

Technology Investment Agreement – FA8650-22-2-5503

PLEASE NOTE REQUIREMENTS FOR THIS CONTRACT CODE:

**10 U.S.C. 2358 AND TITLE III OF THE DEFENSE PRODUCTION ACT OF 1950
AS AMENDED (50 U.S.C. 4501 ET SEQ.)**

**DOD GRANT AND AGREEMENT REGULATIONS (CHAPTER 1, SUBCHAPTER C OF
TITLE 32, CODE OF FEDERAL REGULATIONS (CFR) AND CHAPTER XI OF TITLE 2, CFR).**

2.000 TRAFFICKING IN PERSONS (DEC 2007)

(a) Provisions applicable to a Recipient that is a private entity.

(1) You as the Recipient, your employees, subrecipients under this award, and subrecipients' employees may not—

(i) Engage in severe forms of trafficking in persons during the period of time that the award is in effect;

(ii) Procure a commercial sex act during the period of time that the award is in effect; or

(iii) Use forced labor in the performance of the award or subawards under the award.

(2) We as the Federal awarding agency may unilaterally terminate this award, without penalty, if you or a subrecipient that is a private entity –

(i) Is determined to have violated a prohibition in paragraph a.1 of this award term; or

(ii) Has an employee who is determined by the agency official authorized to terminate the award to have violated a prohibition in paragraph a.1 of this award term through conduct that is either—

(A) Associated with performance under this award; or

(B) Imputed to you or the subrecipient using the standards and due process for imputing the conduct of an individual to an organization that are provided in 2 CFR part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 CFR 180

(b) Provision applicable to a Recipient other than a private entity. We as the Federal awarding agency may unilaterally terminate this award, without penalty, if a subrecipient that is a private entity—

(1) Is determined to have violated an applicable prohibition in paragraph a.1 of this award term; or

(2) Has an employee who is determined by the agency official authorized to terminate the award to have violated an applicable prohibition in paragraph a.1 of this award term through conduct that is either-

(i) Associated with performance under this award; or

(ii) Imputed to the subrecipient using the standards and due process for imputing the conduct of an individual to an organization that are provided in 2 CFR part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 CFR part 180

(c) Provisions applicable to any Recipient.

(1) You must inform us immediately of any information you receive from any source alleging a violation of a prohibition in paragraph a.1 of this award term.

(2) Our right to terminate unilaterally that is described in paragraph a.2 or b of this section:

(i) Implements section 106(g) of the Trafficking Victims Protection Act of 2000 (TVPA), as amended (22 U.S.C. 7104(g)), and

(ii) Is in addition to all other remedies for noncompliance that are available to us under this award. (3)

You must include the requirements of paragraph a.1 of this award term in any subaward you make to a private entity.

(d) Definitions. For purposes of this award term:

(1) "**Employee**" means either:

- (i) An individual employed by you or a subrecipient who is engaged in the performance of the project or program under this award; or
- (ii) Another person engaged in the performance of the project or program under this award and not compensated by you including, but not limited to, a volunteer or individual whose services are contributed by a third party as an in-kind contribution toward cost sharing or matching requirements.

(2) "**Forced Labor**" means labor obtained by any of the following methods: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

(3) "**Private Entity**":

(i) Means any entity other than a State, local government, Indian tribe, or foreign public entity, as those terms are defined in 2 CFR 175.25.

(ii) Includes:

(A) A nonprofit organization, including any nonprofit institution of higher education, hospital, or tribal organization other than one included in the definition of Indian tribe at 2 CFR 175.25(b).

(B) A for-profit organization.

(4) "**Severe Forms of Trafficking In Persons**," "commercial sex act," and "coercion" have the meanings given at section 103 of the TVPA, as amended (22 U.S.C. 7102).

6.00 INVENTIONS (JUN 2001)

(a) Definitions:

1. "**Invention**" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.).
2. "**Subject invention**" means any invention of the recipient conceived or first actually reduced to practice in the performance of work under this agreement, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of agreement performance.
3. "**Practical Application**" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or government regulations, available to the public on reasonable terms.
4. "**Made**" when used in relation to any invention means the conception or first actual reduction to practice of such invention.
5. "**Small Business Firm**" means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this article, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.
6. "**Nonprofit Organization**" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c) and exempt from taxation under section 501(a) of the Internal Revenue Code (25 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(b) Allocation of Principal Rights:

1. The recipient may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this article and 35 U.S.C. 203. With respect to any subject invention in which the recipient retains title, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) Invention Disclosure, Election of Title and Filing of Patent Application by Recipient:

1. The recipient will disclose each subject invention to the Government within 2 months after the inventor discloses it in writing to recipient personnel responsible for patent matters. The disclosure to the Government shall be in the form of a written report and shall identify the agreement under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the Government, the recipient will promptly notify the Government of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the recipient.
2. The recipient will elect in writing whether or not to retain title to any such invention by notifying the Government within 2 years of disclosure to the Government. However, in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the Government to a date that is no more than 60 days prior to the end of the statutory period.
3. The recipient will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The recipient will file patent applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.
4. Requests for extension of the time for disclosure, election, and filing under subparagraphs (1), (2), and (3) may, at the discretion of the Government, be granted.

(d) Conditions When the Government May Obtain Title: The recipient will convey to the Government, upon written request, title to any subject invention—

1. If the recipient fails to disclose or elect title to the subject invention within the times specified in (c), above, or elects not to retain title; provided that the Government may only request title within 60 days after learning of the failure of the recipient to disclose or elect within the specified times.
2. In those countries in which the recipient fails to file patent applications within the times specified in (c) above; provided, however, that if the recipient has filed a patent application in a country after the times specified in (c) above, but prior to its receipt of the written request of the Government, the recipient shall continue to retain title in that country.
3. In any country in which the recipient decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum Rights to Recipient and Protection of the Recipient Right to File:

1. The recipient will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the recipient fails to disclose the invention within the times specified in (c), above. The recipient's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the recipient is a party and includes the right to grant sublicenses of the same scope to the extent the recipient was legally obligated to do

so at the time the agreement was awarded. The license is transferable only with the approval of the Government except when transferred to the successor of that party of the recipient's business to which the invention pertains.

2. The recipient's domestic license may be revoked or modified by the Government to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and Government licensing regulations (if any). This license will not be revoked in that field of use or the geographical areas in which the recipient has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the Government to the extent the recipient, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.
3. Before revocation or modification of the license, the Government will furnish the recipient a written notice of its intention to revoke or modify the license, and the recipient will be allowed 30 days (or such other time as may be authorized by the Government for good cause shown by the recipient) after the notice to show cause why the license should not be revoked or modified. The recipient has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and Government regulations (if any) concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

(f) **Recipient Action to Protect the Government's Interest:**

1. The recipient agrees to execute or to have executed and promptly deliver to the Government all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the recipient elects to retain title, and (ii) convey title to the Government when requested under paragraph (d) above and to enable the Government to obtain patent protection throughout the world in that subject invention.
2. The recipient agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the recipient each subject invention made under an agreement in order that the recipient can comply with the disclosure provisions of paragraph (c), above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by (c)(1), above. The recipient shall instruct such employees through employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.
3. The recipient will notify the Government of any decisions not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.
4. The recipient agrees to include, within the specification of any United States patent applications and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the agreement) awarded by (identify the Federal Agency). The Government has certain rights in the invention."

(g) **Lower Tier Agreements:** The recipient will include this article, suitably modified to identify the parties, in all lower tier agreements, regardless of tier, for experimental, developmental or research work. Each subrecipient will retain all rights provided for the recipient in this article, and the recipient will not, as part of the consideration for awarding a subrecipient award, obtain rights in a subrecipients' subject inventions.

(h) **Reporting on Utilization of Subject Inventions:** The recipient agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the recipient or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the recipient, and such other data and information as the Government may reasonably specify. The recipient also agrees to provide additional reports as may be requested by the Government in connection with any march-in proceeding undertaken by the Government in accordance

with paragraph (j) of this article. As required by 35 U.S.C. 202(c)(5), the Government agrees it will not disclose such information to persons outside the Government without permission of the recipient.

