**FAIRBANKS MORSE ENGINE**
an EnPro Industries company

**SUPPLEMENTAL PURCHASING TERMS AND CONDITIONS
FLOWDOWN CLAUSES FOR COMMERCIAL ITEMS
PURCHASED IN SUPPORT OF THE
OFFSHORE PATROL CUTTER (OPC) CONTRACT**

BF5855

Effective 1/1/2017

**1.     RATED ORDER.** If this is a "rated order" certified for national defense use, Seller shall follow all the requirements of the Defense Priorities and Allocation System Regulations (15 C.F.R. Part 700).

**2.     CERTIFICATIONS.** By accepting or performing this Purchase Order, Seller certifies that:

a.     Neither Seller nor any of its Principals are presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency.  "Principal" means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

b.     Neither Seller nor any of its affiliates are owned or controlled by the government of a country that is a state sponsor of terrorism.

c.     Seller: (i) is in compliance with Sec. 202 of Executive Order 11246, as amended by Executive Order 11375, and subsequent Executive Orders and the Rules and Regulations set forth by the Secretary of Labor in effect as of the date of this Executive Order; (ii) does not and will not provide or maintain at any of its establishments, nor permit its employees to perform their services at any location under its control where there are maintained segregated facilities; and (iii) agrees that a breach of this Certification violates the Equal Employment clause of Executive Order 11246. "Segregated Facilities" means facilities which are in fact segregated on a basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Seller agrees to: (1) obtain an identical certification from proposed subcontractors prior to the award of subcontracts exceeding $10,000 which are not exempt from the provisions of the Equal Opportunity clause; and (2) maintain such certifications in its files.  The penalty for making a false representation is prescribed under 18 U.S.C. 1001 and any such false representation shall be a material breach of this Purchase Order.

d.     If it has participated in a previous prime contract or subcontract subject to FAR 52.222-26, "Equal Opportunity," that Seller has filed all required compliance reports.

e.     If it has previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor (41 CFR 60-1 and 60-2), that Seller has developed and has on file at each establishment affirmative action programs required by such rules and regulations.

f.     If Seller is registered in the System for Award Management ("SAM"), the size or socioeconomic representations and certifications in SAM (or any other successor system) are current, accurate and complete as of the date of Seller's offer.

g.     To the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, or an employee of a Member of Congress on its behalf in connection with the awarding of this Purchase Order.  If any registrants under the Lobbying Disclosure Act of 1995 have made a lobbying contact on behalf of Seller with respect to this Purchase Order, Seller shall complete and submit, with its offer, OMB Standard Form LLL, Disclosure of Lobbying Activities, to provide the name of the registrants.  Seller need not report regularly employed officers or employees of Seller to whom payments of reasonable compensation were made.  Submission of this certification and disclosure is a prerequisite for making or entering into this Purchase Order imposed by 31 U.S.C. 1352.  Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure required

to be filed or amended by this provision, shall be subject to a civil penalty of not less than $10,000, and not more than $100,000, for each such failure. As used in this Certification, "Lobbying contact" has the meaning provided at 2 U.S.C. 1602(8) and the remaining terms are defined in FAR clause 52.203-12, "Limitation on Payments to Influence Certain Federal Transactions."

**3.     GRATUITIES.** Seller warrants that it has not offered or given and will not offer or give to any employee, agent, or representative of Buyer, Buyer's customer, or the U.S. Government, a payment gratuity, or kickback for obtaining or rewarding favorable treatment by Buyer, Buyer's Customer, or the U.S. Government with respect to the terms, conditions, price, performance, or award of this Purchase Order. A breach of this warranty shall be considered a material breach of the Purchase Order and may result in Buyer's termination of this Purchase Order and/or notification to Buyer's customer or the U.S. Government of such breach.

**4.     EQUAL EMPLOYMENT OPPORTUNITY.   Buyer and Seller shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a), 60-741.5(a) and 29 CFR Part 471, Appendix A to Subpart A. These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, protected veteran status or disability. Seller shall include this Paragraph 4 in each lower-tier subcontract it issues.**

**5.     CERTIFICATES OF CONFORMANCE.**

   a.      Seller shall include with each shipment of Goods a Certificate of Conformance as follows:

   I certify that on [*insert date*], the [*insert Seller's name*] furnished the supplies or services called for by Purchase Order No. [*insert Purchase Order number*] via [*insert Carrier*] on [*identify the bill of lading or shipping document*] in accordance with all applicable requirements. I further certify that the supplies or services are of the quality specified and conform in all respects with the contract requirements, including specifications, preservation, packaging, packing, marking requirements, and physical item identification (part number), and are in the quantity shown on this or on the attached acceptance document. I further certify that, except as stated below, the supplies have been mined, produced, or manufactured in the United States and, if the supplies contain specialty metals, the supplies comply with the restrictions on specialty metals, as implemented through the Department of Defense Federal Acquisition Regulation Supplement.

   Date of Execution: _____

   Signature: _____

   Title: _____

   The following Goods supplied under this Purchase Order have not been mined, produced, or manufactured in the United States:

   Item Number or Identifier:_____

   Country of manufacture: _____

Buyer will not accept shipments of Goods that do not contain a properly executed Certificate of Conformance as required in this Paragraph 5.

## 6. EXPORT CONTROLS AND ECONOMIC SANCTIONS:

a. Seller agrees to comply with all applicable export control and economic sanctions laws including, but not limited to: (i) the Export Administration Regulations (EAR) administered by the U.S. Department of Commerce; (ii) the International Traffic in Arms Regulations (ITAR) administered by the U.S. Department of State; (iii) the various economic sanctions programs administered by the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC regulations) and the U.S. Department of State's Office of Terrorism Finance and Economic Sanctions Policy; and (iv) any export controls or economic sanctions maintained by the European Union ("EU"), United Kingdom, or any other governmental authority to which Seller is subject (collectively "Export Control Laws").

b. Seller shall obtain any authorizations, licenses, or registrations required under the aforementioned Export Control Laws, including those required for the sale at issue to Buyer. Seller will furnish Buyer with: (i) documentation identifying: any articles, services, software, technology, and/or technical data requiring subject to these Export Control Laws; (ii) written confirmation of the relevant Export Classification Control Numbers ("ECCNs"), U.S. Munition List ("USML") category numbers, or other export classification designators for each such item; and (iii) copies of any related export licenses or authorizations. If Seller sources such items outside the United States, then Seller shall notify Buyer and take all necessary measures to comply with all foreign Export Control Laws that may relate to the sale or transfer of the same.

c. Seller shall clearly and appropriately label any controlled technical data (including, but not limited to, drawings, designs, specifications, blueprints, CAD information, and other technical documents or electronic information related to the production, manufacture, or maintenance of a controlled article) that it provides to Buyer with as controlled pursuant to the EAR, ITAR, and/or other applicable laws. Seller shall provide any controlled technical data communicated to Buyer using secure communication protocols designed for the purpose of complying with the aforementioned Export Control Laws. Under no circumstances should such information be emailed using systems that are not designed for the secure communication of controlled technical data.

d. Seller agrees that it will not source any articles, services, software, technology, or technical data that originate from any country, government, organization, or person that is: (i) subject to U.S., EU, or British economic sanctions or other applicable sanction regimes; or (ii) any party that is debarred or restricted pursuant to the aforementioned Export Control Laws, or the U.S. Department of Defense Federal Acquisition Regulations.

e. Seller is solely and exclusively responsible for safeguarding all export controlled articles, services, software, technology, or technical data until Buyer receives the items at issue. This includes both exports to a non-U.S. destination and allowing non-U.S. persons to access such items while located within the United States. Seller will also take appropriate steps to ensure that no export controlled articles, services, software, technology, or technical data can be shipped to a controlled country (or otherwise accessed by unauthorized foreign nationals) without the appropriate export licenses. Where the Seller is shipping of a controlled article, the Seller shall use a carrier that maintains procedures designed to comply with the aforementioned Export Control Laws, and to provide any required notifications to the carrier that the shipment involves controlled items.

f. If the Seller is a signatory to a Technical Assistance Agreement ("TAA") or Manufacturing License Agreement ("MLA") with Buyer, Seller shall promptly notify Buyer of any changed circumstances that would require modifying the terms of such an agreement, including any potential violation of the terms of the agreement, any ineligibility to export, any investigation into alleged violations of the aforementioned Export Control Laws, any self-disclosure of potential export controls violations, any addition of foreign personnel to any project covered by such an Agreement, or any other circumstances that may affect the Seller's ability to perform pursuant to the terms of the Agreement.

g.       Seller shall immediately notify Buyer if it is or becomes listed on any Excluded or Denied Party List maintained by any U.S. EU, or British agency, or if any government denies, suspends, or revokes its export privileges.

h.       Seller shall prepare and provide accurate invoices and documentation for each shipment that will allow Buyer to comply with the export and import requirements administered by U.S. Customs & Border Protection ("CBP"), including: (i) the Seller's name and address; (ii) the terms of sale; (iii) the total quantity of Goods being shipped; (iv) a description of the Goods being shipped; (v) the country of origin of the Goods; (vi) the valuation of the Goods; (vii) the currency in which the Goods are priced; and (viii) any discounts that have been included for the shipment that are not otherwise reflected in the unit price.

i.       Seller shall promptly notify Buyer of any suspected violation of the aforementioned Export Control Laws.  Seller further agrees that it will fully cooperate in any investigation related to the subject matter of the Purchase Order, including by providing full access to relevant personnel and records to aid Buyer in the identification and evaluation of any suspected violation, following reasonable notice from Buyer.

j.       Seller agrees to indemnify Buyer for any fines, penalties, claims, losses, damages, costs (including legal costs), expenses, and liabilities (including costs of investigation of potential violations of the aforementioned Export Control Law) that may arise as a result of Seller's breach of any of the provisions within this Paragraph 6.

