



1. **The Applicant acknowledges that these Terms and Conditions are part of an Application being submitted to participate in the Multifamily New Construction Program (MF NCP) administered by the New York State Energy Research and Development Authority (NYSERDA).**

2. **Eligibility:**

The project identified below must be a multifamily, residential building(s) with four (4) or more stories. To be eligible for MF NCP participation, an Applicant must be, or be capable of and intend to be, a New York State electricity distribution customer of a participating utility company that pays into the System Benefits Charge.

3. **Application Does Not Entitle Applicant to Participate:**

Submission of an Application does not entitle the Applicant to MF NCP participation or incentives.

4. **Glossary of Terms:**

**Building Performance Plan** – This calculator is used by the Primary Energy Consultant to capture details regarding the project's recommended scope of work and achievement of the required performance threshold(s) for projects following either Passive House compliance path. This document also collects project cost information and verification that the required Passive House professionals, as detailed in the MF NCP Guidelines, have been hired by the Applicant.

**Modified Prescriptive Path** – This compliance path requires the project to meet the set of requirements specified in the Modified Prescriptive Path Requirements and the ENERGY STAR MFHR Testing & Verification Protocols. Inclusion of these requirements is considered to equal or exceed the performance target specified in the project's approved performance tier. The Modified Prescriptive Path offers some exceptions to its requirements for gut rehabs and historical buildings on a case-by-case basis. This pathway does not result in an ENERGY STAR label, but may result in the New York Energy \$mart designation from NYSERDA.

**Modified Prescriptive Path Calculator** – This calculator includes a checklist where the Primary Energy Consultant and the Applicant confirm that the Modified Prescriptive Path requirements are met. It also calculates estimated savings based on project-specific data.

**Multifamily High-Rise Review Organizations (MROs)** – EPA-recognized entities which deliver the verification process required for multifamily high rise projects to earn the ENERGY STAR label.

**Passive House Institute (PHI)** – Projects following this compliance path must comply with the Passive House Standard developed by the Passive House Institute (PHI). The project must contract with a PHI Consultant or Designer and a PHI Certifier, and must pursue and obtain certification by PHI. In addition to meeting the PHI requirements, projects following the PHI path are required to meet applicable Testing and Verification requirements.

**Passive House Institute US (PHIUS)** – Projects following this compliance path must comply with the PHIUS+ Multifamily Certification Standard developed by the Passive House Institute US (PHIUS). The project must contract with a Certified Passive House Consultant (CPHC) and a PHIUS+ Verifier, and must pursue and obtain certification by PHIUS. In addition to meeting the PHIUS requirements, projects following the PHIUS path are required to meet applicable Testing and Verification requirements.

**Performance Path Calculator** – The Performance Path Calculator, which was developed by the EPA and is the calculator used by projects following the Performance Path with ENERGY STAR, is a set of worksheets in an Excel file designed to provide consistency among Primary Energy Consultants by providing the exact calculations described in the Simulation Guidelines. It also provides a consistent format for reporting the results of the project's energy savings.

**Performance Path with ENERGY STAR** – Projects following this compliance path must comply with the standards developed by the US Environmental Protection Agency (EPA) for the ENERGY STAR Multifamily High Rise (MFHR) program. The Primary Energy Consultant is required to create a model of the proposed building design based on ASHRAE standards and compare it to a baseline model. The

difference in the source energy savings of the two models must equal or exceed the performance target specified in the project's approved performance tier. Projects following the Performance Path with ENERGY STAR are required to adhere to all ENERGY STAR MFHR Performance Path Prerequisites and Testing & Verification Protocols. The Primary Energy Consultant must contract with an EPA-recognized Multifamily High-Rise Review Organization (MRO) to complete the review and approval of the model as-built documentation per EPA requirements.

**Performance Target** – The performance target is a performance threshold based on projected energy use. Achievement of the performance target for a specific tier determines which of the three incentive amounts the project is eligible to receive.

**Primary Energy Consultant** – The Primary Energy Consultant is the primary resource for the Applicant participating in the MF NCP. Primary Energy Consultants have been approved by NYSERDA to provide technical support to Applicants. Primary Energy Consultants can provide a variety of services to the Applicant including, as applicable: explaining the requirements of MF NCP, completing and submitting the required MF NCP documentation, conducting a review of the project's design, creating a model of the project design, comparing it to a code-compliant baseline, evaluating the project's design for compliance with a prescriptive guideline, working in conjunction with the developer and design team to recommend a set of improvements to the project design to achieve the MF NCP performance target as identified in the appropriate calculator tool and inspecting the installed work to ensure it meets MF NCP requirements and conforms with the assumptions made in the submittal package. The Primary Energy Consultant is selected by the Applicant, who is expected to separately contract with and manage the performance of the Primary Energy Consultant. Applicants must work with their Primary Energy Consultant until the project is complete and has received all payments from NYSERDA; and notify NYSERDA if an alternative Primary Energy Consultant firm is engaged.

