



Negotiating a Subcontract that Pleases Both Sides

July 28, 2022

Daniel J. Kelly & Cara Wulf
Partners
McCarter & English LLP
cwulf@mccarter.com
dkelly@mccarter.com

PCI · Washington, DC 20006 · (202) 775-7240

Our Agenda

- The Need for a Negotiated Agreement
- Top 10 (+2) Most Important Terms That Require Negotiation
 - Scope & Deliverables
 - Limitation of Liability
 - Indemnification
 - Price/Form of Contract
 - Changes
 - Delivery & Acceptance
 - Warranties
 - Payment
 - IP
 - Termination
 - Disputes
- Mandatory vs. Permissive Flow-Downs: BEWARE THE BROAD FLOW-DOWN LINK!

What is a Subcontract in the U.S. Supply Chain? Things to Think About

- It is Not a Government Contract
- There is No Privity With the Government
- It is a Product of Negotiation Between the Parties
- It is Constrained Only by Mandatory Flow-Downs
- Think of It in Two Parts: Negotiated Terms and FAR and FAR Supp Flow-Downs
- Commercial Item Suppliers Have Very Limited Mandatory Flow-Downs
- Flow-Downs Can Have Extended Reach
- It Can Take Many Forms

A Must – a Negotiated Agreement

Alternatives Are All Bad

- Starting Work Before Definitive Agreement
- Competing Forms
- Email Exchanges
- Attaching the Prime Contract

The Dreaded Standard Forms by the Behemoth Prime

[Raytheon Technologies](#)

RTX Standard Terms and Conditions of Purchase – Product (November 2021)

Flowdown of U.S. Government Contract Clauses under U.S. Government Contracts (April 2022)

[Lockheed Martin](#)

CORPDOC 2 GENERAL PROVISIONS FOR SUBCONTRACTS/PURCHASE ORDERS FOR COMMERCIAL ITEMS UNDER A U.S. GOVERNMENT PRIME CONTRACT (ALL AGENCIES) (2022)

CORPDOC 2A FEDERAL ACQUISITION REGULATION (FAR) AND DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT (DFARS) FLOWDOWN PROVISIONS FOR SUBCONTRACTS/PURCHASE ORDERS FOR COMMERCIAL ITEMS UNDER A UNITED STATES DEPARTMENT OF DEFENSE PRIME CONTRACT (2022)

Top 10 *Negotiated* Contract Terms for Aerospace and Defense Sectors*

1. **Limitation of Liability (3.1)**
2. **Price/Charge/ Price Changes (2.9)**
3. **Indemnification (2.9)**
4. **Scope and Goals/Specification [Deliverables] (2.7)**
5. **Termination (2.7)**
6. **Payment/Payment Options (2.6)**
7. **Responsibility of the Parties (2.6)**
8. **Warranty (2.6)**
9. **Liquidated Damages (2.5)**
10. **Delivery (2.5)**

*Per World Commerce & Contracting 2020 Study (Red Terms top terms since surveys began 2000)

0-4 Level of Importance (2 Moderately Important; 3 Very Important)

NOT ON THE LIST

- Intellectual Property
- Order of Precedence
- Term
- Invoices/Late Payment
- Data Privacy
- Data Security/Cybersecurity
- Acceptance
- Regulatory Compliance [Flow-Downs]
- Change Management
- Force Majeure
- Dispute Resolution

Top 10 *Most Important* Terms for Aerospace and Defense Sectors*

**1.Scope and Goals/Specification
[Deliverables] (3.2)**

2.Responsibility of the Parties (3.1)

3.Price/Charge/Price Changes (3.1)

4.Delivery (3.1)

5.Service Levels (3.0)

6.Limitation of Liability (2.9)

7.Data Security (2.9)

8.Data Privacy (2.8)

9.Change Management (2.8)

10.Warranty (2.9)

NOT ON NEGOTIATED TERMS LIST

- Service Levels
- Data Security
- Data Privacy
- Change Management

OFF THE RADAR

- Intellectual Property
- Order of Precedence
- Term
- Invoices/Late Payment
- Acceptance
- Regulatory Compliance [Flow-Downs]
- Force Majeure
- Dispute Resolution

1. Scope and Deliverables

Subcontractor Wish List for Scope & Deliverables

- Clearly defined description of work with assigned responsibilities for subcontractor
- SOW tied to payments and to deliverables – to CLINS and SLINS
- Disclosure/relationship with prime contractor's SOW
- Limit IP deliverables

2. Limitation on Liability

FAR 52.212-4(p)*

Limitation of liability. Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for **consequential damages** resulting from any defect or deficiencies in accepted items.

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

Subcontractor Wish List

- Expand scope of damages covered
- Expand scope of actions covered
- Extend limitations or cap limitations
- Extend categories of persons/entities protected by limitation
- Include statute of limitations
- Extend to third party actions

Raytheon and LM – No Clause

3. Indemnification

FAR 52.212-4(h)*

Patent indemnity. The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, **provided the Contractor is reasonably notified of such claims and proceedings.**

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

Common Embedded Indemnity Provisions

- EVERYTHING
- Property Damage, Personal Injury, and Wrongful Death
- Infringement
- Compliance with the Law
- Export Control
- Defective Cost or Pricing Data
- Contract Disputes Act Appeals Made on Sub's Behalf

“Seller shall indemnify and hold Buyer and its customers harmless from any and all expenses, liability, and loss of any kind (including all costs and expenses including attorneys’ fees) arising out of claims, suits, or actions”

Subcontractor Wish List

- Limitations on types of claims
- Limiting indemnitees
- Adding concept of fault or negligence
- Limitations on who is making the claim
- Notice
- Opportunity to defend and settle
- Duty to cooperate
- Caps (e.g., at insurance)
- Carving out nature of work being performed at prime
- Reasonableness of costs, expenses and fees
- For patent indemnity – right to substitute and relationship with “Authorization and Consent”

Raytheon

7. INDEMNIFICATION Supplier shall indemnify and hold harmless Buyer, **Buyer's Customers**, insurers, Affiliates and their employees, agents, officers, and directors from and against all suits, claims, judgments, awards, losses, damages, costs, or expenses (including attorneys' fees) **relating to, arising out of, or caused by (i) Supplier's performance hereunder, (ii) any act or omission of Supplier, or (iii) any Goods or Services.** Supplier's indemnification obligation hereunder covers, without limitation, injuries, sickness, diseases (including occupational disease whenever occurring), or death of **Supplier employees.**

LM

17. Indemnity

SELLER shall defend, indemnify, and hold harmless LOCKHEED MARTIN, its officers, directors, employees, consultants, agents, affiliates, successors, permitted assigns and customers from and against all losses, costs, claims, causes of action, damages, liabilities, and expenses, including attorney's fees, all expenses of litigation and/or settlement, and court costs, arising from any act or omission of SELLER, its officers, employees, agents, suppliers, or subcontractors at any tier, in the performance of any of its obligations under this Contract.

