shall require prior written authorization from the Sponsor Commission Agreement Manager.
- d. Origination and destination points for calculating travel expenses shall be the Facility Operator's office location where the employees performing on the Agreement are permanently assigned. The Facility Operator shall be reimbursed for travel and per diem on the same basis as the Facility Operator's DOE-approved rates in effect during this Agreement.
- e. The Facility Operator will document travel expenses as follows:
 - i. expenses must be detailed using the Facility Operator's DOE-approved rates.
 - ii. expenses must be documented by trip including dates and times of departure and return. Employee's travel expense report may be used instead.
 - iii. The Facility Operator will retain travel expense documentation and receipts for audit and verification to the extent audits are permitted by DOE policy.

22. Accounting, Cost Allowability, and Audit Provisions

- a. Accounting Procedures. The Facility Operator's costs shall be determined on the basis of the Facility Operator's accounting system procedures and practices employed as of the effective date of this Agreement, and as may be revised from time to time, provided that generally accepted accounting principles and cost reimbursement practices are used. The Facility Operator'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 Facility Operator'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.
- b. Allowability and Unallowability of Costs. To the extent permitted by California law and any applicable funding mechanism limitations, the costs that shall be reimbursed by Sponsor include all costs, direct and indirect, incurred in the performance of work under this Agreement, as specified in Exhibit B. Allowability or unallowability of costs shall be determined in accordance with the Allowable Costs provision of the Department of Energy Acquisition Regulation (DEAR) incorporated in the Facility Operator's M&O Contract with the DOE as of the effective date of this Agreement and shall be determinative of the costs allowed under this Agreement. A copy of this provision shall be provided to Sponsor upon request.

- c. Audit. Sponsor or any other California state agency shall not audit the records of DOE. Upon the Sponsor's or the California State Auditor's (State Auditor) request and at the Sponsor's or State Auditor's expense, any cognizant federal audit agency, including the Defense Contract Audit Agency, the Government Accountability Office, the DOE Office of Inspector General, and the NASA Office of Inspector General, shall audit the Facility Operator's records related to this Agreement. The Facility Operator shall furnish detailed itemization of, and retain all records relating to, direct expenses reimbursed to Facility Operator, and to hours of employment on this Agreement by any employee of Facility Operator for which Sponsor is billed. Such records shall be maintained for a period of three years after final payment under this Agreement, or until audited by the DOE or its designee pursuant to the Sponsor's or the State Auditor's request, whichever occurs first. Once notified of a request for audit, the Facility Operator shall maintain such records until the audit is completed. Said shall be conducted in accordance with Government Auditing Standards, and shall be performed in a time frame and shall contain a scope of work mutually agreed to by the DOE and the State Auditor. The State Auditor shall be provided a copy of the audit report.

23. Stop Work

Sponsor's Commission Agreement Officer may, at any time, by five days written notice to the DOE, require the Facility Operator to stop all or any part of the Agreement's work tasks.

- a. Compliance. Upon receipt of such stop work order, the DOE shall ensure that the Facility Operator immediately take all necessary steps to comply and to minimize the incurrence of costs allocable to work stopped.
- b. Equitable Adjustment. An equitable adjustment shall be made by the Sponsor based upon a written request for an equitable adjustment by the DOE. Such adjustment request must be made within thirty (30) days from the date of receipt of the stop work notice.
- c. Revoking a Stop Work Order. The DOE shall order the Facility Operator to resume the stopped work only upon receipt of written instructions from the Sponsor's Commission Agreement Officer canceling the stop work order.

24. Captions

The headings that appear in this Agreement have been inserted for the purpose of convenience and ready reference. They do not purport, and shall not be deemed, to define, limit, or extend the scope or intent of the clauses to which they relate.

25. Independent Contractors

Under the terms of this Agreement, the DOE and its Facility Operator and their agents and employees and the Sponsor and its agents and employees shall act in an independent capacity and not as officers or employees or agents of the other. The Parties and the Facility Operator specifically acknowledge that they do not have authority to incur any obligations or responsibilities on behalf of the others.

26. Severability

If any provision of this Agreement or the application thereof is held invalid, that invalidity shall not affect other provisions of the Agreement.