**Simulation Guidelines** – The Simulation Guidelines was developed by the EPA and is a companion document to ASHRAE 90.1 Appendix G that contains guidance intended to assist Primary Energy Consultants in developing the Baseline Building Design, Proposed Building Design, and As-Built models for each project. This document applies to the Performance Path with ENERGY STAR projects only.

## **5. Approval of Required Documentation:**

NYSERDA is not bound to pay any incentive unless NYSERDA approves the documentation required to be submitted as a condition of each Milestone. NYSERDA reserves complete discretion to approve or disapprove any documentation. Projects that proceed with the Energy Modeling prior to receipt of NYSERDA's "Project Award Letter" or proceed with the installation of the Project Work without resolving Energy Modeling comments in response to their submission of deliverables, or Action Items identified in the Open Wall Inspection Report, do so at their own risk. Projects that fail to comply with these requirements may forfeit any MF NCP incentives and/or risk termination of this Agreement. Projects that have already initiated construction at the time of application must be able to comply with all requirements of the Open Wall Inspection once its path-appropriate calculator tool has been prepared by the Primary Energy Consultant and reviewed and approved by NYSERDA.

## **6. Under these Terms and Conditions, the Applicant agrees to:**

- (a) hire a Primary Energy Consultant that is approved through their submission to NYSERDA's Request for Proposal (RFP) 3771 or previously under 3036 or any subsequent solicitation identified by NYSERDA as an acceptable alternative to meet this requirement. The Primary Energy Consultant hired by the Applicant must be integrated into the design team, to ensure that the design of the project meets MF NCP requirements and, based on the compliance path indicated in this Application, will follow one of the four pathways: the Performance Path, the Modified Prescriptive Path, the Passive House Institute (PHI) path, or the Passive House Institute US (PHIUS) path.
- (b) work with the project's Primary Energy Consultant to finalize a set of designs that conforms to the MF NCP's compliance path requirements and, based on the compliance path indicated in this Application, will incorporate the recommended measures outlined in the documentation submitted to, and approved by, NYSERDA for this specific project.
- (c) Submit the applicable Energy Modeling Milestone deliverables to NYSERDA within 30 days of securing the required approval by the MRO or through Passive House pre-certification. Submission

of the deliverables must include confirmation from the MRO, PHI, or PHIUS that the required review has been satisfactorily completed.

- (d) construct its project as described by the Proposed Performance Path Calculator for Performance Path, the Building Performance Plan for Passive House Institute (PHI) and Passive House Institute US (PHIUS) path projects or the Modified Prescriptive Path Calculator for Modified Prescriptive Path projects and commit to make no changes during construction that would cause the As-Built project to fail to meet MF NCP's compliance path requirements.
- (e) either i) provide NYSERDA or its designees the electricity, fuel, and water consumption data for the entire common area and a representative 10% sample of the dwelling units as outlined in the Data Release Authorization Form (DRAF) following the building(s)' receipt of a Certificate of Occupancy, or ii) as an alternative to providing information on a 10% sample of dwelling units, follow the alternative process for As-Built Deliverables.
- (f) for a project pursuing the LMI incentive, the Applicant will ensure that the project complies with LMI eligibility requirements; and,
- (g) acquire and maintain, at its own cost, all permits, licenses, easements, and permissions of every nature necessary to perform the work.

**7. Incentive Payments:** NYSERDA will arrange to provide incentives as set forth in the fully executed Project Award Letter in accordance with the attached Prompt Payment Policy (Exhibit B).

- (a) **Upon approval of the completed application, including these Terms and Conditions:** NYSERDA will issue an Award Letter specifying the incentives for which the project may be eligible to receive. The executed Award Letter is the final determination of the project's potential incentive payments.
- (b) **Maximum Incentives** – A project's maximum incentive may not exceed the amount set forth in the executed Award Letter. The total per project incentives may be capped. To receive the full incentive amount, projects must verify that they have achieved the performance targets specified in their approved performance tier, and each submission of deliverables must be approved by NYSERDA. If the project will not meet the performance target, the Primary Energy Consultant must contact NYSERDA or NYSERDA's designee.