4. Price/Form of Contract

Part 44.2 – The FAR’s Influence on Price and Form of Contract

- Approved Purchasing System Relieves Consent for Some Fixed-Price Contracts (Threshold Application)
- No APS Means Approval for Cost-Reimbursement, T&M, and Labor-Hour Subcontracts
- Adequate Price Competition
- Adequate Cost or Price Analysis
- Certified Cost or Pricing Data
- FAR 44.402 Endorses Subcontracting Commercial Products and Services. Still have Price Reasonableness Determination Under 12.209

Subcontractor Wish List

- Typically fixed price vs. cost reimbursement
- Now with supply chain issues – the tables have turned! – varieties of fixed price contracts with adjustments
- Avoid most favored customer clauses
- Avoid intrusive cost or pricing data review
- Price should reflect additional risks of being a government contractor

5. Changes

FAR 52.212-4(c)*

Changes. Changes in the terms and conditions of this contract may be made only **by written agreement of the parties.**

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

Subcontractor Wish List

- Mutuality
- Limiting breadth
- Tied to government action
- Addressing constructive changes and authority
- Claim process – no unreasonable deadlines
- Flexibility with duty to continue performing
- Limiting verification of claim

Raytheon

11. CHANGES 11.1. Buyer's authorized procurement representative (which does not include Buyer's engineering and technical personnel) may **unilaterally make changes within the general scope of the Order, including changes in whole or part to: (i) shipping, waste reduction or packing instructions, (ii) place of delivery, (iii) **any designs, Specifications and drawings**, (iv) **the statement of work**, (v) the method or manner of performance, (vi) Buyer Items, facilities, equipment, or materials, (vii) flowdown requirements from contracts between Buyer and Buyer's Customer, and/or (viii) quality requirements (collectively "Change(s)"). Supplier shall perform any Changes ordered by Buyer. Any Order terms that incorporate flexibility for variations or modifications shall not be considered Changes within the meaning of this Section.**

Raytheon (cont.)

11.2. Except as set forth herein, or as otherwise agreed, if any Change under this Section causes an increase or decrease in the cost of or the time required for performance, an equitable adjustment shall be made in price or delivery schedule or both ("Adjustment Claim"), and Buyer shall modify the Order accordingly. If the cost of property or material made obsolete or excess as a result of a Change is included in the Adjustment Claim, Buyer may direct the disposition of such property or material. For Supplier-initiated requests, Supplier must submit an Adjustment Claim in writing in the form of a complete change proposal, fully supported by factual information, to Buyer's procurement representative no later than 15 days after Supplier's receipt of the Change. Supplier acknowledges and agrees that changes in delivery/performance schedule are normal and anticipated in the course of the program. Supplier further agrees that the cost of such changes is included in the prices provided under the Order, and that any such change does not constitute a Change under this Section. Notwithstanding any pending Adjustment Claims, Supplier shall diligently proceed with the performance of the Order, inclusive of the Change, as directed by Buyer.

11.3. Notwithstanding the foregoing, if any Change is the result of a requirement by Buyer's Customer, Supplier is entitled to an equitable adjustment only to the extent that Buyer receives such an adjustment from Buyer's Customer.

LM

5. CHANGES

(a) The LOCKHEED MARTIN Procurement Representative may at any time, by written notice, and without notice to sureties or assignees, make changes **within the general scope of this Contract in any one or more of the following: (i) drawings, designs, or specifications; (ii) method of shipping or packing; (iii) place of inspection, acceptance, or point of delivery; and (iv) delivery schedule.**

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of this Contract, **LOCKHEED MARTIN shall make an equitable adjustment in the Contract price and/or delivery schedule, and modify this Contract accordingly.** Changes to the delivery schedule will be subject to a price adjustment only.

(c) SELLER must assert its **right to an equitable adjustment** under this clause within thirty (30) days from the date of receipt of the written change order from LOCKHEED MARTIN. If SELLER's proposed equitable adjustment includes the cost of property made obsolete or excess by the change, LOCKHEED MARTIN shall have the right to prescribe the manner of disposition of the property.

(d) Failure to agree to any adjustment shall be resolved in accordance with the "Disputes" clause of this Contract. However, nothing contained in this "Changes" clause shall excuse SELLER from proceeding without delay in the performance of this Contract as changed.

6. Delivery and Acceptance

Delivery to Warranty Timeline

Delivery

Inspection

Rejection/Repair/Replace/Price Adj.

Acceptance

Warranty

FAR 52.212-4(a)*

Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the **right to inspect** or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its **post-acceptance rights** –

1. **Within a reasonable time after the defect was discovered or should have been discovered;** and
2. Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

Acceptance is defined in Prompt Payment Act regs as an **acknowledgement by the Government that goods received and services rendered conform with the contract requirements.**

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

Delivery to Warranty Pressure Points

- Who can inspect and when and where?
- Time period for acceptance once delivered/inspected
- Remedies other than rejection – repair and replace, cost adjustment, cost or third party repair or replace
- Time limits for acceptance
- Is Customer acceptance an issue?
- Latent defects and fraud
- Seller notice of defects and seller assurances
- Watch out for creeping warranties

Raytheon

5. INSPECTION, ACCEPTANCE AND REJECTION OF GOODS

5.1. Supplier shall only tender Goods to Buyer **that have passed inspection** in accordance with the applicable inspection system and that otherwise conform to all requirements of an Order.

