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Correction of PTO Error

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Conveyance Type



Assignment



Security Agreement



License



Change of Name



Merger



Other Confirmatory License

U.S. Government

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Departmental File



Secret File

Conveying Party(ies)



Mark if additional names of conveying parties attached

Name (line 1) Photon Energy Inc.

Execution Date
Month Day Year

07/17/1998

Name (line 2)

Execution Date
Month Day Year

Second Party

Name (line 1)

Name (line 2)

Receiving Party



Mark if additional names of receiving parties attached

Name (line 1) United States Department of Energy

Name (line 2)

Address (line 1) 1000 Independence Avenue

Address (line 2)

Address (line 3) Washington

City

D.C. USA

State/Country

20585

Zip Code

☐ If document to be recorded is an assignment and the receiving party is not domiciled in the United States, an appointment of a domestic representative is attached. (Designation must be a separate document from Assignment.)

Domestic Representative Name and Address

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Name

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Mail documents to be recorded with required cover sheet(s) information to:
Commissioner of Patents and Trademarks, Box Assignments, Washington, D.C. 20231

PATENT
REEL: 9838 FRAME: 0468

Correspondent Name and Address

Area Code and Telephone Number

(630) 252-2176

Name Robert J. Fisher

Address (line 1) U.S. Department of Energy

Address (line 2) Office of Intellectual Property Law

Address (line 3) 9800 South Cass Avenue

Address (line 4) Argonne, IL 60439

Pages

Enter the total number of pages of the attached conveyance document including any attachments.

24

Application Number(s) or Patent Number(s)

☐ Mark if additional numbers attached

Enter either the Patent Application Number or the Patent Number (DO NOT ENTER BOTH numbers for the same property).

Patent Application Number(s)

Patent Number(s)

08/572,088

If this document is being filed together with a new Patent Application, enter the date the patent application was

Month Day Year

Patent Cooperation Treaty (PCT)

Enter PCT application number only if a U.S. Application Number has not been assigned.

PCT

PCT

PCT

PCT

PCT

PCT

Number of Properties

Enter the total number of properties involved.

#

Fee Amount

Fee Amount for Properties Listed (37 CFR 3.41): \$

Method of Payment:

Enclosed ☐

Deposit Account ☐

Deposit Account

(Enter for payment by deposit account or if additional fees can be charged to the

Deposit Account Number:

#

Authorization to charge additional fees:

Yes ☐

No ☒

Statement and Signature

To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document. Charges to deposit account are authorized, as indicated herein.

Mark P. Dvorscak, Reg. No. 33,492

Name of Person Signing

Mark P. Dvorscak

Signature

Mar 23, 1999

Date

CONFIRMATORY LICENSE

(Large Business - Advance Waiver)

Title : *Photovoltaic Cell Manufacturing Process*

Inventor(s) : *Scot P. Albright, Rhodes R. Chamberlin*

Serial No. : *572,088* Filing Date (U.S.): *December 14, 1995*

Contractor : *Photon Energy Inc., Golden, Colo.*

DOE Contract No. : *NREL-ZN-0-19019-1*

Waiver No. : *W(A)-93-033*

DOE Case No. : *S-88,389*

Foreign Applications filed in or intended to be filed at Contractor's expense in (countries):

None

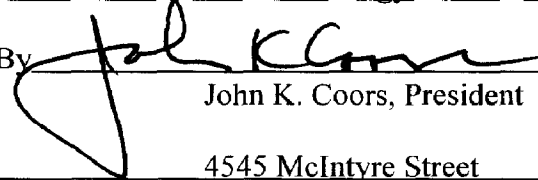
An advance waiver of Government Rights having been granted by DOE to the Contractor, and the above-identified invention having been reported as a subject invention to DOE by the contractor with his election to file a domestic patent application thereon, the effective date of said waiver for the above invention is *June 26, 1997*.

Accordingly, this document is confirmatory of the paid-up license required to be granted to the Government under 10 CFR Part 784 and this contract in this invention, patent application and any resulting patent, and of all other rights acquired by the Government by the referenced clause, a copy of which is attached hereto and incorporated by reference herein. The undersigned certifies the attached copy to be a true copy of said clause. It is understood and agreed that this license does not preclude the Government from asserting rights under the provisions of said contract or of any other agreement between the Government and the Contractor, or any other rights of the Government with respect to the above-identified invention.

The Government is hereby granted an irrevocable power to inspect and make copies of the above-identified patent application.

