

National Ecological Observatory Network (NEON) Specific Supplemental Terms & Conditions

1. INTRODUCTION & NOTES

(a) NEON

NEON is a Cooperative Agreement awarded to Battelle Memorial Institute (BATTELLE) by the National Science Foundation (NSF). The terms and conditions contained within this document are incorporated into and made part of the parties' Agreement. To the extent a conflict exists between the terms and conditions contained in this document and any term or condition in other Attachments to the parties' Agreement, the following order of precedence shall apply: 1) Schedule; 2) the terms and conditions of the Subaward document, such as the Purchase Order; 3) terms and conditions of individual Task Order(s), if applicable; 4) this document (F-4113) including Government Flowdown Clauses; and 5) Statement of Work. All applicable terms and conditions contained in this document shall take precedence over any other term or condition listed in any quote or offer between the parties.

(b) AMENDMENTS REQUIRED BY PRIME NSF COOPERATIVE AGREEMENT

Seller agrees that, upon the request of BATTELLE, it will negotiate in good faith with BATTELLE relative to amendments to this Agreement to incorporate additional clauses herein or to change clauses hereof, as BATTELLE may reasonably deem necessary in order to comply with the clauses of the prime NSF Cooperative Agreement or with the clauses of amendments to the prime NSF Cooperative Agreement. If any such amendment to this Agreement causes an increase or decrease in the cost of, or the time required for, performance of any part of the Services under this Agreement, an equitable adjustment shall be made pursuant to the "Changes" clause of this Agreement.

2. 2 CFR 200 APPENDIX II SPECIFIC TERMS & CONDITIONS

- (a) Rights and Remedies. The rights and remedies of Battelle set forth in this Subcontract are cumulative and are in addition to any other rights or remedies that Battelle may have at law and/or in equity. A party's failure to enforce any of rights under this agreement will not be deemed to be a waiver of that party's rights.
- (b) Termination for Convenience. Battelle may terminate part or all of this Agreement for its convenience by giving written notice to Seller. In the event Battelle terminates for its convenience, after performance has commenced, Battelle will compensate Seller for the actual, allowable, and reasonable expenses incurred by Seller for work in process up to and including the date of termination provided Seller has used reasonable efforts to mitigate the Battelle liability under this clause. Upon termination, in accordance with the Battelle written direction, Seller will immediately: 1) cease work; 2) prepare and submit to Battelle an itemization of all completed and partially completed deliverables and services; 3) deliver to Battelle deliverables satisfactorily completed up to the date of termination at the agreed upon prices in the relevant Statement of Work; 4) deliver upon request any work in process; and 5) Seller shall take reasonable steps to mitigate costs and/or damages caused by the termination. In no event shall Battelle be liable for lost or anticipated profits, unabsorbed indirect costs or overhead, or for any sum in excess of the total subcontract price. Seller's

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termination claim shall be submitted within ninety (90) calendar days from the effective date of the termination. Seller shall continue all work not terminated.

- (c) Termination for Default. Battelle, by written notice, may terminate this Subcontract for default, in whole or in part, if Seller: fails to comply with any of the terms of this Subcontract; fails to make progress so as to endanger performance of this Subcontract; fails to provide adequate assurance of future performance; or becomes insolvent or makes a general assignment for the benefit of creditors. Seller shall have ten (10) calendar days (or such longer period as Battelle may authorize in writing) to cure any such failure(s) after receipt of notice from Battelle. Default involving performance delays shall not be subject to the cure provision. Seller shall be compensated only for the work actually delivered and accepted. Battelle may require Seller to deliver to Battelle any supplies and materials, or other items that Seller has specifically produced or acquired for the terminated portion of this Subcontract. Battelle and Seller shall agree on the amount of payment for these other deliverables. Seller shall continue all work not terminated. In the event of a termination for default, Seller shall be liable to Battelle for cover costs, in addition to the Battelle other rights and remedies at law or in equity. If after termination under subpart (a) above, it is determined that Seller was not in default, such termination shall be converted to a Termination for Convenience.
- (d) Davis-Bacon and Anti-Kickback. If the Purchase Order indicates Davis-Bacon Act, as amended (40 U.S.C. 3141-3148) applies and the Agreement is over \$2,000, Seller shall comply with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, Seller shall pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, Seller must pay wages not less than once a week. The Seller must report all suspected or reported violations to the Federal awarding agency. Seller acknowledges acceptance of the wage determination included in this Agreement. Seller shall comply with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that Seller is prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The Seller must report all suspected or reported violations to the Federal awarding agency. Seller shall flow this down in all Subawards under this Agreement.
- (e) Contract Work Hours and Safety Standards Act. If the Agreement is in excess of \$100,000 and involves the employment of mechanics or laborers, Seller shall comply with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, Seller is required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

