

Air-Source Heat Pump Program

This Air-Source Heat Pump Program (“ASHP Program”) Participation Agreement (“Agreement”), including Exhibits A and B attached hereto, and incorporating herein by reference PON 3653 and the Air-Source State Heat Pump Program Manual (“Manual”), as they may be revised from time to time, is entered into by and between the New York State Energy Research and Development Authority (“NYSERDA”), having its principal place of business at 17 Columbia Circle, Albany, New York 12203-6399 and the “Participating Installer” (hereinafter “Participating Installer or “Contractor”) as identified in the ASHP Participating Installer Application and as referenced in this Agreement, which hereinafter may be referred to collectively as the “Parties” to govern the rights and responsibilities of NYSERDA, and the Participating Installer with respect to the application, procurement, and installation of ASHP systems approved under and through NYSERDA’s ASHP Incentive Program and to otherwise effectuate the purposes of the ASHP Program. The terms, conditions, and provisions of the ASHP Program as identified in the Manual are incorporated herein and made a part hereof by reference.

WHEREAS, NYSERDA has issued the ASHP Program for furthering the State’s objective of supporting the development of the ASHP industry in New York State and by providing financial Incentives (“Incentives”) for the installation of ASHP Systems that meet the requirements of the ASHP Program, NYSERDA and the Parties agree to be bound, for purposes of the ASHP Program, by the following terms and conditions; and

WHEREAS, the success and future of this publicly funded program depends on the performance and integrity of the Participating Installers in their dealings with the public and their installation of ASHP Systems; and

WHEREAS, this Agreement has been designed to foster and protect the integrity of the ASHP Program, and will be enforced; and

WHEREAS, in its role as administrator of the ASHP Program, NYSERDA reserves the right to deny the Participating Installer status to any applicant and to revoke such status where in its judgment such action is in the best interests of the ASHP Program;

NOW, the Parties agree that all the terms and conditions contained in this Agreement shall be binding upon the Parties.

Article 1: Participation in the Air-Source Heat Pump Incentive Program

Section 1: The Participating Installer agrees that by the act of signing and submitting an ASHP Program Participating Installer Application (Participating Installer Application) to the ASHP Program, the Participating Installer confirms and agrees: (1) that the Participating Installer has read and understands this ASHP Program Participation Agreement and accepts and agrees to abide by the terms and conditions contained herein; (2) that all of the information provided in an ASHP Program Participating Installer Application and site owner Invoice submitted by the Participating Installer, including any attachments, is true and accurate, to the best of its knowledge; (3) that any project for which an ASHP Program Incentive Application is submitted by the Participating Installer under ASHP Program shall comply with the requirements of the ASHP Program, the applicable Manual, the terms and conditions of this Agreement, and with all applicable codes, accepted industry standards, and best practices. This Agreement does not obligate NYSERDA to make any payment to the Participating Installer.

Section 2: The Participating Installer acknowledges that failure to adhere to the terms and conditions of participation in the ASHP Program or to otherwise fail to follow the ASHP Program requirements and procedures may result in termination of this Participation Agreement. The obligation of the Participating Installer with respect to approved ASHP Participating Installer and Incentive Applications shall survive any expiration or termination of this Agreement.

Section 3: The Participating Installer shall provide an ASHP Manufacturer-sponsored Installation Training Certificate or comparable Proof of Training Completion documentation. This course, at a minimum should have covered application, sizing, pipe layout, equipment location and installation of indoor and outdoor ASHP units.

Section 4: Upon NYSERDA’s acceptance of an ASHP Installer into the ASHP Program, Participating Installers are then

authorized to submit Incentive Application(s). The Participating Installer will be responsible for all ASHP System installations for which an Incentive Application is submitted under this Agreement, regardless of whether the installation was performed partially or completely by others.

Section 5: ASHP System installations must comply with the Manual in effect at the time of NYSEERDA's acceptance of the Incentive Application, and must conform to the corresponding NYSEERDA-approved Incentive Application. The Manual identifies the current Incentive, rules for participation, submission requirements, ASHP System requirements, and the procedures for securing Incentive payments. The ASHP Incentive Program and Manual may be changed by NYSEERDA at any time, and changes will be applicable to all ASHP Systems not yet approved by NYSEERDA. Notice of all such changes will be provided to the Participating Installer via the e-mail address identified in the Participating Installer Application. Notice of all such changes will also be posted on NYSEERDA's website.

