

**CUSTOMER CONTRACT REQUIREMENTS**  
**XS-1**  
**CUSTOMER CONTRACT HR0011-17-9-0001**

**CUSTOMER CONTRACT REQUIREMENTS**

The following customer contract requirements apply to this contract to the extent indicated below.

**1. Prime Contract Special Provisions** The following prime contract special provisions apply to this purchase order

**Special Provisions - HR0011-17-9-0001 .**

**ARTICLE VII: GROUND AND FLIGHT RISK**

(a) Definitions. As used in this article—

(1) “Aircraft,” unless otherwise provided in the contract Schedule, means—

(i) The XS-1 prototype reusable booster system vehicle to be delivered to the Government under this contract (either before or after Government acceptance), including complete vehicle and vehicle in the process of being manufactured, disassembled, or reassembled; provided that an engine, portion of a wing or a wing is attached to a fuselage of the vehicle;

(ii) Aircraft, whether in a state of disassembly or reassembly, furnished by the Government to the Performer under this contract, including all Government property installed, in the process of installation, or temporarily removed; provided that the aircraft and property are not covered by a separate bailment agreement;

(iii) Aircraft furnished by the Seller under this contract (either before or after Government acceptance); or

(2) “Seller’s managerial personnel” means the Seller’s directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of—

(i) All, or substantially all, of the Seller’s business;

(ii) All, or substantially all, of the Seller’s operation at any one plant or separate location; or

(iii) A separate and complete major industrial operation.

(3) “Seller’s premises” means those premises, including subcontractors’ premises, designated in the Schedule or in writing by the Agreements Officer, and any other place the aircraft is moved for safeguarding.

(4) “Flight” means any flight demonstration, flight test, taxi test, or other flight made in the performance of this Contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the Agreements Officer.

(i) For land based aircraft, “flight” begins with the taxi roll from a flight line on the Performer’s premises and continues until the aircraft has completed the taxi roll in returning to a flight line on the Performer’s premises.

(ii) For vertical take-off or landing aircraft, “flight” begins upon disengagement from any launching platform or device on the Performer’s premises and continues until the aircraft has been engaged to any launching platform or device on the Performer’s premises.

(iii) All aircraft off the Performer’s premises shall be considered to be in flight when on the ground or water for reasonable periods of time following emergency landings, landings made in performance of this contract, or landings approved in writing by the Agreements Officer.

(5) “Flight crew member” means the pilot, the co-pilot, and, unless otherwise provided in the Schedule, the flight engineer, navigator, and bombardier-navigator when assigned to their respective crew positions for the purpose of conducting any flight on behalf of the Performer. It also includes any pilot or operator of an unmanned aerial vehicle. If required, a defense systems operator may also be assigned as a flight crew member.

(6) "In the open" means located wholly outside of buildings on the Performer's premises or other places described in the Schedule as being "in the open." Government furnished aircraft shall be considered to be located "in the open" at all times while in the Performer's possession, care, custody, or control.

(7) "Operation" means operations and tests of the aircraft and its installed equipment, accessories, and power plants, while the aircraft is in the open or in motion. The term does not apply to aircraft on any production line or in flight.

(b) Combined regulation/instruction. The Seller shall comply with Chapter 509 of Title 51 of the United States Code and Chapter III of Title 14 of the Code of Federal Regulations, or seek the appropriate relief from the Federal Aviation Administration.

(c) Government as self-insurer. Subject to the conditions in paragraph (d) of this clause, the Government self-insures and assumes the risk of damage to, or loss or destruction of aircraft "in the open," during "operation," and in "flight," except as may be specifically provided in the Schedule as an exception to this clause. The Performer shall not be liable to the Government for such damage, loss, or destruction beyond the Performer's share of loss amount under the Government's self-insurance.

(d) Conditions for Government's self-insurance. The Government's assumption of risk for aircraft in the open shall continue unless the Agreements Officer finds that the Seller has failed to comply with paragraph (b) of this clause, or that the aircraft is in the open under unreasonable conditions, and the Seller fails to take prompt corrective action.

(1) The Agreements Officer, when finding that the Seller has failed to comply with paragraph (b) of this clause or that the aircraft is in the open under unreasonable conditions, shall notify the Seller in writing and shall require the Seller to make corrections within a reasonable time.

(2) Upon receipt of the notice, the Seller shall promptly correct the cited conditions, regardless of whether there is agreement that the conditions are unreasonable.

(i) If the Agreements Officer later determines that the cited conditions were not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred in correcting the conditions.

(ii) Any dispute as to the unreasonableness of the conditions or the equitable adjustment shall be considered a dispute under the Disputes clause of this Agreement.

