

**STANDARD COMPETITIVE TIER 2 REC AGREEMENT**

**BY AND BETWEEN**

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

**AND**

**[NAME OF SELLER]**

**Dated: \_\_\_\_\_, 2021**

Agreement No. \_\_\_\_\_

This Renewable Energy Standard (“RES”) Agreement (“Agreement”) is entered into as of \_\_\_\_\_, 2021 (the “Effective Date”) by and between the New York State Energy Research and Development Authority (“NYSERDA”), a public benefit corporation, having a principal business address of 17 Columbia Circle, Albany, New York 12203, and \_\_\_\_\_ (“Seller”), a [insert as appropriate], having a principal business address of \_\_\_\_\_. NYSERDA and Seller are each referred to herein as a “Party” and are collectively referred to herein as the “Parties.”

WHEREAS, the New York State Public Service Commission (“PSC”) through its “Order Adopting a Clean Energy Standard”<sup>1</sup> (“2016 CES Order”) established a Clean Energy Standard Program, including a Renewable Energy Standard (“RES”); and

WHEREAS, the 2016 CES Order designated NYSERDA as the central procurement administrator of the RES program; and

WHEREAS, on October 15, 2020 the Order Adopting Modifications to the Clean Energy Standard (Case 15-E-0302) authorized and directed a competitive procurement program under Tier 2 of the CES to secure the continued availability of existing renewable resources, and authorized NYSERDA, as central procurement administrator of the CES program, to issue three annual solicitations under Competitive Tier 2, the first of which was issued as T2RFP21-1; and

WHEREAS, Seller has participated in T2RFP21-1, and has been selected by NYSERDA for an award with respect to the [name of facility] (“Bid Facility”); and

WHEREAS, Seller agrees to sell to NYSERDA, and NYSERDA agrees to purchase from Seller, the Tier-2 Renewable Energy Certificates associated with the energy production of the Bid Facility described in the Bid Proposal submitted in response to T2RFP21-1 during the Contract Delivery Term, on the terms and subject to the conditions set forth herein;

NOW, THEREFORE, this Agreement has been entered into by the Parties to define, among other things, their rights and obligations concerning the Tier-2 Renewable Energy Certificates associated with the generation of electric energy by the Bid Facility, the delivery by Seller of Tier-2 Renewable Energy Certificates to NYSERDA, and payments by NYSERDA to Seller during the term of this Agreement.

## Article I

### Definitions

The terms defined in the recitals, the preamble, this Article I, or any other Articles of this Agreement, whenever used in this Agreement (including in any Exhibit hereto), shall have the respective meanings indicated in such provisions for all purposes of this Agreement (each such

---

<sup>1</sup> See Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, “Order Adopting a Clean Energy Standard,” issued and effective August 1, 2016.

meaning to be equally applicable to the singular and the plural forms of the respective terms so defined). All references herein to a Section, Article or Exhibit are to a Section, Article or Exhibit of or to this Agreement, unless otherwise indicated. The words “hereby”, “herein”, “hereof”, “hereunder” and words of similar import refer to this Agreement as a whole (including any Exhibit) and not merely to the specific section, paragraph or clause in which such word appears, unless so specified. The words “include”, “includes”, and “including” shall be deemed, in every instance, to be followed by the phrase “without limitation.” Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. Except as otherwise expressly provided herein, all references to “dollars” and “\$” shall be deemed references to the lawful money of the United States of America.

Actual Annual Production: The amount, in MWh, of the Actual Eligible Production during a full Contract Year, measured at the Delivery Point.

Actual Production: The amount, in MWh, of the total electric energy production of the Bid Facility during any period within a Contract Year, measured at the Delivery Point.

Agreement: This Agreement, including Exhibits A and B hereto.

Annual REC Cap: A number of RECs equal to the Bid Quantity. Seller will retain ownership and all rights to RECs that exceed the Annual REC Cap.

Bid Facility: The electric generating station that has been identified and described in the Bid Proposal.

Bid Price: A single fixed production payment, expressed in \$/MWh, applicable to each Tier-2 Renewable Energy Certificate offered as performance throughout the Contract Delivery Term. Subject to Article V, for all transactions contemplated and consummated under this Agreement the Bid Price shall be \$ \_\_\_\_\_.