- (i) **Preference for United States Industry:** Notwithstanding any other provision of this article, the recipient agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject inventions in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the Government upon a showing by the recipient or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

- (j) **March-in Rights:** The recipient agrees that with respect to any subject invention in which it has acquired title, the Government has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the Government to require the recipient, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the recipient, assignee, or exclusive licensee refuses such a request the Government has the right to grant such a license itself if the Government determines that:
 - 1. Such action is necessary because the recipient or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use.
 - 2. Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the recipient, assignee or their licensees;
 - 3. Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the recipient, assignee or licensees; or
 - 4. Such action is necessary because the agreement required by paragraph (i) of this article has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.
 - 5. Special Provisions for Agreements with Nonprofit Organizations

- (k) If the recipient is a nonprofit organization, it agrees that:
 - 1. Rights to a subject invention in the United States may not be assigned without the approval of the Government, except where such assignment is made to an organization which has as one of its primary functions the management of inventions, provided that such assignee will be subject to the same provisions as the recipient;
 - 2. The recipient will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when the Government deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;
 - 3. The balance of any royalties or income earned by the recipient with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education; and
 - 4. It will make efforts that are reasonable under the circumstances to attract licensees of subject invention that are small business firms and that it will give a preference to a small business firm when licensing a subject invention if the recipient determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the recipient is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the recipient. However, the recipient agrees that the Secretary may review the recipient's licensing program and decisions regarding small business applicants, and the recipient will negotiate changes to its licensing policies, procedures, or practices with the Secretary when the Secretary's review discloses that the

recipient could take reasonable steps to implement more effectively the requirements of this paragraph (k)(4).

- (l) **Communication:** The point of contact on matters relating to this article will be the servicing Staff Judge Advocate's office identified in the article entitled Administrative Responsibilities.

6.01 DATA RIGHTS (AUG 2001)

(a) **Definitions:**

- (1) **"Government Purposes"**, as used in this article, means any activity in which the United States Government is a party, including cooperative agreements with international or multinational 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 data for commercial purposes or authorize others to do so.
- (2) **"Government Purpose Rights"**, as used in this article, means the right 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.
- (3) **"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 of 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; or
 - (B) A release or disclosure to –
 - 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
 - A foreign government, of technical data, other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the government and is required for evaluation or information purposes;
 - (ii) The Recipient of the technical data is subject to a prohibition on the further reduction, release, disclosure, or use of the technical data; and
 - (iii) The contractor or subcontractor asserting the resection is notified of such reproduction, release, disclosure, or use.
- (4) **"Unlimited Rights"**, as used in this article, means rights to use, modify, reproduce, perform, display, release, or disclose data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.
- (5) **"Data"**, as used in this article, means recorded information, regardless of form or method or recording, which includes but is not limited to, technical data, software, trade secrets, and mask works. The term does not include financial, administrative, cost, pricing or management information and does not include subject inventions included under the article entitled Inventions.
- (6) **"Practical Application"**, as used in this article, means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or government regulations, available to the public on reasonable terms.

(b) **Allocation of Principal Rights:**

- (1) Ownership rights to data generated under this agreement shall vest in the Recipient. This agreement shall be performed with mixed Government and Recipient funding and the parties agree that in consideration for Government funding, the Recipient intends to reduce to practical application items, components and processes developed under this agreement.

(2) The Recipient agrees to retain and maintain in good condition until 3 years after completion or termination of this agreement, all data necessary to achieve practical application. In the event of exercise of the Government's march-in rights as set forth under the Article entitled Inventions, the Recipient agrees, upon written request from the Government, to deliver at no additional cost to the Government, all data necessary to achieve practical application within 60 days from the date of the written request. The Government shall have unlimited rights to this delivered data.

(3) With respect to data generated under this agreement, including data delivered pursuant to Part 7 of this agreement, Technical and Financial Reporting, the Government shall receive Government Purpose Rights. If any deliverable listed under Part 7 of this agreement requires data subject to "Limited Rights" markings, the Recipient shall submit data rights assertions against the pertinent data. The submitted data rights assertions will be negotiated and any validated assertions will be added as an attachment to the agreement. The Government shall receive Government Purpose Rights in data delivered pursuant to Part 7 of this agreement without proper markings and assertions.

(c) **Marking of Data:**

(1) Pursuant to subparagraph (b)(3) above, any data delivered under this agreement to the government shall be marked with the following legend:

Government Purpose Rights

Agreement No.:

Recipient's Name:

Recipient's Address:

The Government may use, modify, reproduce, release, perform, display or disclose these data within the Government without restriction, and may release or disclose outside the Government and authorize persons to whom such release or disclosure has been made to use, modify, reproduce, release, perform, display or disclose that data for United States Government purposes, including competitive procurement.

(2) Pursuant to subparagraph (b)(3) above, any Limited Rights data delivered under this agreement shall be marked with the following legend:

Limited Rights

Agreement No:

Recipient's Name:

Recipient's Address:

The Government may use, modify, reproduce, release, perform, display, or disclose data, only in accordance with the definition of "Limited Rights" found in Article 6.002 (AUG 2001), Data Rights, of Technology Investment Agreement FA8650-22-2-5503.

