

EXHIBIT C
PIER STANDARD GRANT
TERMS AND CONDITIONS

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EXHIBIT C

TERMS AND CONDITIONS

1. Grant Agreement

This project is being funded with a grant from the California Energy Commission's (Energy Commission) Public Interest Energy Research (PIER) Program.

Project refers to the entire effort undertaken and planned by the Recipient, including the work co-funded by the Commission. The project may coincide with or extend beyond the Agreement period. **Project tasks** refer to the work elements of the project. Typically, there are distinct projects tasks within the project being paid for by the Commission under this Agreement.

This Agreement is comprised of the grant funding award, the Terms and Conditions, and all attachments. These Terms and Conditions are standard requirements for Public Interest Energy Research (PIER) grant awards. The Commission may impose special conditions in this grant Agreement which address the unique circumstances of this project. Special conditions that conflict with these standard provisions take precedence. Any special conditions are attached to this Agreement.

The Recipient shall sign two originals of the CEC-146 of this Agreement and return two signed CEC-146's to the Commission's Grants and Loans Office within 30 days. Failure to meet this requirement may result in the forfeiture of this award. When all required signatures are obtained, an executed copy will be returned to the Recipient.

All work and/or the expenditure of funds (Commission-reimbursed and/or match share) must occur within the approved term of this Agreement. The Commission cannot authorize any payments until all parties sign this Agreement. The start term of this Agreement is either the specified start term or the date the Energy Commission signs the Agreement, whichever is later. The Energy Commission will only sign the Agreement after the Recipient signs it and it has been approved at an Energy Commission Business Meeting.

2. Attachments and References

The following are attached and hereby expressly incorporated into this Agreement.

- Work Statement
- Budget
- Content and Format of Progress Reports
- Confidentiality Exhibit (if applicable)
- Intellectual Property Exhibit (if applicable)
- Information Practices Exhibit (if applicable)
- Special Conditions (if applicable)

The Office of Management and Budget (OMB) Circulars and/or federal regulations identified below are incorporated by reference as part of this Agreement. These Terms and Conditions and any Special Conditions take precedence over the circulars and/or regulations. The OMB Circulars and federal regulations are used to help guide the administration of the award when questions arise during the course of performance of the award. OMB Circulars may be accessed on the OMB web site at www.whitehouse.gov/omb/circulars/index.html and federal regulations may be accessed at www.arnet.gov/far/, or by calling the Office of Administration, Publications Office, at (202) 395-7332. Common Rule for Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

- OMB Circular A-110: Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations (also applicable to private entities)
- 10 CFR Part 600: DOE Financial Assistance Regulations (www.pr.doe.gov/f600toc.html)
- OMB Circular A-87: Cost Principles for State, Local and Tribal Governments
- OMB Circular A-21: Cost Principles Applicable to Grants, Contracts, and Other Agreements with Institutions of Higher Education (public and private colleges and universities)
- OMB Circular A-122: Cost Principles Applicable to Grants, Contracts, and Other Agreements with Non-Profit Organizations (non-profit organizations and individuals, except for those specifically exempted)
- OMB Circular A-133: Audits of States, Local Governments, and Non-Profit Organizations
- Title 48 CFR, Ch. 1, Subpart 31.2: Contracts with Commercial Organizations (Supplemented by 48 CFR, Ch. 9, Subpart 931.2 for Department of Energy grants) (commercial firms and certain non-profit organizations) (www.access.gpo.gov/nara/cfr/cfr-table-search.html)

3. Funding Limitations

Any federal, state, and local laws and regulations applicable to your project not expressly listed in this Agreement are incorporated herein as part of this Agreement.

4. Due Diligence

The Recipient is required to take timely actions which, taken collectively, move this project to completion. The Commission Agreement Manager will periodically evaluate the schedule for completion of Work Statement tasks. If the Commission Agreement Manager determines (1) the Recipient is not being diligent in completing the tasks in the Work Statement or (2) the time remaining in the funding award is insufficient to complete all project work tasks by the Agreement term end date, the Project Manager may recommend to the Policy Committee of the Commission (Committee) that this Agreement be terminated, and the Committee may, without prejudice to any of its remedies, terminate this Agreement.

5. Products

Products are defined as any tangible item specified in the Work Statement. Unless otherwise directed, draft copies of all products identified in the Work Statement shall be submitted to the Commission's Accounting Office at the address below. The Accounting Office will forward products to the Commission Agreement Manager for review and comment. The Recipient will submit an original and two copies of the final version of all products to the Accounting Office. If the Commission Agreement Manager determines a product is substandard, given the description and intended use of the product as described in the Work Statement and the grant application, the Commission Agreement Manager may refuse to authorize payment for the product and any subsequent products that rely upon or are based upon that product under this Agreement.

California Energy Commission
Accounting Office
1516 Ninth Street, MS-2
Sacramento, CA 95814

a. Product Guidelines

The Recipient shall submit all products listed in the Work Statement to the Commission Agreement Manager for review and comment in accordance with the approved Schedule of Products and Due Dates.

If a draft product is required, the Commission Agreement Manager will provide written comments back to the Recipient on the draft product within ten (10) working days of receipt. Once agreement has been reached on the draft, the Recipient shall submit the final product to the Commission Agreement Manager. The Commission Agreement Manager shall provide written approval of the final product within five (5) working days of receipt. The Recipient shall include key elements from the products in the Final Report for this Agreement.

Alternative review timeframes may be specified in the Work Statement. Review timeframes specified in the Work Statement will take precedence over the timeframes stated herein.

The required format for products can be found in the PIER Style Manual published on the Energy Commission's website:

<http://www.energy.ca.gov/contracts/pier/contractors/index.html>

The Recipient shall use and follow these formats unless otherwise instructed in writing by the Commission Agreement Manager or the product is described differently in the Work Statement.

b. Electronic File Format

The Recipient shall deliver documents to the Commission Agreement Manager in the following formats:

- Data sets shall be in Microsoft (MS) Access or MS Excel file format.
- PC-based text documents shall be in MS Word file format.
- Documents intended for public distribution shall be in Portable Document Format (PDF) file format, with the native file format provided as well.
- Project management documents shall be in MS Project file format.

Submit any requests for exemption to the electronic file in writing at least ninety (90) days before the product is due. The Commission Agreement Manager must approve or deny the request in writing.

6.Reports

a. Submission of Reports

All reports will be submitted to the Accounting Office at the address listed in Section 5 above.

b. Progress Reports

The Recipient shall prepare progress reports on the schedule provided in the work statement. The Recipient shall prepare progress reports which summarize all grant activities conducted by the Recipient for the reporting period, including an assessment of the ability to complete the project within the current budget and any anticipated cost overruns. See Exhibit A, Attachment A-2 "Content and Format of Progress Reports" for more information.

c. Final Reports

The Recipient shall prepare a final report outline, draft final report and final report on the schedule provided in the work statement. The final report shall describe the original purpose, approach, results and conclusions of the work done under this Agreement. See *Style Manual: Preparing Public Interest Energy Research (PIER) Program Technical Research Project Reports* located online at <http://www.energy.ca.gov/contracts/pier/contractors/>.

Upon receipt of the final report, the Commission Agreement Manager shall ensure that all work has been satisfactorily completed. The Payment Request for the final payment (including any retention) may only be submitted after the final report is completed and the Commission Agreement Manager has verified satisfactory completion of the work.

d. Rights in Reports

The Commission reserves the right to use and reproduce all reports and data produced and delivered pursuant to this Agreement, and reserves the right to authorize others to use or reproduce such materials. Each report becomes the property of the Commission.

e. Failure to Comply with Reporting Requirements

Failure to comply with the reporting requirements contained in this award will be considered a material noncompliance with the terms of the award. Noncompliance may result in withholding of future payments, suspension or termination of the current award, and withholding of future awards.

7. Legal Statement on Reports and Products

No product or report produced as a result of work funded by this program shall be represented to be endorsed by the Commission, and all such products or reports shall include the following statement:

LEGAL NOTICE

This document was prepared as a result of work sponsored by the California Energy Commission. It does not necessarily represent the views of the Energy Commission, its employees, or the State of California. The Commission, the State of California, its employees, contractors, and subcontractors make no warranty, express or implied, and assume no legal liability for the information in this document; nor does any party represent that the use of this information will not infringe upon privately owned rights. This report has not been approved or disapproved by the Commission nor has the Commission passed upon the accuracy of the information in this report.