Section 6: The Participating Installer, its employees, and subcontractors shall treat customers fairly and in good faith, and shall deliver promised services in a timely, responsible, professional, and competent manner. The Participating Installer shall fairly represent the ASHP Program and the relationship of the Participating Installer with NYSEERDA to customers and the public. If it is determined that the Participating Installer is not fairly or accurately representing the ASHP Program and/or its relationship with NYSEERDA, the Participating Installer will be subject to administrative review and its status within the ASHP Incentive Program may be affected. All installations completed through this Program are subject to random field inspections. The selection of installations for inspection will be determined by NYSEERDA according to standard NYSEERDA protocol and the status of the Participating Installer. Written complaints received by NYSEERDA from customers will be documented and investigated by NYSEERDA or its representatives. Complaints from customers will be shared with the Participating Installer unless determined by NYSEERDA to be frivolous and/or have no merit.

Section 7: The Participating Installer shall not, without prior written permission from NYSEERDA, knowingly subcontract with, employ, or hire any individual or company to perform work related to an Incentive Application if said individual or company is currently in a probation or suspended status, or whose past participation in the ASHP Program or any other NYSEERDA PON or program has been suspended or terminated. A list of Participating Installers in the ASHP Incentive Program is accessible on NYSEERDA's website at: www.nyserda.ny.gov/ASHP

Section 8: The Participating Installer agrees to provide to NYSEERDA and NYSEERDA's agents, throughout the Term of this Agreement, access to a Project Site(s) (as defined in the Manual) facility, equipment, and personnel as necessary to facilitate quality assurance of the ASHP system installation. NYSEERDA or its technical contractor(s) may conduct a site inspection at a Project Site at any time. NYSEERDA or its agents may choose to visit a Project Site to verify that the information provided in any of the required documentation is accurate. Should NYSEERDA decide to inspect a Project Site, NYSEERDA or its agents may or may not contact the Participating Installer to schedule the inspection; inspections may occur without notice to the Participating Installer. If the inspection reveals activities different from that represented in any of the required documentation, NYSEERDA may refuse to make payment. The Participating Installer hereby agrees that NYSEERDA may independently communicate with any site owner with respect to any Project, as defined in the Manual, without prior notice to the Participating Installer.

Article 2: Air-Source Heat Pump Program Incentives and Payments

Section 1: The amounts, limitations, and availability of Incentives as defined in the Manual are those that are in effect at the time that NYSEERDA accepts the Incentive Application.

Section 2: NYSEERDA reserves the right to change the ASHP Program Incentives as needed. Notice of all such changes will be provided to the Participating Installer via the e-mail address as identified on the ASHP Participating Installer Application. Notice of all such changes will also be posted on NYSEERDA's website.

Section 3: Incentive payments that result from Incentive Applications will be paid to the Participating Installer listed on the corresponding Incentive Application. Acceptance by the Participating Installer of final payment shall release NYSEERDA from all claims and liability of the Participating Installer, representatives and assigns to this Agreement.

Section 4: NYSEERDA reserves the right to withhold approval of Incentive Applications at any time, for any reason. NYSEERDA will not process an Incentive Application submitted by the Participating Installer if their Agreement has been terminated, or where the Participating Installer is a party on customer contract(s) that are the subject of unresolved application, installation, or performance issues.

Section 5: NYSERDA may charge the Participating Installer for any costs incurred by NYSERDA for additional field inspections required due to the failure by the Participating Installer to submit a complete Incentive Application, repetitive errors in design or installation or to make corrections or modifications as requested by NYSERDA.

Section 6: Notwithstanding any other provision of this Agreement, NYSERDA reserves the right to deny or alter payment of an Incentive, to exercise its Set-Off rights, or to seek reimbursement of Incentives paid if, at any time, it learns that the approved ASHP system was not actually installed or was not installed as required under the ASHP Program or this Agreement. NYSERDA may: (a) elect to not pay the Incentive; (b) require changes before making any payments; (c) require reimbursement of Incentives already paid unless the requested changes are made; (d) withhold approval of Incentive Applications for other ASHP Systems; or (e) exercise its Set-Off rights.

Section 7: Incentive payments payable under this Agreement will be made pursuant to NYSERDA's Prompt Payment Policy as outlined in Exhibit B of this Agreement.

Article 3: Obligations between the Participating Installer and Eligible Customers

Section 1: The Participating Installer shall execute a written agreement with the customer for each ASHP System. Each such agreement, including the disclosure of all subcontractors, shall meet the requirements identified in the applicable Manual. In addition, at the completion of each ASHP installation, the Participating Installer must train site owners on system operation and maintenance.

Section 2: The Parties agree that NYSERDA may, at NYSERDA's discretion, communicate by voice and/or written format with any ASHP System customer with respect to any matter relevant to a proposed or installed ASHP System. Such communications may be in reply to an inquiry from a customer or at NYSERDA's initiation.

Section 3: The Participating Installer further attests that the customer signature appearing on any document submitted by the Participating Installer below shall be the true and genuine signature of the customer and that it was affixed to the document on the date indicated.