5.2 Buyer may provide written notice of acceptance of the Goods to Supplier. However, in the absence of Buyer's written acceptance and notwithstanding (i) prior inspection of, (ii) payment for, (iii) use of, (iv) delivery of, or (v) transfer of title to or risk of loss of the Goods to Buyer, **acceptance shall not be deemed to occur until 12 months following Buyer's receipt of Goods ("Inspection Period")**.

5.3 During the Inspection Period, Buyer may: (i) reject all or a portion of any nonconforming Goods; or (ii) accept all or a portion of such nonconforming Goods with a price reduction for the cost of repair or the diminution of value.

5.4 Buyer may reject and/or return, at Supplier's risk and expense, shipments of Goods made in excess of the Order quantities, or in advance of the scheduled Delivery Date. Buyer may defer payment on Goods delivered in advance of the scheduled Delivery Date until the scheduled Delivery Date for such Goods.

Raytheon

5.5. Within 30 days of Supplier's receipt of Buyer's notification of a nonconformity, Supplier shall, at Supplier's sole cost and expense, investigate the nonconformity, deliver to Buyer a written report of its investigation and conclusions, and formulate a corrective action plan acceptable to Buyer. Once approved by Buyer, Supplier must then timely implement such corrective action plan.

5.6 With respect to nonconforming Goods rejected prior to acceptance, Buyer may at its election and at Supplier's risk and expense (i) hold nonconforming Goods for Supplier, or (ii) return nonconforming Goods to Supplier for, at Buyer's option, either (a) full credit or refund, or (b) replacement Goods to be received within 24 hours of nonconformity notification. Title to such rejected Goods returned to Supplier shall transfer to Supplier upon such delivery and such Goods shall not be replaced by Supplier except upon written instructions from Buyer. Replacement Goods delivered to Buyer hereunder shall be shipped at Supplier's expense and risk of loss. Additionally, nonconforming Goods rejected prior to acceptance shall not be tendered again to Buyer for acceptance unless permitted by Buyer and applicable law and accompanied by a disclosure of Buyer's prior rejection.

5.7 Notwithstanding any other provision, in addition to the foregoing, Supplier shall be liable for Buyer's actual costs, expenses and damages related to or arising from nonconforming Goods, including, but not limited to labor and other costs related to transportation, expediting, removal, disassembly, failure analysis, fault isolation, assembly, reinstallation, re-inspection, retrofit, replacement, and any and all other such corrective action costs incurred by Buyer.

LM

Section 21 Inspection and Acceptance

(a) LOCKHEED MARTIN and its customer may inspect all Work at reasonable times and places, including, when practicable, during manufacture and before shipment. SELLER shall provide all information, facilities, and assistance necessary for safe and convenient inspection without additional charge.

(b) No such inspection shall relieve SELLER of its obligations to furnish and warrant all Work in accordance with the requirements of this Contract. LOCKHEED MARTIN's final inspection and **acceptance** shall be at destination.

(c) **If SELLER delivers non-conforming Work, LOCKHEED MARTIN may, in addition to any other remedies available at law or at equity: (i) accept all or part of such Work at an equitable price reduction; or (ii) reject such Work; or (iii) require SELLER, at SELLER's cost, to make all repairs, modifications, or replacements at the direction of LOCKHEED MARTIN necessary to enable such Work to comply in all respects with Contract requirements.**

(d) SELLER shall not re-tender rejected Work without disclosing the corrective action taken.

7. Warranties

FAR 52.212-4(o)*

Warranty. The Contractor warrants and implies that the items delivered hereunder are **merchantable and fit for use for the particular purpose** described in this contract.

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

Warranty – Common Pressure Points

- Excluding implied warranties
- Limiting warranty period
- When does warranty period commence
- Limitations on remedy
- Subject matter of warranty
 - Defects in workmanship and materials
 - Defects in design
 - Conform to specifications
 - High professional standards

Raytheon

6. WARRANTY 6.1. Supplier warrants to Buyer, Buyer's successors, assigns, and Buyer's Customers that all Goods provided under the Order shall be, upon acceptance thereof, and thereafter continue to be: (i) merchantable; (ii) fit for the purpose intended; (iii) new; (iv) free from defects in material and workmanship; (v) free from defects in design if the design is not provided by Buyer; (vi) manufactured in strict accordance and compliance with the Specifications; (vii) free from liens or encumbrances on title; and (viii) free of Harmful Code (collectively, "Warranty"). If the Order requires specific Goods to perform as a system, the foregoing Warranty shall also apply to those Goods as a system. Inspection (including Buyer's approval of Supplier's inspection process and any subsequent remedial measures), and acceptance or use of Goods furnished hereunder shall not affect Supplier's obligations under this Warranty, and the Warranty shall survive any such inspection, testing, acceptance, and use.

6.2 Supplier warrants to Buyer, Buyer's successors and assigns, and Buyer's Customers that all Services provided under or in connection with an Order: (i) have been, if applicable, and will be performed in a professional and workmanlike manner and in accordance with current, sound and highest generally accepted industry standards and practices by appropriately licensed, trained, supervised personnel who are experienced in the appropriate fields; and (ii) do, if applicable, and will conform to and be in compliance with all applicable Specifications, performance requirements and other requirements contained in the Order (the "Additional Service Warranty").

Raytheon

6.3 Buyer **may** require Supplier to promptly **(i) repair, replace, or refund amounts paid for, at Buyer's option, any Goods which breach the Warranty; and (ii) re-perform, correct, or refund amounts paid for, at Buyer's option, any Services which breach the Additional Service Warranty.** If Supplier fails or is unable to repair, replace, or correct nonconforming Goods or Services, Buyer may, at Buyer's option, make such repair, replacement, or correction and charge Supplier for the cost incurred thereby. Goods returned to Buyer hereunder shall be shipped at Supplier's expense and risk of loss and shall be accompanied by a notice stating whether they are new replacements or repaired originals and shall continue to be covered under this Warranty. Supplier shall conduct intake, review, analysis, and any other activity required to evaluate whether the returned Goods are covered by the Warranty at no expense to Buyer.