## 7.       DISPUTES.

a.       If Buyer elects to prosecute any dispute involving this Purchase Order under the disputes procedure applicable to the U.S. Government prime or higher-tier contract, Seller shall cooperate fully with Buyer in prosecuting the dispute.  Seller shall be bound by the final outcome of the disputes procedure if: (i) Buyer has afforded Seller an opportunity to participate in Buyer's prosecution of the dispute; or (ii) Buyer, having decided to discontinue its own prosecution of the dispute, has afforded Seller an opportunity to continue to prosecute the dispute in Buyer's name.  Buyer and Seller shall each bear their own costs of prosecuting any dispute.  Pending the final resolution of any dispute arising out of or relating to this Purchase Order, Seller shall proceed diligently with performance of this Purchase Order, including the delivery of Goods.

b.       For all other disputes, the parties shall strive to settle amicably and in good faith any dispute arising in connection with this Purchase Order using the following escalation process:  (1) by the technical and contractual personnel for each party; (2) by executive management of each party; (3) by mediation, or (4) by a court of competent jurisdiction in the State of Wisconsin.

c.       Pending resolution of any dispute hereunder, Seller shall proceed diligently with the performance of work, including the delivery of Goods in accordance with Buyer's direction, as long as Buyer continues to pay Seller for Goods accepted at the Purchase Order price.

## 8.       DELIVERY OF DATA.  Buyer may withhold payment in an amount not to exceed 5% of the applicable Purchase Order price if Seller fails to deliver any technical data or computer software in accordance with the terms of this Purchase Order.

## 9.       WARRANTY OF GOODS/SERVICES

a.       Seller warrants that all goods/services furnished under this Purchase Order (i) will conform to all requirements of this Purchase Order and (ii) will during the Warranty Period be of good material and workmanship and free of defects.  Seller further warrants that the goods/services will be new (not used or reconditioned).  The Warranty Period shall survive inspection, acceptance, and payment.

b.    This Warranty Period shall extend for the shorter of (i) or (ii), however, if the Warranty Period is extended due to (iii), the length of time for which the warranty is extended shall be added:

i.    Three hundred, sixty-five (365) days from the date of delivery of the vessel on which the equipment, materials, installations or services were incorporated (except that such three hundred sixty-five (365) day period shall be seven hundred thirty (730) days for the first Offshore Patrol Cutter delivered to the United States Coast Guard under the United States Coast Guard Contract Number HSCG23-14-C-APC002 issued or to be issued under Solicitation Number HSCG23-12-OPC001 and three hundred sixty-five (365) days for each subsequent Offshore Patrol Cutter); or

ii.    56 months after delivery of Goods or services by Seller to Buyer.

iii.    This Warranty Period shall be extended by an amount of time equal to any time during which the vessel, is out of service due to reason of any failure or deficiency in the equipment, materials, installations or services furnished hereunder.    The warranty provided hereunder shall insure to the benefit of Buyer's customer and the U.S. Government and shall be fully transferable and/or assignable to such customer and/or the U.S. Government.

c.    Seller warrants for a period of three (3) years from the dates of delivery of technical data that all technical data will at the time of delivery conform with the specifications and requirements of the contract.    Seller shall promptly upon notice from Buyer correct or replace at Seller's expense the nonconforming technical data.

**10.    INSURANCE.**    Seller shall maintain adequate insurance protection covering its respective activities and obligations hereunder and shall upon request, provide to Buyer proof of such coverages, including but not limited to general liability and errors and omissions policies.

**11.    CHANGES.**  Buyer may, at any time request, in writing, to make changes to this Purchase Order. If any such change causes an increase or decrease in the cost or time required for performance of the work, the price and/or delivery schedule, Seller shall promptly notify Buyer thereof.  If Buyer desires to proceed with the requested change on the basis of the increase or decrease in price or time notified by Seller, it shall promptly notify Seller thereof and the Purchase Order shall be modified.

**12.    UNAUTHORIZED CHANGES.** Upon Buyer's approval of Seller's drawings, designs, specifications, etc., Seller shall make no changes affecting form or function of the Goods or services without Buyer's prior written approval.  Any approvals by Buyer shall not relieve Seller of responsibility for any errors or deficiencies that may exist, or for performing the work and furnishing the goods/services in strict accordance with this Purchase Order's requirements.

**13.    TERMINATION FOR DEFAULT**

a.    Buyer may, without liability, and in addition to any other rights or remedies provided herein or by law, terminate this Purchase Order in whole or in part by written notice of default if Seller:

i.    fails to deliver the supplies or perform the services within the time specified;

ii.    fails to make sufficient progress with the work, thereby endangering completion of performance within the time specified; or

iii.    fails to comply with any of the other instructions, terms, or conditions.

b.    Said right to terminate for default may be exercised if Seller does not cure the failure within ten (10) days after receiving Buyer's written notice of such failure.

c.      If this Purchase Order is terminated for default, Buyer may require Seller to transfer title and deliver to Buyer any completed goods that Seller has specifically produced or acquired for the terminated portion of this Purchase Order and if Buyer does so, Buyer shall pay Seller the order price therefor.  Buyer may withhold from any payments due Seller, any sum necessary to protect Buyer against any liability or expenses due to the termination for default.

d.      Seller shall not be liable for default of this Purchase Order if the failure to perform this Order arises out of causes beyond the control and without the fault or negligence of Seller.  Such causes may include, but are not limited to, acts of God or of the public enemy, terrorism, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, freight embargos, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of Seller.  If a default is attributed to a default of a supplier or permitted subcontractor to Seller, and if such default arises out of the causes beyond the control of both Seller and the supplier or subcontractor and without the fault or negligence of either of them, Seller shall not be liable for failure to perform, unless the goods or services to be furnished by the supplier or subcontractor of Seller were reasonably obtainable from other sources in sufficient time to permit Seller to meet the delivery requirements or amendments thereto.  No cause shall constitute a basis for excusable delay unless Seller has notified Buyer, in writing, of the existence of such cause as promptly as practicable, but in no event longer than five (5) days of the date that Seller becomes aware of such event.  In any event, Seller shall take reasonable actions to mitigate the effects of any excusable delay.

e.      The rights and remedies of Buyer provided in this Paragraph 13 shall not be exclusive and are in addition to any other rights and remedies provided by law or equity, or otherwise under this Purchase Order.

## 14.      TERMINATION FOR CONVENIENCE

a.      Buyer reserves the right, at any time, in its own best interest, to terminate this Purchase Order in whole or in part, by written notice of termination for convenience to Seller.

b.      If this Purchase Order is so terminated, then, Buyer shall pay to Seller:

i.      the full purchase price due for all Goods shipped prior to termination;

ii.      the amount of reasonable costs incurred (including reasonable termination charges payable to third parties) for the terminated portion of the Purchase Order prior to or as a result of the stop-work order (if applicable) and termination; and

c.      Seller shall provide Buyer any supporting information necessary to document the reasonableness of Seller's termination for convenience claim within thirty (30) days after such termination.

## 15.      INFORMATION DISCLOSED/INTELLECTUAL PROPERTY

a.      Buyer shall have the right to utilize the Goods and/or services in performance of Buyer's contractual obligations to its customer, including the right to copy and deliver technical data and computer software to Buyer's customer if it is required as a deliverable under Buyer's contract with its customer.

b.      Unless otherwise expressly provided, this Purchase Order does not confer or grant to either party in any manner whatsoever, any license or right under any patent, trademark, trade secret, maskwork, copyright or other intellectual property right held by either party.

c.      If a separate confidentiality, nondisclosure, or proprietary information agreement exists between Buyer and Seller which relates to the subject matter of this Purchase Order, then confidential or proprietary information furnished by one party to the other party shall be protected pursuant to such agreement, and paragraphs (d) through (f) of this clause shall not apply.

d.      If no separate confidentiality, nondisclosure, or proprietary information agreement exists between Buyer and Seller, paragraphs (c) through (f) of this clause apply. For purposes of this clause, "Information" shall mean information disclosed to one party by the other party in connection with this Purchase Order, which is either identified to the receiving party as being proprietary or which is information a reasonable person would understand to be such information.   Examples of Information include, but are not limited to, customer lists, pricing policies, market analyses, business plans or programs, software, specifications, manuals, printouts, notes and annotations, performance data, designs, drawings, dimensions, processes, data, reports, photographs, and engineering, manufacturing or technical information related to a party's products, services, equipment or processes, as well as duplicates, copies or derivative works thereof.  Information shall not mean any information previously known to a receiving party without obligation of confidence, or which becomes publicly disclosed, which is rightfully received by the receiving party from a third party without obligation of confidence, or which is independently developed by the receiving party without reference to the confidential information.

e.      Information furnished to a receiving party shall remain the disclosing party's proprietary property, shall be duplicated only as authorized in writing by the disclosing party, and shall be returned to the disclosing party upon request or when no longer required for the performance of this Purchase Order. A receiving party shall not disclose Information to any third party, and shall take all reasonable precautions to prevent the disclosure of Information to third parties. The receiving party agrees not to use Information to develop any product, service or system, or to support any third party in the development of any product, service or system.

f.      A party's obligations with respect to Information disclosed hereunder prior to the performance in full or termination of this Purchase Order shall not, except as expressly set forth herein, be affected by such performance in full or termination.