Article 4: Insurance Requirements

Section 1: The Participating Installer, at no additional cost to NYSERDA, shall maintain or cause to be maintained throughout the term of this Agreement, insurance of the types and in the amounts specified in this Article. All such insurance shall be evidenced by insurance policies, each of which shall: (1) reference this Agreement; name or be endorsed to cover the Participating Installer as the insured, and NYSERDA and the State of New York as additional insured; and reference all work to be performed under the ASHP Incentive Program; (2) provide that such policy may not be cancelled or modified until at least 30 days after receipt by NYSERDA of written notice thereof; and (3) be reasonably satisfactory to NYSERDA in all other respects. NYSERDA reserves the right to request insurance documentation and copies of subcontractor agreements for any subcontractor, and to request the identity of all individuals participating in the ASHP System installation.

Section 2: The types and amounts of insurance required to be maintained under this Section are as follows: (1) commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of \$1,000,000 in respect of claims arising out of personal injury, sickness, or death of any one person, \$1,000,000 in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$1,000,000 in respect of claims arising out of property damage in any one accident or disaster, and (2) Workers Compensation coverage as required by New York State.

Section 3: Not less than 15 days prior to the date any policy furnished or carried pursuant to this Agreement will expire, the Participating Installer shall deliver to NYSERDA a certificate(s) of insurance evidencing the renewal of such policy(s), and the Participating Installer shall promptly pay all premiums thereon due. No work shall be performed under this Agreement without current insurance. NYSERDA will not accept Incentive Applications or make payments under this Agreement without current insurance certificates.

Section 4: In the event of threatened legal action, claims, encumbrances, or liabilities that may affect NYSERDA hereunder, or if deemed necessary by NYSERDA due to events rendering a review necessary, the Participating Installer shall deliver to NYSERDA a certified copy of each policy upon request.

Section 5: Within five working days, or contemporaneously with the requirements of each insurance policy, the Participating Installer shall notify NYSERDA in writing of the occurrence of any accident, event or incident involving

personal injury or property damage that might reasonably result in any complaint or claim, in law or in equity, against the Participating Installer, any non-customer party to the applicable customer agreement or NYSERDA.

Article 5: Indemnification

The Participating Installer shall protect, indemnify, and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, experts' and/or attorneys' fees and expenses) imposed upon, incurred by, or asserted against, NYSERDA or the State of New York resulting from, arising out of or relating to the Participating Installer's performance of this Agreement. The obligations of the Participating Installer under this section shall survive any expiration or termination of this Agreement, and shall not be limited by any enumeration herein of required insurance coverage.

Article 6: Miscellaneous

Section 1: NYSERDA does not endorse, guarantee, or warrant any manufacturer, product, or the Participating Installer, and NYSERDA disavows and provides no warranties, expressed or implied, for any product or services that may be rendered hereunder. The Participating Installer's reliance on warranties is limited to any warranties that may arise from, or be provided by, contractors, vendors, manufacturers, etc.

Section 2: The Participating Installer acknowledges that neither NYSERDA nor any of its representatives are responsible for assuring that the design, engineering, construction, and/or installation of the ASHP System is proper or in compliance with any particular laws (including patent laws), regulations, codes, or industry standards. NYSERDA does not make any representations of any kind regarding the results to be achieved by any ASHP System, or the adequacy or safety of such measures. The scope of review by NYSERDA of the installation of the ASHP Systems is limited solely to determining whether such ASHP Systems conform to ASHP Program terms, conditions, and requirements.

Section 3: This Agreement, including Exhibits A and B and all documents incorporated by reference, is the entire Agreement between NYSERDA and the Participating Installer and supersedes all other communications and representations. If either NYSERDA or the Participating Installer desire to modify this Agreement, the modification must be in writing and signed by an authorized representative of the party against which enforcement of the modification is sought.

Section 4. The status of the Participating Installer under this Agreement shall be that of an independent contractor and not that of an agent. In accordance with such status, the Participating Installer and its respective officers, agents, employees, subcontractors, representatives, and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status. By reason of this Agreement, the Participating Installer shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives, or servants of NYSERDA nor make any claim, demand, or application for any right or privilege applicable to NYSERDA, including, without limitation, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage, and retirement membership or credit. Nothing in this Agreement shall be construed as creating a partnership, joint venture, employment, agency, legal representation or other relationship between NYSERDA and the Participating Installer for any reason, including but not limited to unemployment, workers' compensation, employee benefits, vicarious liability, professional liability coverage or indemnification. No party shall have the right, power or authority to obligate or bind the other in any manner not specified in this Agreement. The Participating Installer expressly acknowledges NYSERDA's need to be advised, on an immediate basis, of the existence of any claim or event that might result in a claim or claims against NYSERDA, the Participating Installer, subcontractors, vendors and/or the Participating Installer's personnel by virtue of any act or omission on the part of NYSERDA or its employees. Accordingly, the Participating Installer expressly covenants and agrees to notify NYSERDA of any such claim or event, including but not limited to, requests for accommodation and allegations of harassment and/or discrimination, immediately upon contractor's discovery of the same, and to fully and honestly cooperate with NYSERDA in its efforts to investigate and/or address such claims or events, including but not limited to, complying with any reasonable request by NYSERDA for disclosure of information concerning such claim or event even if this Agreement should terminate for any reason.