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- (f) **Rights to Inventions.** The term *funding agreement* means any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph. If Battelle's award from the customer meets the definition of "funding agreement" then Seller shall comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency. If the Seller wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work hereunder, the Seller shall require its lower tier contractor to comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

3. NSF SPECIFIC TERMS & CONDITIONS

- (a) The following terms apply to this Agreement:
- (1) **Certification of Independent Price Determination.** Seller certifies that the price(s) proposed in connection with this Agreement have been arrived at independently, without consultation, communication, or agreement with any others for the purpose of restricting competition, and that Seller has not and will not knowingly disclose the price(s), directly or indirectly, to any other Offeror.
 - (2) **Notice of Labor Disputes.** When an actual or potential labor dispute or other condition delays or threatens to delay the timely performance of this Agreement, Seller shall immediately notify BATTELLE in writing. Such notice shall include all relevant information regarding such dispute or other condition. Seller shall insert the essence of this provision in all lower-tier procurements issued hereunder.
 - (3) **Access to Pertinent Records.** In addition to all rights set forth elsewhere in this Agreement, for any Subaward in excess of the simplified acquisition threshold (as defined by Federal Acquisition Regulation § 2.101) and entered into by less than full and open competition, BATTELLE, the Director of the NSF, the Comptroller General of the United States, or any duly authorized representatives of the above, shall have access to pertinent records of Seller to make audits, examinations, excerpts and transcriptions.
 - (4) **Disputes.** The Contracts Disputes Act shall have no application to this Agreement. Any reference to a "Disputes" clause shall mean the "Disputes" clause of this Agreement.

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(5) Subaward. As used in this Agreement, the term "Subaward" includes contracts, cooperative agreements, purchase orders, subcontracts, orders issued under blanket purchase agreements or similar devices, awards made to sub-recipients regardless of form, and modifications to all the aforementioned to be issued by the Seller under this Agreement. The Seller shall not artificially segregate its procurement to lesser dollar amounts for the purpose of circumventing this requirement.

(b) The following terms apply to all fixed priced supply or service Subawards:

(1) Overage and Damaged Goods.

(i) OVERAGES – Seller is responsible for the delivery of each item quantity within allowable variations, if any, as stated on the applicable agreement. If Seller delivers and BATTELLE receives quantities of any item in excess of the quantity called for (after considering any allowable variation in quantity), such excess quantities will be treated as being delivered for the convenience of Seller. If the Subaward authorizes variable quantities within a percentage range as an acceptable stated variable quantity or, if not so stated, otherwise delivers an extra quantity not ordered, Seller agrees that BATTELLE may retain such excess quantities up to \$300 in value without compensating Seller therefor, and Seller waives all right, title, or interests therein. Seller agrees that it will not invoice for said extra quantities, or BATTELLE may credit any invoice for the overage.

