

APPENDIX B: SAMPLE STANDARD PERFORMANCE AGREEMENT

Clean Energy Fund

Fuel Cell Program (PON 3841)

STANDARD PERFORMANCE  
AGREEMENT

*BETWEEN*

*NEW YORK STATE RESEARCH AND DEVELOPMENT  
AUTHORITY*

*AND*

*[CONTRACTOR]*  
*Agreement #*

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## **AGREEMENT**

This Standard Performance Agreement (hereinafter referred to as the "Agreement") by and between the New York State Energy Research and Development Authority (hereinafter referred to as "NYSERDA") with its principal office located at 17 Columbia Circle, Albany, New York, 12203-6399, and [Contractor], (hereinafter "Contractor") with offices located at [Location], shall become effective on the date of NYSEDA's signature ("Effective Date"). NYSEDA and the Contractor may be individually referred herein as a "Party" and collectively as the "Parties."

In consideration of the mutual promises and agreements herein expressed, NYSEDA and the Contractor hereby agree as follows:

### **ARTICLE 1: DEFINITIONS**

§1.1. Definitions. Unless the context otherwise requires, the terms defined below shall have, for all purposes of this Agreement, the respective meanings set forth below, the following definitions to be equally applicable to both the singular and plural forms of any of the terms defined.

Agreement: This Standard Performance Agreement, including Exhibits A (Maximum Total Incentive), B (Standard Terms and Conditions), C (Prompt Payment Policy Statement), D (Proposal Checklist), E (Project Installation Report Requirements), F (Performance Measurement Requirements), and NYSEDA PON 3841 as published by NYSEDA in 2018 and subsequently updated in 2019, which is incorporated herein and made part hereof as though herein set forth in full.

Application Package: The Contractor's submission to NYSEDA containing the items listed in Section C of PON 3841 requesting incentives through a Standard Performance Agreement.

As-built drawings: The final Site Plan, which is comprised of schematic and Plan View Drawings, showing the installed and commissioned system. The As-built drawings must be included in the Project Installation Report.

Capacity Factor: The net annual output of the fuel cell system delivered to the Project Site divided by the maximum (nameplate) rated output times 8760 hours per year.

Contractor: The Customer or third party who is submitting the Application Package and a party to this Agreement.

Customer: A Host, who is the owner or tenant of the encompassing building, property, or adjacent or contiguous properties of the Project Site.

Effective Date: The date on which this Agreement becomes valid. It is also the date on which NYSEDA signed this Agreement.

Host: The owner or tenant of a Project Site and who pays the SBC Program Surcharge.

Installation and Commissioning: The completion of construction of the fuel cell system, interconnection of the system with the utility grid, at least one month of satisfactory operation of the system according to its design intent, and demonstration of the ability to upload information to NYSEDA's Distributed Energy Resources Website.

Installation Phase: The phase of the Standard Performance Agreement that includes Procurement, developing the Performance Measurement Plan, Installation and Commissioning, and submitting the Project Installation Report.

Maximum Total Incentive: The dollar amount listed in Exhibit A of this Agreement, representing the maximum amount payable under this Agreement.

Performance Measurement: The process of monitoring, measuring, and verifying the electrical energy generated by the fuel cell system, upon commencement of the Performance Phase of the Project.

Performance Phase: The final phase of this Agreement that commences on the date upon which the Contractor begins providing performance data for upload to NYSEDA's DER Website, and continues for three consecutive years from that date.

Performance Report: A report submitted to NYSERDA detailing the operational data for one year subsequent to the date of commissioning and calculations showing that the fuel cell system has met the minimum capacity factor and efficiency requirements for PON 3841. The report provides data that should demonstrate clearly to NYSERDA the net amount of electrical energy delivered to the site by the fuel cell system during the performance period so it can be determined whether or not an installed project is generating the amount of electricity projected in this Agreement.

Project: The installation and operation of a fuel cell as defined in Section 2.1 hereof.

Project Installation Report: The detailed description of the installed and commissioned fuel cell system. The Project Installation Report includes updates to the information provided in the Application Package, which subsequently were used to develop the Standard Performance Agreement, to reflect the installed system, including As-built drawings.

Project Site: The site at which the fuel cell system is located, the electricity is generated, and where the utility meter is located.

Project Term: The term of this Agreement as defined in Section 2.2 hereof.

