

RIGHTS IN DATA-FACILITIES (BioEnergy Science Center [BESC] Deviation)

(a) Definitions.

(1) *Computer data bases*, as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software*, as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data*, as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term "data" does not include data incidental to the administration of this subcontract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data*, as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (g) of this clause.

(5) *Restricted computer software*, as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of paragraph (h) of this clause.

(6) *Technical data*, as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights*, as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(8) *Facility*, as used in this clause, means the BESC as defined in the Intellectual Property Management Plan.

(9) *Intellectual Property Management Plan*, as used in this clause, means the plan approved by DOE and executed by all BESC Team Members within ninety (90) days of the effective date of this Subcontract. The Intellectual Property Management Plan, to be attached as an Appendix to this Subcontract and made a part hereof, ensures and facilitates compliance with federal Intellectual Property law and policy, the public interest regarding dissemination of scientific reports and results, and the rapid transfer of technology for the development of cellulosic ethanol and other biofuels.

(b) Allocation of Rights.

(1) The Government shall have:

(i) [reserved];

(ii) Unlimited rights in technical data and computer software specifically first produced or used in the performance of this Subcontract, except as provided herein regarding copyright, limited rights data, or restricted computer software, or except for other data specifically protected by statute for a period of time;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Subcontract at all reasonable times. The Seller shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have copies of all technical data and computer software first produced or specifically used in the performance of this Subcontract delivered to the Government or otherwise disposed of by the Seller, either as the Contracting Officer of the Company's Contract No. DE-AC05-00OR22725 with DOE may from time to time direct during the progress of the work or in any event as the Contracting Officer shall direct upon completion or termination of this Subcontract. The Seller agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the Contracting Officer. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (g) of this clause (Rights in Limited Rights Data) or paragraph (h) of this clause (Rights in Restricted Computer Software); and

(v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Subcontract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Seller fails to respond thereto within sixty (60) days or fails to substantiate the propriety of the markings. In either case DOE will notify the Seller of the action taken.

(2) The Seller shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Subcontract, data it first produces in the performance of this Subcontract, provided the data requirements of this Subcontract have been met as of the date of the private use of such data.

(3) The Seller agrees that for limited rights data or restricted computer software or other technical, business or financial data in the form of recorded information which it receives from, or is given access to by, DOE or a third party, including a DOE Contractor or subcontractor, and for technical data or computer software it first produces under this Subcontract which is authorized to be marked by DOE, the Seller shall treat such data in accordance with any restrictive legend contained thereon.

(4) Subject to the rights of the Seller set forth in paragraph (b)(2) of this clause, in accordance with the Intellectual Property Management Plan, during the term of this Subcontract and subject to a nondisclosure agreement if required by the Seller, the Seller agrees that all technical data first produced in the performance of this Subcontract will be shared among the members of the Center, to other DOE BioEnergy Science Centers, and to any DOE advisory committee assisting DOE in evaluation of the activities of the Center.

(5) Within ninety (90) days of the effective date of this Subcontract, Company will provide the Seller with a DOE approved list of BESC related data first produced by the BESC in the performance of this Subcontract which will be released to the public.

(c) Copyright (General).

(1) The Seller agrees not to mark, register, or otherwise assert copyright in any data in a published or unpublished work, other than as set forth in paragraphs (d) and (e) of this clause.

(2) Except for material to which the Seller has obtained the right to assert copyright in accordance with either paragraph (d) or (e) of this clause, the Seller agrees not to include in the data delivered under this Subcontract any material copyrighted by the Seller and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (d) of this clause. If the Seller believes that such copyrighted material for which the license cannot be obtained must be included in the data to be delivered, rather than merely incorporated therein by reference, the Seller shall obtain the written authorization of the Contracting Officer to include such material in the data prior to its delivery.

(d) Copyrighted works (scientific and technical articles).

(1) The Seller shall have the right to assert, without prior approval of the Contracting Officer, copyright subsisting in scientific and technical articles composed under this Subcontract or based on or containing data first produced in the performance of this Subcontract, and published in academic, technical or professional journals, symposia, proceedings, or similar works. When assertion of copyright is made, the Seller shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) on the data when such data are delivered to the Government as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Seller grants to the Government, and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) The Seller shall mark each scientific or technical article first produced or composed under this Subcontract and submitted for journal publication or similar means of dissemination with a notice, similar in all material respects to the following on the front reflecting the Government's non-exclusive, paid-up, irrevocable, world-wide license in the copyright.