Overage in excess of \$300 will, at BATTELLE's option and sole discretion, either be returned to Seller at Seller's expense or retained and paid for by BATTELLE at the ordered unit price. BATTELLE will confirm with Seller the overage and request a Return Authorization. If Seller does not issue a Return Authorization and refuses to receive the overage to be return, BATTELLE will consider such action, a breach of contract and pursue a course for termination of the order or equity credit on invoice or setoff another order or agreement at its own election. If Seller refuses acceptance of the return shipment of the overage, BATTELLE may consider the overage as abandoned and may consider the disposition of the excess quantities as a surplus under its property disposition policy.

(ii) DAMAGED GOODS – If damages are discovered within a reasonable time after receiving a shipment of goods or deliverables at any BATTELLE facility, BATTELLE will inform Seller of the damage, and Seller will be responsible for securing authorization for BATTELLE to file a claim and issuing disposition instructions regarding the damaged goods.

(2) WARRANTY OF PRICE – Seller warrants that the price(s) charged for the supplies/services specified in this Agreement do not exceed the selling price(s) Seller charges its most favored customer for the same or substantially similar items, whether sold to the Government or to any other purchaser, taking into account the quantity

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purchased and terms and conditions of sale. Seller further agrees that in the event of an announced price reduction prior to complete shipment of supplies or performance of services, said price reduction shall be passed on to Buyer for supplies remaining to be shipped or services still to be performed.

- (3) Packaging and Packing. In addition to the terms set forth elsewhere in this Agreement, Seller shall be responsible for properly packing and packaging the supplies in suitable containers for protection during shipment in accordance with transportation regulations and good commercial practice. No additional charge will be allowed for packing and packaging unless specifically agreed to in writing. Seller shall label each package with the corresponding Order number. Seller shall prepare an itemized packing list bearing the Order number, description of items, part number, and quantity shipped for each package. One copy of the packing list shall be placed in the shipping container. Failure to provide required packing lists may delay payment pending verification of receipt.
 - (4) Cessation of Production. If Seller plans to permanently discontinue production of any of the supplies, parts, support services, etc. provided to BATTELLE, hereunder, at any time during the useful life of such items, Seller shall provide BATTELLE at least six (6) months advance written notice of such discontinuance and, during this time, agrees to accept BATTELLE orders for such items.
 - (5) Transportation Charges, Title, and Risk of Loss. Unless otherwise provided in the applicable order, transportation charges shall be prepaid and separately invoiced to BATTELLE. No premium transportation costs will be allowed unless authorized by BATTELLE. The F.O.B. point shall be the delivery destination indicated in this Agreement, and title to the supplies and risk of loss or damage shall pass to BATTELLE upon BATTELLE's acceptance of the supplies, regardless of where BATTELLE takes physical possession. If the F.O.B. point is designated as Seller's location, then title and risk of loss or damage to the supplies shall pass to BATTELLE upon Seller's delivery of the supplies to the carrier.
- (c) The following terms apply to all engineering services and commercial firm fixed price construction Sub-Awards, Subcontracts, or Purchase Orders:
- (1) Assignment. At the direction of the NSF, BATTELLE may assign this Agreement to the NSF or the government. Seller shall be given prior written notice of such directed assignment of this Agreement. In no circumstance shall this Agreement be construed as binding on the government or the NSF, or to imply that the government or the NSF are a party to this Agreement, except to the extent this Agreement is assigned in accordance with this clause.
 - (2) Land Permits. Battelle shall be responsible for obtaining any needed land permits for the location of performance.
 - (3) Work on BATTELLE's or BATTELLE's Customer's Premises. If this Agreement requires Seller to perform work on BATTELLE'S or BATTELLE's Customer's premises, Seller shall

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take all reasonable and necessary precautions to prevent any injury to persons or damage to property during the progress of such work. Except to the extent that any injury to persons or damage to property is directly due to BATTELLE's or its Customer's fault or negligence, Seller agrees to indemnify and hold harmless BATTELLE and its Customer against all loss or liability resulting from any negligent acts or omissions of Seller, its employees, agents, or subcontractors.