Signed this *17th* day of *July*, 19*98*
(SEAL)

Photon Energy Inc. (Contractor)

By 
John K. Coors, President

4545 McIntyre Street

Golden, Colorado 80403

"CLAUSE 1 - ADVANCE WAIVER PATENT RIGHTS"**A. Definitions**

1. "Subject Invention" means any invention or discovery of the Contractor conceived or first actually reduced to practice in the course of or under this contract, and where DOE has granted an advance waiver of patent rights, of the Contractor's Subcontractors other than domestic small businesses, universities, and nonprofit organizations within the meaning of P.L. 96-517, as amended, conceived or first actually reduced to practice in the course of or under this contract, and includes any art, method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plants, whether patented or unpatented under the Patent Laws of the United States of America or any foreign country.
2. "Contract" means any contract, grant, agreement, understanding, or other arrangement, which includes research, development, or demonstration work, and includes any assignment or substitution of parties.
3. "Government agency" includes an executive department, independent commission, board, office, agency, administration, authority, Government corporation, or other Government establishment of the Executive Branch of the Government of the United States of America.
4. "To the point of practical application" means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine and under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.
5. "Patent Counsel" means the DOE Patent Counsel assisting the procuring activity.

B. Allocation of Principal Rights

1. Assignment to the Government. The Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are waived to and retained by the Contractor under paragraphs B2 and C of this clause.
2. Greater Rights Determinations. The Contractor or the employee-inventor with authorization of the Contractor may request greater rights than the domestic and foreign patent rights provided in Paragraph C of this clause on identified inventions in accordance with 41 CFR 9-9.109-6. Such requests must be submitted to Patent Counsel (with notification by Patent Counsel to the Contracting Officer) at the time of the first disclosure pursuant to paragraph E2 of this clause, or not later than nine (9) months after conception or first actual reduction to practice, whichever occurs first, or such longer period as may be authorized by Patent Counsel (with notification by Patent Counsel to the Contracting Officer) for good cause shown in writing by the Contractor.

C. Rights to the Contractor

1. Minimum Contractor License. The Contractor reserves an irrevocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title. The license shall extend to the Contractor's domestic subsidiaries and affiliates, if any, within the Contractor's corporate structure of which the Contractor is a part and shall include the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the Contractor's business to which the invention pertains.
2. Election to Retain Waived Rights
 - (i) Subject to the provisions of paragraph C3 and paragraph D of this clause, with respect only to a Subject Invention reported in accordance with paragraph E2(i) of this clause and with the written report of which is included an election as to whether the Contractor will retain the rights in the invention waived therein, the Contractor reserves the entire domestic right, title and interest in any United States patent application on the Subject Invention filed and any resulting United States patent secured by the Contractor.
 - (ii) Subject to the provisions of paragraph C3 and paragraph D of this clause, with respect only to a Subject Invention reported in accordance with paragraph E2(i) of this clause and with the written report of which is included an election as to whether the Contractor will retain the rights in the invention waived herein and a statement specifying those foreign countries in which such rights will be retained, and subject to DOE security regulations and requirements, the Contractor reserves the entire right, title and interest in any foreign patent application on the Subject Invention filed and any resulting foreign patent secured by the Contractor in those foreign countries specified.
3. Terms and Conditions of Waived Rights
 - (i) Subject to the rights granted in paragraph C1 of this clause, the Contractor agrees to convey to the Government, upon request, the entire domestic right, title, and interest in any Subject Invention when the Contractor:
 - (a) Does not elect pursuant to paragraph C2(i) of this clause to retain such rights;
 - (b) Fails to have a United States patent application filed on the invention in accordance with paragraph D1 of this clause, or decides not to continue prosecution of such application; or
 - (c) At any time, no longer desires to retain title.

- (ii) Subject to the rights granted in paragraph C1 of this clause, the Contractor agrees to convey to the Government, upon request, the entire right, title, and interest in any Subject Invention in any foreign country if the Contractor:
- (a) Does not elect pursuant to paragraph C2(ii) of this clause to retain such rights in the country; or
 - (b) Fails to have a patent application filed in the country on the Subject Invention in accordance with paragraph D3 of this clause, or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the Contractor shall notify the Patent Counsel not less than 60 days before the expiration period for any action required by the foreign Patent Office.
- (iii) Conveyance requested pursuant to paragraphs C3(i) and C3(ii) of this clause shall be made by delivering to the Patent Counsel duly executed instruments and such other papers as are deemed necessary to vest in the Government the entire right, title, and interest in the invention to enable the Government to apply for and prosecute patent applications covering the invention in this or the foreign country, respectively, or otherwise establish its ownership of the invention.
- (iv) For each invention in which the Contractor initially elects pursuant to C2(i) or C2(ii) of this clause not to retain the rights waived, the Contractor shall inform the Patent Counsel promptly in writing of the date and identity of any on sale, public use, or public disclosure of the invention which may constitute a statutory bar under 35 USC 102, which was authorized by or known to the Contractor, or any contemplated action of this nature.
- (v) Government License

With respect to any Subject Invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any Subject Invention throughout the world.