Notice: This manuscript has been authored by [insert the name of the Subcontractor] under Subcontract No. _____ and Contract No. DE-AC05-00OR22725 with the U.S. Department of Energy. The United States Government retains and the publisher, by accepting the article for publication, acknowledges that the United States Government retains a non-exclusive, paid-up, irrevocable, world-wide license to publish or reproduce the published form of this manuscript or allow others to do so, for United States Government purposes.

(End of Notice)

(3) The title to the copyright of the original of unclassified graduate theses and the original of related unclassified scientific papers shall vest in the author thereof, subject to the right of DOE to retain duplicates of such documents and to use such documents for any purpose whatsoever without any claim on the part of the author or the Seller for additional compensation.

(e) Copyrighted works (other than scientific and technical articles). The Seller may obtain permission to assert copyright subsisting in technical data and computer software first produced by the Seller in performance of this Subcontract, where the Seller can show that commercialization would be enhanced by such copyright protection, subject to the following:

(1) Contractor Request to Assert Copyright.

(i) For data other than scientific and technical articles the Seller shall submit in writing to DOE Patent Counsel its request to assert copyright in data first produced in the performance of this Subcontract pursuant to this clause. Each request by the Seller must include:

(A) The identity of the data (including any computer program) for which the Seller requests permission to assert copyright, as well as an abstract which is descriptive of the data and is suitable for dissemination purposes,

(B) The program under which it was funded,

(C) Whether, to the best knowledge of the Seller, the data is subject to an international treaty or agreement,

(D) Whether the data is subject to export control,

(E) A statement that the Seller plans to commercialize the data in accordance with the Intellectual Property Management Plan within five (5) years after obtaining permission to assert copyright or, on a case-by-case basis, a specified longer period where the Seller can demonstrate that the ability to commercialize effectively is dependent upon such longer period, and

(F) For data other than computer software, a statement explaining why the assertion of copyright is necessary to enhance commercialization and is consistent with DOE's dissemination responsibilities.

(ii) [reserved]

(iii) [reserved]

(2) *DOE Review and Response to Contractor's Request.* The DOE Patent Counsel shall use its best efforts to respond in writing within ninety (90) days of receipt of a complete request by the Seller to assert copyright in technical data and computer software pursuant to this clause. Such response shall either give or withhold DOE's permission for the Seller to assert copyright or advise the Seller that DOE needs additional time to respond and the reasons therefor.

(3) *Permission for Contractor to Assert Copyright.*

(i) For computer software, the Seller shall furnish to the DOE designated, centralized software distribution and control point, the Energy Science and Technology Software Center, at the time permission to assert copyright is given under paragraph (e)(2) of this clause: (A) an abstract describing the software suitable for publication, (B) the source code for each software program, and (C) the object code and at least the minimum support documentation needed by a technically competent user to understand and use the software. The DOE Patent Counsel, for good cause shown by the Seller, may allow the minimum support documentation to be delivered within sixty (60) days after permission to assert copyright is given or at such time the minimum support documentation becomes available. The Seller acknowledges that the DOE designated software distribution and control point may provide a technical description of the software in an announcement identifying its availability from the copyright holder.

(ii) Unless otherwise directed by the Contracting Officer, for data other than computer software to which the Seller has received permission to assert copyright under paragraph (e)(2) of this clause above, the Seller shall within sixty (60) days of obtaining such permission furnish to DOE's Office of Scientific and Technical Information (OSTI) a copy of such data as well as an abstract of the data suitable for dissemination purposes. The Seller acknowledges that OSTI may provide an abstract of the data in an announcement to DOE, its contractors and to the public identifying its availability from the copyright holder.

(iii) Beginning on the date the Seller is given permission to assert copyright in data, the Seller grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works and perform publicly and display publicly, by or on behalf of the Government.

(iv) If the Seller abandons commercialization activities pertaining to the data to which the Seller has been given permission to assert copyright, the Seller grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, distribute copies to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so.

(v) Whenever the Seller asserts copyright in data pursuant to this paragraph (e), the Seller shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 on the copyrighted data and also an acknowledgment of the Government sponsorship and license rights of paragraphs (e)(3) (iii) and (iv) of this clause. Such action shall be taken when the data are delivered to the Government, published, licensed or deposited for registration as a published work in the U.S. Copyright Office. The acknowledgment of Government sponsorship and license rights shall be as follows:

Notice: These data were produced by (insert name of Seller) under Subcontract No.

_____ and Contract No. DE-AC05-00OR22725 with the Department of Energy. The Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government. Neither the United States nor the United States Department of Energy, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any data, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights.