27. Entire Agreement

It is expressly understood and agreed that this Agreement with its appendices contains the entire agreement between the Parties with respect to the work to be performed under this Agreement.

Exhibit D

Rights in Technical Data-Use of Facility

1. Definitions

- a. "Technical Data" as used throughout this Agreement means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research; document experimental, developmental, demonstrations, 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 documentations).
- b. "Generated Information" means information first produced in the performance of this Agreement.
- c. "Proprietary Information" means information which is developed outside of this Agreement, is marked as Proprietary Information, and embodies (1) trade secrets, or (2) commercial or financial information which is privileged or confidential under the Freedom of Information Act (5 U.S.C. 552 (b)(4)), or (3) is protected under the California Public Records Act (California Government Code section 6250 et seq.)
 - i. 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.
 - ii. Commercial or financial information is information about the operation of a specific business. It includes information concerning the cost and pricing of goods, supply sources, cost analyses, characteristics of customers, books and records of the business, sales information including mailing lists, business opportunities, information regarding the effectiveness and performance of personnel, and information incidental to Agreement administration.
- d. "Unlimited Rights" means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.
- e. "Deliverable" data is that which, under the terms of this Agreement, is required to be delivered to the Sponsor.
- f. "Copyrighted Project Work" means any copyrightable work as defined under U.S. copyright law that is first created by the DOE and Facility Operator in the performance of this Agreement, is not a scholarly work, and to which the Facility Operator has acquired the rights to assert copyright in accordance with its M&O Contract with the DOE.

2. The Sponsor agrees to furnish to the DOE and Facility Operator or leave at the facility that information, if any, which is (1) essential to the performance of work by the Facility Operator personnel or (2) necessary for the health and safety of such personnel in the performance of the work. Any information furnished to the DOE and Facility Operator shall be deemed to have been delivered with Unlimited Rights unless marked as Proprietary Information. The Sponsor agrees that it has the sole responsibility for appropriately identifying and marking all documents containing Proprietary Information, whether such documents are furnished by the Sponsor or are incorporated within report(s) generated under this Agreement and made available to the Sponsor for review. If Proprietary Information is disclosed orally, electronically, visually, or in any other intangible form, it shall be identified as such, at the time of disclosure and confirmed in writing within ten (10) days as being Proprietary Information.

3. The Sponsor, Facility Operator, and the Government shall have Unlimited Rights in all Generated Information, except for information which is disclosed in a Subject Invention disclosure being considered for patent protection or information which is marked as either Proprietary Information or copyrighted in accordance with the provisions set forth herein below. Subject Invention information which may be disclosed to the Sponsor prior to issuance of a patent shall be treated as confidential in accordance with 35 U.S.C. 205 and shall not be further disclosed by the Sponsor during pendency of the patent application.
4. The Government and Facility Operator agree not to disclose properly marked Proprietary Information of the Sponsor without written approval, except to Government employees who are subject to the statutory provisions against disclosure of confidential information set forth in the Trade Secrets Act (18 U.S.C. 1905).
5. The Sponsor is solely responsible for the removal of all of its Proprietary Information from the facility by or before termination of this Agreement. The Government and Facility Operator shall agree to cooperate in the return of any of the State's Proprietary Information. The Government and Facility Operator shall have Unlimited Rights in any Proprietary Information which is incorporated into the facility or equipment under this Agreement to such an extent that the facility or equipment is not restored to the condition existing prior to such incorporation. The Government and Facility Operator shall have Unlimited Rights in any information which is not removed from the facility by termination of this Agreement.
6. The Sponsor has the right to obtain from the DOE through its Facility Operator as a deliverable, a copy of all Technical Data first produced in performance of this Agreement which the Sponsor has not excluded as being unusable. The Sponsor agrees that the Facility Operator will also provide the DOE with a nonproprietary description of the work performed under this Agreement.
7. Copyrights. The Sponsor may assert copyright in any of its Generated Information. Except for software which is separately treated herein below and to the extent the Facility Operator is given permission to assert copyright in accordance with its M&O Contract with the DOE, the Sponsor is hereby granted a royalty-free, non-exclusive, irrevocable, non-transferable, worldwide license to produce, translate, publish, distribute, duplicate, exhibit, prepare derivative works, perform, use and dispose of, and to authorize others to produce, translate, publish, use, distribute, duplicate, exhibit, prepare derivative works, perform and dispose of all Generated Information copyrighted by the Facility Operator for State governmental purposes subject to the other provisions of this article, and to the extent that copyright is asserted, the Government reserves for itself a royalty-free, world-wide, irrevocable, non-exclusive license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, prepare derivative works, and perform any such Generated Information copyrighted by the Facility Operator or the Sponsor.
 - a. In the event software is first produced in performance of this Agreement, Facility Operator shall have the right to copyright and/or patent such software in accordance with its M&O Contract with the DOE and hereby grants the Sponsor a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable, worldwide, license to produce and use the software, and to prepare derivative works for State governmental purposes.
 - b. For all Facility Operator Generated Information which becomes a Copyrighted Project Work, the Facility Operator will apply a notice in accordance with 17 U.S.C. 401 et seq.
8. The terms and conditions of this Exhibit shall survive the Agreement, in the event that the Agreement is terminated in whole or in part before completion of the Exhibit A, Scope of Work.