Section 5: The Participating Installer shall collaborate with NYSERDA's Director of Communications to prepare any press release and to plan for any news conference concerning ASHP Systems installed under the ASHP Program. In addition, the Participating Installer shall notify NYSERDA's Director of Communications regarding

any media interview involving ASHP Systems installed under the ASHP Program.

Section 6: Commercial promotional materials, advertisements, informational brochures, and website content produced by the Participating Installer shall credit NYSEDA and shall be submitted to NYSEDA for review and recommendations to improve their effectiveness prior to use. Such content may be approved in advance by NYSEDA, and after initial approval, such content may be used in subsequent promotional materials or advertisements without additional approvals. In the event that NYSEDA determines that the Participating Installer is presenting or publishing incorrect or misleading information regarding the ASHP Program or the Participating Installer's status in the ASHP Program, the Participating Installer agrees to make appropriate modifications promptly upon notification by NYSEDA. If a website maintained by or for the Participating Installer includes references to NYSEDA and/or the ASHP Program, the website must include the following link: www.nyserda.ny.gov/ASHP or any such link as NYSEDA may provide.

Section 7: This Agreement does not commit NYSEDA to approve any Incentive or Incentive Application, pay any costs incurred in preparing an Incentive Application, or procure or contract for services or supplies. NYSEDA reserves the right to accept or reject any or all Incentive Applications received, to negotiate with all qualified sources, or to cancel, in part or in its entirety, the ASHP Program when it is in NYSEDA's best interest.

Section 8: This Agreement may be terminated by NYSEDA at any time upon notice to the Participating Installer. If the Participating Installer wishes to cancel or terminate this Agreement, NYSEDA may seek reimbursement of any Incentives provided by NYSEDA regarding ASHP Systems that have not been completely installed and commissioned as required in this Agreement.

Section 9: The Participating Installer agrees and consents to receive notices at the email addresses provided in this Participating Installer Application.

Section 10: The Participating Installer shall disclose any conviction for a felony within the past five years, under the laws of the United States or any state or territory of the United States, and shall describe circumstances for each. This disclosure requirement extends to the Participating Installer and its officers, partners, and directors or members of any similarly governing body. If a conviction should come to the attention of NYSEDA after the execution of this Agreement, NYSEDA may instruct the Participating Installer to temporarily stop work pending further investigation, or terminate the Agreement; the Participating Installer may be subject to penalties for violation of any law that may apply in the particular circumstances. The Participating Installer must also disclose if they have ever been debarred or suspended by any agency of the U.S. Government or the New York State Department of Labor.

Section 11: NYSEDA shall have no liability under this Agreement to the Participating Installer or to anyone else beyond the funds actually paid to NYSEDA by third parties, which would fund this Agreement.

Section 12: The Participating Installer shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of three years thereafter, full and detailed books, accounts, and records pertaining to this Agreement, including without limitation, all data, bills, invoices, payrolls, time records, expense reports, subcontracting efforts and other documentation evidencing, or in any material way related to the Participating Installer's performance under this Agreement. NYSEDA shall have the right from time to time and at all reasonable times during the term of the Agreement and such period thereafter to inspect and audit any and all books, accounts and records pertaining to the Participating Installer's performance under this Agreement, at the office or offices of the Participating Installer where they are then being kept, maintained and preserved. If such books, accounts and records are not kept at an office within the State of New York, within a reasonable time of a request by NYSEDA, the Participating Installer shall make such books, accounts and records available to NYSEDA at NYSEDA's offices or at an agreed upon location within the State of New York. Any payment made under this Agreement shall be subject to retroactive adjustment (reduction or increase) regarding amounts included therein which are found by NYSEDA on the basis of any audit of the Participating Installer by an agency of the United States, the State of New York, or NYSEDA not to constitute a properly invoiced amount.