8. Amendments

a. Procedure for Requesting Changes

The Recipient must submit a written request to the Commission Agreement Manager for any change to the Agreement. The request must include:

- A brief summary of the proposed change;
- A brief summary of the reason(s) for the change; and
- The revised section(s) of the Agreement, with changes made in underline/ strikeout format.

b. Significant Changes

Significant changes to the Agreement must be approved by the Commission through a formal amendment. Examples of significant changes include:

- Change of Recipient.
- Changes to Exhibit A that significantly modify the scope or purpose of the Agreement.
- Changes to Exhibit A that extend the due dates beyond the term of the Agreement.
- Changes to Exhibit B that increase the amount of the Agreement.
- Changes to Exhibit B that increase rates or fees.

c. Non-Significant Changes

Changes that are not significant to the Agreement do not require approval through a formal amendment. However, if these changes are not formally approved they must be documented in a Letter of Agreement signed by both parties. Examples of non-significant changes include:

- Budget revisions among tasks or budget categories that do not affect the scope of the project or the overall Agreement amount, and adhere to the budget reallocation requirements discussed below.
- Corrections of grammatical or other minor errors.

- Revised product due dates, if the revised dates are within the approved term of the Agreement and are agreed to in writing by the Commission Agreement Manager.
- Designation of Project Managers.
- Revised contact information.
- An increase of the Recipient's match share.
- Selection of a new demonstration site, if the site change does not affect the Energy Commission's determination that the funded work is exempt from or not a project under the California Environmental Quality Act.

d. Budget Reallocations

1) The Energy Commission, through its Project Manager and Grants Officer, and the Recipient can agree upon and make certain budget reallocations without a formal amendment to this Agreement as long as ALL of the following conditions are met:

a) The total of all budget reallocations cannot exceed ten percent (10%) with a cap amount of \$75,000 of the Agreement Amount. For purposes of this provision, "Agreement Amount" means the total amount of Energy Commission funds being paid to Recipient under this Agreement. It does not include any match funds provided by Recipient.

For example, if under an agreement the Energy Commission agrees to pay a Recipient \$100,000 and the Recipient is supplying \$500,000 in match funding, the ten percent (10%) limitation applies to the \$100,000. Only up to \$10,000 of Energy Commission funds can be reallocated without a formal amendment. If under an agreement the Energy Commission agrees to pay a recipient \$800,000, ten percent would be \$80,000, but the cap is \$75,000, so the most that could be reallocated without a formal amendment is \$75,000.

b) The budget reallocation cannot substantially change the Work Statement. Examples of budget reallocations that do not substantially change the Work Statement, but are not limited to, the following:

- Increasing or decreasing the overall travel budget. This does not mean an increase to the allowed per diem rates under this Agreement.
- Increasing or decreasing the equipment budget.
- Increasing or decreasing the number of personnel assigned to complete tasks. This does not include increasing the hourly rates of the personnel and classifications listed in the budget. Increasing hourly rates requires a formal amendment. The addition of personnel also requires a formal amendment unless there is already an identified classification of rates in the budget that the new personnel will be filling.

- c) The budget reallocation only involves moving funds between tasks or categories. The total Agreement Amount must remain unchanged. Increasing the total amount of the Agreement requires a formal amendment.
 - d) The budget reallocation does not increase the percentage rate of Indirect Overhead, Direct Overhead, Fringe Benefits, General and Administrative Costs, or any other rates listed in the budget. For example, if an agreement budget lists the Indirect Overhead percentage rate as 25% of Direct Labor, the 25% cannot be changed without a formal amendment.
- 2) To effectuate a budget reallocation under this section, the Recipient must make a request in writing to both the Project Manager and the Grants Officer. Both the Project Manager and Grants Officer will then approve or disapprove the request in writing; the approval or disapproval is not effective or binding unless signed by both the Project Manager and the Grants Officer. Oral communications cannot be used or relied upon. If the request is approved, the Project Manager shall revise the Budget Attachments to reflect the changes and send them to the Grants Officer and Recipient.
 - 3) Any desired budget reallocations that do not meet the four criteria in this section must be made through a formal amendment. For purposes of this provision, a “formal amendment” means that all of the following must occur: approval by the Energy Commission at a Commission Business Meeting, a written amendment signed by both parties.
 - 4) Attempted budget reallocations that do not meet the requirements of this section are not legally binding upon the parties.

9. Contracting and Procurement Procedures

This section provides general requirements for an agreement between the Recipient and a third party (“subcontractor”).

The Recipient is responsible for handling all contractual and administrative issues arising out of or related to any subcontracts it enters into under this Agreement.

All subcontracts must incorporate all of the following:

- A clear and accurate description of the material, products, or services to be procured as well as a detailed budget and timeline.
- Provisions that allow for administrative, contractual, or legal remedies in instances where subcontractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.
- Provisions for termination by the Recipient, including termination procedures and the basis for settlement.
- Any additional requirements specified in the OMB Circulars and/or federal regulations incorporated by reference in this Agreement.
- Further assignments shall not be made to any third or subsequent tier subcontractor without additional advance written consent of the Commission.

Recipients who are subcontracting with University of California (UC) may use the terms and conditions negotiated by the Energy Commission with UC for their subcontracts. Recipients who are subcontracting with the Department of Energy (DOE) national laboratories may use the terms and conditions negotiated with DOE. All other subcontracts must incorporate language conforming to the following provisions specified in this Agreement, and these provisions shall expressly flow down to all subcontractors:

- Standard of Performance
- Nondiscrimination
- Indemnification
- Rights of Parties Regarding Intellectual Property
- Intellectual Property Items Developed Prior to this Agreement
- Travel and Per Diem
- Equipment
- Disputes
- Confidentiality
- Recordkeeping, Cost Accounting, and Auditing
- Access to Sites and Records
- Legal Notice
- Survival of the following sections:
 - Recordkeeping, Cost Accounting and Auditing
 - Equipment
 - Rights of Parties Regarding Intellectual Property
 - Access to Sites and Records

Nothing contained in this Agreement or otherwise, shall create any contractual relation between the Commission and any subcontractors, and no subcontract shall relieve the Recipient of its responsibilities and obligations hereunder. The Recipient agrees to be as fully responsible to the Commission for the acts and omissions of its subcontractors or persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the Recipient. The Recipient's obligation to pay its subcontractors is an independent obligation from the Commission's obligation to make payments to the Recipient. As a result, the Commission shall have no obligation to pay or to enforce the payment of any monies to any subcontractor.

Recipient shall be responsible for establishing and maintaining contractual agreements with and reimbursement of each subcontractor for work performed in accordance with the terms of this Agreement.

All subcontracts entered into pursuant to this Agreement shall be subject to examination and audit by the Energy Commission and/or Bureau of State Audits for a period of three years after final payment under this Agreement.

Recipient shall provide a copy of its subcontracts upon request by the Energy Commission.

Failure to comply with the above requirements may result in the termination of this Agreement.

10. Key Personnel and Key Subcontractors

a. Key Personnel

Key personnel are employees of the Recipient who are critical to the outcome of the project. For example, they may have expertise in the particular field or have experience that is not available from another source. Replacing these individuals may affect the outcome of the project. Key personnel, listed in the Budget exhibit, may not be substituted without the Commission Agreement Manager's approval. Such approval shall not be unreasonably withheld. Recipient may substitute all other personnel, with reasonable advance notification made to the Commission Agreement Manager.

b. Key Subcontractors

Key subcontractors are subcontractors or vendors to the Recipient who are critical to the outcome of the project. As with key personnel, key subcontractors may have expertise in the particular field or have experience that is not available from another source. Replacing these subcontractors may affect the outcome of the project. An employee of the Recipient's subcontractor or vendor may also qualify as "key." Key subcontractors, listed in the Budget exhibit, may not be substituted without the Commission Agreement Manager's approval. Such approval shall not be unreasonably withheld. Recipient may substitute all other subcontractors, with reasonable advance notification made to the Commission Agreement Manager. Replacement of key subcontractors is subject to the "Contracting and Procurement Procedures" section contained within these terms and conditions.

11. Prevailing Wage

Public Work -- Payment of Prevailing Wages Generally Required by Law

Projects that receive an award of public funds from the Energy Commission often involve construction, alteration, demolition, installation, repair or maintenance work over \$1,000.

NOTE: Therefore projects that receive an award of public funds from the Energy Commission are likely to be considered public works under the California Labor Code. See Chapter 1 of Part 7 of Division 2 of the California Labor Code, commencing with Section 1720 and Title 8, California Code of Regulations, Chapter 8, Subchapter 3, commencing with Section 16000.

Accordingly, the Energy Commission assumes that all projects it funds are public works. Projects deemed to be public works require among other things the payment of prevailing wages.

NOTE: Prevailing wage rates can be significantly higher than non-prevailing wage rates.

By accepting this grant, Recipient as a material term of this agreement shall be fully responsible for complying with all California public works requirements including but not limited to payment of prevailing wage. Therefore, as a material term of this grant, Recipient must either:

- (a) Proceed on the assumption that the project is a public work and ensure that:
 - (i) prevailing wages are paid; and

- (ii) the project budget for labor reflects these prevailing wage requirements; and
- (iii) the project complies with all other requirements of prevailing wage law including but not limited to keeping accurate payroll records, and complying with all working hour requirements and apprenticeship obligations;

or,

(b) Timely obtain a legally binding determination from DIR or a court of competent jurisdiction before work begins on the project that the proposed project is not a public work.