(vi) Reporting on Utilization of Subject Inventions

The Contractor agrees to submit on request, periodic reports no more frequently than annually on the utilization of a Subject Invention or on efforts at obtaining such utilization that are being made by the Contractor 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 Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in accordance with paragraph C3(viii) of this clause. To the extent data or information supplied under this paragraph is considered by the Contractor, its licensee or assignee to be privileged and confidential and is so marked, DOE agrees that, to the extent permitted by 35 USC 202(c)(5), it will not disclose such information to persons outside the Government.

(vii) Preference for United States Industry

Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any Subject Invention in the United States unless such person agrees that any products embodying the Subject Invention or produced through the use of the Subject Invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(viii) March-in Rights

The Contractor agrees that with respect to any Subject Invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of DOE, to require the Subcontractor, an assignee, or exclusive licensee of a Subject Invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that;

- (a) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the Subject Invention in such field of use;
- (b) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

- (c) Such action is necessary to meet requirements for public use specified by federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or
- (d) Such action is necessary because the agreement required by paragraph C3(vii) of this clause 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 agreement.

(ix) U.S. Competitiveness

The Contractor agrees that any photovoltaic modules or major components thereof, embodying any waived inventions, or produced through the use of any waived invention, will be manufactured substantially in the United States until the earlier of five (5) years after the submission by the Contractor of the final report as required under paragraph E2 of this clause or start-up by the Contractor (alone or in association with others) of a U.S. based manufacturing plant having an annual capacity to produce photovoltaic modules with a total rated module capacity of at least ten megawatts, unless the Contractor can show to the satisfaction of the Contracting Officer that it is not commercially feasible to do so. In the event the Contracting Officer agrees to foreign manufacture in exception to the forgoing, there will be a requirement that the Government's support of the area of technology which was the subject of this waiver petition be recognized in some appropriate manner, e.g., recoupment of the Government's investment, etc. The contractor agrees that it will not license, assign or otherwise transfer any waived invention to any entity unless that entity agrees to these same requirements.

4. Terminations

- (i) Any waiver or retention of rights by the Contractor under paragraphs B2, C1, or C2 of this clause may be terminated at the discretion of the Secretary or his designee, in whole or in part, if the request for waiver or retention of rights by the Contractor is found to contain false material statements or nondisclosure of material facts, and such were specifically relied upon in reaching the waiver determination or the agreement to the retention of rights by the Contractor.
- (ii) Any waiver of the rights retained in accordance with paragraph C2, as applied to particular inventions, may be terminated at the discretion of the Secretary or his designee, in whole or in part, if the Contractor fails to comply with the provisions set forth in paragraph C3 and paragraph D of this clause, and such failure is determined by the Secretary or his designee to be material and detrimental to the interests of the United States and the general public.

- (iii) Prior to terminating any waiver of rights under paragraph C4(i) or C4(ii) of this clause, the Contractor will be given written notice of the intention to terminate the waiver of rights, the extent of such proposed termination and the reasons therefor, and a period of 30 days, or such longer period as the Secretary or his designee shall determine for good cause shown in writing, to show cause why the waiver of rights should not be so terminated.
- (iv) All terminations of waivers of rights under paragraph C4(ii) shall be subject to the rights granted in paragraph C1 of this clause, and termination shall normally be partial in nature, requiring the Contractor to grant nonexclusive or partially exclusive licenses to responsible applicants upon terms reasonable under the circumstances.

5. Effective Date of Waivers

Waivers shall be effective on the following dates:

- (i) For advance waivers of identified inventions, i.e., inventions conceived prior to the effective date of the subcontract, on the effective date of the subcontract even though the advance waiver may have been requested after that date;
- (ii) For identified inventions under advance waivers, i.e., inventions conceived or first actually reduced to practice after the effective date of the contract, on the date the invention is reported with the election to retain the waived rights in that invention; and
- (iii) For waivers of identified inventions (other than under an advance waiver), on the date of the letter notifying the requestor that the waiver has been granted.