## 16.      PATENT, COPYRIGHT, AND TRADEMARK INDEMNITY

a.      Seller agrees to indemnify, defend, and hold harmless Buyer, its customer, and those for whom Buyer may act as agent from any costs, expenses, including reasonable attorneys' fees, damages, or liability that they or Buyer may incur as a result of any proceedings initiated by a third party charging infringement of any patent, copyright, or trademark by reason of sale or use of any goods/services/data furnished by Seller. The foregoing shall not apply to the extent such proceedings resulted from Buyer's modification of the goods/services/data without Seller's consent, or from Buyer's combination of the goods/services/data with goods/services/data that Seller did not provide (unless such combination was clearly contemplated and documented.)

## 17.      RELATIONSHIP OF PARTIES.  The parties are performing pursuant to this Purchase Order only as independent contractors.  Nothing set forth in this Purchase Order shall be construed to create the relationship of principal and agent between parties.

## 18.      COMPLIANCE WITH LAWS

a.      Seller shall at its expense comply with all applicable federal, state, and local laws, rules, regulations and orders in effect on the date of this Purchase Order, including, but not limited to the following as amended:

i.      The Fair Labor Standards Act of 1938;

ii.      The Federal Occupational Safety and Health Act of 1970 (OSHA);

iii.      The Toxic Substances Control Act of 1976;

iv.      The Walsh-Healy Public Contracts Act;

v.    Federal Executive Order 12549;

vi.    Any other applicable federal law concerning labor relations, non-discrimination in employment, minimum wages, overtime compensation, and hours of employment;

vii.    The Foreign Corrupt Practices Act of 1977;

viii.    The Anti-Kickback Act of 1986, and the Anti-Kickback Enforcement Act of 1986;

ix.    All applicable United States Export Laws and Regulations.

b.    Seller agrees to indemnify and hold Buyer harmless against any loss, liability or expense (including reasonable attorneys' fees) resulting directly from the Seller's violation or noncompliance with such laws, rules, regulations and orders.

**19.    PERMITS, FEES, AND LICENSES.**  Except as may be otherwise provided in this Purchase Order Seller shall obtain at its expense all permits, fees and licenses required for the work other than those that are specific to Buyer's facility.

**20.    INDEMNITY.**  Seller shall release, defend, protect, indemnify, and hold harmless Buyer its officers, agents, and employees, to the extent that third party claims arising out of or resulting from the performance of this Purchase Order for personal injury, illness, death, property (whether real or personal or owned or leased) damage and loss are contributed to or caused by Seller.

**21.    PUBLIC RELEASE OF INFORMATION.**  No public release of information, news release, announcement, advertisement, denial or confirmation of this Purchase Order or the subject matter hereof, shall be made without Buyer's prior written approval.

**22.    FAR/HSAR CLAUSES.**  The following clauses set forth in the Federal Acquisition Regulation ("FAR" available at http://www.acquisition.gov/FAR) and the Department of Homeland Security Acquisition Regulation ("HSAR" available at https://www.dhs.gov/sites/default/files/publications/CPO_HSAR_1_0.pdf), in effect as of the date identified below are incorporated herein by reference with the same force and effect as if they were given in full text.  For purposes of this Purchase Order, the following clauses shall operate, impose the obligations and responsibilities of the parties and be interpreted as if "Government" means "Buyer," "Contracting Officer" means an authorized representative of Buyer's purchasing department, "Contract" means this "Purchase Order," "Offeror" means "Seller," "Contractor" means "Seller," and "Disputes clause" means the Disputes clause of this Purchase Order.  Seller shall also include these FAR and HSAR clauses in each lower-tier subcontract it issues, as applicable.

| FAR | Clauses | Date |
|---|---|---|
| 52.202-1 | Definitions | JAN 2012 |
| 52.203-3 | Gratuities | APR 1984 |
| 52.203-5 | Covenant Against Contingent Fees | APR 1984 |
| 52.203-6 | Restrictions on Subcontractor Sales to the Government, (applies to Purchase Orders with a value over $150,000) | SEP 2006 |
| 52.203-7 | Anti-Kickback Procedures (except paragraph (c)(1), applies to Purchase Orders with a value over $150,000) | OCT 2010 |
| 52.203-8 | Cancellation, Rescission and Recovery of Funds for Illegal or Improper Activity | JAN 1997 |
| 52.203-10 | Price or Fee Adjustment for Illegal or Improper Activity | JAN 1997 |
| 52.203-12 | Limitation on Payments to Influence Certain Federal Transactions (applies to Purchase Orders with a value over $150,000) | OCT 2010 |
| 52.203-13 | Contractor Code of Business Ethics and Conduct (applies to Purchase | APR 2010 |

| | Orders that have a: (i) value exceeding $5 million; and (ii) performance period of more than 120 days; all disclosures of violations of the civil False Claims Act or of Federal criminal law under the clause shall be directed to the agency Office of the Inspector General, with a copy to the U.S. Government Contracting Officer) | |
|---|---|---|
| 52.204-2 | Security Requirements (applies to Purchase Orders that involve access to classified information) | AUG 1996 |
| 52.209-6 | Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment | AUG 2013 |
| 52.211-1 | Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards, and Commercial Item Descriptions, FPMR Part 101-29 | AUG 1998 |
| 52.211-2 | Availability of Specifications, Standards, and Data Item Descriptions Listed in the Acquisition Streamlining and Standardization Information System (ASSIST) | APR 2014 |
| 52.211-5 | Material Requirements | AUG 2000 |
| 52.211-7 | Alternatives to Government-Unique Standards | NOV 1999 |
| 52.211-15 | Defense Priority and Allocation Requirements | APR 2008 |
| 52.215-19 | Notification of Ownership Changes | OCT 1997 |
| 52.215-21 | Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data – Modifications (including Alt III) (insert Microsoft Office as the required media format) | OCT 1997 |
| 52.219-8 | Utilization of Small Business Concerns | JUL 2013 |
| 52.219-28 | Post-Award Small Business Program Rerepresentation (First fill-in: 336611; Second fill-in: HSCG23-14-C-APC002) | JUL 2013 |
| 52.222-1 | Notice to the Government of Labor Disputes | FEB 1997 |
| 52.222-4 | Contract Work Hours and Safety Standards Act – Overtime Compensation | JUL 2005 |
| 52.222-19 | Child Labor – Cooperation with Authorities and Remedies | NOV 2013 |
| 52.222-20 | Walsh-Healey Public Contracts Act | OCT 2010 |
| 52.222-21 | Prohibition of Segregated Facilities | FEB 1999 |
| 52.222-24 | Preaward On-Site Equal Opportunity Compliance Evaluation (applies to Purchase Orders over $10 million) | FEB 1999 |
| 52.222-26 | Equal Opportunity | MAR 2007 |
| 52.222-35 | Equal Opportunity for Veterans (applies to Purchase Orders with a value equal to or exceeding $100,000) | SEP 2010 |
| 52.222-36 | Affirmative Action for Workers with Disabilities (applies to Purchase Orders with a value over $15,000) | OCT 2010 |
| 52.222-37 | Employment Reports on Veterans (applies to Purchase Orders with a value equal to or exceeding $100,000) | SEP 2010 |
| 52.222-40 | Notification of Employee Rights Under the National Labor Relations Act (applies to Purchase Orders with a value over $10,000) | DEC 2010 |
| 52.222-50 | Combating Trafficking in Persons | FEB 2009 |
| 52.222-54 | Employment Eligibility Verification (applies to Purchase Orders for services that have a value of more than $3,000 and include work performed in the United States) | AUG 2013 |
| 52.223-3 Alt I | Hazardous Material Identification and Material Safety Data Alt I (JUL 1995) | JAN 1997 |
| 52.223-5 | Pollution Prevention and Right-to-Know Information | MAY 2011 |
| 52.223-11 | Ozone Depleting Substances | MAY 2001 |
| 52.223-18 | Encouraging Contractor Policies to Ban Text Messaging While Driving | AUG 2011 |
| 52.225-1 | Buy American Act – Supplies (applies to Purchase Orders for goods that will be delivered to the U.S. Government as-is (e.g., spare parts)) | FEB 2009 |
| 52.225-13 | Restrictions on Certain Foreign Purchases | JUN 2008 |