NOTE: Only the California Department of Industrial Relations (DIR) and courts of competent jurisdiction have jurisdiction to issue legally binding determinations that a particular project is or is not a public work.

If the Recipient is unsure whether the project receiving this award is a “public work” as defined in the California Labor Code, it may wish to seek a timely determination from the California Department of Industrial Relations (DIR) or an appropriate court.

NOTE: Such processes can be time consuming and therefore it may not be possible to obtain a timely determination before the date for performance of the award commences.

If the Recipient does not timely obtain a binding determination from DIR or a court of competent jurisdiction that the project is not a public work, before the grant agreement from the Commission is executed, the Recipient shall assume that the project is a public work and that payment of prevailing wages is required and shall pay prevailing wages unless and until such time as the project is subsequently determined to not be a public work by DIR or a court of competent jurisdiction.

NOTE: California Prevailing Wage law provides for substantial damages and financial penalties for failure to pay prevailing wages when payment of prevailing wages is required.

Subcontractors and Flow-down Requirements. Recipient shall ensure that its subcontractors, if any, also comply with above requirements with respect to public works/prevailing wage. Recipient shall ensure that all agreements with its contractors/subcontractors to perform work related to this Project contain the above terms regarding payment of prevailing wages on public works projects. Recipient shall be responsible for any failure of Recipient’s subcontractors to comply with California prevailing wage and public works laws.

Indemnification and breach. Any failure of Recipient or its subcontractors to comply with the above requirements shall constitute a breach of this agreement that excuses the Commission's performance of this grant agreement at the Commission's option, and shall be at Recipient's sole risk. In such a case, Commission may refuse payment to Recipient of any amount under this award and Commission shall be released, at its option, from any further performance of this award or any portion thereof. By accepting this grant award, as a material term of this agreement, Recipient agrees to indemnify the Energy Commission and hold the Energy Commission harmless for any and all financial consequences arising out of or resulting from the failure of Recipient and/or any of Recipient's subcontractors to pay prevailing wages or to otherwise comply with the requirements of prevailing wage law.

Budget. Recipient's budget on public works projects must indicate which job classifications are subject to prevailing wage. For detailed information about prevailing wage and the process to determine if the proposed project is a public work, Recipient may wish to contact the California Department of Industrial Relations (DIR) or a qualified labor attorney of their choice for guidance.

Covered Trades. For public works projects, Recipient may contact DIR for a list of covered trades and the applicable prevailing wage.

Questions. If Recipient has any questions about this contractual requirement or the wage, record keeping, apprenticeship or other significant requirements of California prevailing wage law, it is recommended that Recipient consult DIR and/or a qualified labor attorney of its choice before accepting the award for this grant.

Certification. Recipient shall certify to the Energy Commission on each Payment Request Form, either that (a) prevailing wages were paid to eligible workers who provided labor for work covered by the payment request and that the Recipient and all contractors and subcontractors otherwise complied with all California prevailing wage laws, or (b) that the project is not a public work requiring the payment of prevailing wages. In the latter case, Recipient shall provide competent proof of a DIR or court determination that the project is not a public work requiring the payment of prevailing wages.

Prior to the release of any retained funds under this Agreement, the Recipient shall submit to the Energy Commission the above-described certificate signed by the Recipient and all contractors and subcontractors performing public works activities on the project. Absent such certificate, Recipient shall have no right to any funds under this grant, and Commission shall be relieved of any obligation to pay said funds.

12. Permits and Clearances

The Recipient is responsible for ensuring all necessary permits and environmental documents are prepared and clearances are obtained from the appropriate agencies.

13. Equipment

Title to equipment acquired by the Recipient with grant funds shall vest in the Recipient. The Recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by grant funds and the Recipient shall not encumber the property without Commission Agreement Manager approval.

Recipient should refer to the applicable OMB Circulars and/or federal regulations incorporated by reference in this Agreement for additional equipment requirements.

14. Termination

a. Purpose

The parties agree that because the Energy Commission is a state entity and provides funding on behalf of all Californian ratepayers, it is necessary for the Energy Commission to be able to terminate, at once, upon the default of Recipient and to proceed with the work required under the Agreement in any manner the Energy Commission deems proper. Recipient specifically acknowledges that the termination of the Agreement by the Energy Commission under the terms set forth below is an essential term of the Agreement, without which the Energy Commission would not enter into the Agreement. Recipient further agrees that upon any of the events triggering the termination of the Agreement by the Energy Commission, the Energy Commission has the right to terminate the Agreement, and it would constitute bad faith of the Recipient to interfere with the immediate termination of the Agreement by the Energy Commission.

b. Breach

The Energy Commission shall provide Recipient written notice of intent to terminate due to Recipient's breach. Recipient will have fifteen (15) calendar days to fully perform or cure the breach. In the event Recipient does not cure the breach within fifteen (15) days, the Energy Commission may, without prejudice to any of its other remedies, terminate this Agreement upon five (5) calendar days written notice to Recipient. In such event, the Energy Commission shall pay Recipient only the reasonable value of the satisfactorily performed services rendered by Recipient before the notice of termination, as may be agreed upon by the parties or determined by a court of law, but not in excess of the Agreement maximum payable.

c. For Cause

The Energy Commission may, for cause, and at its option, terminate this Agreement upon giving thirty (30) calendar days advance written notice to Recipient. In such event, Recipient agrees to use all reasonable efforts to mitigate its expenses and obligations. The Energy Commission will pay Recipient for services rendered and expenses incurred within thirty (30) days after notice of termination which could not by reasonable efforts of Recipient have been avoided, but not in excess of Agreement maximum payable. Recipient agrees to relinquish possession of equipment purchased for this Agreement with Energy Commission funds to the Commission, or Recipient may, with approval of the Energy Commission, purchase the equipment as provided by the terms of this Agreement.

The term "for cause" includes, but is not limited to, the following reasons:

- Partial or complete loss of Match Funds;

- Reorganization to a business entity unsatisfactory to the Energy Commission;
 - Retention or hiring of subcontractors, or replacement or addition of Key Personnel that fail to perform to the standards and requirements of this Agreement;
 - Recipient is not able to pay its debts as they become due and/or Recipient is in default of an obligation that impacts its ability to perform under this Agreement; or
 - Significant change in State or Energy Commission policy such that the work or product being funded would not be supported by the Commission.
- d. Without Cause

The Energy Commission may, at its option, terminate this Agreement without cause in whole or in part, upon giving thirty (30) days advance notice in writing to the Recipient. In such an event, the Recipient agrees to use all reasonable efforts to mitigate the Recipient's expenses and obligations hereunder. Also, in such event, the Energy Commission shall pay the Recipient for all satisfactory services rendered and expenses incurred within thirty (30) calendar days after notice of termination which could not by reasonable efforts of the Recipient have been avoided, but not in excess of the maximum payable under this Agreement.

15. Stop Work

The Commission Grants Officer may, at any time, by written notice to Recipient, require Recipient to stop all or any part of the work tasks in this Agreement. Stop work orders may be issued for reasons such as a Project exceeding budget, standard of performance, out of scope work, delay in Project schedule, misrepresentations and the like.

- a. Compliance. Upon receipt of such stop work order, Recipient shall immediately take all necessary steps to comply therewith and to minimize the incurrence of costs allocable to work stopped.
- b. Equitable Adjustment. An equitable adjustment shall be made by Energy Commission based upon a written request by Recipient. Such adjustment request must be made by Recipient within thirty (30) days from the date of the stop work order.
- c. Canceling a Stop Work Order. Recipient shall resume the work only upon receipt of written instructions from the Commission Grants Officer.

16. Travel and Per Diem

For purposes of payment, Recipient's headquarters shall be considered the location of the Recipient's office where the employees assigned responsibilities for this award are permanently assigned. Travel expenditures not listed in this section cannot be reimbursed.

Travel not listed in the Budget section of this Agreement shall require prior written authorization from the Commission Agreement Manager. Recipient shall be reimbursed for authorized travel and per diem up to, but not to exceed, the rates allowed nonrepresented state employees. A copy of the current allowable travel reimbursement rates can be obtained from the Commission's web site at <http://www.energy.ca.gov/contracts/> or by contacting the Commission's Grants and Loans Office at (916) 654-4381.

Travel expense claims must detail expenses using the allowable rates, and Recipient must sign and date travel expense claim before submitting the travel expense claim to the Commission for payment. Expenses must be listed by trip including dates and times of departure and return. Travel expense claims supporting receipts and expense documentation shall be attached to the Recipient's Payment Request. A vehicle license number is required when claiming mileage, parking, or toll charges. Questions regarding allowable travel expenses or per diem should be addressed to the Commission Agreement Manager.