6.4 Notwithstanding any other provision, in addition to the foregoing, Supplier shall be liable for Buyer's actual costs, expenses and damages related to or arising from Goods and/or Services not conforming to the Warranty or the Additional Service Warranty, as applicable, including but not limited to labor and other costs related to transportation, expediting, removal, disassembly, failure analysis, fault isolation, assembly, reinstallation, reinspection, retrofit, **replacement**, and any and all other such corrective action costs incurred by Buyer.

6.5 Supplier warrants to Buyer that all **documentation and certifications** by Supplier or Supplier's **subcontractors or business partners related** to the Goods, Services and Order, as applicable, are current, complete, truthful, and accurate and have been signed or stamped, as applicable, by individuals authorized and qualified to sign or stamp such documentation and certifications.

LM

Section 42 Warranty

SELLER warrants that all Work furnished pursuant to this Contract shall strictly conform to applicable specifications, drawings, samples, descriptions, and other requirements of this Contract and be free from defects in design, material, and workmanship. **This warranty shall begin upon final acceptance and extend for a period of one (1) year. If any nonconforming Work is identified within the warranty period, SELLER, at LOCKHEED MARTIN's option, shall promptly repair, replace, or reperform the Work. Transportation of replacement Work, return of nonconforming Work, and reperformance of Work shall be at SELLER's expense. **If repair, or replacement, or reperformance of Work is not timely, LOCKHEED MARTIN may elect to return, reperform, repair, replace, or reprocure the non-conforming Work at SELLER's expense.** All warranties shall run to LOCKHEED MARTIN and its customers.**

8. Payment

FAR 52.212-4(I)

Payment.

(1) Items accepted. Payment shall be made for **items accepted** by the Government that have been delivered to the delivery destinations set forth in this contract.

(2) Prompt Payment. The Government will make payment in accordance with the **Prompt Payment Act** (31 U.S.C. 3903) and prompt payment regulations at 5 CFR Part 1315.

(6) Interest.

(i) All amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the **date due until paid unless paid within 30 days of becoming due**. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, as provided in (i)(6)(v) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

Prompt Payment Act – Fundamentals

5 CFR Part 1315; FAR 32.9; 52.232-25.

- Payment period begins on **receipt of a proper invoice** when required
- Payment is due 30 days of start of payment period unless specified in contract or if accelerated payment methods are not used
- An invoice is deemed received on the **later of** (1) actual receipt of an invoice or (2) the 7th day after the date goods are delivered or performance of services is completed or if a longer **acceptance** period is specified in the contract (constructive acceptance period for calculating interest)
- PPA regs require **acceptance to be executed as promptly as possible**. Commercial Products and Services not be subject to extensive acceptance period
- Acceptance is defined as an **acknowledgement by the Government that goods received and services rendered conform with the contract requirements**.
- For cost reimbursement contracts, payment is 30 days after date of receipt of a proper invoice.
- Not applicable to subcontracts except for construction contracts (payment within seven days of payment from agency)

Other Forms of Payment at the Prime Level

- Non-Commercial Products & Services (32.1)
 - Advance Payments
 - Progress Payments Based on Costs Incurred
 - Progress Payments Based on Stage of Completion
- Commercial Products & Services (32.2)
 - Commercial Advance Payments (15% Cap)
 - Commercial Interim Payment

Payment Pressure Points

- Pay when paid
- Trigger point for payment
- Days to payment
- When is payment before delivery justified

Protection for Payments to Subcontractors in FAR

FAR 32.112-1. Subcontractor may make assertion of non-payment directly to Contracting Officer (giving flexibility of CO to withhold payment to prime)

FAR 52.242-5 and 15 U.S.C. 637. The prime must self-disclose to the CO when a small business subcontractor receives a reduced or untimely payment and the reasons for such. A history of unjustified untimely payments may result in negative performance history.

FAR 52.232-27. For construction contracts, the prime must pay the subcontractor within 7 days after payment from the Government. Withholding payments from a sub is allowed if permitted under the agreement. However, withholding must be reported to the CO.

FAR 52.232-40. If the prime gets accelerated payments from the Government, it must make accelerated payments to its small business subcontractors to the maximum extent practicable and prior to when it is required under the subcontractor (upon receipt of a proper invoice and any other required documentation)

Raytheon (Flowdown of U.S. Govt. Contract Clauses under U.S. Govt. Clauses)

Looks to the FAR for Cost and T&M Contracts (and Construction Contracts)

52.216-7 Allowable Cost and Payment

52.216-8 Fixed Fee (allows withholding of a reserve)

52.232-7 Payments Under T&M and Labor Hour Contracts

52.232-20 Limitation of Cost (fully funded POs)

52.232-22 Limitation of Funds (incrementally funded POs)

52.232-27 Prompt Payment for Construction Contracts

LM

Section 28 Payments, Taxes and Duties

(a) Unless otherwise provided, **terms of payment shall be net thirty (30) days from latest of the following: (1) LOCKHEED MARTIN's receipt of SELLER's proper invoice; (2) scheduled delivery date of the Work; or (3) actual delivery of the Work at the final destination.**

(b) Each payment made shall be subject to reduction to the extent of amounts which are found by LOCKHEED MARTIN or SELLER not to have been properly payable, and shall also be subject to reduction for overpayments. SELLER shall promptly notify LOCKHEED MARTIN of any such overpayments and remit the amount of the overpayment except as otherwise directed by LOCKHEED MARTIN.

(c) LOCKHEED MARTIN shall have a right of setoff against payments due or at issue under this Contract or any other Contract between the parties.

(d) Payment shall be deemed to have been made as of the date of mailing LOCKHEED MARTIN's payment or electronic funds transfer.

(e) Unless otherwise specified, prices include all applicable federal, state, and local taxes, duties, tariffs, and similar fees imposed by any government, all of which shall be listed separately on the invoice.

9. Intellectual Property

Subcontractor Rights

- No Rights to Prime Except to Perform
- Flow-down on DFARS Data Rights and FAR/DFARS Patent Clause
- Avoid Deferred Delivery/Deferred Ordering Flow-Down
- If Commercial Item, Use of EULA
- Limitations of Delivery Tied to Prime's Obligations
- Participation in Data Assertions Table
- Direct Ability to Negotiate Directly with the Agency

Raytheon (Flow-down Terms) -- Data

7.1. Technical Data and Computer Software Ownership and License Rights.

7.1.1. Supplier acknowledges and agrees that the rights in Technical Data and Computer Software to be granted to the Government will be determined in accordance with the regulations set forth in FAR Part 27 and DFARS Part 227 based upon the specific Technical Data, Computer Software, and Goods to be performed under the Order and the assertions of restrictions on use, release, or disclosure of Supplier's Intellectual Property that are provided to Buyer for delivery to the Government. **Supplier grants licenses to the Government as required to be granted in DFARS 252.227-7013, 7014, 7015, 7016 and 7018, or for Prime Contracts with NASA in FAR 52.227-14, for Technical Data and Computer Software acquired, created, or delivered to Buyer in the performance of the Order.**

7.1.2. For Technical Data and Computer Software in which the Government has Unlimited Rights, Supplier hereby grants to Buyer an irrevocable, nonexclusive, paid-up, worldwide license, with the right to grant sublicenses, to Use, including the right to make or have made, such Supplier's Technical Data and Computer Software **for any purpose whatsoever, and to have or authorize others to do so.**

7.1.3. Except as provided above, Supplier hereby grants to Buyer an irrevocable, nonexclusive, paid-up, worldwide, license to sell and Use Supplier's Technical Data and Computer Software acquired, created, or delivered in the performance of the Order (i) to fulfill Buyer's obligations under the prime contract; (ii) to disclose to third parties for obtaining government approvals, including airworthiness; and (iii) to satisfy other contract requirements for the same or similar Goods.

7.1.4. Supplier shall deliver to Buyer all Technical Data and Computer Software needed to fulfill Supplier's obligations in the performance of the Order by the Delivery Date. At Buyer's request, Supplier shall deliver to Buyer all Technical Data and Computer Software acquired or created by Supplier in the performance of the Order, whether or not delivery was required and without additional cost to Buyer.

7.3. General Intellectual Property

7.3.1. Supplier represents and warrants that Supplier has sufficient rights in all Intellectual Property that Supplier uses or transfers to Buyer in connection with the Order to allow Supplier to lawfully comply with the Order. If, in the performance of the Order, Supplier incorporates third party Intellectual Property into the Goods, Supplier shall obtain for the Government and the Buyer license rights equivalent to those granted by Supplier herein.

7.3.2. Except as expressly authorized herein, nothing in the Order shall be construed as Buyer granting Supplier a license in or any right to use any of Buyer's Intellectual Property other than in the performance of work under the Order.

7.3.3. If the Supplier does not receive Government funding to acquire or create Intellectual Property under the Order, the Section of the Terms and Conditions of the Order entitled "Intellectual Property Rights" shall apply to rights in such Intellectual Property in lieu of this Section.

7.4. Data Assertions and Markings

7.4.1. Supplier shall properly identify and assert the Supplier's rights in Technical Data and Computer Software delivered to the Government with other than Unlimited Rights in conformance with the applicable Government Acquisition Regulations. For assertions made subsequent to the effective date of the Order, the Supplier shall describe why the assertion is an inadvertent omission or new information before the Buyer will submit such assertions to the Government. Supplier shall properly mark all Technical Data and Computer Software that Supplier delivers to the Buyer in connection with the Order. Supplier represents and warrants that it has written procedures and maintains records sufficient to justify the validity of all restrictive markings.

7.4.2. If the Supplier's assertions do not comply with the applicable Government Acquisition Regulations, the Government rejects the Supplier's assertions, or the Supplier does not correctly mark Technical Data or Computer Software, the Buyer assumes no responsibility or liability for any loss of rights by the Supplier. Supplier is responsible for ensuring that markings and assertions are consistent. If the markings and the assertions are inconsistent, Buyer may submit such inconsistently marked Technical Data or Computer Software to the Government and the Supplier assumes the risk of loss of rights. In the event the Government rejects the Supplier assertions, Supplier agrees to work diligently with the Buyer to immediately correct such rejections such that there is no negative impact to Buyer's delivery obligations under the Prime Contract.

Raytheon (Flow-down Terms) – Inventions

7.2. Patent Ownership and License Rights

7.2.1. For any Subject Invention, Supplier hereby grants the Government a nonexclusive, nontransferable, irrevocable, paid-up, worldwide license to Practice or have Practiced the Subject Invention for or on behalf of the U.S. Government. For NASA Prime Contracts, if required by such Prime Contract, Supplier agrees to assign the Subject Invention to the Government.

7.2.2. For any Subject Invention in which the Supplier retains ownership, Supplier hereby grants Buyer a non-exclusive, nontransferable, irrevocable, paid-up, worldwide license to Practice and have Practiced the Subject Invention to the extent necessary to fulfill Buyer's obligations under the Prime Contract, **as well as for any other purpose.**

7.2.3. Supplier acknowledges the Government invention reporting requirements under the applicable Government Acquisition Regulations and **hereby agrees to report all Subject Inventions directly to the Government in accordance with these Sections.** Supplier shall submit to Buyer a copy of the Government invention reporting letter, without including detailed invention disclosure information.

7.5 Patent Indemnification

7.5.1. To the extent that the Prime Contract includes the Authorization and Consent provision under FAR 52.227-1, the Government shall authorize and consent to the Supplier's use and manufacture of any invention described in a United States patent in accordance with the Prime Contract. If the Government has assumed liability for U.S. patent infringement under the Prime Contract, Supplier is relieved of its obligations for such U.S. patent infringement under the Section of the Terms and Conditions of the Order entitled "Intellectual Property Indemnification", but only to the extent such liability is indemnified by the Government.

7.5.2. If the Prime Contract includes the Patent Indemnification provision under FAR 52.227-3, and if the Buyer's liability to the Government is for the infringement of a U.S. patent related to the Goods, the Supplier shall indemnify the Buyer under the same provision provided for in FAR 52.227-3 which is incorporated herein by reference, except that the terms "Contractor", "Government", "contract" and "Contracting Officer" shall be replaced by "Supplier", "Buyer", "Order" and "Buyer" respectively.

In addition –

For DoD Acquisitions -- Commercial Products and Services --

252.227-7013 “Rights in Technical Data Noncommercial Items”

252.227-7015 “Technical Data – Commercial Items”

252.227-7037 “Validation of Restrictive Markings on Technical Data”

For Non-Commercial Products and Services

52.227-10 “Filing of Patent Applications-Classified Subject Matter”

52.227-11 “Patent Rights – Ownership by the Contractor”

52.227-14 “Rights in Data – General”

For DOD Acquisitions – Non-Commercial Products and Services

252.227-7013 “Rights in Technical Data – Noncommercial Items”

252.227-7014 “Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation”

252.227-7015 “Technical Data – Commercial Items”

252.227-7016 “Rights in Bid or Proposal Information”

252.227-7017 “Identification and Assertion of Use, Release, or Disclosure Restrictions”

252.227-7019 “Validation of Asserted Restrictions – Computer Software”

252.227-7020 “Rights in Special Works”

252.227-7021 “Rights in Data-Existing Works”

252.227-7022 “Government Rights (Unlimited)”

252.227-7023 “Drawings and Other Data Become Property of Government”

252.227-7025 “Limitation on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends”

252.227-7026 “Deferred Delivery of Technical Data or Computer Software”

252.227-7027 “Deferred Ordering of Technical Data or Computer Software”

252.227-7028 “Technical Data or Computer Software Previously Delivered to the Government”

252.227-7030 “Technical Data - Withholding of Payment”

252.227-7032 “Rights in Technical Data and Computer Software (Foreign)”

252.227-7033 “Rights in Shop Drawings”

252.227-7037 “Validation of Restrictive Markings on Technical Data”

252.227-7038 “Patent Rights – Ownership by the Contractor (Large Business)”

24. INTELLECTUAL PROPERTY

(a) SELLER **warrants** that the Work performed or delivered under this Contract will not infringe or otherwise violate the intellectual property rights of any third party in the United States or any foreign country. SELLER shall defend, **indemnify**, and hold harmless LOCKHEED MARTIN, its officers, directors, employees, consultants, agents, affiliates, successors, permitted assigns and customers from and against all losses, costs, claims, causes of action, damages, liabilities, and expenses, including attorney's fees, all expenses of litigation and/or settlement, and court costs, arising out of any action by a third party that is based upon a claim that the Work performed or delivered under this Contract infringes or otherwise violates the intellectual property rights of any person or entity.

(b) **In addition to the Government's rights in data and inventions**, SELLER agrees that LOCKHEED MARTIN, in the performance of its prime or higher tier contract obligations, shall have a limited, irrevocable, nonexclusive, world-wide, royalty-free license to: (i) make, have made, sell, offer for sale, use, execute, reproduce, display, perform, distribute (internally or externally) copies of, transfer computer software to the Government and the Government's end customer, and prepare derivative works of any inventions, discoveries, improvements, maskworks and patents as well as any and all data, copyrights, reports and works of authorship delivered in performance of this Contract, **to the limited extent necessary for LOCKHEED MARTIN to make use of the Work performed or items delivered under this Contract in the performance of its contract obligations with its customer**; and (ii) authorize others to do any, some or all of the foregoing.

(c) The tangible medium storing copies of all reports, memoranda or other materials in written form including machine readable form, prepared by SELLER and furnished to LOCKHEED MARTIN pursuant to this Contract shall become the sole property of LOCKHEED MARTIN. Nothing in this paragraph (c) assigns ownership of SELLER's intellectual property included on such medium to LOCKHEED MARTIN.

(d) No other provision in this Contract, including but not limited to the Indemnity clause, shall be construed to limit the liabilities or remedies of the parties under this clause.

In addition (for commercial products)

FAR 52.227-19 COMMERCIAL COMPUTER SOFTWARE-RESTRICTED RIGHTS (DEC 2007)

DFARS 252.227-7013 RIGHTS IN TECHNICAL DATA --NONCOMMERCIAL ITEMS (FEB 2014) (Applies in lieu of FAR 52.22714. Applies to the extent specified in DFARS 252.227-7015.)

DFARS 252.227-7014 RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION (FEB 2014) (Applies in lieu of FAR 52.227-14.)

DFARS 252.227-7015 TECHNICAL DATA -- COMMERCIAL ITEMS (FEB 2014)

DFARS 252.227-7019 VALIDATION OF ASSERTED RESTRICTIONS - COMPUTER SOFTWARE (SEP 2016)

DFARS 252.227-7037 VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA (SEP 2016)

10. Termination

FAR 52.212-4(I)*

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

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

FAR 52.212-4(m)*

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply **with any contract terms and conditions**, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the **Contractor shall be liable to the Government for any and all rights and remedies provided by law.** If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

Termination Pressure Points

- Convenience – Tied to Government T/C or Not
- Notice for T/D and Ability to Cure
- Grounds for T/D
- Conversion of T/D into T/C if Wrongful
- Remedies
- Availability of IP

Raytheon – Termination for Convenience

13.1. Buyer may, at any time, terminate all or part of an Order or Agreement for its convenience upon written notice to Supplier.

13.2. Upon termination, in accordance with Buyer's written direction, Supplier will immediately: (i) cease work and place no further subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the Order; (ii) prepare and submit to Buyer an itemization of all completed and partially completed Goods and/or Services; (iii) if requested by Buyer, deliver to Buyer any and all Goods and/or Services completed up to the date of termination at the pre-termination Order price; and (iv) if requested by Buyer, deliver any work-in-process.

13.3. Buyer shall not be liable to Supplier for an Order terminated prior to the commencement of Lead Time.

13.4. In the event Buyer terminates an Order or Agreement for its convenience after performance has commenced, Buyer will compensate Supplier only for the actual and reasonable work-in-process costs incurred by Supplier on Goods and/or Services required to be delivered within the Lead Time period, calculated from Buyer's issuance of the notice of termination. If the Order does not specify Lead Time, Lead Time shall be the reasonable average time required to manufacture and deliver the Goods and/or perform the Services. Supplier shall use reasonable efforts to mitigate its own and Buyer's liability under this Section. In order to receive compensation, Supplier must submit its termination claim, by means of a form and process directed by Buyer, within 90 days from the effective date of the termination.