BY THE ACT OF SUBMITTING AN INCENTIVE APPLICATION, THE PARTICIPATING INSTALLER ACKNOWLEDGES AND CONFIRMS ITS UNDERSTANDING THAT NYSEDA MAKES NO REPRESENTATIONS OF ANY KIND REGARDING THE RESULTS TO BE ACHIEVED OR THE PERFORMANCE, ADEQUACY OR SAFETY OF ANY SYSTEM INSTALLED UNDER THE ASHP PROGRAM. NYSEDA DOES NOT ENDORSE, GUARANTEE, OR WARRANT ANY PARTICIPATING INSTALLER, PARTICULAR MANUFACTURER, OR PRODUCT, AND NYSEDA PROVIDES NO WARRANTIES, EXPRESSED OR IMPLIED, FOR ANY PRODUCT OR SERVICE. NYSEDA IS NOT

RESPONSIBLE FOR AND WILL NOT CONTRIBUTE TO ANY REMEDY TO AN ACTUAL OR ALLEGED SYSTEM DEFECT, INADEQUACY, MALFUNCTION, OR COMPLAINT.

EXHIBIT A

STANDARD TERMS AND CONDITIONS FOR ALL NYSERDA AGREEMENTS

(Based on Standard Clauses for New York State Contracts and Tax Law Section 5-a)

The parties to the Agreement agree to be bound by the following clauses which are hereby made a part of the Agreement:

1. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, sexual orientation, age, disability, genetic predisposition or carrier status, or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is an Agreement for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this Agreement shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this Agreement. If this is a building service Agreement as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this Agreement and forfeiture of all moneys due hereunder for a second subsequent violation.

2. WAGE AND HOURS PROVISIONS. If this is a public work Agreement covered by Article 8 of the Labor Law or a building service Agreement covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by NYSERDA of any NYSERDA-approved sums due and owing for work done upon the project.

3. NON-COLLUSIVE BIDDING REQUIREMENT. In accordance with Section 2878 of the Public Authorities Law, if this Agreement was awarded based upon the submission of bids, Contractor warrants, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further warrants that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to NYSERDA a non-collusive bidding certification on Contractor's behalf.

4. INTERNATIONAL BOYCOTT PROHIBITION. If this Agreement exceeds \$5,000, the Contractor agrees, as a material condition of the Agreement, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the Federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the Agreement's execution, such Agreement, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify NYSERDA within five (5) business days of such conviction, determination or disposition of appeal. (See and compare Section 220-f of the Labor Law, Section 139-h of the State Finance Law, and 2 NYCRR 105.4).

5. SET-OFF RIGHTS. NYSERDA shall have all of its common law and statutory rights of set-off. These rights shall include, but not be limited to, NYSERDA's option to withhold for the purposes of set-off any moneys due to the Contractor under this Agreement up to any amounts due and owing to NYSERDA with regard to this Agreement, any other Agreement, including any Agreement for a term commencing prior to the term of this Agreement, plus any amounts due and owing to NYSERDA for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto.

6. PROPRIETARY INFORMATION. Notwithstanding any provisions to the contrary in the Agreement, Contractor and NYSERDA acknowledge and agree that all information, in any format, submitted to NYSERDA shall be subject to and treated in accordance with the NYS Freedom of Information Law ("FOIL," Public Officers Law, Article 6). Pursuant to FOIL, NYSERDA is required to make available to the public, upon request, records or portions thereof which it possesses, unless that information is statutorily exempt from disclosure. Therefore, unless the Agreement specifically requires otherwise, Contractor should submit information to NYSERDA in a non-confidential, non-proprietary format. FOIL does provide that NYSERDA may deny access to records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." [See Public Officers Law, § 87(2)(d)]. Accordingly, if the Agreement specifically requires submission of information in a format Contractor considers a proprietary and/or confidential trade secret, Contractor shall fully identify and plainly label the information "confidential" or "proprietary" at the time of disclosure. By so marking such information, Contractor represents that the information has actual or potential specific commercial or competitive value to the competitors of Contractor. Without limitation, information will not be considered confidential or proprietary if it is or has been (i) generally known or available from other sources without obligation concerning its confidentiality; (ii) made available by the owner to others without obligation concerning its confidentiality; or (iii) already available to NYSERDA without obligation concerning its confidentiality. In the event of a FOIL request, it is NYSERDA's policy to consider records as marked above pursuant to the trade secret exemption procedure set forth in 21 New York Codes Rules & Regulations § 501.6 and any other applicable law or regulation. However, NYSERDA cannot guarantee the confidentiality of any information submitted. More information on FOIL, and the relevant statutory law and regulations, can be found at the website for the Committee on Open Government <http://www.dos.ny.gov/about/foil2.html> and NYSERDA's Regulations, Part 501 <http://www.nyserda.ny.gov/About/New-York-State-Regulations.aspx>

7. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.