17. Standard of Performance

- a. Recipient, its subcontractors and their employees in the performance of Recipient's work under this Agreement shall be responsible for exercising the degree of skill and care required by customarily accepted good professional practices and procedures used in scientific and engineering research fields.
- b. The failure of a project to achieve the technical or economic goals stated in the Work Statement is not a basis for the Energy Commission to determine that the work is unacceptable, unless the work conducted by the Recipient or its subcontractors is deemed by the Energy Commission to have failed the foregoing standard of performance.
- c. In the event that Recipient or its subcontractor fails to perform in accordance with the foregoing standard of performance, the Commission Agreement Manager and the Recipient Project Manager shall seek to negotiate in good faith an equitable resolution satisfactory to both parties. If such a resolution cannot be reached, the parties shall work through the Energy Commission's dispute resolution process described in the Disputes Section herein.
- d. Nothing contained in this section is intended to limit any of the rights or remedies which the Energy Commission may have under law.

18. Payment of Funds

The Energy Commission agrees to reimburse the Recipient for actual allowable expenditures incurred in accordance with the Budget. The rates in the Budget are rate caps, or the maximum amount allowed to be billed. The Recipient can only bill for actual expenses incurred at the Recipient's actual direct labor rate(s), fringe benefit rate(s), and indirect rate(s), not to exceed the rates specified in the Budget.

a. Payment Requests

Unless indicated otherwise in Special Conditions, the Recipient may request payment from the Energy Commission at any time during the term of this Agreement, but no more frequently than monthly, although it is preferred that payment requests be submitted with the progress reports.

Payments will be made on a reimbursement basis for Recipient's expenditures, i.e., after the Recipient has paid for a service, product, supplies, or other approved budget item. No reimbursement for food or beverages shall be made other than allowable per diem charges.

The Energy Commission, at its sole discretion, may honor advance payment requests subject to special conditions specified by the Commission's Grants and Loans Office.

Funds in this award have a limited period in which they must be expended. All Recipient expenditures (Energy Commission-reimbursable and match share) must occur within the approved term of this Agreement.

b. Payment Request Format

A request for payment shall consist of, but is not limited to the following. Recipient may use the sample invoice format from the Energy Commission's Web Site www.energy.ca.gov/contracts.pier.html.

- 1) An invoice that includes a **list** of actual expenses incurred during the billing period, up to any Budget rate caps. The Recipient can only bill the lower of actual rates or Budget rate caps. Backup documentation is required at time of invoice submittal. Unless specified otherwise in Special Conditions, the invoice list must include expenditures in accordance with the Budget, as follows:
 - a) Date prepared, grant number, Recipient's Federal ID number, and billing period;
 - b) Recipient's actual labor expenditures, including hourly labor rates by individual name and classification, hours worked, and benefits (fully loaded rates may only be used if fully loaded rates are included in the grant Budget);
 - c) Operating expenses, including travel, equipment, supplies, and other;
 - d) Receipts for travel, including departure and return times.
 - e) Receipts for materials, miscellaneous, and equipment.
 - f) Subcontractor invoices;
 - g) Overhead/indirect;
 - h) Match fund expenditures, and
 - i) By Budget line item (cost component) category, list budgeted amount, billed to date, current billing, and balance of funds.
- 2) A progress report that documents evidence of progress, which includes written progress reports and products prepared by the Recipient as detailed in the Work Statement.

The Commission will accept computer-generated or electronically transmitted invoices without backup documentation provided that the Recipient sends a hardcopy the same day.

Recipient shall submit all invoices to the following address:

California Energy Commission
Accounting Office
PIER Grant Program
1516 Ninth Street, MS-2
Sacramento, CA 95814

c. Certification

The following certification shall be included on each Payment Request form and signed by the Recipient's authorized officer:

The documents included in this request for payment are true and correct to the best of my knowledge and I, as an agent of [Company Name] have authority to submit this request. I certify that reimbursement for these costs has not and will not be received from any other sources, including but not limited to a Government entity contract, subcontract, or other procurement method. For projects considered to be a public work: Prevailing wages were paid to eligible workers who provided labor for the work covered by this invoice; Recipient and all subcontractors have complied with prevailing wage laws.

d. Government Entity

Government Entity is defined as a governmental agency from California or any state or a state college or state university from California or any state; a local government entity or agency, including those created as a Joint Powers Authority; an auxiliary organization of the California State University or a California community college; the Federal government; a foundation organized to support the Board of Governors of the California Community Colleges or an auxiliary organization of the Student Aid Commission established under Education Code 69522.

e. Release of Funds

Each invoice is subject to Commission Agreement Manager approval. The Commission Agreement Manager will not process any payment request during the Agreement term if the following conditions have not been met:

- All required reports have been submitted and are satisfactory to the Commission Agreement Manager.
- All applicable special conditions have been met.
- All appropriate permits or permit waivers from governmental agencies have been issued to the Recipient and copies have been received by the Commission Agreement Manager.
- All products due have been submitted and are satisfactory to the Commission Agreement Manager.
- Other prepayment conditions as may be required by the Commission Agreement Manager have been met. Such conditions will be specified in writing ahead of time, if possible.

Payments shall be made to the Recipient only for undisputed invoices. An undisputed invoice is an invoice executed by the Recipient for project expenditures, that meets all payment conditions of the Agreement, and for which additional evidence is not required to make payment. The invoice may be disputed if all products due for the billing period have not been received and approved, if the invoice is inaccurate, or if it does not comply with the terms of this Agreement. If the invoice is disputed the Recipient will be notified via a Dispute Notification Form within 15 working days of receipt of the invoice.

f. Fringe Benefits, Indirect Overhead, General and Administrative (G&A), and Facilities and Administration (F&A)

Indirect cost rates must be developed in accordance with generally accepted accounting principles and the applicable OMB circulars or federal acquisition regulations. If the Recipient has an approved fringe benefits or indirect cost rate (indirect overhead, G&A, or F&A) from their cognizant Federal Agency, the Recipient may bill at the federal rate up to the Budget rate caps if the following conditions are met:

- The Recipient may bill at the federal provisional rate but must adjust annually to reflect their actual final rates for the year in accordance with the Labor, Fringe, and Indirect Invoicing Instructions which can be accessed at www.energy.ca.gov/contracts/pier/PIERInvoicingInstructions.doc.
- The cost pools used to develop the federal rates must be allocable to the Commission Agreement, and the rates must be representative of the portion of costs benefiting the Commission Agreement. For example, if the federal rate is for manufacturing overhead at the Recipient's manufacturing facility and the Commission Agreement is for research and development at their research facility, the federal indirect overhead rate would not be applicable to the Commission Agreement.
- The federal rate must be adjusted to exclude any costs that are specifically prohibited in the Commission Agreement.
- The Recipient may only bill up to the Agreement Budget rate caps unless and until an amendment to the Agreement Budget is approved.

g. Retention

It is the Commission's policy to retain 10 percent of any payment request or 10 percent of the total Commission award at the end of the project. After the project is complete the Recipient must submit a completed payment request form requesting release of the retention. The Commission Agreement Manager will review the project file and, when satisfied that the terms of the funding Agreement have been fulfilled, will authorize release of the retention.

h. State Controller's Office

Payments are made by the State Controller's Office.

- 1) Conditions for payment:
 - a) No payment shall be made in advance of services rendered unless prior written approval has been obtained by the Grants and Loans Office.
 - b) Payment shall only be made in accordance with the Budget attachment.
 - c) Each request for payment is subject to the Commission Agreement Manager's approval.

- d) Payments shall be made to the Recipient for undisputed invoices. An undisputed invoice is an invoice submitted by the Recipient for work performed, and for which additional evidence is not required to determine its validity. The invoice will be disputed if all products due for the billing period have not been received and approved, if the invoice is inaccurate, or if it does not comply with the terms of this Agreement. If the invoice is disputed, Recipient will be notified via a Dispute Notification Form within 15 working days of receipt of the invoice.
- e) Final invoice must be received by the Energy Commission no later than 30 calendar days after the Agreement termination date.
- f) No payment will be made for costs identified in recipient invoices that has or will be reimbursed by another source, including but not limited to a Government Entity contract.

19. Recordkeeping, Cost Accounting, and Auditing

a. Cost Accounting

Recipient agrees to keep separate, complete, and correct accounting of the costs involved in completing the grant and match funded (if any) portion of this project. The Commission or its agent shall have the right to examine Recipient's books of accounts at all reasonable times to the extent and as is necessary to verify the accuracy of Recipient's reports.

b. Accounting Procedures

The Recipient's costs shall be determined on the basis of the Recipient's accounting system procedures and practices employed as of the effective date of this Agreement, provided that the Recipient shall use generally accepted accounting principles and cost reimbursement practices. The Recipient's cost accounting practices used in accumulating and reporting costs during the performance of this Agreement shall be consistent with the practices used in estimating costs for any proposal to which this Agreement relates; provided that such practices are consistent with the other terms of this Agreement and provided, further, that such costs may be accumulated and reported in greater detail during performance of this Agreement. The Recipient's accounting system shall distinguish between direct costs and indirect costs. All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to costs incurred under this Agreement.

c. Allowability of Costs

1) Allowable Costs

The costs for which the Recipient shall be reimbursed under this Agreement include all costs, direct and indirect, incurred in the performance of work that are identified in the grant Budget. Costs must be incurred within the term of the Agreement. Factors to be considered in determining whether an individual item of cost is allowable include (i) reasonableness of the item, (ii) appropriate use of the allowability of the item to the work, (iii) applicable federal OMB circulars and/or federal regulations incorporated by reference in this Agreement, and (iv) the terms and conditions of this Agreement.