D. Filing of Patent Applications

- 1. With respect to each Subject Invention in which the Contractor elects to retain domestic rights pursuant to paragraph C2(i) of this clause, the Contractor shall have a domestic patent application filed on the invention within six (6) months after submission of the invention disclosure pursuant to paragraph E2(i) of this clause, or such longer period of time as may be approved by the Patent Counsel for good cause shown in writing by the Contractor. For identified inventions waived to the Contractor, the Contractor shall have a domestic patent application on the invention filed within 6 months after the waiver has become effective. With respect to such inventions, the Contractor shall promptly notify the Patent Counsel of any decision not to file an application.
- 2. For each Subject Invention on which a patent application is filed by the Contractor, the Contractor shall:
 - (i) Within 2 months after the filing, or within 2 months after submission of the invention disclosure if the patent application previously has been filed, deliver to Patent Counsel a copy of the application as filed including the filing date and serial number;

- (ii) Within 6 months after filing the application or within 6 months after submitting the invention disclosure if the application has been filed previously, deliver to the Patent Counsel a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled, and provide DOE an irrevocable power to inspect and make copies of the patent application filed;
 - (iii) Provide the Patent Counsel with a copy of the patent within 2 months after a patent is issued on the application;
 - (iv) Not less than 30 days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application and deliver to the Patent Counsel executed instruments granting the Government a power of attorney; and
 - (v) Include the following statement in the second paragraph of the specification of the application and any patents issued on a Subject Invention, "The Government of the United States of America has rights in this invention pursuant to Subcontract No. ____ (or Grant No. _____) awarded by the U.S. Department of Energy."
3. With respect to each Subject Invention in which the Contractor has elected pursuant to paragraph C2(ii) of this clause to retain the patent rights waived in specified foreign countries, or in which the Contractor has obtained a waiver of foreign rights on an identified invention:
- (i) The Contractor shall file a patent application on the invention in each specified foreign country in accordance with applicable statutes and regulations and within one of the following periods:
 - (a) Eight months from the date of filing a corresponding United States application, or if such an application is not filed, six months from the date the invention is submitted in a disclosure pursuant to paragraph E2(i) of this clause;
 - (b) Six months from the date a license is granted by the Commissioner of Patents and Trademarks to file the foreign patent application where such filing has been prohibited by security reasons; or
 - (c) Such longer period as may be approved by the Patent Counsel for good cause shown in writing by the Contractor.
 - (ii) The Contractor shall notify the Patent Counsel promptly of each foreign application filed and upon written request shall furnish an English version of the application without additional compensation.

E. Invention Identification, Disclosures, and Reports

1. The Contractor shall establish and maintain active and effective procedures to ensure that Subject Inventions are promptly identified and timely disclosed. Those procedures shall include the maintenance of laboratory notebooks or equivalent records and any other records that are reasonably necessary to document the conception and/or the first actual reduction to practice of Subject Inventions, and records which show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of these procedures so that he may evaluate and determine their effectiveness.
2. The Contractor shall furnish the Patent Counsel (with notification by Patent Counsel to the Contracting Office) on a DOE-approved form:
 - (i) A written report containing full and complete technical information concerning each Subject Invention within two (2) months after the inventor discloses it in writing to the subcontractor personnel responsible for patent matters, but in any event prior to any sale, public use or public disclosure of such invention known to the Contractor. The report shall identify the contract and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any election of foreign patent rights under paragraph C2(ii) of this clause and any election of rights under paragraph C2(i) of this clause. Any requests for greater rights shall be made within the period set forth in paragraph B2 of this clause. When an invention is reported under this paragraph E2(i), it shall be presumed to have been made in the manner specified in Section (a)(1) and (2) of 42 USC 5908 unless the Contractor contends it was not so made in accordance with paragraph G2(ii) of this clause.
 - (ii) Upon request, but not more than annually, interim reports on a DOE-approved form listing Subject Inventions and lower-tier subcontracts awarded containing a Patent Rights clause for that period and certifying that:
 - (a) The Contractor's procedures for identifying and disclosing Subject Inventions as required by this paragraph E have been followed throughout the reporting period;
 - (b) All Subject Inventions have been disclosed or that there are no such inventions;
 - (c) All subcontracts containing a Patent Rights clause have been reported or that no such subcontracts have been awarded; and
 - (iii) A final report on a DOE-approved form within 3 months after completion of the contract work listing all Subject Inventions and all lower-tier subcontracts awarded containing a Patent Rights clause and certifying that:

- (a) All Subject Inventions have been disclosed or that there were no such inventions;
and
 - (b) All subcontracts containing a Patent Rights clause have been reported or that no such lower-tier subcontracts have been awarded.
- 3. The Contractor shall obtain patent agreements to effectuate the provisions of this clause from all persons in its employ who perform any part of the work under this contract except nontechnical personnel, such as clerical employees and manual laborers.
 - 4. The Contractor agrees that the Government may duplicate and disclose Subject Invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause. If the Contractor is to file a foreign patent application on a Subject Invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures until the expiration of the time period specified in paragraph D1 of this clause, but in no event shall the Government or its employees be liable for any publication thereof.

F. Publication

It is recognized that during the course of the work under this contract, the Contractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. In order that the public disclosure of such information will not adversely affect the patent interests of DOE or the Contractor, patent approval for release or publication shall be secured from Patent Counsel prior to any such release or publication.

G. Forfeiture of Rights in Unreported Subject Inventions

- 1. The Contractor shall forfeit to the Government, at the request of the Secretary or his designee, all rights in any Subject Inventions which the Contractor fails to report to Patent Counsel (with notification by Patent Counsel to the Contracting Officer) within six months after the time the Contractor:
 - (i) Files or causes to be filed a United States or foreign patent application thereon; or
 - (ii) Submits the final report required by paragraph E2(iii) of this clause, whichever is later.
- 2. However, the Contractor shall not forfeit rights in a Subject Invention if, within the time specified in 1(i) or 1(ii) of this paragraph G, the Contractor:
 - (i) Prepared a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the contract and delivers the same to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer); or

- (ii) Contending that the invention is not a Subject Invention the Contractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer); or
 - (iii) Establishes that the failure to disclose did not result from the Contractor's fault or negligence.
- 3. Pending written assignment of the patent application and patents on a Subject Invention determined by the Secretary or his designee to be forfeited (such determination to be a final decision under the Disputes Clause of this contract), the Contractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph G shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to Subject Inventions.

H. Examination of Records Relating to Inventions

- 1. The Contracting Officer or his authorized representative, until the expiration of 3 years after final payment under this contract, shall have the right to examine any books (including laboratory notebooks), records, documents, and other supporting data of the Contractor which the Contracting Officer or his authorized representative reasonably deem pertinent to the discovery or identification of Subject Inventions or to determine compliance with the requirements of this clause.
- 2. The Contracting Officer or his authorized representative shall have the right to examine all books (including laboratory notebooks), records and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this subcontract to determine whether any such inventions are Subject Inventions, if the Contractor refuses or fails to:
 - (i) Establish the procedures of paragraph E1 of this clause; or
 - (ii) Maintain and follow such procedures; or
 - (iii) Correct or eliminate any material deficiency in the procedures within thirty (30) days after the Contracting Officer notifies the Contractor of such a deficiency.

I. Withholding of Payment (Not Applicable to Lower-Tier Subcontracts)

- 1. Any time before final payment of the amount of this contract, the Contracting Officer may, if he deems such action warranted, withhold payment until a reserve not exceeding \$50,000.00 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if in his opinion the Contractor fails to:
 - (i) Establish, maintain and follow effective procedures for identifying and disclosing Subject Inventions pursuant to paragraph E1 of this clause; or
 - (ii) Disclose any Subject Invention pursuant to paragraph E2(i) of this clause; or

- (iii) Deliver the interim reports pursuant to paragraph E2(ii) of this clause; or
 - (iv) Provide the information regarding subcontracts pursuant to paragraph J5 of this clause; or
 - (v) Convey to the Government in a DOE-approved form, the title and/or rights of the Government in each Subject Invention as required by this clause.
2. The reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.
 3. Final payment under this subcontract shall not be made by the Contracting Officer before the Contractor delivers to Patent Counsel all disclosures of Subject Inventions and other information required by E2(i) of this clause, the final report required by E2(iii) of this clause, and Patent Counsel has issued a patent clearance certification to the Contracting Officer.
 4. The Contractor may, in its discretion, decrease or increase the sums withheld up to the maximum authorized above. If the Contractor is a nonprofit organization, the maximum amount that may be withheld under this paragraph shall not exceed \$50,000 or 1 percent of the amount of this contract, whichever is less. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the subcontract. The withholding of any amount or subsequent payment thereof shall not be construed as a waiver of any rights accruing to the Government under this contract.