(a) **FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER.** As a condition to NYSERDA's obligation to pay any invoices submitted by Contractor pursuant to this Agreement, Contractor shall provide to NYSERDA its Federal employer identification number or Federal social security number, or both such numbers when the Contractor has both such numbers. Where the Contractor does not have such number or numbers, the Contractor must give the reason or reasons why the payee does not have such number or numbers.

(b) **PRIVACY NOTIFICATION.** The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by Contractor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law.

8. CONFLICTING TERMS. In the event of a conflict between the terms of the Agreement (including any and all attachments thereto and amendments thereof) and the terms of this Exhibit A, the terms of this Exhibit A shall control.

9. GOVERNING LAW. This Agreement shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

10. NO ARBITRATION. Disputes involving this Agreement, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily required) without the NYSERDA's written consent, but must, instead, be heard in a court of competent jurisdiction of the State of New York.

11. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon NYSERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify NYSERDA, in writing, of each and every change of address to which service of process can be made. Service by NYSERDA to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

12. CRIMINAL ACTIVITY. If subsequent to the effectiveness of this Agreement, NYSERDA comes to know of any allegation previously unknown to it that the Contractor or any of its principals is under indictment for a felony, or has been, within five (5) years prior to submission of the Contractor's proposal to NYSERDA, convicted of a felony, under the laws of the United States or Territory of the United States, then NYSERDA may exercise its stop work right under this Agreement. If subsequent to the effectiveness of this Agreement, NYSERDA comes to know of the fact, previously unknown to it, that Contractor or any of its principals is under such indictment or has been so convicted, then NYSERDA may exercise its right to terminate this Agreement. If the Contractor knowingly withheld information about such an indictment or conviction, NYSERDA may declare the Agreement null and void and may seek legal remedies against the Contractor and its principals. The Contractor or its principals may also be subject to penalties for any violation of law which may apply in the particular circumstances. For a Contractor which is an association, partnership, corporation, or other organization, the provisions of this paragraph apply to any such indictment or conviction of the organization itself or any of its officers, partners, or directors or members of any similar governing body, as applicable.

13. PERMITS. It is the responsibility of the Contractor to acquire and maintain, at its own cost, any and all permits, licenses, easements, waivers and permissions of every nature necessary to perform the work.

14. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this Agreement will be in accordance with, but not limited to, the specifications and provisions of State Finance Law Section 165 (Use of Tropical Hardwoods), which prohibits purchase and use of tropical hardwoods, unless specifically exempted by NYSERDA.

15. OMNIBUS PROCUREMENT ACT OF 1992. It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development
Division for Small Business
625 Broadway
Albany, New York 12207
Telephone: 518-292-5200
Fax: 518-292-5884
<http://www.esd.ny.gov>

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development
Division of Minority and Women's Business Development
625 Broadway
Albany, New York 12207
Telephone: 518-292-5200
Fax: 518-292-5803
<http://www.empire.state.ny.us>

The Omnibus Procurement Act of 1992 requires that by signing this Agreement, Contractors certify that whenever the total amount is greater than \$1 million:

- (a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;
- (b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;
- (c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

16. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

17. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

18. PROCUREMENT LOBBYING. To the extent this Agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this Agreement the Contractor certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, NYSERDA may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

19. COMPLIANCE WITH TAX LAW SECTION 5-a. The following provisions apply to Contractors that have entered into agreements in an amount exceeding \$100,000 for the purchase of goods and services:

Before such agreement can take effect, the Contractor must have on file with the New York State Department of Taxation and Finance a Contractor Certification form (ST-220-TD).

Prior to entering into such an agreement, the Contractor is required to provide NYSERDA with a completed Contractor Certification to Covered Agency form (Form ST-220-CA).

Prior to any renewal period (if applicable) under the agreement, the Contractor is required to provide NYSERDA with a completed Form ST-220-CA.

Certifications referenced in paragraphs (b) and (c) above will be maintained by NYSERDA and made a part hereof and incorporated herein by reference.

NYSERDA reserves the right to terminate this agreement in the event it is found that the certification filed by the Contractor in accordance with Tax Law Section 5-a was false when made.

20. IRANIAN ENERGY SECTOR DIVESTMENT. In accordance with Section 2879-c of the Public Authorities Law, by signing this contract, each person and each person signing on behalf of any other party certifies, and in the case of a joint bid or partnership each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each person is not on the list created pursuant to paragraph (b) of subdivision 3 of Section 165-a of the State Finance Law (See www.ogs.ny.gov/about/regs/ida.asp).