(3) Any trade secrets and commercial or financial information the Recipient wishes to protect from release under Freedom of Information Act (FOIA) requirements must be marked with a legend identifying it as privileged or confidential information.

(d) **Lower Tier Agreements:** The Recipient shall include this article, suitably modified to identify the parties, in all subcontracts or lower tier agreements, regardless of tier, for experimental, developmental, or research work.

6.02 FOREIGN ACCESS TO TECHNOLOGY (APR 2000)

(a) **Definitions:**

(1) "**Foreign Firm or Institution**" means a firm or institution organized or existing under the laws of a country other than the United States, its territories, or possessions. The term includes, for purposes of this agreement, any agency or instrumentality of a foreign government, and firms, institutions or business organizations which are owned or substantially controlled by foreign governments, firms, institutions, or individuals.

(2) "**Know-how**" means all information including, but not limited to, discoveries, formulas, materials, inventions, processes, ideas, approaches, concepts, techniques, methods, software, programs, documentation, procedures, firmware, hardware, technical data, specifications, devices, apparatus and machines.

(3) "**Technology**" means discoveries, innovations, know-how and inventions, whether patentable or not, including computer software, recognized under U.S. law as intellectual creations to which rights of

ownership accrue, including, but not limited to, patents, trade secrets, mask works, and copyrights developed under this agreement.

- (b) **General:** The parties agree that research findings and technology developments in Ultra-High and High Temperature Composites for Hypersonic, Strategic Missile, and Space Launch Systems may constitute a significant enhancement to the national defense, and to the economic vitality of the United States. Accordingly, access to important technology developments under this agreement by foreign firms or institutions must be carefully controlled. The controls contemplated in this article are in addition to, and are not intended to change or supersede, the provisions of the International Traffic in Arms Regulation (22 CFR pt. 120 et seq.), the DOD Industrial Security Regulation (DOD 5220.22-R) and the Department of Commerce Export Regulation (15 CFR pt. 770 et seq.).

(c) **Restrictions on Sale or Transfer of Technology to Foreign Firms or Institutions.**

(1) In order to promote the national security interests of the United States and to effectuate the policies that underlie the regulations cited above, the procedures stated in subparagraphs C.2, C.3, and C.4 below shall apply to any transfer of Technology. For purposes of this paragraph, a transfer includes a sale of the company, and sales or licensing of Technology. Transfers do not include:

- (i) Sales of products or components, or
- (ii) Licenses of software or documentation related to sales of products or components, or
- (iii) Transfer to foreign subsidiaries of the Recipient (Recipient participants) for purposes related to this agreement, or
- (iv) Transfer which provides access to technology to a foreign firm or institution which is an approved source of supply or source for the conduct of research under this agreement provided that such transfer shall be limited to that necessary to allow the firm or institution to perform its approved role under this agreement.

(2) The Recipient shall provide timely notice to the Government of any proposed transfer from the Recipient of Technology developed under this agreement to foreign firms or institutions. If the Government determines that the transfer may have adverse consequences to the national security interests of the United States, the Recipient, its vendors, and the Government shall jointly endeavor to find alternatives to the proposed transfer which obviate or mitigate potential adverse consequences of the transfer but which provide substantially equivalent benefits to the Recipient.

(3) In any event, the Recipient shall provide written notice to the Agreements Officer and Government Program Manager of any proposed transfer to a foreign firm or institution at least 60 days prior to the proposed date of transfer. Such notice shall cite this article and shall state specifically what is to be transferred and the general terms of the transfer. Within 30 days of receipt of the Recipient's written notification, the Agreements Officer shall advise the Recipient whether it consents to the proposed transfer. In cases where the Government does not concur or 60 days after receipt and the Government provides no decision, the Recipient may utilize the procedures under the article entitled Claims, Disputes and Appeals. No transfer shall take place until a decision is rendered.

(4) Except as provided in subparagraph C.1 above and in the event the transfer of Technology to foreign firms or institutions is not approved by the Government, but the transfer is made nonetheless, the Recipient shall (a) refund to the Government the funds paid for the development of the Technology and (b) negotiate a license with the Government to the Technology under terms that are reasonable under the circumstances.