(3) If the Agreements Officer finds that the Seller failed to act promptly to correct the cited conditions or failed to correct the conditions within a reasonable time, the Agreements Officer may terminate the Government's assumption of risk for any aircraft in the open under the cited conditions. The termination will be effective at 12:01 a.m. on the fifteenth day following the day the written notice is received by the Seller.

(i) If the Agreements Officer later determines that the Seller acted promptly to correct the cited conditions or that the time taken by the Seller was not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred as a result of termination of the Government's assumption of risk.

(ii) Any dispute as to the timeliness of the Seller's action or the equitable adjustment shall be considered a dispute under the Disputes clause of this Agreement.

(4) If the Government terminates its assumption of risk pursuant to the terms of this clause—

(i) The Seller shall thereafter assume the entire risk for damage, loss, or destruction of, the affected aircraft;

(ii) Any costs incurred by the Seller (including the costs of the Seller's self-insurance, insurance premiums paid to insure the Seller's assumption of risk, deductibles associated with such purchased insurance, etc.) to mitigate its assumption of risk are unallowable costs; and

(iii) The liability provisions of the Government Property clause of this contract are not applicable to the affected aircraft.

(5) The Seller shall promptly notify the Agreements Officer when unreasonable conditions have been corrected.

(i) If, upon receipt of the Seller's notice of the correction of the unreasonable conditions, the Government elects to again assume the risk of loss and relieve the Seller of its liability for damage, loss, or destruction of the aircraft, the Agreements Officer will notify the Seller of the Agreements Officer's decision to resume the Government's risk of loss. The Seller shall be entitled to an equitable adjustment in the contract price for any insurance costs extending from the end of the third working day after the Government's receipt of the Seller notice of correction until the Seller is notified that the Government will resume the risk of loss.

(ii) If the Government does not again assume the risk of loss and the unreasonable conditions have been corrected,

the Seller shall be entitled to an equitable adjustment for insurance costs, if any, extending after the third working day after the Government's receipt of the Seller's notice of correction.

(6) The Government's termination of its assumption of risk of loss does not relieve the Seller of its obligation to comply with all other provisions of this clause, including the combined regulation/instruction under paragraph (b).

(e) Exclusions from the Government's assumption of risk. The Government's assumption of risk shall not extend to damage, loss, or destruction of aircraft which—

(1) Results from failure of the Seller, due to willful misconduct or lack of good faith of any of the Seller's managerial personnel, to maintain and administer a program for the protection and preservation of aircraft in the open and during operation in accordance with sound industrial practice, including oversight of subcontractor's program.

(2) Is sustained during flight if either the flight or the flight crew members have not been approved in advance of any flight writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation/instruction under paragraph (b);

(3) Occurs in the course of transportation by rail, or by conveyance on public streets, highways, or waterways, except for Government-furnished property;

(4) Is covered by insurance;

(5) Consists of wear and tear; deterioration (including rust and corrosion); freezing; or mechanical, structural, or electrical breakdown or failure, unless these are the result of other loss, damage or destruction covered by this clause. (This exclusion does not apply to Government-furnished property if damage consists of reasonable wear and tear or deterioration, or results from inherent vice, e.g., a known condition or design defect, in the property); or

(6) Is sustained while the aircraft is being worked on and is a direct result of the work unless such damage, loss, or destruction would be covered by insurance which would have been maintained by the Seller, but for the Government's assumption of risk.

(f) Seller's share of loss and Seller's deductible under the Government's self-insurance.

(1) The Seller assumes the risk of loss and shall be responsible for the Seller's share of loss under the Government's self-insurance. That share is the lesser of—

(i) The first \$100,000 of loss or damage to aircraft in the open, during operation, or in flight resulting from each separate event, except for reasonable wear and tear and to the extent the loss or damage is caused by negligence of Government personnel; or

(ii) Twenty percent of the price or estimated cost of this Agreement.

(2) If the Government elects to require that the aircraft be replaced or restored by the Seller to its condition immediately prior to the damage, the equitable adjustment in the price authorized by paragraph (j) of this clause shall not include the dollar amount of the risk assumed by the Seller.

(3) In the event the Government does not elect repair or replacement, the Seller agrees to credit the contract price or pay the Government, as directed by the Agreements Officer, the lesser of—

(i) \$100,000;

(ii) Twenty percent of the price or estimated cost of this Agreement; or

(iii) The amount of the loss.