To request and receive the Low to Moderate Income (LMI) incentives, a project must qualify by meeting the LMI eligibility and documentation requirements. The Applicant must certify that the project meets the requirements for an LMI project.

- (c) **Incentive Amounts** –The Applicant must state in its MF NCP application which compliance path and performance tier it is pursuing. The executed Award Letter states the maximum incentives the project will be eligible to receive. The basis for determining the incentive payment schedule for a project is as detailed in the PON and may be subject to change. NYSERDA's determination on total incentive amounts and the payment schedules is final. If an Applicant elects to change the compliance path or performance tier it is pursuing prior to the submittal of the Energy Modeling deliverables, the Applicant shall notify NYSERDA in writing or via email. To be eligible for a higher incentive associated with a higher performance tier than initially requested, the Applicant must receive explicit approval from NYSERDA.

**8. MF NCP Changes**

NYSERDA reserves the right to change, modify, or terminate MF NCP at any time without notice or any liability except as expressly stated herein.

**9. Post-Construction Analysis and Follow-Up Visits:**

- (a) The Applicant agrees to provide NYSERDA copies of all utility bills showing consumption and cost for electricity, fuel, and water, or provide access to such information using the MF NCP's Data

Release Authorization Form (DRAF). As an alternative to providing information on a 10% sample of dwelling units, the Applicant may follow the alternative process for submission of As-Built deliverables.

- (b) The Applicant agrees to provide access to NYSERDA and/or its contractors to make a reasonable number of pre- and post-installation follow-up visits to the project during the implementation of the Project Work and up to 36 months following the date of its completion. Such visit(s) will be scheduled with the owner with at least one (1) week notice to the Applicant by NYSERDA.
- (c) The purpose of the follow-up visit(s) is to provide NYSERDA with an opportunity to evaluate the installed Project Work and to determine the actual demand reduction and energy savings for MF NCP evaluation purposes.

#### **10. Time of the Essence:**

Applicant's failure to act within the time required constitutes a breach of the contract. Time is of the essence with respect to all provisions of this Agreement, and all exhibits and attachments hereto that specify a time for performance. NYSERDA may, at its discretion, terminate a project for failing to progress with the development of its Energy Modeling or Modified Prescriptive Path Calculator deliverables or the construction of the project as required in Section 11 of this document. Such termination does not necessarily preclude the building from reapplying to the MF NCP once the issues preventing progress have been resolved, but approval of such reapplication shall be at NYSERDA's discretion.

#### **11. Energy Modeling Deliverables and Construction Requirements:**

- (a) If the Applicant has not submitted a completed Performance Path Calculator within 30 days of following approval by the EPA-recognized Multifamily High Rise Review Organization (MRO), or a completed Building Performance Plan within 30 days of the project's Passive House pre-certification for Passive House Path projects, through the portal, this Agreement may be terminated in accordance with Section 18.
- (b) The project's As-Built deliverables must be completed and submitted to the MRO, and submitted to NYSERDA for final review and payment, within 6 months of receipt of the Temporary Certificate of Occupancy. Extensions will only be considered if the Applicant submits a project extension from NYSERDA. NYSERDA may grant extensions at its discretion. The extension is only effective when NYSERDA has approved it through writing or email.

#### **12. Proprietary Information:**

It is anticipated that NYSERDA will retain a copy of all materials or reports completed in accordance with these Terms and Conditions. The NYS Freedom of Information Law, Public Officers Law, Article 6, provides for public access to information NYSERDA possesses. Public Officers Law, Section 87(2)(d) provides for exceptions to disclosure for 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." Information submitted to NYSERDA that the Applicant wishes to have treated as proprietary and confidential trade secret information, should be identified and labeled "Confidential" or "Proprietary" on each page at the time of disclosure. This information should include a written request to exclude it from disclosure, including a written statement of the reasons why the information should be excluded. See Public Officers Law, Section 89(5) and the procedures set forth in 21 NYCRR Part 501. However, NYSERDA cannot guarantee the confidentiality of any information submitted.

If the dwelling units in the building(s) earn the EPA ENERGY STAR label, project specific information may be shared with the EPA for the purposes of complying with its program requirements. Unless identified as confidential or proprietary by the Applicant, information contained in these materials or reports may be used to promote awareness and adoption of energy efficiency strategies, practices, and technologies. NYSERDA does not provide any endorsement of any Primary Energy Consultant's capabilities to provide services outside of the Scope of Work to be conducted pursuant to this Program.