(d) **Lower Tier Agreements:** The Recipient shall include this article, suitably modified to identify the parties, in all subcontracts or lower tier agreements, regardless of tier, for experimental, development, or research work.

(e) This article shall remain in effect during the term of the agreement and for 5 years thereafter.

6.03 EXPORT-CONTROLLED DATA RESTRICTIONS (AUG 2013)

(a) For the purpose of this article,

(1) Foreign person is any person who is not a citizen or national of the U.S. or lawfully admitted to the U.S. for permanent residence under the Immigration and Nationality Act, and includes foreign corporations, international organizations, and foreign governments;

(2) Foreign representative is anyone, regardless of nationality or citizenship, acting as an agent, representative, official, or employee of a foreign government, a foreign-owned or influence firm, corporation or person;

(3) Foreign sources are those sources (vendors, subcontractors, and suppliers) owned and controlled by a foreign person.

(b) The Recipient shall place an article/clause in subawards/subcontracts containing appropriate export control restrictions, set forth in this article.

(c) Nothing in this article waives any requirement imposed by any other U.S. Government agency with respect to employment of foreign nationals or export controlled data and information.

(d) This agreement is subject to the International Traffic in Arms Regulations (ITAR), 22 CFR Sections 121 through 128. An export license may be required before assigning any foreign source to perform work under this agreement or before granting access to foreign persons to any information generated or delivered during performance (see 22 CFR Section 125).

8.00 ADMINISTRATIVE REQUIREMENTS FOR SUBAWARDS AND CONTRACTS (APR 2000) (TAILORED)

(a) The Recipients shall apply to each subaward the administrative requirements of 2 CFR 200 applicable to awards to universities or other nonprofit organizations and awards to state and local governments, and DoDGARS Part 34 shall be applied to for-profit entities.

(b) Recipients awarding contracts under this agreement shall assure that contracts awarded contain, as a minimum, the provisions in Appendix A to DoDGARS Part 34.

9.00 ASSURANCES (FEB 2001)

(a) By signing or accepting funds under the agreement, the Recipient assures that it will comply with applicable provisions of the following National policies on:

(1) Prohibiting discrimination:

(i) On the basis of race, color, or national origin, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.), as implemented by DoD regulations at 32 CFR part 195;

(ii) On the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.) as implemented by Department of Health and Human Services regulations at 45 CFR part 90;

(iii) On the basis of handicap, in Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DoD regulations at 32 CFR part 56;

(2) The Clean Air Act (42 U.S.C. 7401, et seq.) and Clean Water Act (33 U.S. 1251, et seq.), as implemented by Executive Order 11738 (3 CFR, 1971-1975 Comp., p. 799).

(b) The Recipient shall obtain assurances of compliance from contractors and Recipients at lower tiers.

9.01 SAFEGUARDING COVERED DEFENSE INFORMATION AND CYBER SECURITY REPORTING (JULY 2020)

(a) **Definitions.** As used in this article –

Adequate security means protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information.

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object, or the copying of information to unauthorized media may have occurred.

Recipient attributional/proprietary information means information that identifies the Recipient(s), whether directly or indirectly, by the grouping of information that can be traced back to the Recipient(s) (e.g., program description, facility locations), personally identifiable information, as well as trade secrets, commercial or financial information, or other commercially sensitive information that is not customarily shared outside of the company.

Controlled technical information means technical information with military or space application that is subject to controls on the access, use, reproduction, modification, performance, display, release, disclosure, or dissemination. Controlled technical information would meet the criteria, if disseminated, for distribution statements B through F using the criteria set forth in DoD Instruction 5230.24, Distribution Statements on Technical Documents. The term does not include information that is lawfully publicly available without restrictions.

Covered Recipient information system means an unclassified information system that is owned, or operated by or for, a Recipient and that processes, stores, or transmits covered defense information.

Covered defense information means unclassified controlled technical information or other information, as described in the Controlled Unclassified Information (CUI) Registry at <http://www.archives.gov/cui/registry/category-list.html>, that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Government wide policies, and is –

- (1) Marked or otherwise identified in the Agreement and provided to the recipient by or on behalf of DoD in support of the performance of the Agreement; or
- (2) Collected, developed, received, transmitted, used, or stored by or on behalf of the Recipient in support of the performance of the Agreement.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Forensic analysis means the practice of gathering, retaining, and analyzing computer-related data for investigative purposes in a manner that maintains the integrity of the data.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Malicious software means computer software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of an information system. This definition includes a virus, worm, Trojan horse, or other code-based entity that infects a host, as well as spyware and some forms of adware.