13.5. Buyer shall not be liable to Supplier for costs or damages other than as described above, and in no event for lost or anticipated profits, or unabsorbed indirect costs or overhead, or for any sum in excess of the price allocated to the portion of the Order terminated.

13.6 Notwithstanding anything to the contrary in these Terms and Conditions, an Agreement, or an Order, Buyer shall not be liable to Supplier for any costs or damages whatsoever for a termination for convenience with respect to a particular program of any of Buyer's Customers, if the termination is due to the cancellation, in whole or in part, of such program by Buyer's immediate customer(s) or Buyer's ultimate customer(s) or the bankruptcy or insolvency of such customer(s).

Raytheon – Termination for Default

14.1. Buyer may, by written notice, terminate an Order or Agreement, or any portion thereof, for default without any liability or obligation whatsoever to Supplier for the portion terminated, in the following circumstances: (i) Supplier fails to perform any obligation hereunder (other than a delivery obligation) and **fails to cure such obligation within 10 days (or as otherwise mutually agreed) (the “Cure Period”)**; (ii) Supplier fails to perform any **delivery obligation** hereunder; (iii) when Buyer has reasonable grounds for insecurity, and Supplier fails to **provide adequate assurances of performance in writing within 10 days following Buyer's demand** or, (iv) should Supplier (a) become insolvent, (b) become unable to pay its debts as they mature, (c) make a general assignment for the benefit of creditors, (d) have a receiver appointed for the whole or any substantial part of its assets, or (e) become in any way the subject of a bankruptcy petition (each in Subsection (iv), a “Supplier Insolvency”). **Notwithstanding the foregoing**, if a cure is not possible within such Cure Period, Supplier shall submit to Buyer, within a period of 10 days after receipt of notice from Buyer specifying such failure, a detailed plan to cure such failure (including related time period) acceptable to Buyer in its sole discretion, provided, however, that if such a cure plan is approved by Buyer, Supplier’s subsequent failure to comply with such cure plan shall be deemed a default hereunder, and Buyer may terminate immediately without additional cure periods.

14.2. Buyer shall have no liability in relation to those Goods and/or Services terminated for Supplier's default. Supplier shall be liable to Buyer for any and all expenses, costs, and damages including increased re-procurement costs, requalification costs, and other nonrecurring costs, except in the circumstance of any failure or delay constituting a “Force Majeure Event” as set forth in the Section herein entitled “Force Majeure”.

14.3. If the Order or Agreement is entirely or partially terminated under this Section other than pursuant to a Supplier Insolvency, Buyer, in addition to any other rights Buyer may have, may require Supplier, at no charge to Buyer, to: (i) deliver to Buyer all information, data, know-how, and other Intellectual Property, . . .

14.4. In addition to and not in lieu of other rights to Intellectual Property otherwise set forth in the Order and these Terms and Conditions, Supplier hereby grants to Buyer a worldwide, perpetual, non-exclusive, fully paid, irrevocable, license (“Additional License”), with the right to grant sublicenses, to Supplier's information, data, know-how, tooling, test equipment and other Intellectual Property, including without limitation proprietary and manufacturing information to enable Buyer to make, have made, use, sell and license the Goods and/or perform, or have performed, the Services, subject to Buyer’s agreement not to exercise such rights under this Additional License except in the event of a Supplier Insolvency, whether or not the Order is terminated. As part of such Additional License, Supplier shall upon Buyer's written request and at no charge to Buyer, promptly (i) deliver to Buyer all information, data, know-how, and other Intellectual Property, including proprietary and manufacturing information, utilized by Supplier in performing the Order, and (ii) deliver the tooling and test equipment necessary to make or have made the Goods, provide the Services and provide technical and transition assistance in order to ensure Buyer's continuing requirements for Goods and/or Services.

14.5. If, after notice of termination under this Section, it is determined that Supplier was not in default, the rights and obligations of the Parties shall be the same as if the notice of termination had been issued pursuant to the Section herein entitled “Termination for Convenience”. In such case, Supplier shall not be entitled to any remedy other than as provided for in the Section herein entitled “Termination for Convenience”.

11. Flow-Down Clauses

- Required Flow-Downs vs. Discretionary Flow-Downs
- Some cannot be flowed down –
e.g., Disputes Clause
- Some are to protect the prime's interests
e.g., termination, stop work, suspension,
changes, warranty, DPAS, and IP rights clauses
- Often Conditioned on Contract Type, Type of
Work to be Performed and Total Anticipated
Contract Value

Flow-Downs and Commercial Products and Services

Flow-downs for Commercial Products and Services – Limited by FAR and DFARS (listed in FAR 52.212-5(e)(1), FAR 52.244-6(c)(1)) and 252.224-7000) plus “a minimal number of additional clauses necessary to satisfy . . . Contractual obligations”

FAR 12.504 and DFARS 212.504 lists laws that are not subject to subcontracts for commercial items at any tier. E.g., validation of proprietary data restrictions and rights in technical data.

Some exemptions listed in clauses themselves:

FAR 52.203-14 – Display of Hotline Posters

FAR 52.219-9 Small Business Subcontracting Plan

How to Flow Down Clauses

FAR 52.102 recommends incorporation by reference versus full text and that they be tailored on a contract-by-contract basis.

Primes must flow down version of the clause in the Prime contract. Earlier versions of clauses available at “Archives” tab of www.acquisition.gov website.

Primes should alter terms to fit the subcontract but watch for global alterations.

Watch for Order of Precedence!

Suggested Categories for Flow-Downs

Prime (Commercial)

Prime (Non-Commercial) – Sub (Non-Commercial)

Prime (Non-Commercial) – Sub (Commercial)

- Regardless of contract value
- Value exceeds certain dollar amounts
- DoD Prime Contract

The following FAR clauses apply to this Contract regardless of value

- 52.202-1 DEFINITIONS.
- 52.204-21 BASIC SAFEGUARDING OF COVERED CONTRACTOR INFORMATION SYSTEMS (Applicable to all Orders where Seller will have Federal contract information, as defined by the clause, residing in or transiting through its information system).
- 52-204-25 PROHIBITION ON CONTRACTING FOR CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT
- 52.219-8 UTILIZATION OF SMALL BUSINESS CONCERNS.
- 52.222-21 PROHIBITION OF SEGREGATED FACILITIES.
- 52.222-26 EQUAL OPPORTUNITY.
- 52.222-41 SERVICE CONTRACT LABOR STANDARDS (Applicable to Orders that are subject to the Service Contract Labor Standards statute).