(5) The costs incurred by the Seller for its share of the loss and for insuring against that loss are unallowable costs, including but not limited to—

(i) The Seller's share of loss under the Government's self-insurance;

(ii) The costs of the Seller's self-insurance;

(iii) The deductible for any Seller-purchased insurance;

(iv) Insurance premiums paid for Seller-purchased insurance; and

(v) Costs associated with determining, litigating, and defending against the Seller's liability.

(g) Subcontractor possession or control. The Seller shall not be relieved from liability for damage, loss, or destruction of aircraft while such aircraft is in the possession or control of its subcontractors, except to the extent that the subcontract, with the written approval of the Agreements Officer, provides for relief from each liability. In the absence of approval, the subcontract shall contain provisions requiring the return of aircraft in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract.

(h) Seller's exclusion of insurance costs. The Seller warrants that the contract price does not and will not include, except as may be authorized in this clause, any charge or contingency reserve for insurance covering damage, loss, or destruction of aircraft while in the open, during operation, or in flight when the risk has been assumed by the Government including the Seller's share of loss in this clause, even if the assumption may be terminated for aircraft in the open.

(i) Procedures in the event of loss.

(1) In the event of damage, loss, or destruction of aircraft in the open, during operation, or in flight, the Seller shall take all reasonable steps to protect the aircraft from further damage, to separate damaged and undamaged aircraft and to put all aircraft in the best possible order. Except in cases covered by paragraph (f)(2) of this clause, the Seller shall furnish to the Agreements Officer a statement of—

- (i) The damaged, lost, or destroyed aircraft;
- (ii) The time and origin of the damage, loss, or destruction;
- (iii) All known interests in commingled property of which aircraft are a part; and
- (iv) The insurance, if any, covering the interest in commingled property.

(2) The Agreements Officer will make an equitable adjustment for expenditures made by the Seller in performing the obligations under this paragraph.

(j) Loss prior to delivery.

(1) If prior to delivery and acceptance by the Government, aircraft is damaged, lost, or destroyed and the Government assumed the risk, the Government shall either—

- (i) Require that the aircraft be replaced or restored by the Seller to the condition immediately prior to the damage, in which event the Agreements Officer will make an equitable adjustment in the contract price and the time for contract performance; or
- (ii) Terminate this contract with respect to the aircraft. Notwithstanding the provisions in any other termination clause under this contract, in the event of termination, the Seller shall be paid the contract price for the aircraft (or, if applicable, any work to be performed on the aircraft) less any amount the Agreements Officer determines—

(A) It would have cost the Seller to complete the aircraft (or any work to be performed on the aircraft) together with anticipated profit on uncompleted work; and

(B) Would be the value of the damaged aircraft or any salvage retained by the Seller.

(2) The Agreements Officer shall prescribe the manner of disposition of the damaged, lost, or destroyed aircraft, or any parts of the aircraft. If any additional costs of such disposition are incurred by the Seller, a further equitable adjustment will be made in the amount due the Seller. Failure of the parties to agree upon termination costs or an equitable adjustment with respect to any aircraft shall be considered a dispute under the Disputes clause.

(k) Reimbursement from a third party. In the event the Seller is reimbursed or compensated by a third party for damage, loss, or destruction of aircraft and has also been compensated by the Government, the Seller shall equitably reimburse the Government. The Seller shall do nothing to prejudice the Government's right to recover against third parties for damage, loss, or destruction. Upon the request of the Agreements Officer or authorized representative, the Seller shall at Government expense furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment or subrogation) in obtaining recovery.

(l) Government acceptance of liability. To the extent the Government has accepted such liability under other provisions of this contract, the Seller shall not be reimbursed for liability to third persons for loss or damage to property or for death or bodily injury caused by aircraft during flight unless the flight crew members previously have been approved for this flight in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation under paragraph (b).

(m) Subcontracts. The Seller shall incorporate the requirements of this clause, including this paragraph (m), in all subcontracts.

## **ARTICLE VIII: PATENT RIGHTS AND TRADE SECRET RIGHTS**

### **A. Allocation of Principal Rights**

1. Unless the Seller shall have notified DARPA, in accordance with subparagraph B.2 below, that the Seller does not intend to retain title, the Seller will retain the entire right, title, and interest throughout the world to each Subject Invention consistent with the provisions of this Article.
2. With respect to any Subject Invention in which the Seller retains title, DARPA shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or to have practiced on behalf of the United States, the Subject Invention throughout the world.