J. Subcontracts

1. For the purpose of this paragraph the term "Contractor" means the party awarding a subcontract and the term "Subcontractor" means the party being awarded a subcontract, regardless of tier.
2. The Contractor will include the Patent Rights clause of DEAR 952.227-71 suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental or research work to be performed by a small business or a domestic nonprofit organization. In all other subcontracts, regardless of tier, for experimental, developmental, demonstration or research work, the Contractor shall include the Patent Rights article of 41 CFR 9-9.107-5(a) or 41 CFR 9-9.107-6, as appropriate, modified to identify the parties.
3. Except as may be otherwise provided in this clause, the Contractor shall not, in any subcontract or by using a subcontract as consideration therefore, acquire any rights in its Contractors Subject Invention for the Contractor's own use (as distinguished from such rights as may be required solely to fulfill the Contractor's contract obligations to the Government in the performance of this contract).

4. All invention disclosures, reports, instruments, and other information required to be furnished by the Contractor to DOE, under the provisions of a Patent Rights clause in any subcontract hereunder may, in the discretion of the Contracting Officer be furnished to the Contractor for transmission to DOE.
5. The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract containing a Patent Rights clause by identifying the Subcontractor, the work to be performed under the subcontract, and the dates of award, and estimated completion. Upon the request of the Contracting Officer the Contractor shall furnish him a copy of the subcontract.
6. The contractor shall identify all Subject Inventions of the Subcontractor of which it acquires knowledge in the performance of this contract and shall notify the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) promptly upon the identification of the inventions.
7. It is understood that the Government is a third party beneficiary of any subcontract clause granting rights to the Government in Subject Inventions, and the Contractor hereby assigns to the Government all rights that the contractor would have to enforce the Subcontractor's obligations for the benefit of the Government with respect to Subject Inventions. The contractor shall not be obligated to enforce the agreements of any Contractor hereunder relating to the obligations of the Subcontractor to the Government regarding Subject Inventions.

K. Background Patents

1. "Background patent" means a domestic patent covering an invention or discovery which is not a Subject Invention and which is owned or controlled by the Contractor at any time through the completion of this subcontract;
 - (i) Which the Contractor, but not the Government has the right to license to others without obligation to pay royalties thereon, and
 - (ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development or demonstration work performed under this subcontract.
2. The Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any Background Patent for purposes of practicing a subject of this contract by or for the Government in research, development and demonstration work only.

3. If (i) the Contractor is unwilling or unable to participate under reasonable terms and conditions in further work under this contract, or any follow-on contracts, or if the Contractor subsequently fails to make reasonable efforts to commercialize the technology forming the subject matter of this agreement, and (ii) the Contractor is not during a period of eight (8) years after execution of this contract novation actively pursuing start-up of a manufacturing facility in the United States having an annual capacity for producing photovoltaic modules rated for at least a total of ten megawatts of rated module capacity, or if Contractor is not during a period following eight (8) years after execution of this contract novation operating such a manufacturing facility, the Contractor also agrees that upon written application by DOE, it will grant to responsible parties for purposes of practicing a subject of this nonexclusive licenses under any Background Patent on terms that are reasonable under the circumstances. If, however, the Contractor believes that exclusive or partially exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Contractor.
4. Notwithstanding the foregoing paragraph K3, the Contractor shall not be obligated to license any Background Patent if the Contractor demonstrates to the satisfaction of the Secretary or his designee that:
 - (i) A competitive alternative to the subject matter covered by said Background Patent is commercially available or readily introducible from one or more other sources; or
 - (ii) The Contractor or its licensees are supplying the subject matter covered by said Background Patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.
5. "Subject of this contract" for purposes of this paragraph K shall include only research and development of cadmium telluride photovoltaic modules and of processes for manufacturing such modules.
6. No action shall be taken by the DOE under this paragraph K prior to a period ending five (5) years following expiration or termination of this contract.

L. Atomic Energy

1. No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the Contractor or its employees with respect to any invention or discovery made or conceived in the course of or under this contract.
2. Except as otherwise authorized in writing by the Contracting Officer, the Contractor will obtain patent agreements to effectuate the provisions of paragraph L1 of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

M. Limitation of Rights

Nothing contained in this Patent Rights clause shall be deemed to give the Government any rights with respect to any invention other than a Subject Invention except as set forth in the Patent Rights clause of this subcontract with respect to background patents and the facilities license.