SBC Surcharge: One of the delivery charges levied by National Grid, NYSEG, Rochester Gas and Electric, Orange and Rockland, Central Hudson Gas and Electric, and Consolidated Edison. The SBC Surcharge permits these companies to recover costs associated with providing financial incentives for the development of renewable resources in New York State.

Total System Efficiency: The sum of the Net Useful Electric Power (P) and the Net Useful Thermal Production (Q) divided by the Total Fuel Input (F) based on the Higher Heating Value of the input fuel.

## ARTICLE 2: PROJECT ORGANIZATION

§2.1. Project Organization. The Project contemplated herein shall be implemented in accordance with the Agreement and in two phases: Installation and Performance. The Installation Phase shall begin with the Effective Date and will include the Procurement, Installation, and Commissioning of the fuel cell system set forth in the approved Application Package, and preparation of the Project Installation Report. The Performance Phase shall begin upon approval by NYSERDA of the Project Installation Report and will include and continue through completion of the performance measurement activities required by the approved Performance Measurement Plan.

§2.2. Project Term. The term of this Agreement shall begin on the Effective Date and continue until approval of the Performance Report, unless extended or terminated under the terms hereof.

§2.3. Extensions of Time. The Project Term or other deadlines for submittal of documentation to NYSERDA, including those described under Article 3 hereto, may be extended for good cause at NYSERDA's discretion. As used herein, "good cause" means an unanticipated circumstance or event, which despite the due diligence of the Contractor, renders compliance with project term or other deadline impracticable. A request for an extension must be submitted in writing to NYSERDA no less than 30 calendar days prior to the expiration of the applicable deadline. Extensions may be granted or denied at NYSERDA's sole discretion. Any such extension shall be communicated in writing. NYSERDA may terminate this Agreement upon the failure of the Contractor to conform to these requirements.

§2.4. Manner of Performance. The Contractor shall perform its responsibilities under this Agreement in an efficient and expeditious manner and in accordance with all of the terms and provisions of this Agreement. The Contractor shall perform all responsibilities in accordance with the current professional standards and with the diligence and skill expected for the performance of work of the type described in this Agreement. The Contractor shall furnish such personnel and shall procure such materials, machinery, supplies, tools, equipment and other items as may reasonably be necessary or appropriate to perform its responsibilities in accordance with this Agreement.

### ARTICLE 3: PROCUREMENT; INSTALLATION

§3.1. Procurement. Procurement of major equipment must be completed, and sufficient documentation of Procurement must be provided to NYSERDA, within nine (9) months of the Effective Date. Major equipment may include, but is not limited to, the fuel cell stacks, on-board reformer, fuel storage tanks and appurtenances, electric power conditioning equipment, essential heat management systems, controls, meters, and interconnection equipment. Sufficient documentation of Procurement may include, but is not be limited to, invoices, photographs, or Bills of Lading.

§3.2. Installation and Commissioning. The Contractor shall be responsible for Installation and Commissioning of the fuel cell system, which shall include interconnection of the system with the utility grid, at least one month of satisfactory operation of the system according to its design intent, and demonstration of the ability to upload information to NYSERDA's Distributed Energy Resources Website. For installations with islanding capability, the Contractor shall demonstrate the actual operation of the fuel cell system in grid-parallel mode, its transition to and operation in stand-alone mode where it actually serves the facility to the fullest extent intended, and its transition back to and operation in grid-parallel mode.

§3.3. Project Installation Report. A Project Installation Report must be completed and submitted to NYSERDA within 15 months of the Effective Date; such Report must be prepared in accordance with the requirements of Exhibit D to PON 3841 and must sufficiently document that Installation and Commissioning has been completed. The Project Installation Report must include As-built drawings of the commissioned fuel cell system. NYSERDA's approval of the Project Installation Report will depend on the results of a Post-Installation Site Inspection, which will verify the information provided in the Project Installation Report. NYSERDA will provide notice of approval of the Project Installation Report or will request additional information within 60 days of receipt. NYSERDA will review the Project Installation Report, inspect the system and either approve the Project Installation Report as submitted, approve it with minor revisions, or reject it. If the Project Installation Report is rejected, the Contractor will be provided with a period of 60 calendar days from the date of rejection to provide necessary information and resolve all outstanding issues with NYSERDA.

§3.4. Permits. Contractor shall be responsible for the acquisition and maintenance, at its own cost, of any and all permits, approvals, licenses, easements, waivers and permissions of every nature necessary to perform the Project.