Exhibit E
Patent Rights-Use of Facilities

1. Definitions

- a. "Subject Invention" means any invention or discovery of the United States Department Of Energy (DOE) or Facility Operator which is conceived in the course of or under this Agreement or, to the extent the Sponsor is performing any work under this Agreement, of the Sponsor, conceived or first actually reduced to practice in the course of or under this Agreement. "Subject Invention" includes any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, whether patented under the Patent Laws of the United States of America or any foreign country, or unpatented.
- b. "Patent Counsel" means the DOE Patent Counsel assisting the procuring activity who has the administrative responsibility for the facility where the work under this Agreement is to be performed.
- c. "Background Intellectual Property" means the separately developed intellectual property items identified by the Facility Operator in paragraph 9, which were conceived or in existence prior to or first produced outside of this Agreement.

2. Rights of the Sponsor -Election to Retain Rights

- a. Subject to the provisions of paragraph 6, with respect to any Subject Invention reported and elected in accordance with paragraph 7(a) of this Exhibit, the Sponsor may elect to obtain the entire right, title and interest throughout the world to each Subject Invention made by the Sponsor's employees and any patent application filed in any country on that Subject Invention and in any resulting patent secured by the Sponsor. Where appropriate, the filing of patent applications by the Sponsor is subject to DOE and other United States Government (Government) security regulations and requirements.
- b. With respect to any Subject Invention in which the Facility Operator or the Government obtains title, the Facility Operator or the Government grants to the Sponsor a nonexclusive, non-transferable, irrevocable, paid-up, license to practice or have practiced by or on behalf of the State of California, for State governmental purposes, the Subject Invention throughout the world. The Facility Operator and/or Government will obtain agreements to effectuate this clause with all persons or entities obtaining ownership interest in patented Subject Inventions.

3. Rights of the Facility Operator -Election to Retain Rights

With respect to any Subject Invention reported in accordance with paragraph 7(b) of this Exhibit, the Facility Operator may elect to obtain title to each Subject Invention made by the Facility Operator's employees subject to the terms of its M&O Contract with the DOE. Once title has been elected by the Facility Operator, a Facility Operator's Subject Invention may subsequently be assigned to the Sponsor, subject to the provisions of paragraphs 4 and 6 hereunder, for continuation of patent prosecution, the payment of maintenance fees, or other good cause as mutually agreed to by the DOE, Facility Operator and the Sponsor. In the case of a nonprofit management and operations Facility Operator, the above arrangement has been approved by the DOE under 35 USC 202 (c) (7).

4. Rights of Facility Operator and Government

Assignment to the Facility Operator or the Government.

The Sponsor agrees to assign to either the Facility Operator or the Government, as requested by the DOE, the entire right, title, and interest in any country to each Subject Invention of the Sponsor, where the Sponsor:

- i. does not elect pursuant to this Exhibit to retain such rights;
- ii. elects or is assigned title to a Subject Invention pursuant to paragraph 2 or 3, but fails to have a patent application filed in that country on the Subject Invention or decides not to continue prosecution or decides not to pay any maintenance fees covering such Subject Invention; or
- iii. elects to retain title but, at any time, no longer desires to retain title.

5. Unelected Interests

Placement in the Public Domain

The Parties and the Facility Operator each agree that either may place any Subject Invention disclosures in the public domain (by inclusion in the final report of this project) which:

- i. are not elected by either Party or the Facility Operator pursuant to this Exhibit;
- ii. each Party and the Facility Operator fails to have a patent application filed in that country on a Subject Invention or decides not to pay any maintenance fees covering such Subject Invention; or
- iii. title, at any time, neither Party nor the Facility Operator desires to retain.

6. Terms and Conditions of Waived Rights

- a. To preserve the Facility Operator's and the Government's residual rights to Sponsor's Subject Inventions, and in patent applications and patents on Sponsor's Subject Inventions, the Sponsor will take all actions in reporting, electing, filing on, prosecuting, and maintaining invention rights promptly, but in any event, in sufficient time to satisfy domestic and foreign statutory and regulatory time requirements; or, if the Sponsor decides not to take appropriate steps to protect the invention rights, it will notify the Facility Operator or DOE Patent Counsel in sufficient time to permit either the Facility Operator or the Government to file, prosecute, and maintain patent applications and any resulting patents prior to the end of such domestic or foreign statutory or regulatory time requirements.
- b. The Sponsor will convey or ensure the conveyance of any executed instruments necessary to vest in either the Facility Operator or the Government the rights set forth in this Exhibit.
- c. With respect to any Subject Invention in which the Sponsor obtains title, the Sponsor hereby grants to the Government a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced by or on behalf of the Government the Subject Invention throughout the world.
- d. The Sponsor will provide the Government a copy of any patent application which it files on a Subject Invention within six (6) months after such application is filed, including its serial number and filing date.
- e. The Sponsor agrees to include, within the specification of any U.S. patent application and any patent issuing thereon covering a Subject Invention in which the Sponsor obtains title, the following statement: "The Government has rights in this invention pursuant to [specify this underlying Agreement]."
- f. Preference for U.S. Industry. Notwithstanding any other provision of this Exhibit, the Sponsor agrees that neither it nor any assignee, will grant to any person the exclusive right to use or sell any Subject Invention in the U.S. unless such person agrees that any products embodying the Subject Invention or produced through the use of the Subject Invention will be manufactured substantially in the U.S. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Sponsor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the U.S. or that under the circumstances domestic manufacture is not commercially feasible.
- g. March-In-Rights. The Sponsor agrees that with respect to any Subject Invention in which it has acquired title, the DOE will retain the right to require the Sponsor to grant a responsible applicant a non-exclusive, partially exclusive, or exclusive license to use the Subject Invention in any field of use, on terms that are reasonable under the circumstances, or if the Sponsor fails to grant such a license, to grant the license itself. DOE may exercise this right only in exceptional circumstances and only if DOE determines that:

- i. the action is necessary to meet health or safety needs that are not reasonably satisfied by the Sponsor; or
 - ii. the action is necessary to meet the requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Sponsor; or
 - iii. such action is necessary because a licensee of the exclusive right to use or sell any Subject Invention in the United States is in breach of the agreement required by paragraph 6(f).
- h. The Sponsor agrees to refund any amounts received as royalty charges on any Subject Invention to which the Sponsor obtains title in procurement by or on behalf of the Government and to provide for that refund in any instrument transferring rights to any party in the Subject Invention.

7. Invention Identification, Disclosures, and Reports

- a. The Sponsor will furnish the DOE Patent Counsel a written report containing full and complete technical information concerning each Subject Invention it makes within six (6) months after conception or first actual reduction to practice, whichever occurs first, in the course of or under this Agreement, but in any event prior to any on sale, public use, or public disclosure of such invention known to the Sponsor. The report will identify the contract and inventor(s) and will be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding to the extent known at the time of disclosure, of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any election of invention rights under this Exhibit. When a Subject Invention is reported under this paragraph 7(a), it will be presumed to have been made in the manner specified in Section (a)(1) and (2) of 42 U.S.C. 5908.
- b. The Facility Operator shall report Subject Inventions it makes in accordance with the terms and conditions set forth in its M&O Contract with the DOE. In addition, the Facility Operator shall disclose to the Sponsor at the same time as disclosure to the Department any Subject Inventions made by the Facility Operator under this Agreement.
- c. The Facility Operator agrees to include, within the specification of any U.S. patent application and any patent issuing thereon covering a Subject Invention in which the Facility Operator obtains title, the following statement: "This invention was made with support from the US Dept of Energy under Contract No. [contract number] and the State of California under Contract No. [contract number.] Both the Government and the Sponsor have certain rights in this invention."
- d. Requests for extension of time for election under paragraphs (a) and (b) above may be granted by DOE Patent Counsel for good cause shown in writing.

8. Facilities License

In addition to the rights of the Parties and the Facility Operator with respect to Subject Inventions, the Sponsor hereby grants to the Government an irrevocable, non-exclusive, paid-up license to (1) practice or to have practiced by or for the Government at the facility, and (2) transfer such license with the transfer of the facility any inventions or discoveries regardless of when conceived or first actually reduced to practice or acquired by the Sponsor, which at any time, through completion of this Agreement, are owned or controlled by the Sponsor and are incorporated in the facility as a result of this Agreement to such an extent that the facility is not restored to the condition existing prior to the Agreement. The acceptance or exercise by the Government of the aforesaid rights and license will not prevent the Government at any time from contesting the enforceability, validity, scope of, or title to, any rights or patents herein licensed.

9. Background Intellectual Property

The Facility Operator will not knowingly use Background Intellectual Property in performing work under this Agreement unless such Background Intellectual Property, if any, is identified herein below. The Sponsor is not granted any license rights, either express or implied, to this Background Intellectual Property under this Agreement. Facility Operator provides this information to comply with its M&O Contract and to notify the Sponsor that licenses to Background Intellectual Property may be necessary to practice Subject Inventions made under this Agreement. Neither the Government nor the Facility Operator shall be liable for failing to bring Background Intellectual Property to the Sponsor's attention or for infringement of others' rights or damages incurred through the use of such intellectual property.

[Select ONE of the following]

[No Background Intellectual Property will be used in performing work under this Agreement.]

[The Background Intellectual Property (BIP) that will be used in performing work under this Agreement is listed in the attachment to this Exhibit.]

10. Limitation of Rights

Nothing contained in this patent rights Exhibit shall be deemed to give the Government any rights with respect to any invention other than a Subject Invention except as set forth in Facilities License of paragraph 8.

11. Early Termination of Agreement

If the Agreement is terminated before completion of the Exhibit A Statement of Work, then the terms and conditions of this Exhibit will survive the Agreement.

Exhibit G

Payments to Sponsor

DOE has no objection to a laboratory director's agreeing to share royalties in certain Background Inventions (i.e. inventions that are conceived outside of this Agreement, elected by the performing Facility Operator, for which patent protection has or will be obtained, and which is first actually reduced to practice in the course of or under this Agreement) with state agencies as provided in this Exhibit G. The decision to engage in such sharing is within the purview of the laboratory director as the steward of laboratory-developed intellectual property. Inclusion of such provisions cannot be characterized as strongly endorsed by DOE. Should a laboratory director agree to royalty sharing in Background Inventions, the laboratory director must be prepared to authorize the same treatment for other state agencies under similar circumstances.

A. Definitions.

- (1) "Net Royalties" means gross royalties and fees received by the Facility Operator from a Licensee as consideration for commercially licensing any Subject Invention, Copyrighted Project Work or Other Intellectual Property, less the following:
- (a) legal and other direct expenses (that are not otherwise reimbursed under an option or license agreement from a third party) of patenting, protection and preserving patent, copyrighted and related intellectual property rights, maintaining patents and such other costs, taxes, or reimbursements as may be necessary or required by law, except patent infringement expenses, and
 - (b) inventor or author shares in accordance with the Facility Operator's patent or copyright policy.

Direct expenses includes operation expenses of the Facility Operator. Net Royalties does not include any payments to joint holders nor research funding accepted in association with an option or licensing agreement. Net Royalties shall be aggregated cumulatively, over time, by the Facility Operator for each licensed Subject Invention, Copyrighted Work, and/or Other Intellectual Property.