(End of Notice)

(vi) With respect to any data to which the Seller has received permission to assert copyright, the DOE has the right to request the Seller to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant(s) upon terms that are reasonable under the circumstances, and if the Seller refuses such request, to grant such license itself, if the DOE determines that the Seller has not made a satisfactory demonstration that either it or its licensee(s) is actively pursuing commercialization of the data as set forth in subparagraph (e)(1)(A) of this clause. Before licensing under this subparagraph (vi), DOE shall furnish the Seller a written request for the Seller to grant the stated license, and the Seller shall be allowed thirty (30) days (or such longer period as may be authorized by the Contracting Officer for good cause shown in writing by the Seller) after such notice to show cause why the license should not be granted. The Seller

shall have the right to appeal the decision of the DOE to grant the stated license to the Invention Licensing Appeal Board as set forth in 10 CFR 781.65-- Appeals.

(vii) No costs shall be allowable for maintenance of copyrighted data, primarily for the benefit of the Seller and/or a licensee which exceeds DOE Program needs, except as expressly provided in writing by the Contracting Officer. The Seller may use its net royalty income to effect such maintenance costs.

(viii) At any time the Seller abandons commercialization activities for data for which the Seller has received permission to assert copyright in accordance with this clause, it shall advise OSTI and DOE Patent Counsel and upon request assign the copyright to the Government so that the Government can distribute the data to the public.

(4) The following notice may be placed on computer software prior to any publication and prior to the Seller's obtaining permission from the Department of Energy to assert copyright in the computer software pursuant to paragraph (e)(3) of this section.

Notice: This computer software was prepared by [insert the Seller's name and the individual author], hereinafter the Seller, under Subcontract [insert the Subcontract Number] and Contract No. DE-AC05-00OR22725 with the Department of Energy (DOE). All rights in the computer software are reserved by DOE on behalf of the United States Government and the Seller as provided in the Subcontract. You are authorized to use this computer software for Governmental purposes but it is not to be released or distributed to the public. NEITHER THE GOVERNMENT NOR THE CONTRACTOR MAKES ANY WARRANTY, EXPRESS OR IMPLIED, OR ASSUMES ANY LIABILITY FOR THE USE OF THIS SOFTWARE. This notice including this sentence must appear on any copies of this computer software.

(End of Notice)

(5) A similar notice can be used for data, other than computer software, upon approval of DOE Patent Counsel.

(f) Subcontracting.

(1) Unless otherwise directed by the Contracting Officer, Seller shall use this clause, "Rights in Data-Facilities (BESC Deviation)" in all subcontracts with BESC Team Members.

(2) It is the responsibility of the Seller to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Seller's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Seller shall:

(i) Promptly submit written notice to the Contracting Officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the Contracting Officer.

(3) Neither the Seller nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use.

(g) Rights in Limited Rights Data.

Except as may be otherwise specified in this Subcontract as data which are not subject to this paragraph, the Seller agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license by or for the Government, in any limited rights data of the Seller specifically used in the performance of this Subcontract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Seller at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the "Limited Rights Notice" set forth. All such limited rights data shall be marked with the following "Limited Rights Notice":

Limited Rights Notice

These data contain "limited rights data," furnished under Subcontract No. _____ and Contract No. DE-AC05-00OR22725 with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the "limited rights data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Seller, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This "limited rights data" may be disclosed for evaluation purposes under the restriction that the limited rights data be retained in confidence and not be further disclosed;

(c) This "limited rights data" may be disclosed to other contractors participating in the Government's program of which this Subcontract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(d) This "limited rights data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the limited rights data be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

This Notice shall be marked on any reproduction of this data in whole or in part.

(End of Notice)

(h) Rights in Restricted Computer Software.

(1) Except as may be otherwise specified in this Subcontract as data which are not subject to this paragraph, the Seller agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Seller specifically used in the performance of this Subcontract, provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Seller at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the "Restricted Rights Notice:" set forth below. All such restricted computer software shall be marked with the following "Restricted Rights Notice:"

Restricted Rights Notice-Long Form

(a) This computer software is submitted with restricted rights under Subcontract No. _____ and Contract Number DE-AC05-00OR22725 with the United States Department of Energy. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in FAR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of Notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice--Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Subcontract No. _____ with (name of Seller).

(End of Notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr), in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Subcontract contains any variation to the rights in the Long Form Notice, then the Subcontract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Seller includes the following statement with such copyright notice "Unpublished-rights reserved under the Copyright Laws of the United States."

(i) Relationship to patents. Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of Clause)