### **B. Invention Disclosure, Election of Title, and Filing of Patent Application**

1. The Seller shall disclose each Subject Invention to DARPA within four (4) months after the inventor discloses it in writing to his company personnel responsible for patent matters. The disclosure to DARPA shall be in the form of a written report and shall identify the Contract and circumstances under which the Invention was made and the identity of the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological, or electrical characteristics of the Invention. The disclosure shall also identify any publication, sale, or public use of the invention and whether a manuscript describing the invention has been submitted and/or accepted for publication at the time of disclosure.
2. If the Seller determines that it does not intend to retain title to any such Invention, the Seller shall notify DARPA, in writing, within eight (8) months of disclosure to DARPA. However, in any case where publication, sale, or public use has initiated the one-year statutory period wherein valid patent protection can still be obtained in the United States, the period for such notice may be shortened by DARPA to a date that is no more than sixty (60) calendar days prior to the end of the statutory period.
3. The Seller may protect a Subject Invention to which it retains title either under applicable trade secret law or by filing for patent protection for such Subject Invention. If the Seller elects to protect a Subject Invention to which it retains title under applicable trade secret law, the Seller shall notify DARPA within sixty (60) days of its decision to do so. If the Seller elects to file for patent protection, the Seller shall file its initial patent application on a Subject Invention to which it elects to retain title within one (1) year after election of title or, if earlier, prior to the end of the statutory period wherein valid patent protection can be obtained in the United States after a publication, or sale, or public use. The Seller may elect to file patent applications in additional countries, including the European Patent Office and the Patent Cooperation Treaty, within either ten (10) months of the corresponding initial patent application or six (6) months from the date permission is granted by the Commissioner for Patents to file foreign patent applications, where such filing has been prohibited by a Secrecy Order.
4. The Seller shall notify DARPA of any decisions not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceedings on a patent, in any country, not less than thirty (30) calendar days before the expiration of the response period required by the relevant patent office.
5. Requests for extension of the time for disclosure election, and filing under Article VIII, may be granted at DARPA's discretion after considering the circumstances of the Seller and the overall effect of the extension.
6. The Seller shall submit to DARPA annual listings of Subject Inventions. At the completion of the Agreement, the Seller shall submit a comprehensive listing of all Subject Inventions identified during the course of the Agreement and the current status of each.

### **C. Conditions When the Government May Obtain Title**

Upon DARPA's written request, the Seller shall convey title to any Subject Invention to DARPA under any of the following conditions:

1. If the Seller fails to disclose or elects not to retain title to the Subject Invention within the times specified in Paragraph B of this Article; however, DARPA may only request title within sixty (60) calendar days after learning of the failure of the Seller to disclose or elect within the specified times;
2. In those countries in which the Seller fails to file patent applications within the times specified in Paragraph B of this Article; however, if the Seller has filed a patent application in a country after the times specified in Paragraph B of this Article, but prior to its receipt of the written request by DARPA, the Seller shall continue to retain title in that country; or

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

#### **D. Minimum Rights to the Seller and Protection of the Seller's Right to File**

1. The Seller shall retain a nonexclusive, royalty-free license throughout the world in each Subject Invention to which the Government obtains title, except if the Seller fails to disclose the Subject Invention within the times specified in Paragraph B of this Article. The Seller's license extends to its subsidiaries and affiliates, if any, and includes the right to grant licenses of the same scope to the extent that the Seller was legally obligated to do so at the time the Agreement was awarded. The license is transferable only with the approval of DARPA, except when transferred to the successor of that part of the business to which the Subject Invention pertains. DARPA approval for license transfer shall not be unreasonably withheld.

2. The Seller's domestic license may be revoked or modified by DARPA to the extent necessary to achieve expeditious Practical Application of the Subject Invention pursuant to an application for an exclusive license submitted consistent with appropriate provisions at 37 C.F.R. Part 404. This license shall not be revoked in that field of use or the geographical areas in which the Seller has achieved Practical Application and continues to make the benefits of the Subject Invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DARPA to the extent the Seller, its licensees, or the subsidiaries or affiliates have failed to achieve Practical Application in that foreign country.

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

#### **E. Action to Protect the Government's Interest**

1. The Seller agrees to execute or to have executed and promptly deliver to DARPA all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those Subject Inventions to which the Seller elects to retain title, and (ii) convey title to DARPA when requested under Paragraph C of this Article and to enable the Government to obtain patent protection throughout the world in that Subject Invention.

2. The Seller agrees to require its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Seller each Subject Invention made under this Contract in order that the Seller can comply with the disclosure provisions of Paragraph B of this Article.

3. The Seller shall include, within the specification of any United States patent application and any patent issuing thereon covering a Subject Invention, the following statement:

This invention was made with Government support under Agreement No. HR0011-17-9-0001, awarded by DARPA. The Government has certain rights in the invention.