- (4) Insurance. Seller shall maintain Excess/Umbrella Liability Insurance in the amount of \$2,000,000. Furthermore, in the event Seller fails to furnish BATTELLE any required certificate of insurance, BATTELLE may obtain, at Seller's expense, the insurance coverage required for such compliance. Seller also agrees to provide insurance for all BATTELLE's property in Seller's possession against loss or damage resulting from fire or theft, including extended coverage, malicious mischief and vandalism.
- (5) Construction Procedure. BATTELLE's observation or monitoring of portions of the work performed under this Agreement shall not relieve Seller from its responsibility for performing the work in accordance with the applicable contract documents and all applicable laws. BATTELLE shall not control, have charge of, or be responsible for construction means, methods, techniques, sequences, or procedures, health or safety programs, or precautions connected with the work and shall not manage, supervise, control, or have charge of Seller personnel. BATTELLE shall not be responsible for negligent acts or omissions of the Seller.

4. NATIONAL SCIENCE FOUNDATION FLOWDOWN PROVISIONS

The following terms apply to Seller and Seller shall flowdown in all Subawards under this Agreement changing identification of the parties as appropriate:

- (a) Award of any amendments, and delivery orders hereunder may be subject to and contingent upon approval of the NSF.
- (b) Any amendments, and delivery orders hereunder may be contingent upon funding by the NSF. Any incurrence of cost in advance of authorized funds, without written approval by BATTELLE, will not be accepted.
- (c) This agreement does not bind nor purport to bind NSF or any other federal government sponsors.
- (d) If this Agreement exceeds \$100,000 Seller must comply with the Byrd Anti-Lobbying Amendment. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.
- (e) The Seller shall comply with the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, entitled "Equal Employment Opportunity" (30 FR 12319,

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12935, 3 CFR Part, 1964-1965 Comp., p. 339) as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

- (f) If this Agreement is in excess of \$150,000 the Seller shall comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).
- (g) This Agreement incorporates certain National Science Foundation (NSF) terms and conditions. If the date or substance of any NSF term or condition is different from the date or substance of the term or condition actually incorporated in the NSF Cooperative Agreement referenced herein, the date or substance of the term or condition incorporated by said NSF Cooperative Agreement shall apply instead. The Seller shall flow down in its Subawards all clauses and provisions necessary to fulfill the terms of this Agreement, as well as all applicable NSF Cooperative Agreement Financial & Administrative Terms and Conditions (CA-FATC) (Effective October 25, 2021), which are accessible here: https://www.nsf.gov/bfa/dias/policy/cafatc/cafatc_102521.pdf
and NSF Cooperative Agreement Modifications and Supplemental Financial & Administrative Terms and Conditions for Major Multi-User Research Facility Projects and Federally Funded Research and Development Centers" (CA-FATC Mods) (Effective October 25, 2021), which are accessible here: https://www.nsf.gov/bfa/dias/policy/cafatc/cafatc_modsandsup102521.pdf
All NSF terms & conditions apply to this Agreement as indicated in the substance of the clause. All clauses that are not applicable are self-deleting.
- (h) The Seller shall make all Subawards in its own name and shall not bind or purport to bind BATTELLE, the Government or NSF; and hereby agrees to administer/monitor all Subawards it enters into and supports with NSF funds in accordance with the applicable federal cost principles and the applicable federal administrative requirements; remains responsible for maintaining the necessary documentation on all Subawards and making it available to Battelle and/or NSF upon request; and, if applicable, shall include major Subaward activities that constitute a significant part of the program or project effort in the annual and final progress and final project reports that are submitted to Battelle under this Agreement.
- (i) The Seller shall give the BATTELLE Subcontracts Representative immediate notice in writing of any legal action or suit files, and prompt notice of any claim made against Seller by any recipient of a Subaward which in the opinion of the Seller may result in litigation, related in any way to this Agreement, with respect to which the Seller may be entitled to reimbursement from BATTELLE or the NSF.
- (j) Debarment and Suspension (Executive Orders 12549 and 12689). Seller shall ensure a lower tier award under this Agreement (see 2 CFR 180.220) is not made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.