### ARTICLE 4: PERFORMANCE MEASUREMENT

§4.1. Performance Measurement Plan. The Contractor must develop a Performance Measurement Plan (in accordance with Appendix C to PON 3841) *in conjunction with NYSERDA's Agent*. The Performance Measurement Plan must be received and approved by NYSERDA prior to submittal (or payment) of any invoices. Contractor shall be responsible to provide the instrumentation (sensors and meters) and communications capability specified within the approved Performance Measurement Plan; all performance measurement activities shall be conducted in accordance with the approved Performance Measurement Plan.

§4.2. Performance Report. Upon NYSERDA's approval of the Project Installation Report, the Contractor must begin providing performance data for upload to NYSERDA's DG/CHP Website. The first year's performance period will commence on the date the Project Installation Report is approved by NYSERDA. Within 60 days from the end of the first year's performance period, the Contractor must submit a Performance Report to NYSERDA, which will become the basis for the Performance/Efficiency Incentive payment. The Performance Report shall detail the operational data for one year subsequent to the date of commissioning and calculations showing that the fuel cell system has met the minimum capacity factor and total system efficiency requirements for PON 3841. Annual performance reporting shall be in accordance with Appendix C to PON 3841 Large Fuel Cell Program. The Contractor shall be responsible for ensuring that data provided in the Performance Report accurately represents the operation of the fuel cell system.

§4.3. Prior Notice. NYSERDA or its agent may choose to visit a project site to verify that the information provided in the Annual Performance Report is accurate with regard to project equipment, site conditions, and monitoring configurations. These inspections may occur at any time after project installation. Should NYSERDA decide to inspect a site, NYSERDA, or its agent may or may not contact the Contractor to schedule the inspection. In other words, an inspection may occur without advance notice given to the Contractor. If the performance measurement activities are found to be different from those represented in either the Performance Measurement Plan or the Annual Performance Report, NYSERDA may refuse any further incentive payments. If NYSERDA deems

an inspection necessary, an Annual Performance Report that is under review will not be approved until the inspection has been completed.

## ARTICLE 5: PAYMENTS

§5.1. Invoicing. Payments may be requested by the Contractor by submitting an invoice to NYSERDA ([invoices@nyserdera.ny.gov](mailto:invoices@nyserdera.ny.gov)). Invoices must be accompanied by all additional required information and documentation. NYSERDA shall make payments to the Contractor in accordance with terms of this Agreement and subject to its Prompt Payment Policy Statement, which is attached hereto as Exhibit C. No invoice may be submitted and no payment will become payable unless and until NYSERDA has approved Contractor's Performance Measurement Plan. No invoices will be accepted nor paid if received more than 90 days after the expiration of the Project Term.

§5.2. Milestone 1: Capacity Payment. Upon demonstration of procurement of major equipment and following the acquisition of necessary permits, interconnection approval, Performance Measurement Plan approval, demonstration of electricity generating data delivered to NYSERDA's Distributed Energy Resources website, and approval by NYSERDA of the Project Installation Report; the Contractor may request payment of Milestone 1: Capacity Payment (50% of the Maximum Total Incentive). Sufficient documentation of fuel cell system procurement expenditures, interconnection approval, documentation to substantiate any claims for Bonus Incentives (including demonstration of transitioning to and back from Grid Independent operation, if applicable) and the documentation of the acquisition of necessary permits must be presented to NYSERDA when the request for the Capacity Incentive payment is made.

§5.3. Milestone 2: Performance/Efficiency Payment. The Performance/Efficiency incentive payment will become payable upon approval by NYSERDA of the required Performance Report detailing the operational data for one year subsequent to the date of commissioning and calculations showing that the fuel cell system has met the minimum capacity factor and efficiency requirements for PON 3841. Fuel cell systems operating at an annual capacity factor of less than 50% and/or a Total System Efficiency of less than 45% will not be eligible to receive performance incentives. Eligibility for Performance Incentive payments will be determined based on the verified electric energy generated by the System.