2) Unallowable Costs

The following is a description of some specific items of cost that are unallowable; provided, however, that the fact that a particular item of cost is not included shall not mean that it is allowable. Details concerning the allowability of costs are available from the Energy Commission's Accounting Office.

- a) Profit or Fees, Contingency Costs, Imputed Costs (e.g., Cost of Money), Fines and Penalties, Losses, Excess Profit Taxes and increased rates and fees for this Agreement.
- b) The Commission will pay for state or local sales or use taxes on expenditures. The State of California is exempt from Federal excise taxes.
- 3) Except as provided for in this Agreement, Recipient shall use the federal OMB circulars and/or federal regulations incorporated by reference in this Agreement when determining allowable and unallowable costs. In the event of a conflict, this Agreement takes precedence over the OMB Circulars and/or federal regulations.

d. Audit Rights

Recipient shall maintain books, records, documents, and other evidence, based on the procedures set forth above, sufficient to reflect properly all costs claimed to have been incurred in performing this Agreement. The Energy Commission, an agency of the state or, at the Energy Commission's option, a public accounting firm designated by the Energy Commission, may audit such accounting records at all reasonable times with prior notice by the Energy Commission. The Energy Commission shall bear the expense of such audits. It is the intent of the parties that such audits shall ordinarily be performed not more frequently than once every twelve (12) months during the performance of the work and once at any time within three (3) years following payment by the Energy Commission of the Recipient's final invoice. However, performance of any such interim audits by the Energy Commission does not preclude further audit.

Recipient agrees that the Energy Commission, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting source documentation pertaining to the performance of this Agreement. Recipient agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of record retention is stipulated. Recipient agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, Recipient agrees to include a similar right of the state to audit records and interview staff in any subcontract related to performance of this Agreement.

e. Refund to the Energy Commission

If the Energy Commission determines, that any invoiced and paid amounts exceed the actual allowable incurred costs, Recipient shall repay such amounts to the Energy Commission within thirty (30) days of request or as otherwise agreed by the Energy Commission and Recipient. If the Energy Commission does not receive such repayments, the Energy Commission shall be entitled to withhold further payments to the Recipient or seek repayment from the Recipient.

f. Audit Cost

The cost of the audit shall be borne by the Energy Commission except when the results of the audit reveal an error detrimental to the Energy Commission exceeding more than ten percent (10%) or \$5,000 (whichever is greater) of 1) the amount audited, or 2) if a royalty audit, the total royalties due in the period audited. Recipient shall pay the refund as specified in "e. Refund to the Energy Commission," and Recipient agrees to reimburse the Energy Commission for reasonable costs and expenses incurred by the Energy Commission in conducting such audit.

g. Match or Cost Share (match)

If the Budget includes a match share requirement, the Recipient's commitment of resources, as described in this Agreement, is a required expenditure for receipt of Energy Commission funds. Grant funds will be released only if the required match percentages are expended. The Recipient must maintain accounting records detailing the expenditure of the match (actual cash and in-kind services) and report on match share expenditures on the Recipient's request for payment.

20. Indemnification

The Recipient agrees to indemnify, defend, and save harmless the state, its officers, agents, and employees from any and all claims and losses accruing or resulting to Recipient and to any and all contractors, subcontractors, materialmen, laborers, and any other person, firm, or corporation furnishing or supplying work, services, materials, or supplies in connection with the performance of this Agreement, and from any and all claims and losses accruing or resulting to any person, firm, or corporation who may be injured or damaged by the Recipient in the performance of this Agreement.

21. Disputes

In the event of an Agreement dispute or grievance between Recipient and the Energy Commission, both parties may follow the procedure **detailed below**. Recipient shall continue with the responsibilities under this Agreement during any dispute.

a. First Level Dispute Resolution

The Recipient shall first discuss the problem informally with the Commission Agreement Manager. If the problem cannot be resolved at this stage, the Recipient must direct the grievance together with any evidence, in writing, to the Grants and Loans Office. The grievance must state the issues in the dispute, the legal authority or other basis for the Recipient's position and the remedy sought. The Grants and Loans Office and the Program Office Manager must make a determination on the problem within ten (10) working days after receipt of the written communication from the Recipient. The Grants and Loans Office shall respond in writing to the Recipient, indicating a decision and explanation for the decision. Should the Recipient disagree with the Grants and Loans Office's decision, the Recipient may appeal to the second level.

b. Second Level Dispute Resolution

The Recipient must prepare a letter indicating why the Grants and Loans Office's decision is unacceptable, attaching to it the Recipient's original statement of the dispute with supporting documents, along with a copy of the Grants and Loans Office's response. This letter shall be sent to the Energy Commission's Executive Director within ten (10) working days from receipt of the Grants and Loans Office's decision. The Executive Director or designee shall meet with the Recipient to review the issues raised. A written decision signed by the Executive Director or designee shall be returned to the Recipient within twenty (20) working days of receipt of the Recipient's letter. The Executive Director may inform the Energy Commission of the decision at an Energy Commission business meeting. Should the Recipient disagree with the Executive Director's decision, the Recipient may appeal to the Energy Commission at a regularly scheduled business meeting. Recipient will be provided with the current procedures for placing the appeal on a Energy Commission business meeting agenda.

22. Workers' Compensation Insurance

- a. Recipient hereby warrants that it carries Worker's Compensation Insurance for all of its employees who will be engaged in the performance of this Agreement, and agrees to furnish to the Commission Agreement Manager satisfactory evidence of this insurance at any time the Commission Agreement Manager may request.
- b. If Recipient is self-insured for worker's compensation, it hereby warrants such self-insurance is permissible under the laws of the State of California and agrees to furnish to the Commission Agreement Manager satisfactory evidence of this insurance at any time the Commission Agreement Manager may request.

23. Confidentiality

- a. Information Considered Confidential
All Recipient information considered confidential at the commencement of this Agreement is designated an Attachment to this Agreement.
- b. Confidential Products: Labeling and Submitting Confidential Information
Prior to the commencement of this Agreement, the parties have identified in an Attachment to this Agreement, specific Confidential Information to be provided as a product. All such confidential products shall be marked, by the Recipient, as "Confidential" on each page of the document containing the Confidential Information and presented in a sealed package to the Grants and Loans Office. (Non-confidential products are submitted to the Commission Agreement Manager.) All Confidential Information will be contained in the "confidential" volume: no Confidential Information will be in the "public" volume.
- c. Submittal of Unanticipated Confidential Information as a Product
The Recipient and the Commission agree that during this Agreement, it is possible that the Recipient may develop additional data or information not originally anticipated as a confidential product. In this case, Recipient shall follow the procedures for a request for designation of Confidential Information specified in title 20 CCR 2505. The Energy Commission's Executive Director makes the determination of confidentiality. Such subsequent determinations may be added to the list of confidential products in an Attachment to this Agreement.

d. Disclosure of Confidential Information

Disclosure of Confidential Information by the Energy Commission may only be made pursuant to 20 CCR 2506 and 2507. All confidential data, records or products that are legally disclosed by the Recipient or any other entity become public records and are no longer subject to the above confidentiality designation.

24. Intellectual Property Items Developed Prior to This Agreement

- a. Intellectual property information is designated in an Attachment to this Agreement.
- b. The Energy Commission makes no claim to intellectual property that existed prior to this Agreement and was developed without Energy Commission funding.

25. Rights of Parties Regarding Intellectual Property

a. Energy Commission's Rights in Products

Products and reports specified for delivery to the Energy Commission under this Agreement shall become the property of the Energy Commission. The Energy Commission may use, publish, and reproduce the products and reports subject to the provisions of subsection c.

b. Rights in Technical, Generated, and Product Data

1) Recipient's Rights

All data (i.e., technical, generated and product data) produced under this Agreement shall be the property of the Recipient, limited by the license retained by the Energy Commission in 2) below, and the rights the Energy Commission has in products specified above in a.

2) Energy Commission's Rights

Recipient shall provide the Commission Agreement Manager and any designated reviewer(s) with a copy of all technical, generated and product data produced under the Agreement, when requested. Recipient is not required to copy and submit data the Commission Agreement Manager has identified as being unusable to the Energy Commission and the PIER program such as raw data that is too disaggregated or voluminous for practical application. Such data shall be retained at the Recipient's facility for inspection, review and possible copying by the Commission Agreement Manager for a minimum of three (3) years after final payment unless a longer period of records retention is stipulated.