Bid Proposal: Documents submitted by Seller in response to T2RFP21-1 and received by NYSERDA.

Bid Quantity: The amount, in MWh, of Tier-2 RECs the Bid Facility expects to proffer as performance under this Agreement during each Contract Year during the Contract Delivery Term. The Bid Quantity must be the same for each Contract Year throughout the Contract Delivery Term consummated under this Agreement the Bid Quantity shall be as stated in Schedule 1 of this Agreement. For purposes of this Agreement, the Bid Quantity shall be \_\_\_\_\_.

Business Day: Means any day except a Saturday, Sunday or a New York State or NERC recognized holiday.

Contract Delivery Term: The period of performance under this Agreement. The Contract Delivery Term will commence on January 1, 2021 and shall expire on December 31, 2023.

Contract Tenor: The duration, in years, of the Contract Delivery Term. The Contract Tenor shall be (3) years.

Contract Year: A 12-month period commencing with the beginning of the Contract Delivery Term on January 1, 2021 and each anniversary thereof within the Contract Delivery Term.

Delivery Point: The generator bus or location where (a) the administrator of the wholesale power market, or (b) the operator of the transmission/distribution utility, public authority or municipal electric company measures, or otherwise determines, energy production from the Bid Facility.

MW: a megawatt of alternating current electric energy generating capacity.

MWh: a megawatt-hour of electric energy.

Nameplate Capacity: The gross generating capacity of the entire Bid Facility in MW. The Nameplate Capacity shall be \_\_\_\_\_.

New York Generation Attribute Tracking System (NYGATS): The tracking system that records electricity generation attribute information within New York State, and processes generation attribute information from energy imported and consumed within New York State, as a basis for creating generation attribute certificates, including Tier-2 RECs. NYGATS will create exactly one Tier-2 REC per MWh of RES eligible generation.

NYGATS Forward Certificate Transfer: A Forward Certificate Transfer is an automated monthly transfer of Certificates over the duration of the Contract Delivery Term. Seller will continue to be responsible for providing the Static Data and Dynamic Data required of Projects, notwithstanding the Forward Certificate Transfer. See Section 10.3 of the NYGATS Operating Rules at: <https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS/Registration-Documents>

NYISO: The New York Independent System Operator, Inc., is the administrator of the wholesale power markets in New York and manages the physical electrical operations of the NYCA.

NYSERDA NYGATS Account: The NYGATS account established by NYSERDA into which Seller shall transfer RECs as performance under this Agreement.

Operating Rules: The NYGATS Operating Rules (the “Operating Rules”), the General Terms of Use and other guidelines posted to the NYGATS website at: <https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS/Registration-Documents>

Tier-2 Renewable Energy Certificate (REC): The electronic record of generation data created by NYGATS and representing all of the attributes of one MWh of electricity generation from a Competitive Tier-2 Bid Facility registered with the NYGATS tracking system. The attributes represented in each Tier-2 REC include all environmental characteristics, claims, credits, benefits, emissions reductions, offsets, allowances, and allocations, however characterized, denominated, measured or entitled, attributable to the generation of Actual Eligible Production by a Bid Facility, include but not limited to: (i) any direct emissions or any avoided emissions of

pollutants to the air, soil or water including but not limited to sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), particulate matter and other pollutants; (ii) any direct or avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases (“GHGs”) that have been or may be determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth’s climate by trapping heat in the atmosphere; (iii) all set-aside allowances and/or allocations from emissions trading programs made unnecessary for compliance in such program as a result of performance under this Agreement, including but not limited to allocations available under 6 NYCRR §§ 204, 237 and 238; and (iv) all credits, certificates, registrations, recordations, or other memorializations of whatever type or sort, representing any of the above.

## Article II

### Purchase and Sale of Tier-2 Renewable Energy Certificates

Section 2.01. On the terms and subject to the conditions of this Agreement, Seller agrees to sell, assign, convey, deliver and Transfer to NYSERDA, and NYSERDA agrees to purchase from Seller, all right, title and interest in the Tier-2 RECs associated with the Actual Production generated by the Bid Facility during the Contract Delivery Term. NYSERDA shall have no obligation, for any Contract Year, to purchase Tier-2 RECs in excess of the Annual REC Cap.