## ARTICLE 6: FORCE MAJEURE

§6.1. Neither party hereto shall be liable for any failure or delay in the performance of its respective obligations hereunder if and to the extent that such delay or failure is due to a cause or circumstance beyond the reasonable control of such party, including, without limitation, acts of God or the public enemy, expropriation or confiscation of land or facilities, compliance with any law, order or request of any Federal, State, municipal or local governmental authority, acts of war, rebellion or sabotage or damage resulting therefrom, fires, floods, storms, explosions, accidents, riots, or strikes or the delay or failure to perform by any subcontractor by reason of any cause or circumstance beyond the reasonable control of such subcontractor. Variability in the frequency or force of the wind, of rainfall, or of water levels will in no event constitute force majeure events. Failure by Seller to obtain or secure any permit or approval or delay in obtaining any permit or approval of any sort with regard to Seller's performance under the Agreement shall not constitute a force majeure event.

## ARTICLE 7: TERMINATION

§7.1. This Agreement shall remain in effect for the term defined in Section 2.2, unless there is an event of default and the Agreement is terminated in accordance with this Article. Events of default include either Party's breach of any provision of this Agreement, including provisions incorporated by reference, and including, but not limited to, the following:

- a. failure of the Contractor to perform its responsibilities in a timely manner, including, but not limited to, failure to provide the required submittals within the required time frames, including responses to requests for clarification or additional information, or failure complete the required inspections within the time limits and manner set forth in PON 3841;
- b. failure of the Contractor to provide NYSERDA or its agent sufficient access to the Project Site for inspection and/or observation of the Contractor's field performance measurement activities;
- c. failure of the Contractor to cure any deficiency in a material term or cure any material breach of this Agreement within 30 calendar days after written notice;

- d. failure of the Contractor to acquire or maintain any necessary permit, license or failure to maintain Insurance as required under this Agreement;
- e. assignment or subcontracting of all or part of the Contractor's obligations required under this Agreement without NYSERDA's prior written permission, except that the Contractor shall not be required to obtain NYSERDA approval to subcontract all or part of the work;
- f. submittal by the Contractor of false, misleading or incorrect information; and
- g. failure by NYSERDA to make payments due pursuant to the terms of this Agreement to the Contractor within the time limits set forth in this Agreement.

§7.2. Once an event of default occurs, and at any time thereafter so long as the default continues, the non-defaulting Party may, by written notice to the defaulting Party, specify the nature of such default, and declare this Agreement to be in default. The defaulting Party must remedy the default within the time specified in the written notice of default, or 30 calendar days from the date such written notice was given if no time is specified, or within any further period to which the parties may agree. In no event, however, will the defaulting Party be required to remedy a default in less than 30 calendar days from the date the written notice of default was given.

§7.3. Notwithstanding the provisions of this Article, NYSERDA may terminate this Agreement on notice, and without providing an opportunity for cure, for Contractor's failure to fulfill, adhere to, or comply with the provisions of Article 3.

§7.4. If the defaulting party fails to cure its default within the appropriate time period, the non-defaulting party may terminate this Agreement at any time thereafter and, without a waiver of any other remedies which exist in law or equity, exercise at its election, any other rights or remedies it may have under this Agreement, at law or in equity, or institute other proceedings including but not limited to bringing an action or actions from time to time for specific performance, for the recovery of amounts due and unpaid, and for damages.

#### ARTICLE 8: THIS SECTION HAS BEEN REMOVED

#### ARTICLE 9: INDEMNIFICATION

§9.1. The Contractor 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, attorneys' 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 Contractor's performance of this Agreement. The Contractor agrees that such obligations under this Article shall survive any expiration or termination of this Agreement and shall not be limited by any insurance coverage required under this Agreement.

#### ARTICLE 10: INSURANCE.

§10.1. Maintenance of Insurance; Policy Provisions. The Contractor, 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 the Section hereof entitled Types of Insurance. All such insurance shall be evidenced by insurance policies, each of which shall:

- a. name or be endorsed to cover NYSERDA and the State of New York as additional insured;
- b. provide that such policy may not be canceled or modified until at least thirty (30) calendar days after receipt by NYSERDA of written notice thereof; and
- c. be reasonably satisfactory to NYSERDA in all other respects.

§10.2. Types of Insurance. The types and amounts of insurance required to be maintained under this Article are as follows:

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 per occurrence in respect of claims arising out of personal injury or sickness or death of any one person, \$1,000,000 per occurrence in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$1,000,000 per occurrence in respect of claims arising out of property damage in any one accident or disaster.

