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January 20, 2009

Office of the Assistant General Counsel for
Technology Transfer and Intellectual Property,
U.S. Department of Energy
1000 Independence Avenue., SW
Washington, D.C. 20585

Attention: Technology Transfer Questions

Dear DOE General Counsel,

In response to the DOE's Notice of Inquiry identified in the Federal Register /Vol. 73, No. 229, dated November 26, 2008, due no later than January 26, 2009, JPL respectfully submits the following written comments to question No. 1 pertaining to improvements to the CRADAs, WFO Agreements and User Agreements.

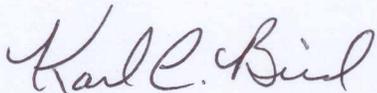
JPL Comments:

The WFO contains indemnification provisions in paragraphs in 10a, 10b and 11 which are very appropriate where the sponsor is using its personal non-governmental dollars to fund the research but very inappropriate where the Sponsor is a government contractor who is funded by the government and operating under a cost reimbursement contract. Accordingly, JPL believes the DOE should have separate WFO agreements for (1) commercial, private dollar sponsors; and (2) cost reimbursement government contractors and FFRDCs. The indemnification provisions should be in the former but not the latter.

When a non-DOE FFRDC transfers government money to a DOE laboratory under a WFO agreement, that FFRDC is operating under the terms and conditions of its sponsorship agreement with its agency. See FAR 35.017-1 Sponsoring Agreements. That sponsoring agreement is typically a cost reimbursement contract. Cost reimbursement contracts written under the FAR are in the nature of "best efforts contracts" (see General Dynamics Corp v. U.S., 671 F.2d 474 (1982)) which do not require indemnification of the government. Accordingly, the DOE, in requiring non-DOE FFRDC's to indemnify the government, are in effect forcing the Sponsors to modify the terms of their sponsorship agreement previously negotiated with the government and also requiring them to risk their personal assets for a project that is not personally beneficial to the sponsor but for the benefit and public trust of the government. See FAR 35.017(a)(2). That is inappropriate since renegotiation of the sponsorship agreement is outside of DOE's purview. This also creates a disincentive to using the DOE laboratories. A non-profit university will not risk its personal educational endowment to indemnify the government in a manner which exceeds the terms of the governing sponsor agreement particularly in the performance of a project which is funded and beneficial to the government and not the university. FFRDCs won't do this. Accordingly, separately drafted WFOs for FFRDCs and other cost reimbursement government contractors without the indemnification language should be utilized.

Thank you for the opportunity to provide comments. JPL is committed to process improvement and other mechanisms that will enable greater collaboration and partnering between our respective institutions. Please feel free to give me a call if you have any questions or require any clarification pertaining to these comments.

Regards,



Karl C. Bird,
Acquisition Division Manager
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Cc: Nancy Saxner, LBNL Contracts Officer
David A. Flores, Caltech General Counsel