Section 2.02. Such right, title and interest shall include perpetual and exclusive rights to the Tier-2 RECs and the underlying attributes, including but not limited to the exclusive rights to claim or represent, consistent with New York State Environmental Disclosure rules: (a) that the energy associated with Tier-2 RECs was generated by the Bid Facility; and (b) that New York State and or the RES Program is responsible for the environmental benefits including reductions in emissions and/or other pollution or any other environmental benefit resulting from the generation of the energy associated with the Tier-2 RECs. For the avoidance of doubt, the only products Seller is selling and NYSERDA is buying under this Agreement are Tier-2 RECs and all rights, title, and interest associated with them. Seller is not selling to NYSERDA and NYSERDA is not purchasing any electric energy, capacity, or ancillary services associated with the Bid Facility.

Section 2.03. Seller shall transfer the Tier-2 RECs to the NYSERDA NYGATS Account via a Forward Certificate Transfer. At the time of Transfer by Seller to NYSERDA, the Tier-2 RECs shall be free and clear of all liens, judgments, encumbrances and restrictions.

Section 2.04. [Reserved]

Section 2.05. In the event that Seller becomes entitled to or must apply for or take some other action under any emission-trading, emissions recordation or other regime other than the RES in order to secure a claim, title, credit, ownership, or rights of any type, nature or sort (“Title”) to any attributes associated with the Tier-2 RECs, or any certification, registration, verification or other memorialization of the creation of such attributes by the Bid Facility to which Seller may be entitled, Seller shall (a) notify NYSERDA of such opportunity, and, if requested to do so by NYSERDA, Seller shall (b) take all actions necessary to apply for and

secure such Title, to the maximum extent to which Seller is entitled, (c) provide NYSERDA with evidence of taking such action; and (d) convey such Title to NYSERDA whenever so secured.

Section 2.06. NYSERDA shall be free to sell, assign, transfer or otherwise subject to any encumbrance, any of the Tier-2 RECs NYSERDA acquires under this Agreement, at any time and from time to time to any entity and on such terms and conditions as NYSERDA may desire. Any financial or other consideration received by NYSERDA from any such action shall inure solely to NYSERDA's benefit, to be applied as determined by NYSERDA as the central procurement administrator of the RES Program or a successor and shall not affect Seller's rights or obligations under the terms of this Agreement.

Section 2.07. Verification/Metering. The Actual Production of the Bid Facility must be capable of accurate and verifiable measurement at the Delivery Point by the local ISO, transmission utility, public authority, or municipal electric company, or through a Dedicated Generation Meter as described in Section 2.08 of this Agreement. Unless specifically agreed to by NYSERDA in writing, the Bid Facility must be separately metered and must be functionally represented by a single and discrete Delivery Point.

Section 2.08. Dedicated Generation Meter. If applicable, Seller must provide, install, and maintain a Dedicated Generation Meter at the Injection Point that shall comply with the requirements and standards stated in the NYGATS Operating Rules at Section 5.3. Revenue Metering Standards. Data collected from the meter will be available to NYSERDA and will be used by NYSERDA to verify the monthly Actual Eligible Production.

### Article III

#### Bid Facility Electricity Delivery Requirements.

Section 3.01. The electricity associated with the Tier-2 RECs must be either:

- (a) delivered into a market administered by the NYISO for end-use in New York State; or
- (b) delivered through a wholesale meter under the control of a utility, public authority, or municipal electric company such that it can be measured, and such that consumption within New York State can be tracked and verified by such entity or by the NYISO; or
- (c) delivered through a Dedicated Generation Meter, in accordance with Section 2.08.

Section 3.03. Bilateral Sales. Nothing in this Agreement shall be read to prohibit bilateral sales by Seller for electric energy, capacity, or ancillary services produced by the Bid Facility. Tier-2 eligible electric energy from the Bid Facility sold on a bilateral basis will produce Tier-2 RECs and NYSERDA will purchase such Tier-2 RECs in accordance with Article II of this Agreement, provided that the energy is delivered into the NYCA in accordance with this Article.