Media means physical devices or writing surfaces including, but is not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which covered defense information is recorded, stored, or printed within a covered Recipient information system.

Operationally critical support means supplies or services designated by the Government as critical for airlift, sealift, intermodal transportation services, or logistical support that is essential to the mobilization, deployment, or sustainment of the Armed Forces in a contingency operation.

Rapidly report means within 72 hours of discovery of any cyber incident.

Technical information means technical data or computer software. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

(b) **Adequate security.** The Recipient shall provide adequate security on all covered Recipient information systems. To provide adequate security, the Recipient shall implement, at a minimum, the following information security protections:

(1) For covered Recipient information systems that are part of an information technology (IT) service or system operated on behalf of the Government, the following security requirements apply:

- (i) Cloud computing services shall be subject to the security requirements specified in the 48 CFR §252.239-7010, Cloud Computing Services.
- (ii) Any other such IT service or system (*i.e.*, other than cloud computing) shall be subject to the security requirements specified elsewhere in this Agreement.

(2) For covered Recipient information systems that are not part of an IT service or system operated on behalf of the Government and therefore are not subject to the security requirement specified at paragraph (b)(1) of this article, the following security requirements apply:

- (i) Except as provided in paragraph (b)(2)(ii) of this article, the covered Recipient information system shall be subject to the security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, "Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations" (available via the internet at <http://dx.doi.org/10.6028/NIST.SP.800-171>) in effect at the time the solicitation is issued or as authorized by the Agreements Officer.

(ii) The Recipient shall implement NIST SP 800-171, as soon as practical, but not later than December 31, 2017. For all Agreements awarded prior to October 1, 2017, the Recipient shall notify the DoD Chief Information Officer (CIO), via email at osd.dibcsia@mail.mil, within 30 days of contract/Agreement award, of any security requirements specified by NIST SP 800-171 not implemented at the time of contract or Agreement award.

(iii) The Recipient shall submit requests to vary from NIST SP 800-171 in writing to the Agreements Officer, for consideration by the DoD CIO. The Recipient need not implement any security requirement adjudicated by an authorized representative of the DoD CIO to be nonapplicable or to have an alternative, but equally effective, security measure that may be implemented in its place.

(iv) If the DoD CIO has previously adjudicated the Recipient's requests indicating that a requirement is not applicable or that an alternative security measure is equally effective, a copy of that approval shall be provided to the Agreements Officer when requesting its recognition under this Agreement.

(v) If the Recipient intends to use an external cloud service provider to store, process, or transmit any covered defense information in performance of this Agreement, the Recipient shall require and ensure that the cloud service provider meets security requirements equivalent to those established by the Government for the Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline (<https://www.fedramp.gov/resources/documents/>) and that the cloud service provider complies with requirements in paragraphs (c) through (g) of this article for cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment.

(3) Apply other information systems security measures when the Recipient reasonably determines that information systems security measures, in addition to those identified in paragraphs (b)(1) and (2) of this article, may be required to provide adequate security in a dynamic environment or to accommodate special circumstances (e.g., medical devices) and any individual, isolated, or temporary deficiencies based on an assessed risk or vulnerability. These measures may be addressed in a system security plan.

(c) Cyber incident reporting requirement.

(1) When the Recipient discovers a cyber incident that affects a covered Recipient information system or the covered defense information residing therein, or that affects the Recipient's ability to perform the requirements of the Agreement that are designated as operationally critical support and identified in the Agreement, the Recipient shall –

(i) Conduct a review for evidence of compromise of covered defense information, including, but not limited to, identifying compromised computers, servers, specific data, and user accounts. This review shall also include analyzing covered Recipient information system(s) that were part of the cyber incident, as well as other information systems on the Recipient's network(s), that may have been accessed as a result of the incident in order to identify compromised covered defense information, or that affect the Recipient's ability to provide operationally critical support; and

(ii) Rapidly report cyber incidents to DoD at <https://dibnet.dod.mil>.

(2) Cyber incident report. The cyber incident report shall be treated as information created by or for DoD and shall include, at a minimum, the required elements at <https://dibnet.dod.mil>.

(3) Medium assurance certificate requirement. In order to report cyber incidents in accordance with this article, the Recipient or Subrecipients/Subcontractors shall have or acquire a DoD-approved medium assurance certificate to report cyber incidents. For information on obtaining a DoD-approved medium assurance certificate, see <https://public.cyber.mil/eca/>.