| 52.227-1* | Authorization and Consent | DEC 2007 |
|---|---|---|
| 52.227-2* | Notice and Assistance Regarding Patent and Copyright Infringement (applies to Purchase Orders with a value over $150,000) | DEC 2007 |
| 52.227-9* | Refund of Royalties (applies to Purchase Orders in which the value of royalties reported during negotiation exceeds $250) | APR 1984 |
| 52.227-10* | Filing of Patent Applications – Classified Subject Matter (applies to Purchase Orders that cover classified subject matters) | DEC 2007 |
| 52.234-1 | Industrial Resources Developed Under Defense Production Act Title III | DEC 1994 |
| 52.242-13 | Bankruptcy | JUL 1995 |
| 52.242-15 | Stop-Work Order (In paragraph (b)(2), the term "30 days" is changed to "15 days") | AUG 1989 |
| 52.244-6 | Subcontracts for Commercial Items | FEB 2016 |
| 52.245-1 | Government Property | APR 2012 |
| 52.245-9 | Use and Charges | APR 2012 |
| 52.246-11 | Higher Level Contract Quality Requirement (ISO 9001) | FEB 2009 |
| 52.246-15 | Certification of Conformance | APR 1984 |
| 52.247-63 | Preference for U.S.-Flag Carriers (applies to Purchase Orders that may involve international air transportation) | JUN 2003 |
| 52.247-64 | Preference for Privately Owned U.S.-Flag Commercial Vessels | FEB 2006 |
| 52.248-1 | Value Engineering (applies to Purchase Orders with a value equal to or exceeding $150,000) | OCT 2010 |
| **HSAR** | **Clauses** | **Date** |
| 3052.203-70 | Instructions for Contractor Disclosure of Violations | SEP 2012 |
| 3052.204-71 | Contractor Employee Access Alt I (SEP 2012) (applies to Purchase Orders that involve access to Government facilities, sensitive information, or resources) | SEP 2012 |
| 3052.205-70 | Advertisements, Publicizing Awards, and Releases Alt I (SEP 2012) | SEP 2012 |
| 3052.222-70 | Strikes or Picketing Affecting Timely Completion of the Contract Work | DEC 2003 |

*For clauses marked with an asterisk (*), no substitution of parties for "Government" and "Contracting Officer" apply. References to the "Government" shall mean the U.S. Government and references to the "Contracting Officer" shall mean the U.S. Government Contracting Officer.

**23.** **ADDITIONAL CLAUSES.** The following clauses (modified as necessary to properly identify the parties to this Purchase Order), contained at Section H of Buyer's customer's Prime Contract with the U.S. Government, are incorporated into this Purchase Order as set forth below:

**H.23** **REQUIREMENTS FOR CONTRACTS INVOLVING EXPORT-CONTROLLED ITEMS**

(a) *Definition.* "Export-controlled items," as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR Parts 730-774) or the International Traffic in Arms Regulations (ITAR)(22 CFR Parts 120-130). The term includes:

(1) "Defense items," defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data, and further defined in the ITAR, 22 CFR Part 120.

(2) "Items," defined in the EAR as "commodities", "software", and "technology"," terms that are also defined in the EAR, 15 CFR 772.1.

(b) Seller shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for contractors to register with the Department of State in accordance with the ITAR. Seller shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR.

(c)      Seller's responsibility to comply with all applicable laws and regulations regarding export-controlled items exists independent of, and is not established or limited by, the information provided by this clause.

(d)      Nothing in the terms of this Purchase Order adds, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to—

          (1)      The Export Administration Act of 1979, as amended (50 U.S.C. App. 2401, et seq.);

          (2)      The Arms Export Control Act of 1976 (22 U.S.C. 2751, et seq.);*et seq.*);

          (3)      The International Emergency Economic Powers Act (50 U.S.C. 1701, et seq.);

          (4)      The Export Administration Regulations (15 CFR Parts 730-774);

          (5)      The International Traffic in Arms Regulations (22 CFR Parts 120-130); and

          (6)      Executive Order 13222, as extended;

(e)      Data delivered under this Purchase Order that contain technical data are subject to the restrictions of the Arms Export Control Act (Title 22, U. S. C., Section 2751).  Technical documents shall be marked with the appropriate ITAR Control Statements

(f)      Seller shall include the substance of this clause, including this paragraph (f), in all subcontracts.

**H.33          EARNED VALUE MANAGEMENT SYSTEM (252. 234-7002)**

(a)      *Definitions.* As used in this clause——

"Acceptable earned value management system" means an earned value management system that generally complies with system criteria in paragraph (b) of this clause.

"Earned value management system" means an earned value management system that complies with the earned value management system guidelines in the ANSI/EIA-748.

"Significant deficiency" means a shortcoming in the system that materially affects the ability of Government officials to rely upon information produced by the system that is needed for management purposes.

(b)      *System criteria*. In the performance of this Purchase Order, Seller shall use—

          (1)      An Earned Value Management System (EVMS) that complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA-748); and

          (2)      Management procedures that provide for generation of timely, reliable, and verifiable information for the Contract Performance Report (CPR) and the Integrated Master Schedule (IMS) required by the CPR and IMS data items of this Purchase Order.

(c)      If this Purchase Order has a value of $50 million or more, Seller shall use an EVMS that has been determined to be acceptable by the Cognizant Federal Agency (CFA).  If, at the time of award, Seller's EVMS has not been determined by the CFA to be in compliance with the EVMS guidelines as stated in paragraph (b)(1) of this clause, Seller shall apply its current system to the Purchase Order and shall take necessary actions to meet the milestones in the Seller's EVMS plan.

(d)      If this Purchase Order has a value of less than $50 million, the Government will not make a formal determination that Seller's EVMS complies with the EVMS guidelines in ANSI/EIA-748 with respect to the Purchase Order. The use of Seller's EVMS for this Purchase Order does not imply a Government determination of Seller's compliance with the EVMS guidelines in ANSI/EIA-748 for application to future contracts. The

Government will allow the use of Seller's EVMS that has been formally reviewed and determined by the CFA to be in compliance with the EVMS guidelines in ANSI/EIA-748.

(e)      Seller shall submit notification of any proposed substantive changes to the EVMS procedures and the impact of those changes to the CFA. If this Purchase Order has a value of $50 million or more, unless a waiver is granted by the CFA, any EVMS changes proposed by Seller require approval of the CFA prior to implementation. The CFA will advise Seller of the acceptability of such changes as soon as practicable (generally within 30 calendar days) after receipt of Seller's notice of proposed changes.  If the CFA waives the advance approval requirements, Seller shall disclose EVMS changes to the CFA at least 14 calendar days prior to the effective date of implementation.

(f)      The Government will schedule integrated baseline reviews as early as practicable, and the review process will be conducted not later than 180 calendar days after—

(1)      Contract award;

(2)      The exercise of significant contract options; and

(3)      The incorporation of major modifications.

During such reviews, the Government and Seller will jointly assess Seller's baseline to be used for performance measurement to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

(g)      Seller shall provide access to all pertinent records and data requested by the Contracting Officer or duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS complies, and continues to comply, with the performance criteria referenced in paragraph (b) of this clause.

(h)      When indicated by Purchase Order performance, Seller shall submit a request for approval to initiate an over-target baseline or over-target schedule to the Contracting Officer. The request shall include a top-level projection of cost and/or schedule growth, a determination of whether or not performance variances will be retained, and a schedule of implementation for the rebaselining. The Government will acknowledge receipt of the request in a timely manner (generally within 30 calendar days).

(i)      Significant deficiencies. (1) The Contracting Officer will provide an initial determination to Seller, in writing, of any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow Seller to understand the deficiency.

(2)      Seller shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in Seller's EVMS. If Seller disagrees with the initial determination, Seller shall state, in writing, its rationale for disagreeing.

(3)      The Contracting Officer will evaluate Seller's response and notify Seller, in writing, of the Contracting Officer's final determination concerning—

(i)      Remaining significant deficiencies;

(ii)      The adequacy of any proposed or completed corrective action;

(iii)      System noncompliance, when Seller's existing EVMS fails to comply with the earned value management system guidelines in the ANSI/EIA-748; and

(iv)    System disapproval, if initial EVMS validation is not successfully completed within the timeframe approved by the Contracting Officer, or if the Contracting Officer determines that Seller's earned value management system contains one or more significant deficiencies in high-risk guidelines in ANSI/EIA-748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). When the Contracting Officer determines that the existing earned value management system contains one or more significant deficiencies in one or more of the remaining 16 guidelines in ANSI/EIA-748 standards, the Contracting Officer will use discretion to disapprove the system based on input received from functional specialists and the auditor.

(4)    If Seller receives the Contracting Officer's final determination of significant deficiencies, Seller shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies.

(j)    *Withholding payments*. If the Contracting Officer makes a final determination to disapprove Seller's EVMS, the Contracting Officer will withhold payments in accordance with the clause entitled "Contractor Business Systems".

(k)    With the exception of paragraphs (i) and (j) of this clause, Seller shall require its subcontractors to comply with EVMS requirements as follows:

(1)    For subcontracts valued at $50 million or more, the following subcontractors shall comply with the requirements of this clause:

(m)    Seller shall require the subcontractors specified below to comply with the requirements of this clause: [list of applicable subcontractors will be identified prior to Phase II proposal submission]

## H.34    DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE

In addition to technical data or computer software that is already subject to a contract delivery requirement, the United States may require at any time the delivery of technical data and non commercial computer software that has been generated or utilized in the performance of a contract, and compensate Seller only for reasonable costs incurred for converting and delivering the data in the required form, upon a determination that—

(A) the technical data is needed for the purpose of reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process; and

(B) the technical data—
(i) pertains to an item or process developed in whole or in part with Federal funds; or
(ii) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes, and.

