FERMILAB TERMS AND CONDITIONS
Commercial Items

1. DEFINITIONS

As used throughout this subcontract, the following terms shall have the meanings set forth below--

(a) The terms "Commercial component", "Commercial item", and "Nondevelopmental item" shall have the meanings contained in the clause at Federal Acquisition Regulation (FAR) 2.101, Definitions.

(b) The term "Department" shall mean the U.S. Department of Energy or any duly authorized representative thereof.

(c) The term "Fermilab" shall mean Fermi Research Alliance, LLC, and includes the successor to or any duly authorized representative thereof.

(d) The term "Government" shall mean the United States Government acting through the U.S. Department of Energy or any successor agency.

(e) Except as otherwise provided in this subcontract, the term "sub-subcontract" includes purchase orders under this subcontract.

2. ACCEPTANCE OF SUBCONTRACT

Acceptance of this subcontract must be in accordance with and strictly limited to the requirements set forth in this subcontract, including these Terms and Conditions. Any attempted change by the Subcontractor of the requirements set forth in this subcontract without the proper acknowledgment or agreement by Fermilab shall have no force or effect. Where no such acknowledgment or agreement has been obtained, performance by the Subcontractor shall be deemed to be an acceptance by the Subcontractor of the requirements set forth in this subcontract.

3. INSPECTION

(a) If this subcontract is for supplies, then the inspection provisions of paragraph (b) apply. If this subcontract is for services, then the inspection provisions of paragraph (c) apply. If this subcontract is for both supplies and services, then the provisions of (b) apply to that portion of the work which is for supplies, and those of (c) apply to that portion of the work which is for services.

(b) *Supplies.*

(1) "Supplies," as used in this paragraph, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(2) Fermilab has the right to inspect and test all supplies called for by this subcontract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. Fermilab shall perform inspections and tests in a manner that will not unduly delay the work. Fermilab assumes no contractual obligation to perform any inspection or test for the benefit of the Subcontractor unless specifically set forth elsewhere in this subcontract. If Fermilab performs an inspection or test on the premises of the Subcontractor or a sub-subcontractor, the Subcontractor shall furnish, and shall require all sub-subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(3) Fermilab has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with subcontract requirements. Fermilab may reject nonconforming supplies with or without disposition instructions. The Subcontractor shall remove supplies rejected or required to

be corrected. However, Fermilab may require or permit correction in place, promptly after notice, by and at the expense of the Subcontractor. The Subcontractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when, required, shall disclose the corrective action taken. If the Subcontractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, Fermilab may either (i) by subcontract or otherwise, remove, replace, or correct the supplies and charge the cost to the Subcontractor or (ii) terminate the subcontract for cause. Unless the Subcontractor corrects or replaces the supplies within the delivery schedule, Fermilab may require their delivery and make an equitable price reduction.

(4) Fermilab shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the subcontract. Fermilab failure to inspect and accept or reject the supplies shall not relieve the Subcontractor from responsibility, nor impose liability on Fermilab, for nonconforming supplies. Inspections and tests by Fermilab do not relieve the Subcontractor of responsibility for defects or other failures to meet subcontract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the subcontract.

(5) If acceptance is not conclusive for any of the reasons in the last sentence of (4) above, Fermilab, in addition to any other rights and remedies provided by law, or under other provisions of this subcontract, shall have the right to require the Subcontractor (i) at no increase in subcontract price, to correct or replace the nonconforming supplies at the original point of delivery or at the Subcontractor's plant at Fermilab's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Subcontractor and Fermilab; *provided,* that Fermilab may require a reduction in subcontract price if the Subcontractor fails to meet such delivery schedule, or (ii) within a reasonable time after receipt by the Subcontractor of notice of defects or nonconformance, to repay such portion of the subcontract as is equitable under the circumstances if Fermilab elects not to require correction or replacement. When supplies are returned to the Subcontractor, the Subcontractor shall bear the transportation cost from the original point of delivery to the Subcontractor's plant and return to the original point when that point is not the Subcontractor's plant.

(c) *Services.*

(1) "Services," as used in this paragraph, includes services performed, workmanship, and materials furnished or utilized in the performance of services.

(2) Fermilab has the right to inspect and test all services called for by this subcontract, to the extent practicable at all times and places during the term of the subcontract. Fermilab shall perform inspections and tests in a manner that will not unduly delay the work. If Fermilab performs inspections or tests on the premises of the Subcontractor or a sub-subcontractor, the Subcontractor shall furnish, and shall require sub-subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(3) If any of the services do not conform with subcontract requirements, Fermilab may require the Subcontractor to perform the services again in conformity with subcontract requirements, at no increase in subcontract amount. When the defects in services cannot be corrected by reperformance, Fermilab may require the Subcontractor to take necessary action to ensure that future performance conforms to subcontract requirements, and may reduce the subcontract price to reflect the reduced value of the services performed. If the Subcontractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with subcontract requirements, Fermilab may, by subcontract or otherwise, perform the services and charge to the Subcontractor any cost incurred by Fermilab that is directly related to the performance of such service, or may terminate the subcontract for cause.

4. ASSIGNMENT

Neither this subcontract nor any interest in it nor claim under it shall be assigned or transferred by the Subcontractor except as expressly authorized in writing by Fermilab. Fermilab may assign the whole or any part of this subcontract to the Government or its designee, or to any successor contractor, and in such event this subcontract shall continue in full force and effect.

5. CHANGES

Changes in the requirements of this subcontract may be made only by written agreement of the parties.

6. PAYMENT

Payment will be made after acceptance of the items/services by Fermilab and receipt of a proper invoice. Discount time will be computed from the date of delivery at place of acceptance or from receipt of proper invoice at the office specified by Fermilab, whichever is later. Payment is made, for discount purposes, when the Fermilab check is mailed.

7. EXCUSABLE DELAYS

The Subcontractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Subcontractor and without its fault or negligence such as, acts of God or the public enemy, acts of Fermilab, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Subcontractor shall notify Fermilab in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to Fermilab of the cessation of such occurrence.

8. RISK OF LOSS

Unless the subcontract specifically provides otherwise, risk of loss or damage to the supplies provided under this subcontract shall remain with the Subcontractor until, and shall pass to Fermilab upon:

(a) delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(b) delivery of the supplies to Fermilab at the destination specified in the subcontract, if transportation is f.o.b. destination.

9. TAXES

The subcontract price includes all applicable Federal, State, and local taxes and duties.

10. TERMINATION FOR FERMILAB'S CONVENIENCE

Fermilab reserves the right to terminate this subcontract, or any part hereof, for its sole convenience. In the event of such termination, the Subcontractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and sub-subcontractors to cease work. Subject to the terms of this subcontract, the Subcontractor shall be paid a percentage of the subcontract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Subcontractor can demonstrate to the satisfaction of Fermilab using its standard record keeping system, have resulted from the termination. The Subcontractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This clause does not give Fermilab any right to audit the Subcontractor's records. The Subcontractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

11. TERMINATION FOR CAUSE

Fermilab may terminate this subcontract, or any part hereof, for cause in the event of any default by the Subcontractor, or if the Subcontractor fails to comply with any subcontract requirement, or fails to provide Fermilab, upon request, with adequate assurances of future performance. In the event of termination for cause, Fermilab shall not be liable to the Subcontractor for any amount for supplies or services not accepted, and the Subcontractor shall be liable to Fermilab for any and all rights and remedies provided by law and by other provisions of this subcontract. If it is determined that Fermilab improperly terminated this subcontract for cause, such termination shall be deemed a termination for Fermilab's convenience.

12. TITLE

Unless specified elsewhere in this subcontract, title to items furnished under this subcontract shall pass to the Government upon acceptance, regardless of when or where Fermilab takes physical possession.

13. WARRANTY

(a) The Subcontractor warrants that all supplies or services furnished under this subcontract will conform to the specifications and all other requirements, will be free from defects in material or workmanship, and will otherwise be merchantable and fit for use for the particular purpose described in this subcontract. Such warranties together with the Subcontractor's service and other warranties and guarantees, if any, shall survive inspection, tests, acceptance, and payment, and shall run to Fermilab, its successors and assigns.

(b) In the case of supplies, the Subcontractor shall, within a reasonable time after receipt of written notice from Fermilab and without cost to Fermilab, repair or replace any defects in materials or workmanship or nonconformance with specifications which may appear during the period ending on a date twelve months after initial use by Fermilab or eighteen months after delivery, whichever is earlier, unless a different warranty period is provided in the subcontract. If, within a reasonable time, the Subcontractor is unable or refuses to correct or replace such defective or nonconforming supplies, Fermilab may, at its option, either return for credit or, by subcontract or otherwise, repair or replace such supplies and assess the Subcontractor the cost occasioned thereby.

(c) In the case of services, the Subcontractor shall, within a reasonable time after receipt of written notice from Fermilab and without cost to Fermilab, correct any defects or nonconformities in the services furnished under this subcontract which appear within one year after the date of acceptance by Fermilab, unless a different warranty period is provided in the subcontract. If, within a reasonable time, the Subcontractor is unable or refuses to correct or reperform, Fermilab may, by subcontract or otherwise, correct or replace with similar services and charge to the Subcontractor the cost occasioned thereby, or make an equitable adjustment in the subcontract price. If, however, Fermilab does not require correction or reperformance, it may at its option make an equitable adjustment in the subcontract price.

(d) The rights and remedies of Fermilab provided in this clause are in addition to and do not limit any rights afforded to Fermilab by law or by any other clause of this subcontract.

14. LIMITATION OF LIABILITY

Except as otherwise provided by an express or implied warranty, the Subcontractor will not be liable to Fermilab for consequential damages resulting from any defect or deficiencies in accepted items.

15. APPLICABLE LAW

To the extent that Federal law does not exist and state law could become applicable to this subcontract, the law of Illinois shall apply.

16. ENVIRONMENTAL PROTECTION

In performing this subcontract, the Subcontractor shall comply with the requirements set forth in all applicable Federal and non-Federal environmental protection laws, codes, ordinances, Executive Orders, regulations, and directives.

17. OTHER COMPLIANCES

The Subcontractor shall comply with all applicable Federal, State and local laws, executive orders, rules, and regulations in its performance of this subcontract.

18. COMPLIANCE WITH REQUIREMENTS UNIQUE TO GOVERNMENT CONTRACTS AND SUBCONTRACTS

The Subcontractor agrees to comply with the following FAR clauses, which are incorporated into this subcontract by reference, to implement provisions of law or executive orders applicable to acquisitions of commercial items:

(a) FAR 52.219-8, Utilization of Small Business Concerns (MAY 2004) (15 U.S.C. 637(d)(2) and (3));

(b) FAR 52.222-21, Prohibition of Segregated Facilities (FEB 1999);

(c) FAR 52.222-26, Equal Opportunity (APR 2002) (E.O. 11246);

(d) FAR 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (DEC 2001) (38 U.S.C. 4212); and

(e) FAR 52.222-36, Affirmative Action for Workers with Disabilities (JUN 1998) (29 U.S.C. 793).

19. SUB-SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS

(a) To the maximum extent practicable, the Subcontractor shall incorporate, and require its sub-subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under the subcontract.

(b) Except to the extent set forth elsewhere in this subcontract or where necessary to establish the reasonableness of prices under FAR Part 15, the Subcontractor is not required to include any FAR provision or clause, other than those listed in clause 18 above, in any sub-subcontract at any tier under this subcontract.

(c) The Subcontractor shall include the terms of this clause, including this paragraph (c), in sub-subcontracts awarded under this subcontract.

20. AUTHORIZATION AND CONSENT

(a) The Government authorizes and consents to all use and manufacture, in performing this subcontract or any lower-tier sub-subcontract, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government or Fermilab under this subcontract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Subcontractor or any lower-tier sub-subcontractor with (i) specifications or written provisions forming a part of this subcontract or (ii) specific written instructions given by Fermilab or the Department Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this subcontract or any lower-tier sub-subcontract hereunder, and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) The Subcontractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all lower-tier sub-subcontracts for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed the simplified acquisition threshold at FAR 2.101); however, omission of this clause from any lower-tier sub-subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

21. PATENT INDEMNITY

(a) The Subcontractor shall indemnify Fermilab, the Government, and their officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order

under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this subcontract, or out of the use or disposal by or for the account of the Government or Fermilab of such supplies or construction work.

(b) This indemnity shall not apply unless the Subcontractor shall have been informed as soon as practicable by the Government or Fermilab of the suit or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to (1) an infringement resulting from compliance with specific written instructions of Fermilab or the Department Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the subcontract not normally used by the Subcontractor, (2) an infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance, or (3) a claimed infringement that is unreasonably settled without the consent of the Subcontractor, unless required by final decree of a court of competent jurisdiction.

22. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

(a) The Subcontractor shall report to the Department Contracting Officer through Fermilab promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this subcontract of which the Subcontractor has knowledge.

(b) In the event of any claim or suit against Fermilab or the Government on account of any patent or copyright infringement arising out of the performance of this subcontract or out of the use of any supplies furnished or work or services performed under this subcontract, the Subcontractor shall furnish to Fermilab or the Government, when requested by Fermilab or the Department Contracting Officer, all evidence and information in possession of the Subcontractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Subcontractor has agreed to indemnify the Government or Fermilab.

(c) The Subcontractor agrees to include, and require inclusion of, this clause in all lower-tier sub-subcontracts for supplies or services (including construction and architect-engineer sub-subcontracts and those for material, supplies, models, samples, or design or testing services) expected to exceed the simplified acquisition threshold at FAR 2.101.

23. DISPUTES

The parties agree that they will attempt in good faith to resolve through negotiation any dispute, claim, or controversy arising out of or relating to this subcontract. If such efforts fail to result in a mutually agreeable resolution, the parties shall consider the use of alternative disputes resolution (ADR). In the event that ADR fails or is not used, the parties may thereafter pursue any remedy they may have at law or in equity.