

Pre-Competitive NSRC User Agreement

No.

BETWEEN

(" CONTRACTOR")

under the U.S. Department of Energy Contract No.

AND

("USER")

(Collectively, "the Parties")

ARTICLE I: SCOPE OF SERVICES

CONTRACTOR will make available to USER certain Nanoscale Science Research (NSRC) facilities, equipment, services, information and other material, on a collaborative basis, as described in Appendix A. Appendix A shall set forth the technical scope of work, including deliverables, to be performed pursuant to this Agreement. The scope of work shall not be considered proprietary information and shall be publicly releasable. The Parties agree that an initial abstract of the work to be performed shall be a deliverable under this Agreement.

Access to and use of the NSRC facility is subject to the prior written approval of the Scientific Director of the NSRC facility and available NSRC scheduling therefor. It is understood and agreed that the approval determinations of the Scientific Director of the NSRC facility are final.

ARTICLE II. TERM OF THE AGREEMENT

This agreement shall have a term of ____ months/years from the effective date. The term of this agreement shall be effective as of the date on which it was signed by the last of the Parties.

ARTICLE III: COST Each Party will bear its own costs and expenses associated with this Agreement. No money will be transferred to or from either Party as consideration, in whole or in part, for this Agreement.

ARTICLE IV: ADMISSION REQUIREMENTS

- A. General** - USERS are subject to the administrative and technical supervision and control of CONTRACTOR; and will comply with all applicable rules of CONTRACTOR and DOE with regard to admission to and use of the NSRC facility, including safety, operating and health-physics procedures, environment protection, access to information, hours of work, and conduct. USER is required to obtain agreements from each of the employees or representatives as necessary to implement the provisions of the Agreement. USER's employees will not be considered employees of CONTRACTOR for any purpose.

- B. Safety and Health** - USER shall take all reasonable precautions with regard to the installation of equipment and performance of experiments to protect the safety and health of others and to protect the environment, and shall comply with all applicable safety and health regulations and requirements of the NSRC facility, the CONTRACTOR, and the Government. If USER fails to comply with said regulations or requirements, the CONTRACTOR may, without prejudice to any other legal or contractual rights, issue an order stopping all or any part of USER's activities at the NSRC facility.
- C.** Individuals for whom USER is responsible, but who are not actual employees of USER, shall execute any and all documents required by CONTRACTOR to access and use the NSRC facility.

ARTICLE V: PROPERTY AND MATERIALS USER reserves the right to furnish equipment, tooling, test apparatus, or materials necessary to assist in the performance of its experiment(s) at the NSRC facility. Such items shall remain the property of USER. Unless the parties otherwise agree, all such property furnished by USER or equipment and test apparatus provided by USER will be removed by USER within sixty (60) days of termination of this Agreement or will be disposed of as directed by USER. Any equipment that becomes integrated into the facility shall be the property of the Government. USER acknowledges that any material supplied by USER may be damaged, consumed or lost. Materials (including residues and/or other contaminated material) remaining after performance of the work or analysis will be removed in their then condition by USER at USER's expense. USER will return facilities and equipment utilized in their original condition except for normal wear and tear.

CONTRACTOR shall have no responsibility for USER's property in CONTRACTOR's possession other than loss or damage caused by willful misconduct or gross negligence of CONTRACTOR or its employees.

Personal property produced or acquired during the course of this Agreement shall be disposed of as directed by the owner at the owner's expense.

ARTICLE VI: SCHEDULING USER understands that CONTRACTOR will have sole responsibility and discretion for allocating and scheduling usage of the facilities and equipment needed for or involved in the Activity.

ARTICLE VII: INTELLECTUAL PROPERTY PROVISIONS The rights of the parties in patents, Technical Data, copyrights and other intellectual property that may arise under this Agreement are set forth in Appendix B of this Agreement. Individuals for whom USER is responsible, but who are not actual employees of USER, shall be considered employees of USER solely for the purposes of ownership of intellectual property in accordance with Appendix B.

ARTICLE VIII: EXPORT CONTROLS USER acknowledges that the export of goods or Technical Data may require some form of export control license from the U.S. Government and that failure to obtain such export control license may result in criminal liability under the laws of the United States.

ARTICLE IX: RECORDS AND ACCOUNTING SYSTEM USER will maintain records of receipts, expenditures, and the disposition of all Government property in its custody, related to the Agreement.

ARTICLE X: PUBLICATIONS

- A. USER and CONTRACTOR will provide each other copies of articles of any publication of information generated pursuant to this Agreement for review and comment 14 days prior to publication.
- B. USER will not use the name of CONTRACTOR or the United States Government or their employees in any promotional activity, such as advertisements, with reference to any product or service resulting from this Agreement, without prior written approval of the Government and CONTRACTOR.

ARTICLE XI: ADMINISTRATION OF THE AGREEMENT This Agreement is entered into by CONTRACTOR under the authority of its Prime Contract with DOE. CONTRACTOR will administer this Agreement in all respects. Administration of this Agreement may be transferred from CONTRACTOR to DOE or its designee with notice of such transfer to USER, and CONTRACTOR will have no further responsibilities except as set forth in Article XV of this Agreement.

ARTICLE XII: DISPUTES The parties will attempt to jointly resolve all disputes arising from this Agreement. If the parties are unable to jointly resolve a dispute within a reasonable period of time, the dispute will be decided by the DOE or DOE/NNSA Contracting Officer. After the Contracting Officer's decision is made, either Party may request that the dispute be settled by arbitration in accordance with the then current and applicable rules of the American Arbitration Association. Judgment upon the award rendered by the Arbitrator(s) shall be nonbinding on the Parties, and any costs incurred therefrom shall be divided equally between the Parties.

ARTICLE XIII. CONFLICT OF TERMS This agreement constitutes the primary document which governs the work described in the attached Appendix A. In the event of any conflict between the terms of this document and any other document issued by either party, the terms of this document shall prevail.

ARTICLE XIV: INDEMNITY AND LIABILITY

- A. **Personnel Relationships** - USER shall be responsible for the acts or omissions of its employees and agents and of all other persons that USER allows to participate in the activities under this Agreement.
- B. **Product Liability** - To the extent permitted by U.S. or U.S. state law, if USER elects to retain title to an invention pursuant to the terms of this Agreement, then USER hereby agrees to hold harmless and indemnify CONTRACTOR and the United States Government, their officers, agents and employees from any and all liability, claims, damages, costs and expenses, including attorney fees, for injury to or death of persons, or damage to or destruction of property, as a result of or arising out of the making, using, or selling of a product, process or service which was derived from the work performed under this Agreement by or on behalf of USER, its assignees or licensees.
- C. **General Liability** - To the extent permitted by U.S. or U.S. state law, USER hereby agrees to indemnify and hold harmless CONTRACTOR and the United States Government, their officers, agents and employees from any and all liability, claims, damages, costs and expenses, including attorney fees, for injury to or death of persons, or damage to or destruction of property, to the extent such liability, claims, or damages is caused or contributed to by the intentional or negligent act or willful misconduct of

USER or its employees or representatives during the performance of the work under this Agreement.

D. General Disclaimer - Except to the extent of their negligence or intentional misconduct, neither the Government nor the CONTRACTOR, nor persons acting on their behalf will be responsible for any injury to or death of persons or other living things or damage to or destruction of property or for any other loss, damage, or injury of any kind whatsoever resulting from the performance of services or furnishings of materials hereunder, unless provided otherwise by applicable law.

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

ARTICLE XV: TERMINATION Either party may terminate this Agreement for any reason at any time by giving not less than thirty (30) days prior written notice to the other party. Notice will be deemed made as of the day of receipt. The obligations of any clause of this Agreement, which by their nature extend beyond its termination shall remain in full force and effect until fulfilled.

FOR THE CONTRACTOR:

BY:
TITLE:
DATE:

FOR THE USER:

BY:
TITLE:
ADDRESS:
TELEPHONE:

**APPENDIX B
PATENTS AND TECHNICAL DATA CLAUSES**

CLAUSE I. PATENT AND COPYRIGHT INDEMNITY-LIMITED

To the extent permitted by U.S. or U.S. state law, USER shall fully indemnify the Government and CONTRACTOR and their officers, agents, and employees for infringement of any United States patent or copyright arising out of any acts required or directed by USER to be performed under the Agreement to the extent such acts are not normally performed at the facility. The foregoing indemnity shall not apply unless USER shall have been informed as soon as practicable by CONTRACTOR or the Government of the suit or action alleging such infringement, and such indemnity shall not apply to a claimed infringement that is settled without the consent of USER unless required by a court of competent jurisdiction.

CLAUSE II. INVENTION RIGHTS

A. Definitions

1. USER means the person or entity with which this Agreement is made.
2. CONTRACTOR means the "M&O Contractor," *i.e.*, the Operating Contractor, which manages and operates the Government-owned, contractor-operated facility where the work under this Agreement is to be performed.
3. "Subject Invention" means any invention or discovery conceived or first actually reduced to practice in the course of or under this Agreement and which is or may be patentable or otherwise protectable under Title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. § 2321 *et seq.*)
4. "USER Invention" means any Subject Invention of USER, conceived or first actually reduced to practice in the course of or under this Agreement.
5. "CONTRACTOR Invention" means any Subject Invention of CONTRACTOR, conceived or first actually reduced to practice in the course of or under this Agreement.
6. "Patent Counsel" means the DOE Counsel for Intellectual Property assisting the DOE Contracting activity.

B. Subject Inventions

CONTRACTOR and USER agree to disclose to each other each and every Subject Invention, which may be patentable or otherwise protectable.

C. CONTRACTOR'S Rights

Except as provided below in the case of Joint Inventions, any invention or discovery that CONTRACTOR may make or conceive under this Agreement will be governed by the provisions of CONTRACTOR'S Prime Contract for operation of the NSRC facility.

D. USER'S Rights

Subject to the provisions herein, USER may elect title to any USER Invention and in any resulting patent secured by USER. Where appropriate, the filing of patent applications by USER is subject to DOE security regulations and requirements. If the USER does not elect to retain title to a USER Invention, the CONTRACTOR may elect title in that invention.

E. Joint Inventions

For Subject Inventions conceived or first actually reduced to practice under this Agreement that are joint Subject Inventions made by CONTRACTOR and USER, each Party shall have the option to elect and retain title to its undivided rights in such joint Subject Inventions. Where both Parties elect to retain title to their undivided rights in such joint Subject Inventions, title shall be jointly owned by CONTRACTOR and USER. If a Party elects not to retain title to its undivided rights in any such joint Subject Invention, then the other Party shall have the option to elect to retain title to the non-electing Party's undivided rights.

F. Rights of Government

1. USER agrees to timely assign to the Government the entire right, title, and interest in any country to each USER Invention where USER:
 - a. Does not elect, and the CONTRACTOR does not elect, pursuant to Appendix B, to retain such rights; or
 - b. Fails to timely have a patent application filed in that country on the USER Invention or decides not to continue prosecution or not to pay the maintenance fees covering the Invention; or
 - c. At any time, no longer desires to retain title.
2. USER shall provide the Government a copy of any application filed on a USER Invention promptly after such application is filed, including its serial number and filing date.
3. USER agrees to submit on request periodic reports to DOE no more frequently than annually on the utilization of a USER Invention or on efforts to obtain such utilization that are being made by USER or its licensees or assignees.
4. USER hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the USER Invention throughout the world.
5. USER acknowledges that the DOE has certain March-in Rights to any USER Inventions elected by the USER in accordance with 48 C.F.R. 27.304-1(g) and that the USER is subject to the requirements with respect to preference for U.S. industry pursuant to 35 U.S.C. § 204 to any USER Inventions elected by the USER.
6. Facilities License: USER agrees to and does hereby grant to the Government a nonexclusive, nontransferable, irrevocable, paid-up license in and to any inventions or discoveries, regardless of when conceived or actually reduced to practice or acquired by USER, which are incorporated in the facility as a result of this Agreement to such an extent that the facility is not restored to the condition existing prior to the Agreement (1) to practice or to have practiced by or for the Government at the facility, and (2) to transfer such licenses with the transfer of that facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

G. Invention Report and Election

1. USER shall furnish the Patent Counsel a written report containing full and complete technical information concerning each USER Invention within six months after conception or first actual reduction to practice, whichever occurs first, in the course of or

under this Agreement, but in any event prior to any on sale, public use, or publication of such Invention known to USER. The report shall identify the contract and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the Invention pertains a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the Invention. If USER wishes to elect title to the Invention, such report shall contain USER's notice of election of title.

2. When an Invention is reported under this paragraph G, it shall be presumed to have been made in the manner specified in Section (a)(1) and (2) of 42 U.S.C. § 5908.

H. Limitation of Rights

Nothing contained in this patent rights clause shall be deemed to give the Government any rights with respect to any invention other than a USER Invention except as set forth in the facilities license of Paragraph F.

I. Early Termination of Agreement

The terms and conditions of this Appendix shall survive the Agreement in the event that the Agreement is terminated before completion of the Statement of Work.

CLAUSE III. RIGHTS IN TECHNICAL DATA

A. Definitions:

1. "Technical Data" means recorded information regardless form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, demonstration, or engineering work to be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software databases, and computer software documentation). Technical Data as used herein does not include financial reports, costs analyses, and other information incidental to Agreement administration.
2. "Proprietary Data" means Technical Data which embody trade secrets developed at private expense, outside of this agreement, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:
 - a. Are not generally known or available from other sources without obligation concerning their confidentiality.
 - b. Have not been made available by the owner to others without obligation concerning their confidentiality, and
 - c. Are not already available to the CONTRACTOR or the Government without obligation concerning their confidentiality.
 - d. Are marked as "Proprietary Data."
3. "Unlimited Rights" means right to use, duplicate, or disclose Technical Data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.
4. "Contracting Officer" means the DOE entity having contract authority over

CONTRACTOR and the Facility Operator.

B. Allocation of Rights

1. The Government shall have Unlimited Rights in Technical Data first produced or specifically used in the performance of this Agreement except as otherwise provided in this Agreement.
2. USER shall have the right to use for its private purposes, subject to patent, security or other provisions of this Agreement, Technical Data it first produces in the performance of this Agreement provided the data delivery requirements of this Agreement have been met as of the date of the private use of such data; and Technical Data first produced by CONTRACTOR under its SOW, if any, under this Agreement. USER agrees that to the extent it receives or is given access to Proprietary Data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, USER shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Contracting Officer.

C. Deliverables

1. USER agrees to furnish to DOE or CONTRACTOR those data, if any, which are (a) specified to be delivered in Appendix A, (b) essential to the performance of work by DOE or CONTRACTOR personnel or (c) necessary for the health and safety of such personnel in the performance of the work. Any data furnished to DOE or CONTRACTOR shall be deemed to have been delivered with unlimited rights unless marked as "Proprietary Data" of USER.
2. Upon completion or termination of the project, USER agrees to deliver to DOE and CONTRACTOR a nonproprietary report describing the work performed under this Agreement.

D. Legal Notice

The following legal notice shall be affixed to each report or publication resulting from this Agreement which may be distributed by USER:

DISCLAIMER NOTICE

This document was prepared by _____ as a result of the use of facilities of the U.S. Department of Energy (DOE), National Nuclear Security Administration (NNSA), which are managed by _____, acting under Contract No._____. Neither CONTRACTOR, DOE, or U.S. Government, nor any person acting on their behalf: (a) make any warranty or representation, express or implied, with respect to the information contained in this document; or (b) assume any liabilities with respect to the use of, or damages resulting from the use of any information contained in the document.

E. Copyrighted Material

1. USER agrees to, and does hereby grant to the Government, and to its officers, agents, servants and employees acting within the scope of their duties:
 - a. A royalty-free, nonexclusive, irrevocable license to reproduce, translate, publish, use, and dispose of and to authorize others so to do, all copyrightable material first produced or composed in the performance of this Agreement by USER, its employees

or any individual or concern specifically employed or assigned to originate and prepare such material; and

b. A license as aforesaid under any and all copyrighted or copyrightable works not first produced or composed by USER in the performance of this Agreement but which are incorporated in the material furnished or delivered under the Agreement, provided that such license shall be only to the extent USER now has, or prior to completion or final settlement of the Agreement may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

2. USER agrees that it will not knowingly include any copyrightable material furnished or delivered under this Agreement without a license as provided for in subparagraph 1(b) hereof, or without the consent of the copyright owner, unless it obtains specific written approval of the Contracting Officer for the inclusion of such copyrighted materials.

F. Disclosure of Proprietary Data

Each Party agrees to not disclose Proprietary Data provided by the other Party to anyone other than the providing Party without the written approval of the providing Party, except to Government employees who are subject to 18 U.S.C. § 1905, even after termination (see Art. XV). All Proprietary Data shall be protected from disclosure for a period of ____ years from the date of execution of this Agreement.

NOTE: A Laboratory may delete the clauses pertaining to Proprietary Data if the Laboratory prohibits the USER from bringing Proprietary Data into the facility. In such cases, the Laboratory may substitute the following for Section F:

The USER shall not bring Proprietary Data into the NSRC facility except at USER's own risk. Any such data, regardless how it is marked, shall be deemed Technical Data and shall be treated according to Clause III of this Agreement.

The standard terms and conditions of this User Agreement Form has been reviewed and approved by US DOE. No change to this form may be made without DOE approval.