#### **F. Lower Tier Agreements**

The Seller shall include this Article, suitably modified, in all subcontracts funded under this Contract, regardless of tier, for experimental, developmental, or research work.

#### **G. Reporting on Utilization of Subject Inventions**

1. The Seller agrees to submit, during the term of the Contract, an annual report on the utilization of a Subject Invention or on efforts at obtaining such utilization that are being made by the Seller or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Seller, if any and such other data and information as the agency may reasonably specify. The Seller also agrees to provide additional reports as may be requested by DARPA in connection with any march-in proceedings undertaken by DARPA in accordance with Paragraph I of this Article. DARPA agrees it shall not disclose such information to persons outside the Government without permission of the Seller, unless required by law.

2. All required reporting shall be accomplished, to the extent possible, using the i-Edison reporting website: <https://s-edison.info.nih.gov/iEdison/>. To the extent any such reporting cannot be carried out by use of i-Edison, reports and communications shall be submitted to the AO and Administrative Agreements Officer (AAO), where one is appointed.

#### **H. March-in Rights**

1. The Seller agrees that, with respect to any Subject Invention in which it has retained title, DARPA has the right to require

the Seller, an assignee, or exclusive licensee of a Subject Invention to grant a non-exclusive license to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Seller, assignee, or exclusive licensee refuses such a request, DARPA has the right to grant such a license itself if DARPA determines that:

- A. Such action is necessary because the Seller or assignee has not taken effective steps, consistent with the intent of this Agreement, to achieve Practical Application of the Subject Invention;
- B. Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Seller, assignee, or their licensees;
- C. Such action is necessary to meet requirements for public use and such requirements are not reasonably satisfied by the Seller, assignee, or licensees; or
- D. Such action is necessary because the agreement required by Paragraph H of this Article has not been obtained or waived or because a licensee of the exclusive right to use or sell any Subject Invention in the United States is in breach of such Contract.

2. The procedures under 37 CFR 401.6 shall govern the exercise of the march in rights.

3. In the event the Government chooses to exercise its March-in Rights, the Seller agrees, upon written request from the Government, to deliver at no additional cost to the Government, all Technical Data and Computer Software necessary to achieve practical application of the Subject Invention within sixty (60) calendar days from the date of the written request. The Government shall retain Unlimited Rights or Government Purpose Rights, as defined below and negotiated under this agreement, to this delivered Technical Data and Computer Software. If such Technical Data and Computer Software is subject to Limited or Restricted Rights under this Agreement, in that case, the Seller agrees to grant a no cost license to the Technical Data and Computer Software to a responsible applicant or applicants which is sufficient for the Government to achieve practical application of a subject invention.

**Government Purpose Rights:** The rights to –

- (i) Use, modify, reproduce, release, perform, display, or disclose Technical Data and Computer Software within the Government without restriction; and
- (ii) Release or disclose Technical Data or Computer Software outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that Data for United States Government Purposes.

## **I. Government Recognition of Trade Secrets**

With respect to Article VIII entitled, “Patent Rights and Trade Secret Rights,” the Government shall recognize as valid the current business practices of the Seller in maintaining and protecting certain Subject Inventions as trade secrets under the following provisions:

- 1. For the purpose of this Article, “Trade Secret” means a Subject Invention involving or relating to the Seller’s proprietary specifications, process of manufacturing and/or manufacturing protocols, for which the Seller elects not to file a patent application and to maintain as a trade secret.
- 2. Consistent with all the procedural requirements of this Article, including, without limitation, the requirements for disclosure (as provided below for Subject Inventions that the Seller maintains as trade secrets) and election to retain title under Paragraph B of this Article, and March-in Rights under Paragraph I of this Article, and Reporting on Utilization of Subject Inventions under Paragraph G of this Article, Seller may elect to retain all right, title and interest throughout the world to trade secrets instead of as patents under the following circumstances:
  - (a) Protection as a trade secret is consistent with the purpose of this Agreement;
  - (b) Protection as a trade secret is consistent with Seller’s current business practices, including use of suitable nondisclosure and confidentiality agreements, except with Government employees who are subject to 18 U.S.C. § 1905; and
  - (c) With respect to each Subject Invention, the Seller demonstrates and determines in its disclosure and notification of election of the Subject Invention in accordance with Paragraph B of this Article and to the reasonable satisfaction of the Government that a total departure from protection under the patent system is warranted under the circumstances.

The Government shall accept the Seller’s election to retain title to a Subject Invention as a trade secret with respect to (a), (b), and (c) above and, accordingly, will not request the title to the Subject Invention, unless such election is clearly unreasonable

under the circumstances.

3. If the Government does not accept the Seller's election to retain title to a Subject Invention as a trade secret, the Government shall notify Seller, in writing, of the Government's decision within sixty (60) calendar days of Seller's written notification of its election pursuant to Section B.2 of this Article. If the Government so notifies Seller, Seller shall have thirty (30) calendar days from the date of the Government's notification to notify the Government, in writing, of either its election to retain title to the Subject Invention as a patent (thus triggering all related obligations under this Article as of that election) or its election to decline title to the Subject Invention. If the Government does not provide any written notification to Seller as to the Government's acceptance or rejection of Seller's election to retain title to a Subject Invention as a trade secret within sixty (60) calendar days of Seller's written notification of its election pursuant to Section B.2 and B.3 of this Article, then the Government shall be deemed to have accepted Seller's election to retain title to the Subject Invention as a trade secret.

4. Consistent with allocation of rights under Paragraph A of this Article, including the allocation of Government Purpose Rights, with respect to any Subject Invention in which Seller retains title as trade secret, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced on behalf of the United States, solely for Government Purposes, the Subject Invention throughout the world.

5. The Government is authorized by this Agreement to disclose to its Sellers and support service contractors, without restriction and any consent whatsoever by the Seller, for Government Purposes only, any Subject Invention in which the Seller retains title as trade secret, provided that the Seller (Boeing) and the Seller or support service contractor sign a Non-disclosure/Confidentiality Agreement or the support service contractor executes an appropriate nondisclosure contract clause with the Government prior to the disclosure by the Government of the trade secret prior to the disclosure by the Government of the trade secret.

6. Materials that are deemed a Subject Invention in which Seller retains title as trade secret, shall be marked by the Seller as follows: "Boeing trade secret information subject to the Trade Secrets Act, 18 U.S.C. § 1905. Funded, in part, by the U.S. Government under Agreement HR0011-17-9-0001. The Government has Government Purpose Rights in the trade secret as set forth in Article IX contained in the above identified Agreement, and Seller retains title to the trade secret. Any reproduction of this trade secret, or portions thereof, marked with this legend must also reproduce this marking."

7. The Government shall neither be required to maintain the secrecy of the Subject Invention which the Seller retains as a trade secret, nor be liable for disclosure of the trade secret if the same:

- (a) Was in the public domain at the time it was disclosed by the Seller to the Government; or
- (b) Becomes part of the public domain without breach of this Agreement; or
- (c) Is or was knowingly disclosed by the Seller to a third party without restriction.

8. To the extent consistent with Federal law and regulation, the Government shall not be liable for infringement or misappropriation of Subject Invention retained by the Seller as trade secret by third parties.

## **J. Authorization and Consent**

The Government authorizes and consents to all use and manufacture of any Invention described in and covered by a United States patent in the performance of this Agreement or any subcontract at any tier.

The Seller shall report to the Agreements Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this agreement of which the Seller has knowledge.

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

## **ARTICLE IX: DATA RIGHTS**

### **A. Allocation of Principal Rights**

1. The Parties agree that in consideration for Government funding, the Seller intends to reduce to Practical Application items, components and processes developed under this Agreement.



2. With respect to Technical Data and Computer Software developed, generated, provided and/or delivered under this Contract, the Government shall receive Government Purpose Rights (GPR), as defined in Article VIII, Paragraph H.3, except for Seller's Data Rights assertions (if applicable) that will be delivered with Limited Rights or Restricted Rights.

3. With respect to the Technical Data and Computer Software listed in Seller's Data Rights assertions (if applicable) with an asserted rights category of Limited Rights or Restricted Rights, the Government shall have Limited Rights or Restricted Rights, as applicable, as defined herein, unless it can be shown that another license right had been previously negotiated for the same Technical Data or Computer Software under another Government agreement or contract.. This Technical Data and Computer Software, previously developed exclusively at private expense or partially at private expense and to be furnished to the Government with Limited Rights or Restricted Rights in support of all of the deliverables required under this Agreement, may be furnished within reports, as an addendum to a report, or in separate reports at the Seller's discretion and marked in accordance with instructions under paragraph B of Article IX: Data Rights.

4. Notwithstanding the provisions of Paragraph 2 above, the Seller agrees to provide the Government with Unlimited Rights, as defined herein, for the following Technical Data items:

- Top-level mass properties for both flight system, with and without propellants, and overall subsystem masses
- High-level design configurations (e.g., the size, shape and overall configuration, and general images)
- Load cases, loads designed to, basic fabrication methods
- System-level performance (including payloads, average thrust, and average Isp for all stages), subsystem operating principles, concepts of employment (launch base facilities and processing)
- Mission support data (top-level trajectories that support specific missions, types of payloads, capabilities enabled, etc.)
- Operations data as provided in the Payload User's Guide for the Commercial/Operational system, e.g., nominal time to operate system, integrate and launch a payload, weight and CG envelopes, modal frequency envelope.
- Top-level information on ground support equipment, mission support systems, and operations/remote-monitoring centers
- Top level schedules showing booster and upper stage processing flows presented in the Payload User's Guide.
- Interface Control Document (ICD) for inclusion in the Payload User's Guide that defines the interface between the operational/commercial Upper Stage and Payload. This includes the generation of a generic top level ICD to define the interface for different Payload Flight Systems (PFS) including different upper stages, hypersonic test beds, and interceptor targets.

5. Following the completion of the this Agreement, if Buyer does not conduct and complete a minimum of one (1) launch service for a commercial customer or the Government within ten (10) years after the end of the period of performance of this Agreement, the license rights provided to the Government to all Technical Data and Computer Software developed partially with Government funding and delivered under this Agreement with Limited Rights or Restricted Rights, pursuant to Seller's Data Rights assertions (if applicable), shall change to Government Purpose Rights (GPR).

6. The Seller agrees, with respect to Technical Data and Computer Software developed, generated and/or delivered under this Agreement by Seller, the Government may, during the period of performance, and within three (3) years after completion of the Agreement or termination of this Agreement, whichever comes first, require delivery of Technical Data and Computer Software previously developed, generated and/or delivered under this Agreement, including those items developed exclusively at private expense and listed in Seller's Data Rights assertions (if applicable), but excluding proprietary source code, processes, GN&C and CADs software. If such Technical Data or Computer Software are requested after completion or termination of this Agreement, the Government will compensate the Seller for converting the Technical Data and Computer Software into the prescribed form and for reproduction and delivery of all Technical Data and Computer Software necessary to achieve Practical Application.

7. The parties acknowledge that the Seller's Data Rights assertions (if applicable) may be updated from time to time so that Seller and its team can employ intellectual property to efficiently execute the requirements of this Agreement.

## **B. Marking of Data**

1. All Technical Data, Computer Software delivered with Unlimited Rights under this Agreement/Contract shall be marked with the following legend:

UNLIMITED RIGHTS (provided by Seller's Name) under OTA

HR0011-17-9-0001, The Boeing Company, Boeing Defense Space & Security

5301 Bolsa Avenue, Huntington Beach, CA 92647

2. All Technical Data and Computer Software delivered with Government Purpose Rights under this Agreement/Contract, if consistent with the Data Rights Assertions List contained in OTA HR0011-17-9-0001 shall be marked with the following legend:

GOVERNMENT PURPOSE RIGHTS (provided by Seller's Name) under OTA

HR0011-17-9-0001, The Boeing Company, Boeing Defense Space & Security

5301 Bolsa Avenue, Huntington Beach, CA 92647

Use, duplication, or disclosure is subject to the restrictions as stated in Agreement HR0011-17-9-0001 between the Government and The Boeing Company.

Expiration Date: Ten (10) years from date of execution of Agreement.

3. Technical Data and Computer Software furnished to the Government with Limited or Restricted Rights under this Contract, if consistent with the Data Rights Assertions List contained in OTA HR0011-17-9-0001 may be furnished with a report, as an addendum to a report, or in separate reports at the Seller's discretion and marked as follows:

a. Limited Rights Markings. Technical Data delivered or otherwise furnished to the Government with Limited Rights shall be marked with the following legend:

LIMITED RIGHTS (provided by Seller's Name) under OTA

HR0011-17-9-0001,

The Boeing Company, Boeing Defense Space & Security

5301 Bolsa Avenue, Huntington Beach, CA 92647

Use, duplication, or disclosure is subject to the restrictions as stated in Agreement HR0011-17-9-0001 between the Government and The Boeing Company. Any reproduction of Technical Data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such Data must promptly notify the above named Seller.

b. Restricted Rights Markings: Computer Software delivered or otherwise furnished to the Government with Restricted Rights shall be marked with the following legend:

RESTRICTED RIGHTS (provided by Seller's Name) under OTA

HR0011-17-9-0001, The Boeing Company, Boeing Defense Space & Security

5301 Bolsa Avenue, Huntington Beach, CA 92647-204

Use, duplication, or disclosure is subject to the restrictions as stated in Agreement HR0011-17-9-0001 between the Government and The Boeing Company. Any reproduction of computer software, software documentation or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Seller.

### **C. Lower Tier Agreements**

The Seller shall include this Article, suitably modified to identify the Parties, in all subcontracts funded under this Agreement regardless of tier, for experimental, developmental, or research work.