§10.3. Delivery of Policies; Insurance Certificates. Prior to commencing the Work, the Contractor shall deliver to NYSERDA certificates of insurance issued by the respective insurers, evidencing the insurance required by this Article. In the event any policy furnished or carried pursuant to this Article will expire on a date prior to the termination date established under Article 2 hereof, the Contractor, not less than thirty (30) calendar days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and the Contractor shall promptly pay all premiums thereon due. 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 Contractor shall, upon request, deliver to NYSERDA a certified copy of each policy.

#### ARTICLE 11: WARRANTIES AND GUARANTEES

§11.1. Each Party warrants and guarantees to the other that:

- a. it has all requisite power, authority, licenses, permits and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
- b. its execution, delivery and performance of this Agreement have been duly authorized by, or is in accordance with, its organizing instrument, and this Agreement has been duly executed and delivered for it by the signatories authorized, and it constitutes its legal, valid and binding obligation;
- c. its execution, delivery and performance of this Agreement shall not result in a breach or violation of, or constitute a default under, any agreement, lease, or instrument to which it is a party or by which it or its properties may be bound or affected; and
- d. it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

§11.2. The Contractor also warrants and guarantees that:

- a. it is financially and technically qualified to perform the Project;
- b. it is familiar with and will comply with all general and special federal, State, municipal and local laws, ordinances and regulations, if any, that may in any way affect the performance of this Agreement;
- c. the design, supervision and workmanship furnished with respect to performance of the Project shall be in accordance with sound and currently accepted engineering practices;
- d. neither the Contractor nor any of its employees, agents, representatives or servants has actual knowledge of any patent, copyright or trademark issued under the laws of the United States or any other matter which could constitute a basis for any claim that the performance of the Project or any part thereof infringes any patent, copyright, or trademark or otherwise interferes with any other right of any individual, corporation, association or partnership, organization, business or a government or political subdivision thereof, or any governmental agency or instrumentality;
- e. it has no actual knowledge that there are existing undisclosed or threatened legal actions, claims, or encumbrances, or liabilities that may adversely affect the Project or NYSERDA's rights hereunder;
- f. it has no actual knowledge that any information or document or statement furnished by the Contractor in connection with this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make the statement not misleading, and that all facts have been disclosed that would materially adversely affect the Project;



- g. it has no, and shall not obtain during the course of this Agreement any, interest, financial or otherwise, direct or indirect, nor is it engaged in any business or transaction or professional activity, nor has it incurred any obligation of any nature, which is in substantial conflict with the rendering of services under this Agreement; and
- h. it shall exercise reasonable care to achieve commercial standards of fitness for the Customer's use of the equipment that is installed in connection with the Project.

## ARTICLE 12: COMPLIANCE WITH CERTAIN LAWS

§12.1. Governing Law/Venue. This Agreement shall be interpreted according to the laws of the State of New York without regard to its conflicts of laws principles. The Contractor, its subcontractors and consultants will comply with all laws, rules, orders, regulations and requirements of federal, state and municipal governments applicable thereto, including provisions set forth in Exhibit C hereto. The parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in the United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

§12.2. All Legal Provisions Deemed Included. It is the intent and understanding of the Contractor 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 Contractor, 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.

§12.3. Other Legal Requirements. The references to particular laws of the State of New York in this Article, and elsewhere in this Agreement are not intended to be exclusive and nothing contained in this Article and the Agreement shall be deemed to modify the obligations of the Contractor to comply with all legal requirements.

§12.4. Equipment Requirements. All Equipment required for the fuel cell system described in the Project Application and subsequent As-built Drawings shall be consistent with the New York State Uniform Fire Prevention and Building Code, or the applicable local, State or Federal codes.

§12.5. State Environmental Quality Review Act (SEQR). NYSERDA is subject to the provisions of SEQR, implementing regulations of the New York State Department of Environmental Conservation, and implementing regulations of NYSERDA. Funding will not be released for a Project that has not complied with SEQR.

§12.6. Permits and Approvals. The Contractor shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Project during the Project Term. Neither the SBC Program nor entry into this Agreement in any way replaces or modifies the necessity or applicability of any permit or approval process by any jurisdiction. NYSERDA's obligations to make payments to Contractor will be conditional on the acquisition of all such permits and approvals. Upon request by NYSERDA, Contractor must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Contractor shall provide prompt Notice to NYSERDA of the initiation of any criminal or regulatory investigation, hearing, proceeding, or review process ("Process") by any federal or State entity regarding any actual or alleged violation of any permit or approval obtained or applied for with respect to the Project, as well as of any modification, penalty and/or fine that may be imposed or occur as a result of such a Process or violation.