**13. Tax Liability:**

NYSERDA is not responsible for the payment of any taxes assessed by federal, state, or local governments on benefits conferred on the Applicant by NYSERDA.

**14. Indemnification:**

The Applicant 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, attorney's fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to the performance of this Agreement. The obligations of the Applicant under this section shall survive any expiration or termination of this Agreement.

**15. No Warranties:**

(a) NYSERDA does not endorse, guarantee, or warrant any manufacturer or product, and NYSERDA provides no warranties, expressed or implied, for any product or services. The Applicant's reliance on warranties is limited to any warranties that may arise from, or be provided by, contractors, vendors, etc.

(b) The Applicant acknowledges that neither NYSERDA nor any of its consultants are responsible for assuring that the design, engineering, and construction of the Building or installation of the recommendations made by the Primary Energy Consultant is proper or complies with any laws (including patent laws), codes, or industry standards. NYSERDA does not make any representations of any kind regarding the results to be achieved by the recommendations made by the Primary Energy Consultant or the adequacy or safety of such measures.

**16. Limit of Incentive Payments:**

NYSERDA reserves the right, for any reason, to stop approving incentive applications at any time without notice.

**17. Release by the Applicant:**

The acceptance by the Applicant of final payment shall release NYSERDA from all claims and liability the Applicant, its representatives, and assigns might otherwise have relating to this award.

**18. Termination:**

This Agreement may be terminated by either party at any time with or without cause, upon 30 days prior written notice.

**19. Notices:**

(a) All notices, requests, consents, approvals and other communications which may or are required to be given by either party to the other under this Agreement shall be in writing and shall be transmitted either:

- i. via certified or registered United States mail, return receipt requested;
- ii. by facsimile transmission;
- iii. by personal delivery;
- iv. by expedited delivery service; or
- v. by e-mail.

Such notices shall be addressed to NYSERDA at:

New York State Energy Research and Development Authority

Attn: Multifamily New Construction Program  
17 Columbia Circle  
Albany, NY 12203

Fax: 518-862-1091

Email: [ResMFNCP@nyserda.ny.gov](mailto:ResMFNCP@nyserda.ny.gov)

Notices addressed to Applicant shall be addressed to Applicant at the address supplied in the electronic application.

- (b) Notices shall be deemed given on the date delivered or date of attempted delivery if service is refused. The addresses provided by the Applicant are subject to change at any time during the term of this Agreement provided that the Party changing the address furnished written notification of the new address in accordance with this section.

**20. Modification; Waiver:**

This Agreement cannot be amended or waived except by an agreement in writing signed by authorized representatives of both parties and specifically referring to this Agreement. The failure of either party to object to or to take affirmative action with respect to any conduct of the other party which is in violation of the terms hereof shall not be construed as a waiver thereof, nor of any subsequent breach or wrongful conduct. The rights and remedies set forth herein are intended to be cumulative, and the exercise of any right or remedy by either party shall not preclude or waive its exercise of any other rights or remedies hereunder or pursuant to law or equity.

**21. Section Headings; Counterparts:**

The section headings set forth herein are for convenience only and do not constitute a substantive part of this Agreement. This Agreement may be executed in counterparts and by facsimile signature, all of which together shall be considered one and the same original document.

**22. Severability; Survival:**

If any provision of this Agreement is deemed to be invalid or unenforceable by any court of competent jurisdiction, then the balance of this Agreement shall remain enforceable, and such invalid or unenforceable provision shall be enforced by such court to the maximum possible extent, unless the ineffectiveness of such provision would result in such a material change as to cause completion of the transactions contemplated hereby to be unreasonable. The provisions of Sections 12, 24-32 shall survive the expiration or earlier termination of this Agreement.

**23. Independent Contractors:**

Relationship of the Parties. It is understood and agreed that the personnel furnished by Primary Energy Consultant to perform the services stipulated in this Agreement, including personnel who may perform such services at NYSERDA's offices, shall be Primary Energy Consultant's employee(s) or agent(s), and under no circumstances are such employee(s) to be considered NYSERDA's employee(s) or agent(s), and shall remain the employees of Primary Energy Consultant, except to the extent required by section 414(n) of the Internal Revenue Code.

The relationship of the parties to this Agreement is that of independent contractors. Nothing in this Agreement shall be construed as creating a partnership, joint venture, employment, agency, legal representation or other relationship between NYSERDA and Primary Energy Consultant for any reason, including but not limited to unemployment, workers' compensation, employee benefits, vicarious liability, professional liability coverage or indemnification. Neither party shall have the right, power or authority to obligate or bind the other in any manner not specified in this Agreement.