## **ARTICLE X: FOREIGN ACCESS TO TECHNOLOGY**

This Article shall remain in effect during the term of the Contract and for five (5) years thereafter.

### **A. General**

The Parties agree that research findings and technology developments arising under this Contract may constitute a significant enhancement to the national defense, and to the economic vitality of the United States. Accordingly, access to important technology developments under this Contract by Foreign Firms or Institutions must be carefully controlled. The controls contemplated in this Article are in addition to, and are not intended to change or supersede, the provisions of the International Traffic in Arms Regulations (22 C.F.R. Part 120, et seq.), the National Security Program Operating Manual (NISPOM) (DoD 5220.22-M), and the Department of Commerce's Export Administration Regulations (15 C.F.R. Part 730, et seq.).

#### **B. Restrictions on Sale or Transfer of Technology to Foreign Firms or Institutions**

1. In order to promote the national security interests of the United States and to effectuate the policies that underlie the regulations cited above, the procedures stated in subparagraphs B.2, B.3, and B.4 below shall apply to any transfer of Technology. For purposes of this paragraph, a transfer includes a sale of the company, and sales or licensing of Technology. Transfers do not include:

- a. Sales of products or components; or
- b. Licenses of software or documentation related to sales of products or components; or
- c. Transfer to foreign subsidiaries of the Seller for purposes related to this Contract; or
- d. Transfer which provides access to Technology to a Foreign Firm or Institution which is an approved source of supply or source for the conduct of research under this Contract provided that such transfer shall be limited to that necessary to allow the firm or institution to perform its approved role under this Contract.

2. The Seller shall provide timely notice to the Buyer of any proposed transfers from the Seller of Technology developed under this Contract to Foreign Firms or Institutions. If DARPA and the Buyer determines that the transfer may have adverse consequences to the national security interests of the United States, the Seller, its vendors, DARPA, and the Buyer shall jointly endeavor to find alternatives to the proposed transfer which obviate or mitigate potential adverse consequences of the transfer but which provide substantially equivalent benefits to the Seller.

3. In any event, the Seller shall provide written notice to the Buyer of any proposed transfer to a Foreign Firm or Institution at least forty-five (45) calendar days prior to the proposed date of transfer. Such notice shall cite this Article and shall state specifically what is to be transferred and the general terms of the transfer. Within forty (40) calendar days of receipt of the Seller's written notification, the Buyer shall advise the Seller whether it consents to the proposed transfer. No transfer shall take place until a decision is rendered.

4. In the event a transfer of Technology to Foreign Firms or Institutions which is NOT approved by the Buyer takes place, the Seller shall (a) refund to the Buyer funds paid for the development of the Technology and (b) the Government shall have a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced on behalf of the United States the Technology throughout the world for Government and any and all other purposes, particularly to effectuate the intent of this Contract. Upon request of the Buyer, the Seller shall provide written confirmation of such licenses.

#### **C. Lower Tier Agreements**

The Seller shall include this Article, suitably modified, to identify the Parties, in all subcontracts or lower tier agreements, regardless of tier, for experimental, developmental, or research work.

#### **ARTICLE XIII: CIVIL RIGHTS ACT**

This Contract is subject to the compliance requirements of Title VI of the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000d) relating to nondiscrimination in Federally assisted programs. The Seller has signed an Assurance of Compliance with the nondiscriminatory provisions of the Act.

#### **ARTICLE XIV: PUBLIC RELEASE OR DISSEMINATION OF INFORMATION**

(1) There shall be no dissemination or publication, except within and between the Seller its subcontractors, the Buyer, and the Government of information developed under this Contract or contained in the reports to be furnished pursuant to this Contract without prior written approval of the Buyer. All technical reports will be given proper review by appropriate authority to determine which Distribution Statement is to be applied prior to the initial distribution of these reports by the Seller. Unclassified patent related documents are exempt from prepublication controls and this review requirement. There shall be no dissemination or publication, except within and between the Seller and any subcontractor(s), of information developed under this effort without first obtaining approval for public release from the DARPA Public Release Center (PRC), through the Buyer. Papers prepared in response to academic requirements which are not intended for public release outside the academic institution are exempt from prepublication controls.

(2) The Seller shall submit all proposed public releases for review and approval as instructed at <http://www.darpa.mil/work-with-us/contract-management/public-release>. Public releases include press releases, specific publicity or advertisement, and publication or presentation, but exclude those relating to the open sourcing or licensing, sales or other commercial exploitation of products, services or technologies. In addition, articles for publication or presentation will contain a statement on the title page worded substantially as follows:

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