## ARTICLE 13: PUBLICITY

§13.1. The Contractor shall collaborate with NYSERDA's Manager of Communications to prepare any press release and to plan for any news conference concerning the Project. In addition, the Contractor shall notify NYSERDA's Manager of Communications regarding any media interview in which the Project is referred to or discussed.

§13.2. It is recognized that during the course of the Project under this Agreement, the Contractor or its employees may from time to time desire to publish information regarding scientific or technical developments made or conceived in the course of or under this Agreement. In any such information, the Contractor shall credit funding participation in the Project to the **New York State Clean Energy Fund** and shall state that "NYSERDA has not reviewed the information contained herein, and the opinions expressed in this report do not necessarily reflect those of NYSERDA or the State of New York."

§13.3. The Contractor shall not use NYSERDA's corporate name, logo, identity, or any affiliation, without NYSERDA's prior written consent.

#### ARTICLE 14: MISCELLANEOUS

§14.1. Entire Agreement; Amendment. This Agreement embodies the entire agreement and understanding between NYSERDA and the Contractor and supersedes all prior agreements and understandings relating to the subject matter hereof. Except as otherwise expressly provided for herein, this Agreement may be changed, waived, discharged or terminated only by an instrument in writing, signed by the party against which enforcement of such change, waiver, discharge or termination is sought.

§14.2. Record Retention. The Contractor and subcontractors shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of three (3) years after the expiration or early termination of this Agreement, accurate records of the Project work which is performed hereunder. NYSERDA or its designated agent shall at reasonable times have access to inspect such records.

§14.3. NYSERDA'S Right to Inspect. NYSERDA, and its designated agents, may observe and inspect all Project work at the Project Site with or without notice.

§14.4. No Waiver. The failure of either Party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver nor deprive that Party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

§14.5. Rights and Remedies. No right or remedy conferred upon or reserved to the Parties by this Agreement excludes any other rights or remedies provided by law or equity nor restricts the Parties' rights to exercise any other right or remedy.

§14.6. Disputes. Where any matters related to this Agreement are in dispute, the SPC Program Manager and the Contractor contact person, or their designated representatives shall promptly but in any case, within twenty (20) calendar days of written notice by either party to the other, meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary to exchange information and attempt in good faith to resolve the dispute.

§14.7. Assignment. The assignment, transfer, conveyance, or other disposal of this Agreement or any of the Contractor's rights, obligations, interests or responsibilities hereunder, in whole or in part, without the express consent in writing of NYSERDA shall be void and of no effect as to NYSERDA.

§14.8. Notices. 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 deemed to have been sufficiently given for all purposes hereunder when delivered or mailed by registered or certified mail, postage prepaid, return receipt requested, (i) if to NYSERDA, at 17 Columbia Circle, Albany, New York 12203-6399, or at such other address as NYSERDA shall have furnished to the Contractor in writing, and (ii) if to the Contractor, at the address noted in the first paragraph of Page 1 of this Agreement, or such other address as the Contractor shall have furnished to it in writing.

§14.9. Executory Clause. NYSERDA shall have no liability under this Agreement to the Contractor or to anyone else beyond SBC Surcharge funds actually paid to NYSERDA by third parties which would fund this Agreement.

§14.10. Independent Contractor. The status of the Contractor under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, the Contractor, subcontractors, and their respective officers, agents, employees, representatives and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement 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.

§14.11. Audit. NYSERDA 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 Contractor's performance under this Agreement, at the office or offices of the Contractor 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 NYSERDA, Contractor shall make such books, accounts and records available to NYSERDA at NYSERDA'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 NYSERDA on the basis of any audit of the Contractor by an agency of the United States, the State of New York or NYSERDA not to constitute a properly invoiced amount.

§14.12. Review and Disclaimer. By NYSERDA's execution of this Agreement with the Contractor, neither NYSERDA nor the State of New York: (1) endorse the Contractor, any fuel cell manufacturer, or fuel cell system; or (2) guaranty, warranty, or in any way represent or assume liability for any work proposed or carried out under this Agreement.