No Benefits. Primary Energy Consultant agrees that if the personnel furnished by Primary Energy Consultant are determined to be “leased employees” within the meaning of section 414(n) of the Internal Revenue Code, Primary Energy Consultant acknowledges that leased employees are excluded from participation in the employee benefit plans, funds and programs provided by NYSERDA to its employees including, but not limited to, any group health plan, sickness or accident plan, retirement plan, retirement plan or similar benefit plan provided to employees by NYSERDA, by the terms of such benefit plans, funds or programs. Primary Energy Consultant agrees to notify NYSERDA if it maintains (or ceases to maintain) a plan described in section 414(n)(5)(B) of the Internal Revenue Code.

Notification of Claims/Events. Primary Energy Consultant 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, Primary Energy Consultant and/or Primary Energy Consultant’s personnel by virtue of any act or omission on the part of NYSERDA or its employees. Accordingly, Primary Energy Consultant 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 Primary Energy Consultant’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 in the event that this Agreement should terminate for any reason.

**24. Assignment:**

A Party shall not assign its rights and/or obligations or delegate its duties under this Agreement without the prior written approval of the other Party (Parties) and any attempted assignment or delegation without such approval shall be void and constitute a material breach. This Agreement and all of the terms and provisions hereof will be binding upon, and will inure to the benefit of, the Parties hereto, and their respective successors and approved assigns.

**25. Audit:**

NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and for three (3) years thereafter to inspect and audit any and all books, accounts and records at the office or offices of the Applicant where they are then being kept, maintained and preserved. Any payment made under the Agreement shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Applicant by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

**26. Audit Adjustment:**

Any payment made hereunder shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Applicant by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

**27. Executory Clause:**

It is understood by and between the parties hereto that this agreement shall be deemed executory only to the extent of the monies available to NYSERDA for the purpose of paying incentives under this Agreement, and no liability on account thereof shall be incurred by NYSERDA beyond monies available for such purpose.

**28. Governing Law:**

This Agreement shall be governed by, and be construed in accordance with, the laws of the State of New York, without regard to its choice of law principles.

**29. Laws of the State of New York:**

The Applicant shall comply with the Exhibit A, Standard Terms and Conditions.

**30. Entire Agreement:**

These Terms and Conditions, including Exhibits A and B, constitutes the final, complete and exclusive understanding between the Parties with respect to its subject matter and supersedes all prior or contemporaneous agreements, letters of intent, understandings, negotiations, and discussions of the parties, whether oral or in writing. The Parties have not relied upon any promises, warranties or undertakings other than those expressly set forth in this Agreement.

**31. All Legal Provisions Deemed Included:**

It is the intent and understanding of the Applicant and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or the Applicant, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

**32. Other Legal Requirements:**

The references to particular laws of the State of New York in these Terms and Conditions are not intended to be exclusive and nothing contained in such Article, Exhibit and Agreement shall be deemed to modify the obligations of the Applicant to comply with all legal requirements

**33. Applicant Agreement to Terms and Conditions:**

Applicant acknowledges that this application may not be approved if the requirements of the MF NCP are not met and that incentive payments will be contingent upon meeting all terms and conditions of the MF NCP. The undersigned certifies that he or she is authorized to act on behalf of the Applicant, and that all information provided in this application, including any attachments, is true and correct to the best of his or her knowledge. The undersigned has read and understands the above Terms and Conditions which are part of this application and agrees on behalf of the Applicant to abide by them.

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**Project Name**

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**Applicant Company Name** (must exactly match legal name associated with the Federal ID number; must be the owner of the subject property)

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**Signature of Authorized Representative of the Applicant**

**Date**

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**PRINT Name of Authorized Representative**

**Title of Authorized Representative**  
(in reference to Company listed above)

**Exhibit A**

**REVISED 5/2**

**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.state.ny.us/coog/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, Primary Energy Consultants, 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:

- a) 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).
- b) 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).
- c) 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](http://www.ogs.ny.gov/about/regs/ida.asp)).

## Exhibit B

### 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.<sup>1</sup>
- (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 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 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.
- (g)(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.
- (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.

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<sup>1</sup> This is only a summary; the full text of Part 504 can be accessed at: <https://www.nyserda.ny.gov/About/-/media/Files/About/Contact/NYSERDA-Regulations.ashx>



**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 this 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 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.