Upon request by Commission Agreement Manager, Recipient shall provide the Commission Agreement Manager and any designated reviewer(s) access to review technical and generated data produced in the course of this Agreement that is not requested to be delivered to the Energy Commission.

For all data (technical, generated and product data) produced under this Agreement, the Energy Commission retains a no-cost, non-exclusive, non-transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, produce and to authorize others to produce, translate, publish and use the data, subject to the provisions of subsection c.

- c. Limitations on Commission Disclosure of Recipient's Confidential Records
- 1) Data provided to the Energy Commission by Recipient, which data the Energy Commission has not already agreed to keep confidential and which Recipient seeks to have designated as confidential, or is the subject of a pending application for confidential designation, shall not be disclosed by the Energy Commission except as provided in Title 20 CCR Sections 2506 and 2507 (or as they may be amended), unless disclosure is ordered by a court of competent jurisdiction.
 - 2) It is the Energy Commission's intent to use and release project results such as products and data in a manner calculated to further PIER while protecting proprietary or patentable interests of the parties. Therefore, the Energy Commission agrees not to disclose confidential data or the contents of reports containing data considered by Recipient as confidential, without first providing a copy of the disclosure document for review and comment by Recipient. Recipient shall have no less than 10 working days for review and comment and, if appropriate, to make an application for confidential designation on some or all of the data. The Energy Commission shall consider the comments of the Recipient and use professional judgment in revising the report, information or data accordingly.

d. Exclusive Remedy

In the event the Energy Commission intends to publish or has disclosed data the Recipient considers confidential, the Recipient's exclusive remedy is a civil court action for injunctive relief. Such court action shall be filed in Sacramento County, Sacramento, California.

e. Waiver of Consequential Damages

IN NO EVENT WILL THE ENERGY COMMISSION BE LIABLE FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BASED ON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT TORT, OR ANY OTHER LEGAL THEORY FOR THE DISCLOSURE OF RECIPIENT'S CONFIDENTIAL RECORDS, EVEN IF THE ENERGY COMMISSION HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. DAMAGES THAT THE ENERGY COMMISSION WILL NOT BE RESPONSIBLE FOR INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFIT; LOSS OF SAVINGS OR REVENUE; LOSS OF GOODWILL; LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT; COST OF CAPITAL; COST OF ANY SUBSTITUTE EQUIPMENT, FACILITIES, OR SERVICES; DOWNTIME; THE CLAIMS OF THIRD PARTIES INCLUDING CUSTOMERS; AND INJURY TO PROPERTY.

f. Limitations on Recipient Disclosure of Grant Data, Information, Reports and Records

- 1) Recipient must receive approval from the Commission Agreement Manager before disclosing to any third party the contents of any draft product or report.
- 2) After any document submitted has become a part of the public records of the state, Recipient may, if it wishes to do so at its own expense, publish or utilize the same, but shall include the legal notice stated above.
- 3) Notwithstanding the foregoing, in the event any public statement is made by the Energy Commission as to the role of Recipient or the content of any preliminary or Final Report of Recipient hereunder, Recipient may, if it believes such statement to be incorrect, state publicly what it believes is correct.
- 4) No record that is provided by the Energy Commission to Recipient for Recipient's use in executing this Agreement and which has been designated as confidential, or is the subject of a pending application for confidential designation, except as provided in Title 20, CCR Sections 2506 and 2507, shall be disclosed, unless disclosure is ordered by a court of competent jurisdiction (Title 20 CCR Section 2501, et seq.). At the election of the Commission Agreement Manager, the Recipient, its employees and any subcontractors shall execute a "confidentiality agreement," supplied by the Commission Agreement Manager.
- 5) Recipient acknowledges that each of its officers, employees, and subcontractors who are involved in the performance of this Agreement will be informed about the restrictions contained herein and to abide by the above terms.

g. Proprietary Data

Proprietary data owned by the Recipient shall remain with the Recipient throughout the term of this Agreement and thereafter. The extent of Commission access to the same and the testimony available regarding the same shall be limited to that reasonably necessary to demonstrate, in a scientific manner to the satisfaction of scientific persons, the validity of any premise, postulate or conclusion referred to or expressed in any product or to establish a baseline for repayment purposes. Upon request by Commission Agreement Manager, Recipient shall provide the Commission Agreement Manager and any designated reviewer(s) access to review Recipient's Proprietary Data produced in the course of this Agreement that is not requested to be delivered to the Energy Commission. The Energy Commission shall not disclose any of Recipient's Proprietary Data accessed or reviewed to any third party.

h. Preservation of Data

Any data which is reserved to the Recipient by the express terms hereof, and Proprietary Data and Trade Secrets that have been utilized to support any premise, postulate or conclusion referred to or expressed in any product hereunder, shall be preserved by the Recipient at the Recipient's own expense for a period of not less than three years after final payment, unless a longer period of records retention is stipulated.

i. Destruction of Data

Before the expiration of three years or the stipulated records retention period, and before changing the form of or destroying any Data or Trade Secrets, the Recipient shall notify the Energy Commission of any such contemplated action and the Energy Commission may, within thirty (30) days after said notification, determine whether it desires said data to be further preserved. If the Energy Commission so elects, the expense of further preserving said data shall be paid for by the Energy Commission. Recipient agrees that the Energy Commission may, at its own expense, have reasonable access to said data throughout the time during which said data is preserved. Recipient agrees to use its best efforts to identify competent witnesses to testify in any court of law regarding said data or, at the Energy Commission's expense, to furnish such competent witnesses.

j. Patent Rights

Patent rights for Subject Inventions will be the property of Recipient, subject to the Energy Commission retaining a no-cost, nonexclusive, nontransferable, irrevocable, royalty-free, worldwide perpetual license to use or have practiced for or on behalf of the State of California the Subject Invention(s) for governmental purposes. Recipient must obtain agreements to effectuate this clause with all persons or entities, except for the U.S. Department of Energy (DOE), obtaining ownership interest in the patented Subject Invention(s). Previously documented (whether patented or unpatented under the patent laws of the United States of America or any foreign country) inventions are exempt from this subsection.

k. March-In Rights

The Recipient shall forfeit and assign to the Energy Commission, at the Energy Commission's request, all rights to a Subject Invention if either: 1) Recipient fails to apply for a patent on Subject Inventions(s) developed under this Agreement within six (6) months of conceiving or first actually reducing the technology to practice, or, 2) Recipient or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the Subject Invention. In this event, the Recipient agrees to relinquish all rights, subject to DOE reserved rights, to the Subject Invention to the Energy Commission. The Energy Commission will have the unfettered right to use and/or dispose of the rights in whatever manner it deems most suitable to help transfer the Technology into the market place, including but not limited to, seeking patent protection, or licensing the Subject Invention.

l. Energy Commission's Rights to Invention.

Recipient and all persons and/or entities obtaining an ownership interest in Subject Invention(s) 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 STATE OF CALIFORNIA SUPPORT UNDER CALIFORNIA ENERGY COMMISSION GRANT NUMBER PIR-14-018. THE ENERGY COMMISSION HAS CERTAIN RIGHTS TO THIS INVENTION."

m. Copyrights

- 1) Copyrightable material first produced under this Agreement shall be owned by the Recipient, limited by the license granted to the Energy Commission in 2) below.
- 2) Recipient agrees to grant the Energy Commission a royalty-free, no-cost nonexclusive, irrevocable, nontransferable worldwide, perpetual license to produce, translate, publish, use and dispose of, and to authorize others to produce, translate, publish, use and dispose of all copyrightable material first produced or composed in the performance of this Agreement.
- 3) Recipient will apply copyright notices to all documents prepared for this Agreement that will be released to the public, including reports, products, articles submitted for publication, and all reprints using the following form or such other form as may be reasonably specified by the Energy Commission.

“©[YEAR OF FIRST PUBLICATION OF PRODUCT],

[THE COPYRIGHT HOLDER’S NAME].

ALL RIGHTS RESERVED.”

- 4) Software

In the event software is developed that is not a product under the Agreement, Recipient shall have the right to copyright and/or patent such software and grants the Energy Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable, worldwide, perpetual license to produce and use the software, its derivatives and upgrades for governmental purposes.

n. Intellectual Property Indemnity

Recipient warrants that Recipient will not, in supplying work under this Agreement’s Work Statement, knowingly infringe or misappropriate any intellectual property right of a third party, and that it will conduct a reasonable investigation of the intellectual property rights of third parties to avoid such infringement. Recipient will defend and indemnify Energy Commission from and against any claim, lawsuit or other proceeding, loss, cost, liability or expense (including court costs and reasonable fees of attorneys and other professionals) to the extent arising out of: (i) any third party claim that a product infringes any patent, copyright, trade secret or other intellectual property right of any third party, or (ii) any third party claim arising out of the negligent or other tortious act(s) or omission(s) by the Recipient, its employees, subcontractors or agents, in connection with or related to the products or the Recipient’s performance thereof under this Agreement.