NYSERDA's review of the Application Package is strictly for program compliance. NYSERDA is not responsible for assuring that the design, engineering and construction of the Project or installation of any fuel cell system is proper or complies with any particular laws, regulations, codes, licensing, certification and permit requirements, or industry standards. NYSERDA does not make any representations of any kind regarding the economic or technical feasibility of the Project, the results to be achieved by or the Operations and maintenance of the fuel cell systems, or the adequacy or safety of such measures.

The Contractor shall in no way represent to any third party that NYSERDA's execution of this Agreement or any reviews by NYSERDA, including, but not limited to, NYSERDA's review of the design, construction, operation, or maintenance of the Project is a representation by NYSERDA as to the economic or technical feasibility, operational capability, or reliability of the Project.

§14.13. Requirement to Pay the SBC. To participate in the CEF Fuel Cell Program, Host must be paying the SBC Surcharge at the time of application submittal or for new construction projects, the Host must submit proof that it has begun paying the SBC surcharge, before NYSERDA will approve any invoices.

## ARTICLE 15: FREEDOM OF INFORMATION

§15.1. Freedom of Information Law. Contractor acknowledges that NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL;" see Public Officers' Law Article 6).

§15.2. Claim of Confidentiality. Information of any tangible form including any document that Contractor wishes to be protected from disclosure to third parties must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA.

§15.3. Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception 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." If NYSERDA receives a request from a third party for information or a document received from Contractor and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations (see [www.nyserda.org/About/NYSERDA.Regulations.pdf](http://www.nyserda.org/About/NYSERDA.Regulations.pdf)).

**IN WITNESS WHEREOF**, the Parties hereto do indicate their acceptance of and agreement to the foregoing by causing their duly authorized representatives to execute this Agreement as of the Effective Date of this Agreement.

**[Contractor]**

**NEW YORK STATE ENERGY RESEARCH AND  
DEVELOPMENT AUTHORITY**

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Cheryl M. Glanton  
Director of Contract Management

Title: \_\_\_\_\_

EXHIBIT A

PON 3841 STANDARD PERFORMANCE AGREEMENT

Maximum Total Incentive

Contractor Name:  
Agreement Number:

Project Name:

Incentives	Incentive Amount
Base Incentive (\$1,000/kW)	\$0
Grid Independent Capability Incentive (\$500/kW)	\$0
<b>Total Base Incentive (TBI)</b>	<b>Up To \$1,000,000</b>
Downstate Differential Incentive (+10% of TBI)	\$0
Consolidated Edison Target Zone Incentive (+25% of TBI)	\$0
Critical Infrastructure Incentive (+25% of TBI)	\$0
Community Microgrid Incentive (+25% of TBI)	\$0
<b>Maximum Total Incentive (MTI)</b>	<b>Up To \$1,000,000</b>

NYSERDA will calculate the Total Base Incentive (TBI) and the Maximum Total Incentive (MTI), using the CEF Fuel Cell Program Incentive Calculator (Appendix A of PON 3841). The MTI will serve as the basis for the Applicant's request for funding from NYSERDA. Projects accepted into the program will be contracted based on the Maximum Total Incentive as calculated by the Incentive Calculator. NYSERDA will encumber funds based on the Maximum Total Incentive estimate upon execution of the Standard Performance Agreement.

## EXHIBIT B

REVISED 5/12

### 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/en/About/~/\\_/media/Files/About/Contact/NYSERDAREgulations.ashx](http://www.nyserda.ny.gov/en/About/~/_/media/Files/About/Contact/NYSERDAREgulations.ashx)).

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 C, the terms of this Exhibit C 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 NYSEERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify NYSEERDA, in writing, of each and every change of address to which service of process can be made. Service by NYSEERDA 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, NYSEERDA 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 NYSEERDA, convicted of a felony, under the laws of the United States or Territory of the United States, then NYSEERDA may exercise its stop work right under this Agreement. If subsequent to the effectiveness of this Agreement, NYSEERDA 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 NYSEERDA may exercise its right to terminate this Agreement. If the Contractor knowingly withheld information about such an indictment or conviction, NYSEERDA 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 NYSEERDA.

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  
30 South Pearl St -- 7th Floor  
Albany, New York 12245  
Telephone: 518-292-5220  
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  
30 South Pearl St -- 2nd Floor  
Albany, New York 12245  
Telephone: 518-292-5250  
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 C

### 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.<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 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.

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

(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.

(g) "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.

EXHIBIT D through F

Final completed Proposal Checklist, and Appendices C and D  
of NYSERDA PON 3841