Clause 4 - Rights in Data--General (JUN1987)

A. Definitions.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

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

"Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements, except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formula, and flow charts of the software.

"Limited rights data," as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

"Technical data," as used in this clause, means data (other than computer software) which are of a scientific or technical nature.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

"Unlimited rights," as used in this clause, means the right of Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

"Limited rights," as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph G2 if included in this clause.

"Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph G3 if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

B. Allocations of rights.

1. Except as provided in paragraph C below regarding copyright, the Government shall have unlimited rights in--

- (i) Data first produced in the performance of this contract;
- (ii) Form, fit, and function data delivered under this contract;
- (iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair items, components, or processes delivered or furnished for use under this contract; and
- (iv) All other data delivered under this contract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph G below.

2. The Contractor shall have the right to--

- (i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, unless provided otherwise in paragraph D below;
- (ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph G below;
- (iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs E and F below; and
- (iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph C1 below.

C. Copyright.

1. Data first produced in the performance of this contract. Unless provided otherwise in subparagraph (d) below, the Contractor may establish, without prior approval of the Contracting Officer, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, express written permission of the Contracting Officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract. When claim to copyright is made, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 401 and acknowledgement of Government sponsorship (including contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting in its behalf, a paid-up nonexclusive, irrevocable worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government.
2. Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contains the copyright notice of 17 U.S.C. 401 and 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph 1 above; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph G3 below if included in this contract or as otherwise may be provided in a collateral agreement incorporated in or made part of this contract.
3. Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph C, and to include such notices on all reproductions of the data.

D. Release, publication and use of data.

1. The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided below in this paragraph or expressly set forth in this contract.

2. The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.
3. The Contractor agrees not to establish claim to copyright in computer software first produced in the performance of this contract without prior written permission of the Contracting Officer. When such permission is granted, the Contracting Officer shall specify appropriate terms to assure dissemination of the software. The Contractor shall promptly deliver to the Contracting Officer or to the Patent Counsel designated by the Contracting Officer a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled, and other terms pertaining to the computer software to which claim to copyright is made.

E. Unauthorized marking of data.

1. Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in subparagraphs G2 or G3 below and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this contract, the Contracting Officer may at any time either return the data to the Contractor, or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.
 - (i) The Contracting Officer shall make written inquiry to the contractor affording the Contractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;
 - (ii) If the Contractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Contractor provides written justification to substantiate the propriety of the markings within the period set in subdivision (i) above, the Contracting Officer shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Contractor shall be so notified in writing. If the Contracting Officer determines, with concurrence of the Head of the Contracting Activity, that the markings are not authorized, the Contracting Officer shall furnish the Contractor a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the contractor files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government shall continue to abide by the markings under this subdivision (iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

2. The Time limits in the procedures set forth in subparagraph 1 above may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.
3. This paragraph E does not apply if this contract is for a major system or for support of a major system by a civilian agency other than NASA and the U.S. Coast Guard subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949.
4. Except to the extent the Government's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Contractor is not precluded by this paragraph E from bringing a claim under the Contract Disputes Act, including pursuant to the Disputes clause of this contract, a applicable, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this contract.

F. Omitted or incorrect markings.

1. Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph G below, or the copyright notice required by paragraph C above, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor--

- (i) Identifies the data to which the omitted notice is to be applied;

- (ii) Demonstrates that the omission of the notice was inadvertent;
 - (iii) Establishes that the use of the proposed notice is authorized; and
 - (iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.
2. The Contracting Officer may also (i) permit correction at the Contractor's expense of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

G. Protection of Limited rights data and restricted computer software.

1. When data other than that listed in subparagraphs B1 (i), (ii), and (iii) above are specified to be delivered under this contract and qualify as either limited rights data or restricted computer software, if the Contractor desires to continue protection of such data, the Contractor shall withhold such data and not furnish them to the Government under this Contract. As a condition to this withholding, the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer data base for delivery to the Government is to be treated as limited rights data and not restricted computer software.
2. Notwithstanding subparagraph G1 of this clause, the contract may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request, made within 3 years after final payment under this contract, the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Contractor may affix the following "limited Rights Notice" to the data and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with such Notice:

LIMITED RIGHTS NOTICE (JUN 1987)

(a) These data are submitted with limited rights under Government contract No. _____ (and subcontract No. _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

- (i) Use (except for manufacture) by support service contractors.
- (ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part, for information and use in connection with the work performed under each contract.