EXHIBIT B

NYSERDA PROMPT PAYMENT POLICY STATEMENT

504.1. Purpose and Applicability.

(a) The purpose of this Exhibit is to provide a description of Part 504 of NYSERDA's regulations, which consists of NYSERDA's policy for making payment promptly on amounts properly due and owing by NYSERDA under this Agreement. The section numbers used in this document correspond to the section numbers appearing in Part 504 of the regulations.¹

(b) This Exhibit applies generally to payments due and owing by the NYSERDA to the Contractor pursuant to this Agreement. However, this Exhibit does not apply to Payments due and owing when NYSERDA is exercising a Set-Off against all or part of the Payment, or if a State or federal law, rule or regulation specifically requires otherwise.

504.2. Definitions. Capitalized terms not otherwise defined in this Exhibit shall have the same meaning as set forth earlier in this Agreement. In addition to said terms, the following terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

(a) "Date of Payment" means the date on which NYSERDA requisitions a check from its statutory fiscal agent, the Department of Taxation and Finance, to make a Payment.

(b) "Designated Payment Office" means the Office of NYSERDA's Controller, located at 17 Columbia Circle, Albany, New York 12203.

(c) "Payment" means payment properly due and owing to Contractor pursuant to Article IV, Exhibit B of this Agreement.

(d) "Prompt Payment" means a Payment within the time periods applicable pursuant to Sections 504.3 through 504.5 of this Exhibit in order for NYSERDA not to be liable for interest pursuant to Section 504.6.

(e) "Payment Due Date" means the date by which the Date of Payment must occur, in accordance with the provisions of Sections 504.3 through 504.5 of this Exhibit, in order for NYSERDA not to be liable for interest pursuant to Section 504.6.

(f) "Proper Invoice" means a written request for Payment that is submitted by a Contractor setting forth the description, price or cost, and quantity of goods, property or services delivered or rendered, in such form, and supported by such other substantiating documentation, as NYSERDA may reasonably require, including but not limited to any requirements set forth in Exhibits A or B to this Agreement; and addressed to NYSERDA's Controller, marked "Attention: Accounts Payable," at the Designated Payment Office.

(g)(1) "Receipt of an Invoice" means:

(i) if the Payment is one for which an invoice is required, the later of:

(a) the date on which a Proper Invoice is actually received in the Designated Payment Office during normal business hours; or

(b) the date by which, during normal business hours, NYSERDA has actually received all the purchased goods, property or services covered by a Proper Invoice previously received in the Designated Payment Office.

(ii) if the Agreement provides that a Payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice the 30th calendar day, excluding legal holidays, before the date so specified or predetermined.

(2) For purposes of this subdivision, if the Agreement requires a multifaceted, completed or working system, or delivery of no less than a specified quantity of goods, property or services and only a portion of such systems or less than the required goods, property or services are working, completed or delivered, even though the Contractor has invoiced NYSERDA for the portion working, completed or delivered, NYSERDA will not be in Receipt of an Invoice until the specified minimum amount of the systems, goods, property or services are working, completed or delivered.

¹ This is only a summary; the full text of Part 504 can be accessed at: nyserdera.ny.gov/en/About/~media/Files/About/Contact/NYSERDARegulations.aspx

(h) "Set-off" means the reduction by NYSERDA of a payment due a Contractor by an amount equal to the amount of an unpaid legally enforceable debt owed by the Contractor to NYSERDA.

504.3. Prompt Payment Schedule. Except as otherwise provided by law or regulation or in Sections 504.4 and 504.5 of this Exhibit, the Date of Payment by NYSERDA of an amount properly due and owing under this Agreement shall be no later than thirty (30) calendar days, excluding legal holidays, after Receipt of a Proper Invoice.

504.4. Payment Procedures.

- (a) Unless otherwise specified in this Agreement, a Proper Invoice submitted by the Contractor to the Designated Payment Office shall be required to initiate payment for goods, property or services. As soon as any invoice is received in the Designated Payment Office during normal business hours, such invoice shall be date-stamped. The invoice shall then promptly be reviewed by NYSERDA.
- (b) NYSERDA shall notify the Contractor within fifteen (15) calendar days after Receipt of an Invoice of:
 - (1) any defects in the delivered goods, property or services;
 - (2) any defects in the invoice; or
 - (3) suspected improprieties of any kind.
- (c) The existence of any defects or suspected improprieties shall prevent the commencement of the time period specified in Section 504.3 until any such defects or improprieties are corrected or otherwise resolved.
- (d) If NYSERDA fails to notify a Contractor of a defect or impropriety within the fifteen (15) calendar day period specified in subdivision (b) of this section, the sole effect shall be that the number of days allowed for Payment shall be reduced by the number of days between the 15th day and the day that notification was transmitted to the Contractor. If NYSERDA fails to provide reasonable grounds for its contention that a defect or impropriety exists, the sole effect shall be that the Payment Due Date shall be calculated using the original date of Receipt of an Invoice.
- (e) In the absence of any defect or suspected impropriety, or upon satisfactory correction or resolution of a defect or suspected impropriety, NYSERDA shall make Payment, consistent with any such correction or resolution and the provisions of this Exhibit.