Provided that the United States is not foreclosed from requiring the delivery of the technical data by a failure to challenge, in accordance with the requirements of paragraph (e) of the Section H clause entitled "Validation Of Restrictive Markings On Technical Data" and paragraph (e) of the   Section H clause entitled "Validation Of Asserted Restrictions—Computer Software" of this Purchase Order, Seller's assertion of a use or release restriction on the technical data, the Government's rights to use said data or computer software shall be pursuant to the "Rights In Technical Data – Noncommercial Items" and "Rights In Noncommercial Computer Software And Noncommercial Computer Software Documentation" clauses of this Purchase Order.

## H.36    RIGHTS IN TECHNICAL DATA – NONCOMMERCIAL ITEMS

(a) *Definitions*. As used in this clause—

(1) "Computer data base" means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) "Computer program" means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(3) "Computer software" means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

(4) "Computer software documentation" means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(5) "Covered Government support contractor" means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

   (i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

   (ii) Receives access to technical data or computer software for performance of a Government contract that contains the clause substantially similar to DFARS clause 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(6) "Detailed manufacturing or process data" means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(7) "Developed" means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed," the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(8) "Developed exclusively at private expense" means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

   (i) Private expense determinations should be made at the lowest practicable level.

   (ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete

development shall not be considered when determining whether development was at government, private, or mixed expense.

(9) "Developed exclusively with government funds" means development was not accomplished exclusively or partially at private expense.

(10) "Developed with mixed funding" means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(11) "Form, fit, and function data" means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(12) "Government purpose" means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

(13) "Government purpose rights" means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and

(ii) Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.

(14) "Limited rights" means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(i) The reproduction, release, disclosure, or use is—

(A) Necessary for emergency repair and overhaul;

(B) Necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or

(C) A release or disclosure to—

(*1*) A covered Government support contractor, for use, modification, reproduction, performance, display, or release or disclosure to authorized person(s) in performance of a Government contract; or

(*2*) A foreign government, of technical data, (other than detailed manufacturing or process data) to, or use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(ii) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(iii) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(15) "Technical data" means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(16) "Unlimited rights" means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(17) "Vessel design" means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs described in 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq*.

(b) *Rights in technical data*. Seller grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in technical data other than computer software documentation (see the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this Purchase Order for rights in computer software documentation):

(1) *Unlimited rights*. The Government shall have unlimited rights in technical data that are—

(i) Data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(ii) Studies, analyses, test data, or similar data produced for this Purchase Order, when the study, analysis, test, or similar work was specified as an element of performance;

(iii) Created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

(iv) Form, fit, and function data;

(v) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(vi) Corrections or changes to technical data furnished to Seller by the Government;

(vii) Otherwise publicly available or have been released or disclosed by Seller or subcontractor without restrictions on further use, release or disclosure, other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in

the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(viii) Data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or

(ix) Data furnished to the Government, under this or any other Government contract or subcontract thereunder, with—

(A) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(B) Government purpose rights and Seller's exclusive right to use such data for commercial purposes has expired.

(2) *Government purpose rights.*

(i) The Government shall have government purpose rights for a five-year period, or such other period as may be negotiated, in technical data—

(A) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights in such data as provided in paragraphs (b)(1)(ii) and (b)(1)(iv) through (b)(1)(ix) of this clause; or

(B) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(ii) The five-year period, or such other period as may have been negotiated, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the items, components, or processes or creation of the data described in paragraph (b)(2)(i)(B) of this clause. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the technical data.

(iii) The Government shall not release or disclose technical data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the non-disclosure agreement in the Section attachment entitled "Use and Non-Disclosure Agreement" or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause substantially similar to the DFARS clause 252.227-7025, Information Marked with Restrictive Legends.

(iv) Seller has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this Purchase Order for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (f)(2) of this clause.

(3) *Limited rights*.

(i) Except as provided in paragraphs (b)(1)(ii) and (b)(1)(iv) through (b)(1)(ix) of this clause, the Government shall have limited rights in technical data—

(A) Pertaining to items, components, or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (f) of this clause; or

(B) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(ii) The Government shall require a recipient of limited rights data for emergency repair or overhaul to destroy the data and all copies in its possession promptly following completion of the emergency repair/overhaul and to notify Seller that the data have been destroyed.

(iii) Seller, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data furnished to the Government with limited rights. However, if the Government desires to obtain additional rights in technical data in which it has limited rights, Seller agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All technical data in which Seller has granted the Government additional rights shall be listed or described in a license agreement made part of the contract. The license shall enumerate the additional rights granted the Government in such data.

(iv) Seller acknowledges that—

(A) Limited rights data is authorized to be released or disclosed to covered Government support contractors;

(B) Seller will be notified of such release or disclosure;

(C) Seller (or the party asserting restrictions as identified in the limited rights legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with Seller (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that Seller (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement;

(D) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the limited rights data as set forth in the clause of this Purchase Order and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(E) Seller shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

(4) *Specifically negotiated license rights*. The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause, including the period during which the

Government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in paragraph (a)(14) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this Purchase Order.

(5) *Prior government rights*. Technical data that will be delivered, furnished, or otherwise provided to the Government under this Purchase Order, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability*. Seller agrees to release the Government from liability for any release or disclosure of technical data made in accordance with (b)(7) *Vessel designs*. For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this Purchase Order the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design paragraph (a)(14) or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (b)(4) of this clause, or by others to whom the recipient has released or disclosed the data and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Seller data marked with restrictive legends.

(c) *Contractor rights in technical data*. All rights not granted to the Government are retained by Seller.

(d) *Third party copyrighted data*. Seller shall not, without the written approval of the Contracting Officer, incorporate any copyrighted data in the technical data to be delivered under this Purchase Order unless Seller is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data of the appropriate scope set forth in paragraph (b) of this clause, and has affixed a statement of the license or licenses obtained on behalf of the Government and other persons to the data transmittal document.

(e) *Identification and delivery of data to be furnished with restrictions on use, release, or disclosure*.

(1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in paragraph (e)(3) of this clause, technical data that Seller asserts should be furnished to the Government with restrictions on use, release, or disclosure are identified in an attachment to this Purchase Order (the Attachment). Seller shall not deliver any data with restrictive markings unless the data are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the data, in the following format, and signed by an official authorized to contractually obligate Seller:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data.

Seller asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data should be restricted—

| Technical Data to be Furnished With Restrictions* | Basis for Assertion** | Asserted Rights Category*** | Name of Person Asserting Restrictions**** |
|---|---|---|---|
| (LIST) | (LIST) | (LIST) | (LIST) |

*If the assertion is applicable to items, components, or processes developed at private expense, identify both the data and each such item, component, or process.

**Generally, the development of an item, component, or process at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data pertaining to such items, components, or processes. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited or government purpose rights under this or a prior contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

Date _____
Printed Name and Title _____

_____
Signature _____

(End of identification and assertion)

(4) When requested by the Contracting Officer, Seller shall provide sufficient information to enable the Contracting Officer to evaluate Seller's assertions. The Contracting Officer reserves the right to add Seller's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Restrictive Markings on Technical Data clause of this Purchase Order.

(f) *Marking requirements*. Seller, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this Purchase Order by marking the deliverable data subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this Purchase Order: the government purpose rights legend at paragraph (f)(2) of this clause; the limited rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions*. Seller, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all technical data that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other

appropriate identifier. Technical data transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. Reproductions of technical data or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Government purpose rights markings*. Data delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No.
Contractor Name
Contractor Address

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Technical Data—Noncommercial Items clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(3) *Limited rights markings*. Data delivered or otherwise furnished to the Government with limited rights shall be marked with the following legend:

LIMITED RIGHTS

Contract No.
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Technical Data--Noncommercial Items clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(4) *Special license rights markings*.

(i) Data in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or

disclose these data are restricted by Contract No. _____(Insert contract number)____, License No. ____(Insert license identifier)____. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(5) of this clause).

(5) *Pre-existing data markings*. If the terms of a prior contract or license permitted Seller to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data deliverable under this Purchase Order, and those restrictions are still applicable, Seller may mark such data with the appropriate restrictive legend for which the data qualified under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records*. Throughout performance of this Purchase Order, Seller and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data delivered under this Purchase Order.

(h) *Removal of unjustified and nonconforming markings*.

(1) *Unjustified technical data markings*. The rights and obligations of the parties regarding the validation of restrictive markings on technical data furnished or to be furnished under this Purchase Order are contained in the Section H clause entitled "Validation of Restrictive Markings on Technical Data" of this Purchase Order. Notwithstanding any provision of this Purchase Order concerning inspection and acceptance, the Government may ignore or, at Seller's expense, correct or strike a marking if, in accordance with the procedures in the Validation of Restrictive Markings on Technical Data clause of this Purchase Order, a restrictive marking is determined to be unjustified.

(2) *Nonconforming technical data markings*. A nonconforming marking is a marking placed on technical data delivered or otherwise furnished to the Government under this Purchase Order that is not in the format authorized by this Purchase Order. Correction of nonconforming markings is not subject to the Validation of Restrictive Markings on Technical Data clause of this Purchase Order. If the Contracting Officer notifies Seller of a nonconforming marking and Seller fails to remove or correct such marking within sixty (60) days, the Government may ignore or, at Seller's expense, remove or correct any nonconforming marking.

(i) *Relation to patents*. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in technical data*.

(1) Seller shall not charge to this Purchase Order any cost, including, but not limited to, license fees, royalties, or similar charges, for rights in technical data to be delivered under this Purchase Order when—

(i) The Government has acquired, by any means, the same or greater rights in the data; or

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by Seller to acquire rights in subcontractor or supplier technical data, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data will be delivered.

(k) *Applicability to subcontractors or suppliers*.

(1) Seller shall ensure that the rights afforded its subcontractors and suppliers similar to that under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (e) of this clause are recognized and protected.

(2) Whenever any technical data for noncommercial items, or for commercial items developed in any part at Government expense, is to be obtained from a subcontractor or supplier for delivery to the Government under this Purchase Order, Seller shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to noncommercial items or to any portion of a commercial item that was developed in any part at Government expense, and the Section H clause entitled "Technical Data–Commercial Items" will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense. No other clause shall be used to enlarge or diminish the Government's, Seller's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(4) Seller and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data from their subcontractors or suppliers.

(5) In no event shall Seller use its obligation to recognize and protect subcontractor or supplier rights in technical data as an excuse for failing to satisfy its contractual obligation to the Government.

## H.37 RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION

(a) *Definitions*. As used in this clause—

(1) "Commercial computer software" means software developed or regularly used for non-governmental purposes which—

(i) Has been sold, leased, or licensed to the public;

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this Purchase Order; or

(iv) Satisfies a criterion expressed in paragraph (a)(1)(i), (ii), or (iii) of this clause and would require only minor modification to meet the requirements of this Purchase Order.

(2) "Computer database" means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) "Computer program" means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(4) "Computer software" means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) "Computer software documentation" means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(6) "Covered Government support contractor" means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(ii) Receives access to technical data or computer software for performance of a Government contract that contains the clause entitled "Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends."

(7) "Developed" means that—

(i) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(ii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(iii) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(8) "Developed exclusively at private expense" means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

(9) "Developed exclusively with government funds" means development was not accomplished exclusively or partially at private expense.

(10) "Developed with mixed funding" means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(11) "Government purpose" means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

(12) "Government purpose rights" means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation within the Government without restriction; and

(ii) Release or disclose computer software or computer software documentation outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the software or documentation for United States government purposes.

(13) "Minor modification" means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marketplace.

(14) "Noncommercial computer software" means software that does not qualify as commercial computer software under paragraph (a)(1) of this clause.

(15) "Restricted rights" apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this Purchase Order;

(ii) Transfer a computer program to another Government agency without the further permission of Seller if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

> (A) Use the modified software only as provided in paragraphs (a)(15)(i) and (iii) of this clause; and

> (B) Not release or disclose the modified software except as provided in paragraphs (a)(15)(ii), (v), (vi) and (vii) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

> (A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

> (B) Such contractors or subcontractors are subject to the section J attachment entitled "Use and non-disclosure Agreement" or are Government contractors receiving access to the software for performance of a Government contract that contains the clause entitled Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

> (C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and

> (D) Such use is subject to the limitation in paragraph (a)(15)(i) of this clause;

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

> (A) The intended recipient is subject to the Section J attachment entitled "Use and non-disclosure agreement" of this Purchase Order, or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause substantially similar to DFARS 252.227-7025,

Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends; and

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and

(vii) Permit covered Government support contractors to use, modify, reproduce, perform, display, or release or disclose the computer software to authorized person(s) in the performance of Government contracts that contain the clause substantially similar to DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(16) "Unlimited rights" means rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in computer software or computer software documentation*. Seller grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in noncommercial computer software or computer software documentation. All rights not granted to the Government are retained by Seller.

(1) *Unlimited rights*. The Government shall have unlimited rights in—

(i) Computer software developed exclusively with Government funds;

(ii) Computer software documentation required to be delivered under this Purchase Order;

(iii) Corrections or changes to computer software or computer software documentation furnished to Seller by the Government;

(iv) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by Seller or subcontractor without restriction on further use, release or disclosure, other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(v) Computer software or computer software documentation obtained with unlimited rights under another Government contract or as a result of negotiations; or

(vi) Computer software or computer software documentation furnished to the Government, under this or any other Government contract or subcontract thereunder with—

(A) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(B) Government purpose rights and Seller's exclusive right to use such software or documentation for commercial purposes has expired.

(2) *Government purpose rights*.

(i) Except as provided in paragraph (b)(1) of this clause, the Government shall have government purpose rights in computer software developed with mixed funding.

(ii) Government purpose rights shall remain in effect for a period of five years unless a different period has been negotiated. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the computer software or computer software documentation. The government purpose rights period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software.

(iii) The Government shall not release or disclose computer software in which it has government purpose rights to any other person unless—

> (A) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement Section J attachment entitled "Use and Non Disclosure Agreement" of this Purchase Order; or

> (B) The recipient is a Government contractor receiving access to the software or documentation for performance of a Government contract that contains the clause substantially similar to DFARS 252.227-7025,, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

(3) *Restricted rights*.

> (i) The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under this Purchase Order that were developed exclusively at private expense.

> (ii) Seller, its subcontractors, or suppliers are not required to provide the Government additional rights in noncommercial computer software delivered or otherwise provided to the Government with restricted rights. However, if the Government desires to obtain additional rights in such software, Seller agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All noncommercial computer software in which Seller has granted the Government additional rights shall be listed or described in a license agreement made part of the contract (see paragraph (b)(4) of this clause). The license shall enumerate the additional rights granted the Government.

> (iii) Seller acknowledges that—

>> (A) Restricted rights computer software is authorized to be released or disclosed to covered Government support contractors;

>> (B) Seller will be notified of such release or disclosure;

>> (C) Seller (or the party asserting restrictions, as identified in the restricted rights legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with Seller (or the party asserting restrictions) regarding the covered Government support contractor's use of such software, or alternatively, that Seller (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement;

(D) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the restricted rights software as set forth in the clause Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(E) Seller shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

(4) *Specifically negotiated license rights.*

(i) The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause, including the period during which the Government shall have government purpose rights in computer software, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in computer software than are enumerated in paragraph (a)(15) of this clause or lesser rights in computer software documentation than are enumerated in paragraph (a)(14) of the Rights in Technical Data--Noncommercial Items clause of this Purchase Order.

(ii) Any rights so negotiated shall be identified in a license agreement made part of this Purchase Order.

(5) *Prior government rights.* Computer software or computer software documentation that will be delivered, furnished, or otherwise provided to the Government under this Purchase Order, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* Seller agrees to release the Government from liability for any release or disclosure of computer software made in accordance with paragraph (a)(15) or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (b)(4) of this clause, or by others to whom the recipient has released or disclosed the software, and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor software marked with restrictive legends.

(c) *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this Purchase Order that Seller uses to prepare, or includes in, derivative computer software or computer software documentation.

(d) *Third party copyrighted computer software or computer software documentation.* Seller shall not, without the written approval of the Contracting Officer, incorporate any copyrighted computer software or computer software documentation in the software or documentation to be delivered under this Purchase Order unless Seller is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable software or documentation of the appropriate scope set forth in paragraph (b) of this clause, and prior to delivery of such—

(1) Computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer; or

(2) Computer software documentation, has affixed to the transmittal document a statement of the license rights obtained.

(e) *Identification and delivery of computer software and computer software documentation to be furnished with restrictions on use, release, or disclosure.*

(1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in paragraph (e)(3) of this clause, computer software that Seller asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an attachment to this Purchase Order (the Attachment). Seller shall not deliver any software with restrictive markings unless the software is listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the software, in the following format, and signed by an official authorized to contractually obligate Seller:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Computer Software.

Seller asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following computer software should be restricted:

| Computer Software to be Furnished With Restrictions* | Basis for Assertion** | Asserted Rights Category*** | Name of Person Asserting Restrictions**** |
|---|---|---|---|
| (LIST) | (LIST) | (LIST) | (LIST) |

*Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software.

**Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR software generated under another contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

Date                  _____
Printed Name and Title      _____

                                 _____

Signature                 _____

(End of identification and assertion)

(4) When requested by the Contracting Officer, Seller shall provide sufficient information to enable the Contracting Officer to evaluate Seller's assertions. The Contracting Officer reserves the right to add Seller's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Asserted Restrictions—Computer Software clause of this Purchase Order.

(f) *Marking requirements*. Seller, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software by marking the deliverable software or documentation subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this Purchase Order: the government purpose rights legend at paragraph (f)(2) of this clause; the restricted rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions*. Seller, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all computer software that qualify for such markings. The authorized legends shall be placed on the transmittal document or software storage container and each page, or portions thereof, of printed material containing computer software for which restrictions are asserted. Computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of computer software or any portions thereof subject to asserted restrictions, shall also reproduce the asserted restrictions.

(2) *Government purpose rights markings*. Computer software delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No.
Contractor Name
Contractor Address

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(2) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(3) *Restricted rights markings*. Software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No.
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(4) *Special license rights markings*.

(i) Computer software or computer software documentation in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract No. _____(Insert contract number)____, License No. ____(Insert license identifier)____. Any reproduction of computer software, computer software documentation, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(5) of this clause).

(5) *Pre-existing markings*. If the terms of a prior contract or license permitted Seller to restrict the Government's rights to use, modify, release, perform, display, or disclose computer software or computer software documentation and those restrictions are still applicable, Seller may mark such software or documentation with the appropriate restrictive legend for which the software qualified under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records*. Throughout performance of this Purchase Order, Seller and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on computer software or computer software documentation delivered under this Purchase Order.

(h) *Removal of unjustified and nonconforming markings*.

(1) *Unjustified computer software or computer software documentation markings*. The rights and obligations of the parties regarding the validation of restrictive markings on computer software or computer software documentation furnished or to be furnished under this Purchase Order are contained in the Validation of Asserted Restrictions--Computer Software and the Validation of Restrictive Markings on Technical Data clauses of this Purchase Order, respectively. Notwithstanding any provision of this Purchase Order concerning inspection and acceptance, the Government may ignore or, at Seller's expense, correct or strike a marking if, in accordance with the procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming computer software or computer software documentation markings*. A nonconforming marking is a marking placed on computer software or computer software documentation delivered or otherwise furnished to the Government under this Purchase Order that is not in the format authorized by this Purchase Order. Correction of nonconforming markings is not subject to the Validation of Asserted Restrictions--Computer Software or the Validation of Restrictive Markings on Technical Data clause of this Purchase Order. If the Contracting Officer notifies Seller of a nonconforming marking or markings and Seller fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at Seller's expense, remove or correct any nonconforming markings.

(i) *Relation to patents*. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in computer software or computer software documentation*.

(1) Seller shall not charge to this Purchase Order any cost, including but not limited to license fees, royalties, or similar charges, for rights in computer software or computer software documentation to be delivered under this Purchase Order when—

(i) The Government has acquired, by any means, the same or greater rights in the software or documentation; or

(ii) The software or documentation are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by Seller to acquire rights in subcontractor or supplier computer software or computer software documentation, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the software or documentation will be delivered.

(k) *Applicability to subcontractors or suppliers*.

(1) Whenever any noncommercial computer software or computer software documentation is to be obtained from a subcontractor or supplier for delivery to the Government under this Purchase Order, Seller shall use this same clause in its subcontracts or other contractual instruments, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the Government's, Seller's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's computer software or computer software documentation.

(2) Seller and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in computer software or computer software documentation from their subcontractors or suppliers.

(3) Seller shall ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion, and delivery processes required by paragraph (e) of this clause.

(4) In no event shall Seller use its obligation to recognize and protect subcontractor or supplier rights in computer software or computer software documentation as an excuse for failing to satisfy its contractual obligation to the Government.

## H.38    TECHNICAL DATA—COMMERCIAL ITEMS

(a) *Definitions*. As used in this clause—

(1) "Commercial item" does not include commercial computer software.

(2) "Covered Government support contractor" means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(ii) Receives access to technical data or computer software for performance of a Government contract that contains the clause substantially similar to DFARS 252.227-7025  Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(3) "Form, fit, and function data" means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(4) The term "item" includes components or processes.

(5) "Technical data" means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not

include computer software or data incidental to contract administration, such as financial and/or management information.

(6) "Vessel design" means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs described in 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq*.

(b) *License.*

(1) The Government shall have the unrestricted right to use, modify, reproduce, release, perform, display, or disclose technical data, and to permit others to do so, that—

(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to Seller by the Government;

(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, perform, display, or disclose the data without restrictions.

(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only. The Government shall not—

(i) Use the technical data to manufacture additional quantities of the commercial items; or

(ii) Release, perform, display, disclose, or authorize use of the technical data outside the Government without Seller's written permission unless a release, disclosure, or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this Purchase Order, or for performance of work by covered Government support contractors.

(3) Seller acknowledges that—(i) Technical data covered by paragraph (b)(2) of this clause is authorized to be released or disclosed to covered Government support contractors;

(ii) Seller will be notified of such release or disclosure;

(iii) Seller (or the party asserting restrictions as identified in a restrictive legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with Seller (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that Seller (or party

asserting restrictions) may waive in writing the requirement for an non-disclosure agreement;

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data as set forth in the clause Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(v) Seller shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

 (4) Vessel designs. For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this Purchase Order, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design.

 (c) *Additional license rights*. Seller, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data. However, if the Government desires to obtain additional rights in technical data, Seller agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All technical data in which Seller has granted the Government additional rights shall be listed or described in a special license agreement made part of this Purchase Order. The license shall enumerate the additional rights granted the Government in such data.

(d) *Release from liability*. Seller agrees that the Government, and other persons to whom the Government may have released or disclosed technical data delivered or otherwise furnished under this Purchase Order, shall have no liability for any release or disclosure of technical data that are not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.

(e) *Applicability to subcontractors or suppliers*.

(1) Seller shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320 and 10 U.S.C. 2321.

(2) Whenever any technical data related to commercial items developed in any part at private expense will be obtained from a subcontractor or supplier for delivery to the Government under this Purchase Order, Seller shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense, and the Section H clause entitled "Rights in Technical Data--Noncommercial Items" will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense.

## H.41 VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE

(a) *Definitions*.

(1) As used in this clause, unless otherwise specifically indicated, the term "Contractor" means Seller and its subcontractors or suppliers.

(2) Other terms used in this clause are defined in the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this Purchase Order.

(b) *Justification.* Seller shall maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered or required to be delivered under this Purchase Order and shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a request for information under paragraph (d) or a challenge under paragraph (f) of this clause.

(c) *Direct contact with subcontractors or suppliers*. Seller agrees that the Contracting Officer may transact matters under this clause directly with subcontractors or suppliers at any tier who assert restrictions on the Government's right to use, modify, reproduce, release, perform, display, or disclose computer software. Neither this clause, nor any action taken by the Government under this clause, creates or implies privity of contract between the Government and Seller's subcontractors or suppliers.

(d) *Requests for information*.

(1) The Contracting Officer may request Seller to provide sufficient information to enable the Contracting Officer to evaluate Seller's asserted restrictions. Such information shall be based upon the records required by this clause or other information reasonably available to Seller.

(2) Based upon the information provided, if the—

(i) Contractor agrees that an asserted restriction is not valid, the Contracting Officer may—

(A) Strike or correct the unjustified marking at Seller's expense; or

(B) Return the computer software to Seller for correction at Seller's expense. If Seller fails to correct or strike the unjustified restriction and return the corrected software to the Contracting Officer within sixty (60) days following receipt of the software, the Contracting Officer may correct or strike the markings at Seller's expense.

(ii) Contracting Officer concludes that the asserted restriction is appropriate for this Purchase Order, the Contracting Officer shall so notify Seller in writing.

(3) Seller's failure to provide a timely response to a Contracting Officer's request for information or failure to provide sufficient information to enable the Contracting Officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

(e) *Government right to challenge and validate asserted restrictions*.

(1) The Government, when there are reasonable grounds to do so, has the right to review and challenge the validity of any restrictions asserted by Seller on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software delivered, to be delivered under this Purchase Order, or otherwise provided to the Government in the performance of this Purchase Order. Except for software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions, the Government may exercise this right only within six (6) years after the date(s) the software is delivered or otherwise furnished to the Government, or six (6) years following final payment under this Purchase Order, whichever is later.

(2) The absence of a challenge to an asserted restriction shall not constitute validation under this clause. Only a Contracting Officer's final decision or actions of an agency Board of Contract Appeals or a court of competent jurisdiction that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) *Major systems.* When the Contracting Officer challenges an asserted restriction regarding noncommercial computer software for a major system or a subsystem or component thereof on the basis that the computer software was not developed exclusively at private expense, the Contracting Officer will sustain the challenge unless information provided by Seller or subcontractor demonstrates that the computer software was developed exclusively at private expense.

(g) *Challenge procedures*.

(1) A challenge must be in writing and shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require Seller to respond within sixty (60) days;

(iii) Require Seller to provide justification for the assertion based upon records kept in accordance with paragraph (b) of this clause and such other documentation that are reasonably available to Seller, in sufficient detail to enable the Contracting Officer to determine the validity of the asserted restrictions; and

(iv) State that a Contracting Officer's final decision, during the six -year period preceding this challenge, or action of a court of competent jurisdiction or Board of Contract Appeals that sustained the validity of an identical assertion made by Seller (or a licensee) shall serve as justification for the asserted restriction.

(2) The Contracting Officer shall extend the time for response if Seller submits a written request showing the need for additional time to prepare a response.

(3) The Contracting Officer may request additional supporting documentation if, in the Contracting Officer's opinion, Seller's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. Seller agrees to promptly respond to the Contracting Officer's request for additional supporting documentation.

(4) Notwithstanding challenge by the Contracting Officer, the parties may agree on the disposition of an asserted restriction at any time prior to a Contracting Officer's final decision or, if Seller has appealed that decision, filed suit, or provided notice of an intent to file suit, at any time prior to a decision by a court of competent jurisdiction or Board of Contract Appeals.

(5) If Seller fails to respond to the Contracting Officer's request for information or additional information under paragraph (g)(1) of this clause, the Contracting Officer shall issue a final decision, in accordance with paragraph (f) of this clause and the Disputes clause of this Purchase Order, pertaining to the validity of the asserted restriction.