(d) Malicious software. When the Recipient or subrecipients/subcontractors discover and isolate malicious software in connection with a reported cyber incident, submit the malicious software to DoD Cyber Crime Center (DC3) in accordance with instructions provided by DC3 or the Agreements Officer. Do not send the malicious software to the Agreements Officer.

(e) Media preservation and protection. When a Recipient discovers a cyber incident has occurred, the Recipient shall preserve and protect images of all known affected information systems identified in paragraph (c)(1)(i) of this article and all relevant monitoring/packet capture data for at least 90 days from the submission of the cyber incident report to allow DoD to request the media or decline interest.

(f) Access to additional information or equipment necessary for forensic analysis. Upon request by DoD, the Recipient shall provide DoD with access to additional information or equipment that is necessary to conduct a forensic analysis.

(g) Cyber incident damage assessment activities. If DoD elects to conduct a damage assessment, the Agreements Officer will request that the Recipient provide all of the damage assessment information gathered in accordance with paragraph (e) of this article.

(h) **DoD safeguarding and use of Recipient attributional/proprietary information.** The Government shall protect against the unauthorized use or release of information obtained from the Recipient (or derived from information obtained from the Recipient) under this article that includes Recipient attributional/proprietary information, including such information submitted in accordance with paragraph(c). To the maximum extent practicable, the Recipient shall identify and mark attributional/proprietary information. In making an authorized release of such information, the Government will implement appropriate procedures to minimize the Recipient attributional/proprietary information that is included in such authorized release, seeking to include only that information that is necessary for the authorized purpose(s) for which the information is being released.

(i) **Use and release of Recipient attributional/proprietary information not created by or for DoD.** Information that is obtained from the Recipient (or derived from information obtained from the Recipient) under this article that is not created by or for DoD is authorized to be released outside of DoD –

- (1) To entities with missions that may be affected by such information;
- (2) To entities that may be called upon to assist in the diagnosis, detection, or mitigation of cyber incidents;
- (3) To Government entities that conduct counterintelligence or law enforcement investigations;
- (4) For national security purposes, including cyber situational awareness and defense purposes (including with Defense Industrial Base (DIB) participants in the program at 32 CFR part 236); or
- (5) To a support services contractor (“Recipient”) that is directly supporting Government activities under a contract/Agreement that includes 48 CFR §252.204-7009, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

(j) **Use and release of Recipient attributional/proprietary information created by or for DoD.** Information that is obtained from the Recipient (or derived from information obtained from the Recipient) under this article that is created by or for DoD (including the information submitted pursuant to paragraph (c) of this article) is authorized to be used and released outside of DoD for purposes and activities authorized by paragraph (i) of this article, and for any other lawful Government purpose or activity, subject to all applicable statutory, regulatory, and policy based restrictions on the Government's use and release of such information.

(k) The Recipient shall conduct activities under this article in accordance with applicable laws and regulations on the interception, monitoring, access, use, and disclosure of electronic communications and data.

(l) **Other safeguarding or reporting requirements.** The safeguarding and cyber incident reporting required by this article in no way abrogates the Recipient's responsibility for other safeguarding or cyber incident reporting pertaining to its unclassified information systems as required by other applicable articles of this Agreement, or as a result of other applicable U.S. Government statutory or regulatory requirements.

(m) **Subrecipients/Subcontracts.** The Recipient shall -

- (1) Include this article, including this paragraph (m), to subrecipient or subcontracts or similar contractual instruments, for operationally critical support, or for which subrecipient/subcontract performance will involve covered defense information, including subcontracts for commercial items, without alteration, except to identify the parties. The Recipient shall determine if the information required for subrecipient/subcontractor performance retains its identity as covered defense information and will require protection under this article, and, if necessary, consult with the Agreements Officer; and
- (2) Require subrecipients/subcontractors to –
 - (i) Notify the prime Recipient (or next higher-tier subrecipient/subcontractor) when submitting a request to vary from a NIST SP 800-171 security requirement to the Agreements Officer, in accordance with paragraph (b)(2)(ii)(B) of this article; and
 - (ii) Provide the incident report number, automatically assigned by DoD, to the prime Recipient (or next higher-tier subrecipient/subcontractor) as soon as practicable, when reporting a cyber incident to DoD as required in paragraph (c) of this article.