(iv) Emergency repair or overhaul work.

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

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

3. (i) Notwithstanding subparagraph G1 of this clause, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request, made within 3 years after final payment under this contract, the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Contractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs E and F of this clause, in accordance with the Notice:

RESTRICTED RIGHTS NOTICE (JUN 1987)

(a) This computer software is submitted with restricted rights under Government Contract No. _____ (and subcontract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this Notice or as otherwise expressly stated in the contract.

(b) This computer software may be:

- (1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;
- (2) Used or copied for use in a backup computer if any computer for which it was acquired is inoperative;
- (3) Reproduced for safekeeping (archives) or backup purposes;
- (4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software are made subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Contractors in accordance with subparagraphs (b) (1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and

(6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any others rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the contract.

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

(End of notice)

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

**RESTRICTED RIGHTS NOTICE
SHORT FORM (JUN 1987)**

Use, reproduction, or disclosure is subject to restrictions set forth in Contract No. _____ (and subcontract _____, if appropriate) with _____ (name of Contractor and subcontractor)."

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 W.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Contractor includes the following statement with such copyright notice: "Unpublished-rights reserved under the Copyright Laws of the United States."

H. Subcontracting.

The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

I. Relationship to patents.

Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

- J. The Contractor agrees, except as may be otherwise specified in this contract for specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this contract, inspect at the Contractor's facility any data withheld pursuant to paragraph G1 above, for purposes of verifying the Contractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Contractor whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternative inspector.

K. Contractor Licensing

Except as may be otherwise specified in this contract as data not subject to this paragraph, the contractor agrees that (i) if contractor is not during a period of eight (8) years after execution of this contract novation operating or actively pursuing start-up of a manufacturing facility in the United States having an annual capacity for producing photovoltaic modules rated for at least a total of ten megawatts of rated module capacity or if contractor is not during a period following eight (8) years after execution of this contract novation operating such a manufacturing facility and (ii) upon written application by DOE, it will grant to the Government and responsible third parties, for purposes of practicing a subject of this contract, a nonexclusive license in any limited rights data or restricted computer software on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the contractor shall not be obligated to license any such data if the contractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

1. Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this contract;
2. Such data, in the form of results obtained by their use, have a commercially competitive alternative available or readily introducible from one or more other sources;
3. Such data, in the form of results obtained by their use, are being supplied by the contractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the contractor or its licensees have taken effective steps to so supply such data in the form of results obtained by its use; or
4. Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the contract results.

The "subject of this contract" for purposes of this paragraph k shall include only research and development of cadmium telluride photovoltaic modules and of processes for manufacturing such modules.

No action shall be taken by the DOE under this paragraph K prior to a period ending five (5) years following expiration of termination of this contract.

This paragraph K shall be included in all subcontracts, regardless of tier, except subcontracts with domestic small businesses, universities, or nonprofit organizations pursuant to P.L. 96-517, as amended.

Clause 5 - ADDITIONAL DATA REQUIREMENTS

Note: This clause does not apply to this contract if the contract is for the conduct of basic or applied research, as set out elsewhere in this contract, to be performed solely by a college or university, and the estimated cost is not in excess of \$500,000.

- A. In addition to the data (as defined in the clause at 52.227-14, Rights in Data--General clause or other equivalent included in the contract) specified elsewhere in this contract to be delivered, the Contracting Office may, at any time during contract performances or within a period of 3 years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.
- B. The Rights in Data--General clause or other equivalent included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Contractor to deliver any data the withholding of which is authorized by the Rights in Data--General or other equivalent clause of this contract, or data which are specifically identified in this contract as not subject to this clause.
- C. When data are to be delivered under this clause, the Contractor will be compensated for compiling and converting the data into the prescribed form, for reproduction, and for delivery.
- D. The Contracting Officer may release the Contractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in A above.

Clause 7 - RIGHTS TO PROPOSAL DATA (TECHNICAL (JUN 1987) (MODIFIED)

Except for technical data contained on the pages identified below of the Contractor's supporting materials related to this modification and novation, it is agreed that as a condition of award of this contract, and notwithstanding the conditions of any notice appearing thereon, the Government shall have unlimited rights (as defined in the "Rights in Data--General" clause contained in this contract) in and to the technical data contained in the proposal upon which this modification and novation are based: