

## **Flowdown Attachment**

### **FDA-2019.807**

**Contract No.:** 2018-660-003

**DPAS Rating:** None

**SAS DUNS number:** 799855812

***The following customer contract requirements apply to this Purchase Order to the extent indicated below and are hereby incorporated into the Purchase Order by reference:***

In all clauses listed herein terms shall be revised to suitably identify the party to establish Seller's obligations to Buyer and to the Government; and to enable Buyer to meet its obligations under its prime contract. Without limiting the generality of the foregoing, and except where further clarified or modified below, the term "Government" and equivalent phrases shall mean "Buyer", the term "Contracting Officer" shall mean "Buyer's Purchasing Representative", the term "Contractor" or "Offeror" shall mean "Seller", "Subcontractor" shall mean "Seller's Subcontractor" under this Purchase Order, and the term "Contract" shall mean this "Purchase Order". For the avoidance of doubt, the words "Government" and "Contracting Officer" do not change: (1) when a right, act, authorization or obligation can be granted or performed only by the Government or the prime contract Contracting Officer or duly authorized representative, such as in FAR 52.227-1 and FAR 52.227-2 and (2) when title to property is to be transferred directly to the Government. Seller shall incorporate into each lower tier contract issued in support of this Purchase Order all applicable FAR and DFARS clauses in accordance with the flow down requirements specified in such clauses.

**The following clauses apply to all Purchase Orders, including those for "Commercial Item(s)", as defined in FAR 2.101:**

#### **ARTICLE 28 - DATA RIGHTS**

(a) For the purposes of this Article, "Parties" means the PLP and the Government where collectively identified and "Party" where each entity is individually identified. This is a Data Rights Clause specifically tailored for this Base Agreement to address respective rights of the Government and PLP's on behalf of its actual or prospective PLP to such Data as is owned, developed, to be developed or used by an actual or prospective Consortium Member entity PLP (1) as identified in a Consortium Member entity proposal submitted to the Government through the Consortium Manager in response to a competitive Government Request for Prototype Proposals, and (2) when such proposal is selected by the Government for funded performance and the PA is issued by the CM to that Consortium Member entity for performance of such Government Prototype Project.

##### **(1) Definitions**

(i) "Commercial Computer Software" as used in the Article is defined in DFARS 252- 227-7014(a)(1) (Jun 1995).

(ii) "Commercial Computer Software License" means the license terms under which commercial computer software and Data (as defined in this OTA) is sold or offered for sale, lease or license to the general public.

(iii) "Computer Data Base" as used in this Base Agreement, means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(iv) "Computer program" as used in this Base Agreement means a set of instructions, rules, or routines in a form that is capable of causing a computer to perform a specific operation or series of operations.

(v) "Computer software" as used in this Base Agreement 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.

(vi) "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.

(vii) Reserved.

(viii) "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.

(ix) "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

(x) "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.

Under this Base Agreement, the period of a Government Purpose Rights license shall be no less than five (5) years. In the event that the Data subject to this Government Purpose Rights license is used to perform an additional Prototype Project during this five (5) year period, the Government Purpose Rights license shall be extended an additional five (5) years starting from completion of the additional Prototype Project.

(xi) "Limited rights" as used in this Article is as defined in DFARS 252.227-7013(a)(14) (Feb 2014).

(xii) "Restricted rights" as used in this Article is as defined in DFARS 252.227-7014(a)(15) (Feb 2014).

(xiii) "Specially Negotiated License Rights" are those rights to Data that have been specifically negotiated between the Government and the CM on behalf of the Consortium Member or PLP whose proposal is selected by the Government under a Request for Prototype Proposals issued under the OT Agreement.

(xiv) "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.

(xv) "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.

## (2). Data Categories

(i) Category A is the Data developed and paid for totally by private funds, or the Consortium Member entity's or PLP's (or its subcontractor's) IR&D funds and it is Data to which the Consortium Member entity or PLP (or its subcontractor) retains all rights. Category A Data shall include, but not be limited to, (A) Data or other material provided by the Consortium Member or PLP for a Prototype Project under this Base Agreement which was not developed in the performance of work under that project, and for which the Consortium Member or PLP retains all rights. (B) Any initial Data or technical, marketing, or financial Data provided at the onset of the project by any of the Consortium Members or PLPs. Such Data shall be marked "Category A" and any rights to be provided to the Government for such Data under a specific Prototype Project shall be as identified in the proposal submitted to the Government and included into the CM issued Prototype Awards.

(ii) Category B is any Data developed under this Base Agreement with mixed funding, i.e. development was accomplished partially with costs charged to a Consortium Member or PLP indirect cost pools and/or costs not allocated to a Consortium Member or PLP Prototype Award under this Base Agreement, and partially with Government funding under the OT Agreement.

(iii) Category C is any Data developed exclusively with Government funds under this Base Agreement. Research and Development performed was not accomplished exclusively or partially at private expense. Under this category, (A) the Government will have Government Purpose Rights in Data developed exclusively with Government funds under a Prototype Project funded by the CM under this Base Agreement that is: (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 contract, when the study, analysis, test, or similar work was specified as an element of performance; (iii) Data created in the performance of the Base Agreement that does not require the development, manufacture, construction, or production of items, components, or processes;

(iv) Form, fit, and function data;

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

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

The Government can only order such Data as is developed under the Prototype Project where the order request is made within one (1) year following Prototype Project completion or for an alternate duration specified in the Prototype Award. In the event the Government orders such Data, it shall pay PLP the reasonable costs for all efforts to

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## Space and Airborne Systems

deliver such requested Data, including but not limited to costs of locating such Data, formatting, reproducing, shipping, and associated administrative costs.

(B) The Government shall have unlimited rights in Data that is: (i) Otherwise publicly available or that has been released or disclosed by the PLP 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 Data to another party or the sale or transfer of some or all of a business entity or its assets to another party; (ii) Data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or (iii) Data furnished to the Government, under this Base Agreement or any other Government contract or subcontract thereunder, with- (1) Government Purpose Rights or limited rights and the restrictive condition(s) has/have expired; or (2) Government purpose rights and the PLP's exclusive right to use such Data for commercial purposes under such contract or subcontract has expired.

(C) However, any Data developed outside of this Base Agreement whether or not developed with any Government funding in whole or in part under a Government agreement, contract or subcontract shall have the rights negotiated under such prior agreement, contract or subcontract; the Government shall get no additional rights in such Data.

(D) Further, the Government's rights to Commercial Computer Software and Data licensed under a Commercial Computer Software License under this OTA, and the treatment of Data relating thereto, shall be as set forth in the Commercial Computer Software License.

(iv) The PLP shall stamp all documents in accordance with this Article and that the Freedom of Information Act (FOIA) and Trade Secrets Act (TSA) apply to Data.

### (3). Allocation of Principal Rights

(i) The Government shall have no rights to Category A Data.

(ii) The Government shall have immediate Government Purpose Rights to Category B or C Data upon delivery or Prototype Project completion (whichever is earlier), except that (A) The CM, at the request of small business or any other than small business PLP, may request on such PLP's behalf a delay of the start of Government Purpose Rights in Category B or C Data for a period not to exceed five (5) years from Prototype Project completion. Such requests will only be made in those cases where the PLP through the CM has provided information from the affected actual or prospective PLP demonstrating the need for this additional restriction on Government use and shall be submitted to the SMC/AD AO for approval, which approval shall not be unreasonably withheld. In the event of any dispute regarding approval of this request, the parties agree to treat this as a dispute and shall follow the provisions of Article 17, Disputes and Liability. (B) for Article 28 (2)(iii)(C) Category C Data, the Government shall have only the rights established under prior agreements. (C) for Article 28(2)(iii)(D) Category C Data, the Government shall only have the rights set forth in the Commercial Computer Software Data license agreement.

(iii) Data that will be delivered, furnished, or otherwise provided to the Government as specified in a specific Prototype Award funded under this Base Agreement, in which the Government has previously obtained rights, shall be delivered, furnished, or provided with the pre-existing rights, unless (a) the Parties have agreed otherwise, or (b) any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(iv) Each Proposal submitted by the Consortium Member in response to a Government call for proposals under the OT Agreement shall include a list of the Category A, B and C Data to be used or developed under the PA if selected. Any proposal that includes information to be provided with Limited Rights, Restricted Rights, or Specially Negotiated License Rights shall include supporting detail and rationale. Rights in such Data shall be as established under the terms of this Base Agreement, unless otherwise asserted in the proposal and agreed to by the Government in the Prototype Award. The CM will incorporate the list of Category A, B and C Data and the identified rights therefor in the Prototype Award. Following issuance of a PM and subsequent CM issuance of the Prototype Award to the Government selected PLP, the PLP shall update the list to identify any additional, previously unidentified, Data if such Data will be used or generated in the performance of the funded work. Rights in such Data shall be as established under the terms of this Base Agreement, unless otherwise asserted in a supplemental listing and agreed to by the Government.

### (4). Marking of Data

Except for Data delivered with unlimited rights, Data to be delivered under this Base Agreement subject to restrictions on use, duplication or disclosure shall be marked with the following legends: Category A use company proprietary statement. Category B and C use legend at DFARS 252.227-7013 (f)(2).

It is not anticipated that any Category A Data will be delivered to the Government under this Base Agreement. In the event commercial computer software and Data is licensed under a commercial computer software license under this Base Agreement a Special License rights marking legend shall be used as agreed to by the parties. The Government shall have unlimited rights in all unmarked Data. In the event that a Consortium Member or PLP learns of a release to the Government of its unmarked Data that should have contained a restricted legend, the CM on behalf of the

Consortium Member or PLP will have the opportunity to cure such omission going forward by providing written notice to the AO within three (3) months of the erroneous release.

(5). Copyright

The PLP reserve the right to protect by copyright original works developed under this Base Agreement. All such copyrights will be in the name of the individual PLP. The PLP hereby grants to the U.S. Government a non-exclusive, non-transferable, royalty-free, fully paid-up license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, for governmental purposes, any copyrighted materials developed under this agreement, and to authorize others to do so.

In the event Data is exchanged with a notice indicating that the Data is protected under copyright as a published, copyrighted work and it is also indicated on the Data that such Data existed prior to, or was produced outside of this Base Agreement, the Party receiving the Data and others acting on its behalf may reproduce, distribute, and prepare derivative works for the sole purpose of carrying out that Party's responsibilities under this Base Agreement or Prototype Award with the written permission of the Copyright holder.

Copyrighted Data that existed or was produced outside of this Base Agreement and is unpublished - having only been provided under licensing agreement with restrictions on its use and disclosure - and is provided under this Base Agreement shall be marked as unpublished copyright in addition to the appropriate license rights legend restricting its use, and treated in accordance with such license rights legend markings restricting its use.

The PLP is responsible for affixing appropriate markings indicating the rights of the Government on all Data delivered under this Base Agreement.

The Government agrees not to remove any copyright notices placed on Data and to include such notices on all reproductions of the Data.

(6). Data First Produced by the Government:

As to Data first produced by the Government in carrying out the Government's responsibilities under this Base Agreement and which Data is privileged or confidential if obtained from the SpEC on behalf of any Consortium Member or PLP, such Data will, to the extent permitted by law, be appropriately marked with a suitable notice or legend and maintained in confidence by the SpEC and any Consortium Member or PLP to whom disclosed for three (3) years after the development of the information, with the express understanding that during the aforesaid period such Data may be disclosed and used by the SpEC or any Consortium Member or PLP, including its respective employees or subcontractors of any tier, (under suitable protective conditions) by or on behalf of the Government for Government purposes only.

(7). Prior Technology

(i) Government Prior Technology: In the event it is necessary for the Government to furnish the SpEC or any SpEC Consortium Member or PLP, including their respective employees or their subcontractors of any tier, with Data which existed prior to, or was produced outside of the OT Agreement, and such Data is so identified with a suitable notice or legend, the Data will be maintained in confidence and disclosed and used only for the purpose of carrying out their responsibilities under this Base Agreement. Data protection will include proprietary markings and handling, compliance with Article 29, Proprietary Information, and the signing of non-disclosure agreements by SpEC (their PLPs, PLP subcontractors of any tier and their respective employees) to whom such Data is provided for use under the Base Agreement. Upon completion of activities under this Base Agreement, such Data will be disposed of as requested by the Government. (ii) SpEC and Consortium Member Prior Technology: In the event it is necessary for the SpEC or any Consortium Member or PLP to furnish the Government with Data which existed prior to, or was produced outside of the OT Agreement, and such Data embodies trade secrets or comprises commercial or financial information which is privileged or confidential, and such Data is so identified with a suitable notice or legend, the Data will be maintained in confidence and disclosed and used by the Government and such Government Contractors or contract employees that the Government may hire on a temporary or periodic basis only for the purpose of carrying out the Government's responsibilities under the OT Agreement. Data protection will include proprietary markings and handling, and the signing of nondisclosure agreements by such Government Contractors or contract employees. Neither the SpEC nor any Consortium Member nor PLP shall be obligated to provide Data that existed prior to, or was developed outside of this Base Agreement to the Government. Upon completion of activities under this Base Agreement, such Data will be disposed of as requested by the SpEC on behalf of itself or Consortium Member or PLPs. (iii) Oral and Visual Information: If information which the SpEC (including Consortium Member, PLPs, their subcontractors of any tier and their respective employees) considers to embody trade secrets or to comprise commercial or financial information which is privileged or confidential is expressly disclosed orally or visually directly to the Government, the exchange of such information must be memorialized in tangible, recorded form and marked with a suitable notice or legend, and furnished to the Government within thirty (30) calendar days after such oral or visual disclosure, or the Government shall have no duty to limit or restrict, and shall not incur any liability for any disclosure and use of such information. Upon Government request, additional detailed information about the exchange will be provided subject to restrictions on use and disclosure.

(iv) Disclaimer of Liability: Notwithstanding the above, the Government shall not be restricted in, nor incur any liability for, the disclosure and use of: (A) Data not identified with a suitable notice or legend as set forth in this Article; nor (B) Information contained in any Data for which disclosure and use is restricted under Article 29 entitled "Proprietary Information", if such information is or becomes generally known without breach of the above, is properly known to the Government or is generated by the Government independent of carrying out responsibilities under the OT Agreement, is rightfully received from a third party without restriction, or is included in Data which the SpEC or any Consortium Member of PLP has furnished, or is required to furnish to the Government without restriction on disclosure and use.

(v) Marking of Data: Any Data delivered under this Base Agreement shall be marked with a suitable notice or legend.

(8). Notwithstanding the Paragraphs in this Article, differing rights in Data may be negotiated among the Parties to each individual project on a case-by-case basis.

**(9). Lower Tier Agreements**

**The PLP shall include this Article, suitably modified to identify the parties, in all Prototype Awards, subcontracts or lower tier agreements, regardless of tier, or experimental, developmental, or research work.**

**(10). Survival Rights**

Provisions of this Article shall survive termination of this Base Agreement under Article 7, Term of Agreement. Notwithstanding the terms of this Article, differing rights in data may be negotiated among the Parties to each individual Prototype Award on a case-by-case basis.

**ARTICLE 30 - INVENTIONS AND PATENTS**

**(a) Allocation of Principal Rights**

1. The Prototype Level Performer ("PLP") shall retain ownership throughout the world to each Subject Invention consistent with the provisions of this Article and 35 U.S.C. § 202, provided the PLP has timely pursued a patent application and maintained any awarded patent and has not notified the Government (in accordance with the subparagraph (b) below) that the PLP does not intend to retain title.

2. The PLP shall retain ownership throughout the world to background inventions. Any invention related to, conceived of, or first reduced to practice in support of a PLP's internal development milestone shall be a background invention of PLP and shall not be classified as a Subject Invention, provided that an invention conceived of in support of an internal development milestone that is first reduced to practice under a Prototype Award awarded under this Base Agreement in support of other than internal development milestones shall be considered a Subject Invention.

3. The Government is granted 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.

**(b) Invention Disclosure, Election of Title, and Filing of Patent Application**

1. The PLP shall disclose each Subject Invention through the CM to the Government on a DD Form 882 within eight (8) months after the inventor discloses it in writing to the Prototype Inventor's personnel responsible for patent matters.

2. If the PLP determines that it does not intend to retain title to any Subject Invention, the PLP shall notify the Government through the CM, in writing, within eight (8) months of disclosure to the Government. However, in any case where publication, sale, or public use has initiated the one (1)-year statutory period wherein valid patent protection can still be obtained in the United States, the period for such notice is shortened to at least sixty (60) calendar days prior to the end of the statutory period.

**(c) Conditions When the Government May Obtain Title**

Upon the Agreements Officer's written request through the CM, the PLP shall convey title to any Subject Invention to the Government under any of the following conditions:

1. If the PLP fails to disclose or elects not to retain title to the Subject Invention within the times specified in paragraph (b) of this Article; provided, that the Government may only request title within sixty (60) calendar days after learning of the failure of the Consortium to disclose or elect within the specified times.

2. In those countries in which the PLP fails to file patent applications within the times specified in paragraph (b) of this Article; provided, that if the PLP has filed a patent application in a country after the times specified in paragraph (b) of this Article, but prior to its receipt of the written request by the Government the PLP shall continue to retain title in that country; or

3. In any country in which the PLP decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceedings on, a patent on a Subject Invention.

**(d) Minimum Rights to the Consortium and/or PLP and Protection of the Consortium and/or PLP's Right to File**

1. The PLP shall retain a nonexclusive, royalty-free license throughout the world in each Subject Invention to which the Government obtains title, except if the PLP fails to disclose the Subject Invention within the times specified in paragraph (b) of this Article. The PLP's license extends to the domestic (including Canada) subsidiaries and affiliates, if any, within the corporate structure of which the PLP is a party and includes the right to grant sublicenses of the same scope to the extent that the PLP was legally obligated to do so at the time the PA was awarded. The license is transferable only with the approval of the Government, except when transferred to the successor of that part of the

business to which the Subject Invention pertains. The Government's approval for license transfer shall not be unreasonably withheld.

2. The PLP's domestic license, as described above, 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 consistent with appropriate provisions at 37 CFR Part 404. This license shall not be revoked in that field of use or the geographical areas in which the PLP has achieved practical application and continues to make the benefits of the Subject 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 PLP, its licensees, or the subsidiaries or affiliates have failed to achieve practical application in that foreign country.

3. Before revocation or modification of the license, the Agreements Officer shall furnish the PLP a written notice of its intention to revoke or modify the license, and the PLP shall be allowed thirty (30) calendar days (or such other time as may be authorized for good cause shown) after the notice to show cause why the license should not be revoked or modified.

**(e) Action to Protect the Government's Interest**

1. The PLP agrees to execute or to have executed and promptly deliver through the CM 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 PLP elects to retain title, and (ii) convey title to the Government when requested under paragraph (c) of this Article and to enable the Government to obtain patent protection throughout the world in that Subject Invention.

2. The PLP agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the PLP each Subject Invention made under this Agreement in order that the PLP can comply with the disclosure provisions of paragraph (b) of this Article. The PLP shall instruct employees, through employee agreements or other suitable educational programs, on the importance of reporting Subject Inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

3. The PLP shall notify the Government through the CM of any decisions not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceedings on a patent, in any country, not less than thirty (30) calendar days before the expiration of the response period required by the relevant patent office.

4. The PLP shall include, within the specification of any United States patent application and any patent issuing thereon covering a Subject Invention, the following statement: "This Invention was made with Government support under Agreement No. FA8814-17-9-0002, awarded by SMC/AD. The Government has certain rights in the Invention."

**(f) March-in Rights**

The PLP agrees that, with respect to any Subject Invention in which it has retained title, the Government has the right to require the Prototype Inventor, an assignee, or exclusive licensee of a Subject Invention to grant a non-exclusive license to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the PLP, assignee, or exclusive licensee refuses such a request, the Government has the right to grant such a license itself if the Agreements Officer determines that:

1. Such action is necessary because the PLP or assignee has not taken effective steps, consistent with the intent of this Base Agreement, to achieve practical application of the Subject Invention;

2. Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the PLP, assignee, or their licensees; or

3. Such action is necessary to meet requirements for public use and such requirements are not reasonably satisfied by the PLP, assignee, or licensees.

**(g) Authorization and Consent**

The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this Base Agreement.

**(h) Notice and Assistance**

1. The PLP shall report to the Government through the CM, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of a Prototype Award under this Base Agreement of which the PLP has knowledge.

2. In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of a Prototype Award under this Base Agreement or out of the use of any supplies furnished or work or services performed under a Prototype Award under this Base Agreement, the PLP shall furnish to the Government, when requested by the Agreements Officer through the CM, all evidence and information in the PLP's possession pertaining to such claim or suit. Such evidence and information shall be furnished at the expense of the Government except where the PLP has agreed to indemnify the Government.

**(i) Lower Tier Agreements**

The PLP 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.

(j) Survival Rights

The obligations of the Government and the PLP under this Article shall survive after the expiration or termination of this Base Agreement.

#### **ARTICLE 31 - SECURITY REQUIREMENTS**

(a) This Article applies to the extent that any Prototype Award involves access to information classified that may fall within one (or more) of the following levels:

- (1) "Confidential,"
- (2) "Secret,"
- (3) "Top Secret,"
- (4) "Top Secret/Sensitive Compartmented Information (TS/SCI)"
- (5) "Special Access Program (SAP)"

(b) In the event that a Prototype Award requires the PLP to have access to, or generate, classified information, the Government will generate a Department of Defense Security Classification Specification (DD Form 254) and attach it to the PA. Each Prototype involving classified or controlled information will have a separate DD 254, which will only be applicable to the specified Prototype Award.

(c) The PLP shall comply with the DD Form 254 attached to the Prototype Award at the time of award, and with -

(1) The Security Agreement (DD Form 441), including the National Industrial Security Program Operating Manual (DoD 5220.22-M); and

(2) Any revisions to that manual, notice of which has been furnished to the PLP.

(d) The PLP agrees to insert terms that conform substantially to the language of this article, including this paragraph (d), in all Sub-agreements under Prototype Award that involve access to classified information.

#### **ARTICLE 32 - CYBERSECURITY AND INFORMATION PROTECTION**

(a) Definitions applicable to 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.

"Cloud computing," means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This includes other commercial terms, such as on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service. It also includes commercial offerings for software-as-a-service, infrastructure-as-a-service, and platform-as-a-service.

"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.

"PLP attributional/proprietary information" means information that identifies the PLP(s), whether directly or indirectly, by the grouping of information that can be traced back to the PLP(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 contractor information system" means an unclassified information system that is owned, or operated by or for, a contractor 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 Prototype Award and provided to the PLP by or on behalf of DoD in support of the performance of the Prototype Award; or (2) Collected, developed, received, transmitted, used, or stored by or on behalf of the PLP in support of the performance of the Prototype Award.

"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 contractor 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.

"Safeguarding" means measures or controls that are prescribed to protect information systems.

"Technical information" means technical data or computer software, as those terms are defined in the clause at DFARS 252.227-7013

<<http://www.acq.osd.mil/dpap/dars/dfars/html/current/252227.htm>>.acq.osd.mil/dpap/dars/dfars/html/current/252227.htm <<http://www.acq.osd.mil/dpap/dars/dfars/html/current/252227.htm>>>, Rights in Technical Data-Noncommercial Items, regardless of whether or not the clause is incorporated in the Request for Prototype Proposal or Base Agreement. 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) Compliance with this Article is only required when the PAs explicitly require compliance. The Government will clearly mark solicitations where the resulting Prototype is anticipated to include covered defense information. In such instances, Consortium Members will confirm in their white paper/Proposal either compliance or requirement to comply prior to award.

(c) This article applies to the extent that this Base Agreement or Prototype Award (PA) involves a covered contractor information system that processes, stores or transmits Covered Defense Information (CDI) as determined by the AO.

(1) By submission of an offer, the Offeror represents that it will implement the security requirements specified by National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171 "Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations" (see <<http://dx.doi.org/10.6028/NIST.SP.800-171>>x.doi.org/10.6028/NIST.SP.800-171>

<<http://dx.doi.org/10.6028/NIST.SP.800-171>>) that are in effect at the time the solicitation is issued or as authorized by the Agreements Officer (AO). (2) If the Offeror proposes to vary from any of the security requirements specified by NIST SP 800- 171 that are in effect at the time the solicitation is issued or as authorized by the AO, the Offeror shall submit to the AO through the CM, for consideration by the DoD Chief Information Officer (CIO), a written explanation of why a particular security requirement is not applicable; or how an alternative but equally effective, security measure is used to compensate for the inability to satisfy a particular requirement and achieve equivalent protection. An authorized representative of the DoD CIO will adjudicate offeror requests to vary from NIST SP 800- 171 requirements in writing prior to Prototype Award. Any accepted variance from NIST SP 800-171 shall be incorporated into the resulting PA. (3) The Offeror shall indicate in its proposal whether the use of cloud computing is anticipated at any level under the resultant PA. After the award of a PA, if the PLP proposes to use cloud computing services in the performance of the Prototype Award at any level, the PLP shall obtain approval from the AO prior to utilizing cloud computing services.

(d) The PLP shall provide adequate security on all covered contractor information systems. To provide adequate security, the PLP shall implement, at a minimum, the following safeguarding and information security protections: (1) The PLP shall apply the following basic safeguarding requirements and procedures: (i) Limit information system access to authorized users, processes acting on behalf of authorized users, or devices (including other information systems). (ii) Limit information system access to the types of transactions and functions that authorized users are permitted to execute. (iii) Verify and control/limit connections to and use of external information systems. (iv) Control information posted or processed on publicly accessible information systems. (v) Identify information system users, processes acting on behalf of users, and devices. (vi) Authenticate (or verify) the identities of those users, processes, and devices, as a



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prerequisite to allowing access to organizational information systems. (vii) Sanitize or destroy information system media containing Federal Contract Information before disposal or release for reuse. (viii) Limit physical access to organizational information systems, equipment, and the respective operating environments to authorized individuals. (ix) Escort visitors and monitor visitor activity; maintain audit logs of physical access; and control and manage physical access devices. (x) Monitor, control, and protect organizational communications (i.e., information transmitted or received by organizational information systems) at the external boundaries and key internal boundaries of the information systems. (xi) Implement subnetworks for publicly accessible system components that are physically or logically separated from internal networks. (xii) Identify, report, and correct information and information system flaws in a timely manner. (xiii) Provide protection from malicious code at appropriate locations within organizational information systems. (xiv) Update malicious code protection mechanisms when new releases are available. (xv) Perform periodic scans of the information system and real-time scans of files from external sources as files are downloaded, opened, or executed.

(2) The covered contractor 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>), within 30 days of agreement award, of any security requirements specified by NIST SP 800-171 not implemented at the time of Prototype Award.

(3) Apply additional information systems security measures when the PLP reasonably determines that information systems security measures 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.

(e) The PLP shall notify the DoD Chief Information Officer (CIO), via email at [osd.dibcsia@mail.mil](mailto:osd.dibcsia@mail.mil), within thirty (30) days of Prototype Award, of any security requirements specified by NIST SP 800-171 not implemented at the time of Prototype Award. (1) The PLP shall submit requests to vary from NIST SP 800-171 in writing through the CM to the AO, for consideration by the DoD CIO. The PLP need not implement any security requirement adjudicated by an authorized representative of the DoD CIO to be non-applicable or to have an alternative, but equally effective, security measure that may be implemented in its place. (2) If the DoD CIO has previously adjudicated the PLP'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 through the CM to the AO when requesting its recognition under this agreement. (3) If the PLP intends to use an external cloud service provider to store, process, or transmit any covered defense information in performance of this agreement, the PLP 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 (Fed RAMP) Moderate baseline (<<https://www.fedramp.gov/resources/documents/>><<http://www.fedramp.gov/resources/documents/>>) and that the cloud service provider complies with requirements 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.

(f) When the PLP discovers a cyber-incident that affects a covered contractor information system (including internal or external cloud computing services) or the covered defense information residing therein, or that affects the PLP's ability to perform the requirements of the agreement that are designated as operationally critical support and identified in the agreement, the PLP shall- (1) 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 contractor information system(s) that were part of the cyber incident, as well as other information systems on the PLP'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 PLP's ability to provide operationally critical support; and (2) Rapidly report cyber incidents to DoD at <<http://dibnet.dod.mil/>>net.dod.mil/>.

<<http://dibnet.dod.mil/>> The cyber incident report shall be treated as information created by or for DoD and shall include, at a minimum, the required elements at <http://dibnet.dod.mil>. In order to report cyber incidents in accordance with this article, the PLP or sub performer 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 <<http://iase.disa.mil/pki/eca/Pages/index.aspx>>

<<http://iase.disa.mil/pki/eca/Pages/index.aspx>>

(g) When the PLP or sub performers 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 AO. Do not send the malicious software to the AO.

(h) When a PLP discovers a cyber-incident has occurred, the PLP shall preserve and protect images of all known affected information systems identified in paragraph (d)(1) 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.

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

(j) If DoD elects to conduct a damage assessment, the AO will request that the PLP provide all of the damage assessment information gathered in accordance with paragraph (f) of this clause.

(k) The Government shall protect against the unauthorized use or release of information obtained from the PLP (or derived from information obtained from the PLP) under this Article that includes PLP attributional/proprietary information, including such information submitted in accordance with paragraph (f). To the maximum extent practicable, the PLP shall identify and mark attributional/proprietary information. In making an authorized release of such information, the Government will implement appropriate procedures to minimize the PLP 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.

(l) Information that is obtained from the PLP (or derived from information obtained from the PLP) 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 contract ("recipient") that is directly supporting Government activities under a contract that includes the clause at DFARS 252.204-7009 <<http://www.acq.osd.mil/dpap/dars/dfars/html/current/252204.htm>>.acq.osd.mil/dpap/dars/dfars/html/current/252204.htm

<<http://www.acq.osd.mil/dpap/dars/dfars/html/current/252204.htm>>, Limitations on the Use or Disclosure of Third-Party PLP Reported Cyber Incident Information.

(m) Information that is obtained from the PLP (or derived from information obtained from the PLP) under this clause that is created by or for DoD (including the information submitted pursuant to paragraph (f) of this clause) is authorized to be used and released outside of DoD for purposes and activities authorized by paragraph (l) of this clause, 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.

(n) The PLP 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.

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

(p) Reserved

(q) Reserved

(r) The PLP shall include this Article, including this paragraph (r), in sub agreements, or agreements for which sub performer performance will involve covered defense information, including sub agreements for commercial items, without alteration, except to identify the parties. The PLP shall determine if the information required for sub performer performance retains its identity as covered defense information and will require protection under this article, and, if necessary, consult with the AO through the CM; and require sub performers to notify the prime PLP (or next higher-tier sub performer) when submitting a request to vary from a NIST SP 800-171 security requirement to the AO, in accordance with paragraph (c)(2) of this clause; and provide the incident report number, automatically assigned by DoD, to the prime PLP (or next higher-tier sub performer) as soon as practicable, when reporting a cyber-incident to DoD as required in paragraph (f) of this Article.

### **ARTICLE 33 - EXPORT CONTROL AND FOREIGN ACCESS TO TECHNOLOGY**

(a) General

(1) The Parties agree that research findings and technology developments arising under this Base Agreement 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 Base Agreement by Foreign Firms or Institutions must be carefully controlled.

(2) The PLP shall comply with the International Traffic in Arms Regulation (22 CFR pt. 121 et seq.), the DoD Industrial Security Regulation (DoD 5220.22-R) and the Department of Commerce Export Regulation (15 CFR pt. 770 et seq.).

(3) The Government anticipates Prototype Awards under this Base Agreement may be restricted by the International Traffic in Arms Regulation (ITAR).

(b) Prototype Awards or Lower Tier Agreements

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(1) The PLP shall include this Article, suitably modified to identify the parties, in all subcontracts or lower tier agreements, regardless of tier, for developmental prototype work.