The following FAR clause(s) apply to this Contract if the value of this Contract is equal to or exceeds \$150,000

- 52.203-19 PROHIBITION ON REQUIRING CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS OR STATEMENTS.
- 52.215-2 AUDIT AND RECORDS NEGOTIATION.
- 52.222-35 EQUAL OPPORTUNITY FOR VETERANS.
- 52.222-37 EMPLOYMENT REPORTS ON VETERANS.
- 52.227-1 AUTHORIZATION AND CONSENT (Applicable to Orders that exceed the simplified acquisition threshold).

A. The following DFARS clauses are applicable if this Order is placed under a Department of Defense Prime Contract and is for procuring commercial items

1. The following DFARS clauses apply to this Contract regardless of value

- **252.204-7012 SAFEGUARDING COVERED DEFENSE INFORMATION AND CYBER INCIDENT REPORTING (Applicable to Orders for operationally critical support or for which performance will involve covered defense information, as defined in this clause. Buyer shall notify Seller when submitting a request to vary from a NIST SP 800-171 security requirement to the Government's Contracting Officer, in accordance with paragraph (b)(2)(ii)(B) of this clause; and provide to the Buyer the incident report number, automatically assigned by DoD as soon as practicable, when reporting a cyber incident to DoD as required in paragraph (c) of the clause.)**
- **252.204-7020 NIST SP 800-171 DOD ASSESSMENT REQUIREMENTS (Applicable to all Purchase Orders except POs for commercially available off-the-shelf items.)**
- **252.204-7021 CONTRACTOR COMPLIANCE WITH THE CYBERSECURITY MATURITY MODEL CERTIFICATION ELEMENT (Applicable to all Purchase Orders except POs for commercially available off-the-shelf items.)**
- **252.225-7009 RESTRICTION ON ACQUISITION OF CERTAIN ARTICLES CONTAINING SPECIALTY METALS (Applicable, except for paragraph (d) and (e)(1) which are deleted from this clause) (Applicable to Orders for items containing specialty metals to ensure compliance of the end products that Buyer will deliver to the Government).**

How Raytheon Does It: <https://www.rtx.com/suppliers/purchase-terms-and-conditions>

How Lockheed Does It: <https://www.lockheedmartin.com/en-us/suppliers/business-area-procurement/aeronautics/terms-and-conditions/commercial-terms-and-conditions.html>

How Northrop Grumman Does It:
<https://www.northropgrumman.com/suppliers/contracts/terms-conditions/>

12. Disputes

Pressure Points

- Cooling Off Period
- Does Management Get First Crack
- Mediation before Litigation
- Arbitration vs. Litigation
- Forum Selection
- Choice of Law
- Obligation to Continue Working While Dispute is Pending
- Right to Injunctive/Equitable Relief
- Piggybacking on the Prime to Dispute Gov't

Raytheon

36. GOVERNING LAW AND FORUM

36.1. The Agreement and any Order shall be interpreted in accordance with the plain English meaning of its terms and the construction thereof shall be governed by the laws in force in **the State of New York, USA** without regard to conflicts of law principles, except that the United Nations Convention on Contracts for the International Sale of Goods dated April 11, 1980, as amended to date, will not apply. **Buyer may, but is not obligated to, bring any action or claim relating to or arising out of an Order in the appropriate court in Connecticut, and Supplier hereby irrevocably consents to personal jurisdiction and venue in any such court, hereby appointing the pertinent Secretary of State or other applicable government authority as agent for receiving service of process.** If Supplier or any of its property is entitled to immunity from legal action on the grounds of sovereignty or otherwise, Supplier hereby waives and agrees not to plead such immunity in any legal action arising out of the Agreement and/or Order.

36.2. **Any action or claim by Supplier with respect hereto shall also be brought in Connecticut, if Buyer so elects. Accordingly, Supplier shall give written notice to Buyer of any such intended action or claim, including the intended venue thereof, and shall not commence such action or claim outside of such jurisdiction if Buyer, within 30 days from receipt thereof, makes its election as aforesaid.** If Buyer and Supplier mutually agree to participate in alternative dispute resolution, Supplier agrees that all alternative dispute resolution proceedings shall take place in Connecticut.

37. DISPUTE RESOLUTION

37.1. Except as provided below, prior to a Party initiating a formal legal proceeding relating to a dispute under the Order, such Party must provide the other with a written request for dispute resolution. Each Party shall, within 5 calendar days after such written request is received, designate a representative who will be responsible for negotiating, in good faith, a resolution of the dispute. **Should the representatives fail to reach agreement within 30 calendar days of receipt of the request, executives of each Party shall attempt to resolve the issue within 60 calendar days of receipt of such written request.**

37.2. Either Party may (i) resort to a formal legal proceeding for equitable relief at any time and (ii) institute litigation in order to avoid the expiration of any applicable limitations period or to preserve a superior position with respect to other creditors.

37.3. The dispute resolution procedures set forth herein do not supersede, delay or otherwise affect any rights of termination that are expressly set forth herein.

11. DISPUTES

(a) All disputes under this Contract that are not disposed of by mutual agreement may be decided by recourse to an action at law or in equity. Each party hereby irrevocably waives, to the fullest extent permitted by applicable law, any right it may have to a trial by jury in respect to any litigation directly or indirectly arising out of under or in connection with this Contract.

(b) Until final resolution of any dispute hereunder, SELLER shall diligently proceed with the performance of this Contract as directed by LOCKHEED MARTIN.

Thank You!



Daniel J. Kelly

McCarter & English, LLP

dkelly@mccarter.com

617.449.6526



Cara A. Wulf

McCarter & English, LLP

cwulf@mccarter.com

202.753.3401