504.5. Exceptions and Extension of Payment Due Date. NYSERDA has determined that, notwithstanding the provisions of Sections 504.3 and 504.4 of this Exhibit, any of the following facts or circumstances, which may occur concurrently or consecutively, reasonably justify extension of the Payment Due Date:

- (a) If this Agreement provides Payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice, if any documentation, supporting data, performance verification, or notice specifically required by this Agreement or other State or Federal mandate has not been submitted to NYSERDA on a timely basis, then the Payment Due Date shall be extended by the number of calendar days from the date by which all such matter was to be submitted to NYSERDA and the date when NYSERDA has actually received such matter.
- (b) If an inspection or testing period, performance verification, audit or other review or documentation independent of the Contractor is specifically required by this Agreement or by other State or Federal mandate, whether to be performed by or on behalf of NYSERDA or another entity, or is specifically permitted by this Agreement or by other State or Federal provision and NYSERDA or other entity with the right to do so elects to have such activity or documentation undertaken, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when any such activity or documentation has been completed, NYSERDA has actually received the results of such activity or documentation conducted by another entity, and any deficiencies identified or issues raised as a result of such activity or documentation have been corrected or otherwise resolved.
- (c) If an invoice must be examined by a State or Federal agency, or by another party contributing to the funding of the Contract, prior to Payment, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when the State or Federal agency, or other contributing party to the Contract, has completed the inspection, advised NYSERDA of the results of the inspection, and any deficiencies identified or issues raised as a result of such inspection have been corrected or otherwise resolved.

(d) If appropriated funds from which Payment is to be made have not yet been appropriated or, if appropriated, not yet been made available to NYSERDA, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when such funds are made available to NYSERDA.

504.6. Interest Eligibility and Computation. If NYSERDA fails to make Prompt Payment, NYSERDA shall pay interest to the Contractor on the Payment when such interest computed as provided herein is equal to or more than ten dollars (\$10.00). Interest shall be computed and accrue at the daily rate in effect on the Date of Payment, as set by the New York State Tax Commission for corporate taxes pursuant to Section 1096(e)(1) of the Tax Law. Interest on such a Payment shall be computed for the period beginning on the day after the Payment Due Date and ending on the Date of Payment.

504.7. Sources of Funds to Pay Interest. Any interest payable by NYSERDA pursuant to Exhibit shall be paid only from the same accounts, funds, or appropriations that are lawfully available to make the related Payment.

504.8. Incorporation of Prompt Payment Policy Statement into Contracts. The provisions of this Exhibit shall apply to all Payments as they become due and owing pursuant to the terms and conditions of this Agreement, notwithstanding that NYSERDA may subsequently amend its Prompt Payment Policy by further rulemaking.

504.9. Notice of Objection. Contractor may object to any action taken by NYSERDA pursuant to this Exhibit that prevents the commencement of the time in which interest will be paid by submitting a written notice of objection to NYSERDA. Such notice shall be signed and dated and concisely and clearly set forth the basis for the objection and be addressed to the Vice President, New York State Energy Research and Development Authority, at the notice address set forth in Exhibit B to this Agreement. The Vice President of NYSERDA, or his or her designee, shall review the objection for purposes of affirming or modifying NYSERDA 's action. Within fifteen (15) working days of the receipt of the objection, the Vice President, or his or her designee, shall notify the Contractor either that NYSERDA 's action is affirmed or that it is modified or that, due to the complexity of the issue, additional time is needed to conduct the review; provided, however, in no event shall the extended review period exceed thirty (30) working days.

504.10. Judicial Review. Any determination made by NYSERDA pursuant to this Exhibit that prevents the commencement of the time in which interest will be paid is subject to judicial review in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. Such proceedings shall only be commenced upon completion of the review procedure specified in Section 504.9 of this Exhibit or any other review procedure that may be specified in this Agreement or by other law, rule, or regulation.

504.11. Court Action or Other Legal Processes.

(a) Notwithstanding any other law to the contrary, the liability of NYSERDA to make an interest payment to a Contractor pursuant to this Exhibit shall not extend beyond the date of a notice of intention to file a claim, the date of a notice of a claim, or the date commencing a legal action for the payment of such interest, whichever occurs first.

(b) With respect to the court action or other legal processes referred to in subdivision (a) of this section, any interest obligation incurred by NYSERDA after the date specified therein pursuant to any provision of law other than Public Authorities Law Section 2880 shall be determined as prescribed by such separate provision of law, shall be paid as directed by the court, and shall be paid from any source of funds available for that purpose.