26. Royalty Payments to Commission

In consideration of Energy Commission providing funding to Recipient, Recipient agrees to pay Energy Commission royalties under the following terms and conditions.

- a. Recipient agrees to pay Energy Commission a royalty of one and one-half percent (1.5%) of the Sale Price on Sales of all Project-Related Products and Rights that the Recipient receives.
- b. Recipient's obligation to make payments to Energy Commission shall commence from the date Project-Related Products and Rights are first sold and shall extend for a period of fifteen (15) years thereafter. Payments are payable in annual installments and are due the first day of March in the calendar year immediately following the year during which Recipient receives Gross Revenues.
- c. Early Buyout. Recipient has the option of paying its royalty obligations to Energy Commission without a pre-payment penalty, provided Recipient makes the royalty payment within two (2) years from the date at which royalties are first due to the Energy Commission. Royalty payment must be in a lump sum amount equal to two (2) times the amount of funds drawn down on the Agreement.
- d. Recipient agrees not to make any Sale, license, lease, gift or other transfer of any Project-Related Products and Rights with the intent of, or for the purpose of, depriving Energy Commission of royalties hereunder. Generally, this means that Recipient will not make any Sale, license, lease or other transfer of Project-Related Products and Rights for consideration other than fair market value. Further, Recipient agrees that such activity constitutes breach of this Agreement and that Recipient agrees to repay within sixty (60) days the amount due under c above (Early Buyout).
- e. Recipient acknowledges that a late payment of royalties owed to the Energy Commission will cause the Energy Commission to incur costs not contemplated by the parties. If a royalty payment is not paid when due, Recipient agrees to pay the Energy Commission a late fee equal to two percent (2%) of the payment due. Additionally, Recipient agrees that royalty payments not paid within fifteen (15) days of the due date shall thereupon become debt obligations of Recipient to the Energy Commission, due upon demand and bearing interest at the maximum interest rate allowed by law.
- f. Recipient shall maintain separate accounts within its financial and other records for purposes of tracking components of Sales and royalties due to Energy Commission under this Agreement.
- g. Payments to Energy Commission are subject to audit as provided for under the Recordkeeping, Cost Accounting and Auditing section.
- h. In the event of default hereunder, Energy Commission shall be free to exercise all rights and remedies available to it herein, and under law and at equity. The Recipient's failure to pay when due, any amount due and payable shall cause default under this Agreement.

27. General Provisions

- a. Governing Law

It is hereby understood and agreed that this Agreement shall be governed by the laws of the State of California as to interpretation and performance.

b. Independent Capacity

The Recipient, and the agents and employees of the Recipient, in the performance of this Agreement, shall act in an independent capacity and not as officers or employees or agents of the State of California.

c. Assignment

Without the written consent of the Energy Commission in the form of a formal written amendment, this Agreement is not assignable or transferable by Recipient either in whole or in part.

d. Timeliness

Time is of the essence in this Agreement.

e. Unenforceable Provision

In the event that any provision of this Agreement is unenforceable or held to be unenforceable, then the parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby.

f. Waiver

No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this Agreement shall be taken and construed as cumulative, that is, in addition to every other remedy provided therein or by law.

g. Assurances

The Commission reserves the right to seek further written assurances from the Recipient and its team that the work of the project under this Agreement will be performed consistent with the terms of the Agreement.

h. Change in Business

- 1) Recipient shall promptly notify the Energy Commission of the occurrence of any of the following:
 - a) A change of address.
 - b) A change in the business name or ownership.
 - c) The existence of any litigation or other legal proceeding affecting the project.
 - d) The occurrence of any casualty or other loss to project personnel, equipment or third parties.
 - e) Receipt of notice of any claim or potential claim against Recipient for patent, copyright, trademark, service mark and/or trade secret infringement that could affect the Energy Commission's rights.

2) Recipient shall not change or reorganize the type of business entity under which it does business except upon prior written notification to the Energy Commission. A change of business entity or name change requires an amendment assigning or novating the Agreement to the changed entity. In the event the Energy Commission is not satisfied that the new entity can perform as the original Recipient, the Energy Commission may terminate this Agreement as provided in the termination section.

i. Access to Sites and Records

The Energy Commission staff or its representatives shall have reasonable access to all project sites and to all records related to this Agreement.

j. Survival of Terms

It is understood and agreed that certain provisions shall survive the completion or termination date of this Agreement for any reason. The provisions include, but are not limited to:

- “Payments of Funds”
- “Equipment”
- “Change in Business”
- “Disputes”
- “Termination”
- “Recordkeeping, Cost Accounting, and Auditing”
- “Indemnification”
- “Right of Parties Regarding Intellectual Property”
- “Royalty Payments to Commission”
- Access to Sites and Records

28. Certifications and Compliance

a. Federal, State & Local Laws

Recipient shall comply with all applicable federal, state and local laws, rules and regulations.

b. Nondiscrimination Statement of Compliance

During the performance of this Agreement, Recipient and its subcontractors shall not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, sexual orientation, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (cancer), age (40), marital status, and denial of family care leave. Recipient and its subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. Recipient and its subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code Sections 12990 et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this Agreement by reference and made a part of it as if set forth in full. Recipient and its subcontractors shall give written notice of their obligations under this section to labor organizations with which they have a collective bargaining or other Agreement.

The Recipient shall include the nondiscrimination and compliance provisions of this section in all subcontracts to perform work under this Agreement.

c. Drug Free Workplace Certification

By signing this Agreement, the Recipient hereby certifies under penalty of perjury under the laws of the State of California that the Recipient will comply with the requirements of the Drug-Free Workplace Act of 1990 (Government Code Section 8350 et seq.) and will provide a drug-free workplace by taking the following actions:

- 1) Publish a statement notifying employees that unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited and specifying actions to be taken against employees for violations as required by Government Code Section 8355(a).
- 2) Establish a Drug-Free Awareness Program as required by Government Code Section 8355(b) to inform employees about all of the following:
 - The dangers of drug abuse in the workplace;
 - The person's or organization's policy of maintaining a drug-free workplace;
 - Any available counseling, rehabilitation, and employee assistance programs; and
 - Penalties that may be imposed upon employees for drug abuse violations.
- 3) Provide, as required by Government Code Section 8355(c), that every employee who works on the proposed project:
 - Will receive a copy of the company's drug-free policy statement;
 - Will agree to abide by the terms of the company's statement as a condition of employment on the project.

Failure to comply with these requirements may result in suspension of payments under the Agreement or termination of the Agreement or both, and the Recipient may be ineligible for any future state awards if the Commission determines that any of the following has occurred: (1) the Recipient has made false certification, or (2) violates the certification by failing to carry out the requirements as noted above.

d. National Labor Relations Board Certification (Not applicable to public entities)

Recipient, by signing this Agreement, does swear under penalty of perjury that no more than one final unappealable finding of contempt of court by a Federal Court has been issued against the Recipient within the immediately preceding two year period because of the Recipient's failure to comply with an order of a Federal Court which orders the Recipient to comply with an order of the National Labor Relations Board.

e. Child Support Compliance Act (Applicable to California Employers)

For any agreement in excess of \$100,000, the Recipient acknowledges that:

- 1) It recognizes the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with section 5200) of Part 5 of Division 9 of the Family Code; and
- 2) To the best of its knowledge is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.

f. Air or Water Pollution Violation

Under the state laws, the Recipient shall not be:

- 1) In violation of any order or resolution not subject to review promulgated by the State Air Resources Board or an air pollution control district;
- 2) Subject to cease and desist order not subject to review issued pursuant to Section 13301 of the Water Code for violation of waste discharge requirements or discharge prohibitions; or
- 3) Finally determined to be in violation of provisions of federal law relating to air or water pollution.

g. Americans With Disabilities Act

By signing this Agreement, Recipient assures the State that it complies with the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12101, et seq.), which prohibits discrimination on the basis of disability, as well as applicable regulations and guidelines issued pursuant to the ADA.