(6) If the Contracting Officer, after reviewing the written explanation furnished pursuant to paragraph (f)(1) of this clause, or any other available information pertaining to the validity of an asserted restriction, determines that the asserted restriction has—

(i) Not been justified, the Contracting Officer shall issue promptly a final decision, in accordance with the Disputes clause of this Purchase Order, denying the validity of the asserted restriction; or

(ii) Been justified, the Contracting Officer shall issue promptly a final decision, in accordance with the Disputes clause of this Purchase Order, validating the asserted restriction.

(7) Seller or subcontractors receiving challenges to the same asserted restriction(s) from more than one Contracting Officer shall notify each Contracting Officer of the other challenges. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer who initiated the first in time unanswered challenge, after consultation with the other Contracting Officers who have challenged the restrictions and Seller, shall formulate and distribute a schedule that provides Seller a reasonable opportunity for responding to each challenge.

(h) *Contractor appeal Government obligation.*

(1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (h)(3) of this clause, it will honor the asserted restriction—

(i) For a period of ninety (90) days from the date of the Contracting Officer's final decision to allow Seller to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of one year from the date of the Contracting Officer's final decision if, within the first ninety (90) days following the Contracting Officer's final decision, Seller has provided notice of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if Seller has:

(A) appealed to the Board of Contract Appeals or filed suit an appropriate court within ninety (90) days; or

(B) submitted, within ninety (90) days, a notice of intent to file suit in an appropriate court and filed suit within one year.

(2) Seller agrees that the Government may strike, correct, or ignore the restrictive markings if Seller fails to—

(i) Appeal to a Board of Contract Appeals within ninety (90) days from the date of the Contracting Officer's final decision;

(ii) File suit in an appropriate court within ninety (90) days from such date; or

(iii) File suit within one year after the date of the Contracting Officer's final decision if Seller had provided notice of intent to file suit within ninety (90) days following the date of the Contracting Officer's final decision.

(3) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of

a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify Seller of the urgent or compelling circumstances. Notwithstanding paragraph (h)(1) of this clause, Seller agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with (i) government purpose legends for any purpose, and authorize others to do so; or (ii) restricted or special license rights for government purposes only. The Government agrees not to release or disclose such software unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at J-17 of this Purchase Order Use and Non Disclosure Agreement  or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause that is substantially similar to DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect Seller's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

(i) *Final disposition of appeal or suit.* If Seller appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is:

(1) Sustained—

(i) Any restrictive marking on such computer software shall be struck or corrected at Seller's expense or ignored; and

(ii) If the asserted restriction is found not to be substantially justified, Seller shall be liable to the Government for payment of the cost to the Government of reviewing the asserted restriction and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the restriction, unless special circumstances would make such payment unjust.

(2) Not sustained—

(i) The Government shall be bound by the asserted restriction; and

(ii) If the challenge by the Government is found not to have been made in good faith, the Government shall be liable to Seller for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by Seller in defending the restriction.

(j) *Flowdown.* Seller shall insert this clause in all contracts, purchase orders, and other similar instruments with its subcontractors or suppliers, at any tier, who will be furnishing computer software to the Government in the performance of this Purchase Order. The clause may not be altered other than to identify the appropriate parties.

## H.42    VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA

(a) *Definitions.* The terms used in this clause are defined in the Rights in Technical Data—Noncommercial Items clause of this Purchase Order.

(b) *Presumption regarding development exclusively at private expense*.

(1) *Commercial items*. For commercially available off-the-shelf items (defined at 41 U.S.C. 104) in all cases, and for all other commercial items except as provided in paragraph (b) (2) of this clause, the Contracting Officer will presume that Seller's asserted use or release restrictions are justified on the basis that the item, component, or process was developed exclusively at private

expense. The Contracting Officer shall not challenge such assertions unless the Contracting Officer has information that demonstrates that the item, component, or process was not developed exclusively at private expense.

(2) *Major systems.* The presumption of development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items (which are governed by paragraph (b)(1)) of this clause. When the Contracting Officer challenges an asserted restriction regarding technical data for a major system or a subsystem or component thereof on the basis that the item, component, or process was not developed exclusively at private expense, the Contracting Officer will sustain the challenge unless information provided by Seller or subcontractor demonstrates that the item, component, or process was developed exclusively at private expense.

(c) *Justification.* Seller or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract. Except as provided in paragraph (b)(1) of this clause, Seller or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (e) of this clause.

(d) *Prechallenge request for information.*

(1) The Contracting Officer may request Seller or subcontractor to furnish a written explanation for any restriction asserted by Seller or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request Seller or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, Seller or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). Seller or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (d)(1) of this clause, or any other available information pertaining to the validity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer shall follow the procedures in paragraph (e) of this clause.

(3) If Seller or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (d)(1) of this clause, and the Contracting Officer determines that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer may challenge the validity of the marking as described in paragraph (e) of this clause.

(e) *Challenge.*

(1) Notwithstanding any provision of this Purchase Order concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive marking is warranted, the Contracting Officer shall send a written challenge notice to Seller or subcontractor asserting the restrictive markings. Such challenge shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction;

(iii) State that a U.S. Coast Guard Contracting Officer's final decision, issued pursuant to paragraph (g) of this clause, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same Seller or subcontractor (or any licensee of Seller or subcontractor) to which such notice is being provided; and

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (f) of this clause.

(2) The Contracting Officer shall extend the time for response as appropriate if Seller or subcontractor submits a written request showing the need for additional time to prepare a response.

(3) Seller's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 7101), and shall be certified in the form prescribed at 33.207 of the Federal Acquisition Regulation, regardless of dollar amount.

(4) Seller or subcontractor receiving challenges to the same restrictive markings from more than one Contracting Officer shall notify each Contracting Officer of the existence of more than one challenge. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with Seller or subcontractor and the other Contracting Officers, shall formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule shall afford Seller or subcontractor an opportunity to respond to each challenge notice. All parties will be bound by this schedule.

(f) *Final decision when Contractor or subcontractor fails to respond.* Upon a failure of Seller or subcontractor to submit any response to the challenge notice the Contracting Officer will issue a final decision to Seller or subcontractor in accordance with paragraph (b) of this clause and the Disputes clause of this Purchase Order pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (e)(1)(ii) or (e)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (g)(2)(ii) through (iv) of this clause.

(g) *Final decision when Contractor or subcontractor responds.*

(1) If the Contracting Officer determines that Seller or subcontractor has justified the validity of the restrictive marking, the Contracting Officer shall issue a final decision to Seller or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision shall be issued within sixty (60) days after receipt of Seller's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified Seller or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer shall issue a final decision to Seller or subcontractor in accordance with the Disputes clause of this Purchase Order. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within sixty (60) days after receipt of Seller's or subcontractor's response to the challenge notice, or within such longer period that the Contracting

Officer has notified Seller or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the restrictive marking for a period of ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. Seller or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the Contracting Officer within ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. If Seller or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and the failure of Seller or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Court of Federal Claims  is provided to the Contracting Officer within ninety (90) days from the issuance of the final decision under paragraph (g)(2)(i) of this clause. The Government will no longer be bound, and Seller or subcontractor agrees that the Government may strike or ignore the restrictive markings, if Seller or subcontractor fails to file its suit within one (1) year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Claims Court, Seller or subcontractor agrees that the agency may, following notice to Seller or subcontractor, authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect Seller's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Court of Federal Claims . Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to Seller that urgent or compelling circumstances will not permit awaiting the decision by such Board of Contract Appeals or the United States Claims Court, Seller or subcontractor agrees that the agency may authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect Seller's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(h) *Final disposition of appeal or suit.*

(1) If Seller or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is sustained—

(i) The restrictive marking on the technical data shall be cancelled, corrected or ignored; and

(ii) If the restrictive marking is found not to be substantially justified, Seller or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the restrictive marking and the fees and other expenses (as

defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust.

(2) If Seller or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is not sustained—

(i) The Government shall continue to be bound by the restrictive marking; and

(ii) The Government shall be liable to Seller or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by Seller or subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(i) *Duration of right to challenge.* The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by Seller or subcontractor. During the period within six (6) years of final payment on a contract or within six (6) years of delivery of the technical data to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the restriction. The Government may challenge a use or release restriction asserted with respect to technical data by Seller or a subcontractor at any tier under a contract subject to this section if the Contracting Officer finds that—

(A) reasonable grounds exist to question the current validity of the asserted restriction; and
(B) the continued adherence by the United States to the asserted restriction would make it impracticable to procure the item to which the technical data pertain competitively at a later time.

The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data—

(1) Is publicly available;

(2) Has been furnished to the United States without restriction;

(3) Has been otherwise made available without restriction. Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 2321, or

(4) Has been the subject of a fraudulently asserted use or release restriction.

(j) *Decision not to challenge.* A decision by the Government or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation."

(k) *Privity of contract.* Seller or subcontractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. However, this clause neither creates nor implies privity of contract between the Government and Seller or subcontractors.

(l) *Flowdown.* Seller and subcontractor agrees to insert this clause in contractual instruments with its subcontractors or suppliers at any tier requiring the delivery of technical data.