- (2) "Other Intellectual Property" means (a) intellectual property generated under this Agreement, other than a Subject Invention or Copyrighted Project Work, over which legal protection is established by the performing Facility Operator under Federal law in conformance with the Facility Operator's M&O contract and the foreign counterparts of the intellectual property, such as either a mask work fixed in a semiconductor product as provided by Chapter 9 of USC Title 17 or a trademark/servicemark as provided by Chapter 22 of USC Title 15 and (b) Background Intellectual Property (as defined in Attachment E-1 which were conceived outside of this Agreement, elected by the performing Facility Operator, for which patent protection has or will be obtained and which are first actually reduced to practice in the course of or under this Agreement. Such Other Intellectual Property is subject to certain march-in rights, US Preference, and to a retained United States governmental purpose license. A California state governmental purpose license will also be retained in such Other Intellectual Property which is not identified as Background Intellectual Property.

- B. In consideration of the Sponsor providing funding to Facility Operator, the Department of Energy shall ensure that each Facility Operator agrees to provide in its license contract(s) that Licensees of Subject Inventions, Copyrighted Project Works and/or Other Intellectual Property will directly pay the Sponsor royalties in accordance with the terms and conditions hereinafter set forth. In this regard, the Sponsor shall be considered a third-party beneficiary of such license contract(s) with the full power of enforcement provided by law.
- C. Net Royalties. If the Facility Operator licenses to a Licensee, such a Licensee's obligation to make payments to the Sponsor shall commence from the date that the Net Royalties calculation is positive. Payments are payable in annual installments and are due the first day of March for Net Royalties calculations made for the Facility Operator's prior fiscal year. The Facility Operator is responsible for notifying the Sponsor, on an annual basis, of Net Royalties received as a result of its licensing of intellectual property under this Agreement. Each Licensee shall agree to pay Sponsor an amount equivalent to 15% of the total cumulative Net Royalties, less any payments already made by such Licensee to the Sponsor in the previous years when Net Royalties were positive. Payments shall be made by check, made payable to the California Energy Commission, PIER Fund. Royalty payments resulting from the sale, license, or assignment of each Subject Invention, Copyrighted Project Work or Other Intellectual Property right shall extend for a period of 15 years or until the underlying patent, copyright, or Other Intellectual Property protection expires, whichever occurs first.
- D. Early Buyout. The DOE shall ensure that the Facility Operator provides in its license contract the option of having Licensees pay their entire royalty obligation to the Sponsor without a pre-payment penalty, provided such Licensee makes the payment within two years from the date on which royalties are first due to the Sponsor, in the lump sum amount equal to two (2) times the amount of Sponsor's funds expended under this Agreement.
- E. The Facility Operator agrees to use its best business judgment, consistent with the Facility Operator's licensing practices, when making any sale, license, assignment, or other transfer of any intellectual property rights under this agreement.
- F. Facility Operator shall agree to provide in its license contracts that a late payment of royalties owed to the Sponsor will cause the Sponsor to incur costs not contemplated by the Parties. Facility Operator shall also agree to include in its license contracts, provisions which will have Licensee pay the Sponsor a late fee equal to two percent (2%) of the annual payment due for payments that are past due thirty (30) days or more. Additionally, the Facility Operator shall agree to include in its license contracts, provisions that allow the Sponsor to recoup its attorney fees and costs for enforcement of the license contracts, such as actions to enforce audit and payment of royalties due to the Sponsor. It is understood by the Parties that the Facility Operator is not obligated under this Agreement, nor responsible hereby, for enforcement of the Sponsor's rights provided for under the license contracts.
- G. Facility Operator shall agree to include in license contracts, provisions whereby Licensees shall maintain separate accounts within financial and other records for the purpose of tracking (components of) sales and royalties due to the Sponsor.
- H. Audits of payments to the Commission. The Facility Operator shall agree to provide in its license contracts, provisions which are similar to those set forth within Exhibit C, "Accounting, Cost Allowability, and Audit Provisions" hereunder, provided that any audit of the licensee's account records, pursuant to a request of the Commission, shall be the sole responsibility of the Commission.

- I. Facility Operator's Licensees' failure to pay the Sponsor royalties when due and payable under the terms of their separate license contracts shall constitute a default. Facility Operator will provide that, in the event of default, the Sponsor shall be free to exercise all rights and remedies available to it under law and equity against the licensee only.