29. Definitions

- **Affiliate of the Recipient** means any natural person, corporation, partnership, joint venture, sole proprietorship or other business entity directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Recipient. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by agreement, or otherwise. For purposes of this Agreement, it is presumed that ownership or control of the voting power of more than fifty percent (50%) of the voting stock or partnership interests in an entity constitutes control of that entity.
- **Agreement Period** is the length of this Agreement between the Energy Commission and the Recipient. The Recipient’s Project may coincide with or extend outside the Agreement Period.
- **Confidential Information** is information Recipient has submitted to the Energy Commission and has satisfactorily identified and which the Energy Commission has agreed to designate as confidential pursuant to Title 20 CCR 2501 and following (and amendments).
- **Economic Benefit** for a Project co-funded using Energy Commission funds means the realization of economic gain or other tangible benefits by the Recipient or Affiliate of the Recipient (except bona fide third party purchasers of Recipient's commercial products) through the use of Project-Related Products and Rights, including but not limited to, operation, sale, distribution or manufacturing; or by any other transaction, including but not limited to, grant, rent, loan, equity, option, transfer, license or other fee; or by Otherwise Disposing of the Project-Related Products and Rights. The Energy Commission may rely upon professional accounting opinion in making a final determination of the dollar value of Gross Revenues, and such determination shall be the basis for calculating the royalty payment due the Energy Commission.
- **Equipment** is defined as having a useful life of at least one year, having an acquisition unit cost of at least \$5,000, and purchased with Energy Commission funds. **Equipment** means any products, objects, machinery, apparatus, implements or tools purchased, used or constructed within the Project, including those products, objects, machinery, apparatus, implements or tools from which over thirty percent (30%) of the equipment is composed of Materials purchased for the Project. For purposes of determining depreciated value of equipment used in the Agreement, the Project shall terminate at the end of the normal useful life of the equipment purchased, funded and/or developed with Energy Commission funds. The Energy Commission may determine the normal useful life of such equipment.
- **Gross Revenues** means the gross Sales Price, rentals and other amounts received by Recipient from or on account of the Sale, lease, or other transfer or use of Project-Related Products and Rights, less sales tax paid. Gross Revenues shall be determined as above and in accordance with appropriate Federal cost principles and any Economic Benefit.
- **Match Funds** means cash or in-kind (non-cash) contributions provided by Recipient, subcontractors or other parties that will be used in performance of this Agreement.

- **Materials** means the substances used in constructing a finished object, commodity, device, article or product.
- **Otherwise Disposing Of** means (1) Project-Related Products and Rights not sold but delivered by the Recipient or Affiliate of the Recipient to others regardless of the basis for compensation, if any; and (2) Project-Related Products and Rights put into use by the Recipient or any third party for any purpose other than testing or evaluation of the Project-Related Products and Rights.
- **Project** refers to the entire effort undertaken and planned by the Recipient and consisting of the work co-funded by the Energy Commission. The project may coincide with or extend beyond the Agreement Term.
- **Project-Related Products and Rights** means any and all inventions, discoveries, machines, designs, computer software, products, devices, mechanisms, methods, protocols, processes, algorithms, flowcharts, diagrams, trade secrets, data, copyrights, patents, trademarks, proprietary rights, and the like created or made or discovered or first reduced to practice by the Recipient or other third party as a result, in whole or in part, of the Agreement award(s) and any and all updates, revisions, modification, enhancements, derivations, variations, additions, continuations, renewals, and extensions thereto and all proceeds and products therefrom.
- **Sale** is sale, license, lease, gift or other transfer of Project-Related Product and Rights.
- **Sales Price** means Gross Revenues, excluding normal returns and allowances such as sales tax, freight and insurance, if applicable, derived from a Sale.
- **Subject Invention** means any and all invention or discovery conceived, or first actually reduced to practice in the course of or under the Energy Commission-funded portion of this Agreement (i.e., that portion of this Agreement for which Recipient has invoiced the Energy Commission and received reimbursement) and includes any art, method, process, machine, manufacture design or composition of matter, or any new and useful improvement thereof, whether patented or unpatented, under the patent laws of the United States of America or any foreign country.
- **Technology** refers to the general subject area where the product or innovation will be used. For example, solar thermal electric generation is a Technology area; direct steam generation is an innovation in this Technology area.
- **Terms Relating to Data**
 - **Technical Data or Data** as used throughout this Agreement means recorded information regardless of form or characteristic, of a scientific or technical nature and used in the performance of this Agreement. It may, for example, document research; document experimental, developmental, demonstration, or engineering work; or 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, test specifications or related performance or design type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of Technical Data include manufacturing techniques and methods, machinery, devices such as tools, products, or components, research and engineering data, engineering drawings and associated lists, specifications, engineering calculations, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical Data as used herein does not include financial reports, cost analyses and other information incidental to administration of this Agreement.
- **Proprietary Data** is such data as Recipient has identified in a satisfactory manner as being under Recipient's control prior to commencement of performance of this Agreement, and which Recipient has reasonably demonstrated as being of a proprietary nature either by reason of copyright, patent or trade secret doctrines in full force and effect at the time when performance of this Agreement is commenced. Proprietary Data also includes data of a proprietary nature produced during the course of this Agreement that is produced by Recipient or its subcontractors at their own expense.
- **Generated Data** is that data that the Recipient collects, collates, records, deduces, reads out or postulates for use in the performance of this Agreement. In addition, any electronic data processing program, model or software system developed or substantially modified by the Recipient in the performance of this Agreement at Energy Commission expense, together with complete documentation thereof, shall be treated as Generated Data.
- **Product Data** is that data which, under the terms of this Agreement, is required to be delivered to the Energy Commission.
- A Trade Secret is any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented and which is generally known only to certain individuals with a commercial concern and are using it to fabricate, produce or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

EXHIBIT D
INFORMATION PRACTICES ACT
SPECIAL TERMS AND CONDITIONS

<CAO – Only include these terms if the contractor/recipient will collect or obtain personal information as part of its activities. (delete these instructions)>

1. Priority of these Special Terms

In the event of a conflict between these Special Terms and other terms in this Agreement, these Special Terms shall govern.

2. Recipient and All Subcontractors shall comply with the Information Practices Act

The Information Practices Act (“IPA”) is codified at California Civil Code sections 1798 et seq. Personal Information is defined in the IPA at Civil Code section 1798.3(a). **<Insert Recipient Name>** (“Recipient”), shall comply and ensure that all of its subcontractors and project partners shall comply with the IPA relative to the activities under this Agreement. This includes but is not limited to complying with Section 1798.16 (Personal Information; maintaining sources of information) and Section 1798.17 (Notice; periodic provision; contents). For example:

- A. Sources of information. Recipient, and Recipient’s subcontractors and project partners, shall maintain a record of the source of an individual’s Personal Information in accordance with § 1798.16. Per IPA § 1798.16, this requirement does not apply if the data subject is the source of the Personal Information.
- B. Use of information. Pursuant to IPA § 1798.14, the Recipient, and Recipient’s subcontractors and project partners shall only use Personal Information for the purposes of this Agreement. Recipient, and Recipient’s subcontractors and project partners shall not disclose any Personal Information to any person or entity other than the Energy Commission and Energy Commission employees.
- C. Security. Pursuant to IPA § 1798.21, Recipient, and Recipient’s subcontractors and project partners, shall employ appropriate and reasonable safeguards to ensure the security and confidentiality of Personal Information and to protect against anticipated threats or hazards to their security or integrity which could result in any injury.
- D. Notice. On or with any form used to collect Personal Information from individuals, the Recipient, and Recipient’s subcontractors and project partners, shall provide the notice required in § 1798.17. At the time of executing this agreement, § 1798.17 requires the following:
 - (a) The name of the agency and the division within the agency that is requesting the information.
 - (b) The title, business address, and telephone number of the agency official who is responsible for the system of records and who shall, upon request, inform an individual regarding the location of his or her records and the categories of any persons who use the information in those records.
 - (c) The authority, whether granted by statute, regulation, or executive order which authorizes the maintenance of the information.
 - (d) With respect to each item of information, whether submission of such information is mandatory or voluntary.

(e) The consequences, if any, of not providing all or any part of the requested information.

(f) The principal purpose or purposes within the agency for which the information is to be used.

(g) Any known or foreseeable disclosures which may be made of the information pursuant to subdivision (e) or (f) of Section 1798.24.

(h) The individual's right of access to records containing personal information which are maintained by the agency.

3. Recipient has no Ownership or other Rights to the Personal Information

The Recipient has, and the Recipient shall ensure that its subcontractors and project partners have, no ownership, license, or other rights in Personal Information or in any form in which it is used (e.g., Products). In this regard, the Personal Information shall NOT be treated like Data, Products, Intellectual Property, or other provisions in the Agreement that may indicate that Recipient has ownership, license, or other rights.

4. Rights to Anonymized Information Derived from Personal Information

To the extent that the Recipient uses Personal Information to derive anonymized information that no longer meets the definition of Personal Information, the rights to derived anonymized information follow the rights in Exhibit C. For example, if the Recipient uses Personal Information to derive anonymized figures that are included in a Product, and the Product contains no Personal Information, the rights to the Product flow from Exhibit C, Section 5, like they do for all other Products.

5. Retention and Destruction of Personal Information

Upon the request of the Energy Commission, or upon termination of this Agreement, whichever is earlier, the Recipient and all subcontractors and project partners shall promptly deliver to the Energy Commission or destroy all Personal Information, regardless of form (e.g., written or electronic) and all copies, abstracts, media, and backups thereof, however stored in Recipient's and all of its subcontractors' and project partners' possession. No Personal Information shall remain with Recipient, its subcontractors, or its project partners upon request of the Energy Commission or after the termination of this Agreement, whichever occurs first.

6. Survival

The terms of this Exhibit shall remain in full force and effect in perpetuity.

7. Flow-down

The Recipient shall flow-down the terms in this Exhibit to its subcontractors and project partners.