### Article IV

## Payment

Section 4.01. Invoices. Seller may submit invoices for Tier-2 RECs associated with generation during the first six (6) months of 2021 and successfully transferred by the Seller into the NYSERDA NYGATS Account no sooner than October 15, 2021. Seller may submit invoices for the Tier-2 RECs associated with generation during the last six (6) months of 2021 and successfully transferred by the Seller into the NYSERDA NYGATS Account no sooner than January 15, 2021.

Invoices for Tier-2 RECs associated with generation during Contract Years 2 and 3 may be submitted quarterly, no sooner than the 15<sup>th</sup> day of the months of April, July, October, and January for Tier-2 RECs associated with generation during the prior quarter and delivered to NYSERDA's NYGATS Account. Invoices shall not be submitted before the fifteenth (15) day of the month following the close of each quarter; invoices submitted prior to the fifteenth (15) day of the month following the close of each quarter shall not be considered proper invoices for purposes of NYSERDA's Prompt Payment Policy.

Section 4.02. Invoice Process. Invoices shall be submitted electronically to NYSERDA's online invoice system at: <https://services.nyserda.ny.gov/Invoices/> or, if this Bid Facility is managed through NYSERDA's Salesforce application, via NYSERDA's Salesforce Portal with the Seller's log-in credentials. If electronic submission is not possible, invoices may be addressed to NYSERDA, "Attention: Accounts Payable." Invoices shall reference the purchase order number, which will be generated and provided to the Seller upon contract execution, and the Agreement number shown on page 1 of this Agreement. Invoices shall include a statement of the amount due and payable by NYSERDA to Seller, which amount shall be calculated in accordance with Section 4.03. Invoices must reflect the quantity of Tier-2 Renewable Energy Certificates Transferred and Accepted to the NYSERDA NYGATS Account for the prior month. NYSERDA may not pay any Invoice submitted more than three (3) months after the close of the associated calendar quarter.

Section 4.03. Payment. The amount payable in a given quarter shall be calculated as the multiplicative product of the Bid Price, and the number of Tier-2 Renewable Energy Certificates Transferred and Accepted into the NYSERDA NYGATS Account during the prior quarter.

Section 4.04. Prompt Payment Policy. NYSERDA will make payments to the Seller in accordance with and subject to its Prompt Payment Policy Statement, attached hereto as Exhibit C. Such payments shall be made by check or wire transfer to an account designated by the Seller. NYSERDA will not pay any invoice not accompanied by all information required in accordance with Section 6.01.

Section 4.05. Maximum Commitment/Limitation. The maximum number of Tier-2 Renewable Energy Certificates NYSERDA shall be obligated to purchase under this Agreement shall be equal to the Bid Quantity multiplied by the Bid Price multiplied by three (3)(the number of years in the Contract Delivery Term). The maximum aggregate amount payable by NYSERDA to Seller hereunder is (\$ \_\_\_\_\_ .00).

## Article V

### Adjustments

Section 5.01. True-Up Adjustments. NYSERDA may adjust payments to subsequent invoices consistent with adjustments by NYGATS pursuant to its Operating Rules based on NYISO or other local control area billing settlement true-up procedures, based on actual metered production data measured at the Injection Point, actual and verified data reflecting compliance with the Bid Facility Electricity Delivery Requirements, and/or based on the number of Tier-2 Renewable Energy Certificates Transferred.

## Article VI

### Records and Reports

Section 6.01. Provision of Data. Seller shall, at NYSERDA's request, provide NYSERDA access to generation and delivery data, including detailed monthly market accounting settlement or other pertinent data from the administrator(s) of the energy market into which energy from the Bid Facility was delivered, from the entity or party in control of any meter through which the energy associated with the Quantity Obligation was delivered, and from the administrator of any attribute accounting system operating in such control area. Seller may be required to waive confidentiality, as to NYSERDA, for the direct transfer to NYSERDA by an energy market administrator or the operator of the transmission and/or distribution system into which the energy from the Bid Facility is delivered of transactional and/or delivery information and data pertinent to the verification of attribute creation and electricity delivery.

Section 6.02. Maintenance of Records. Seller shall keep, maintain, and preserve throughout the term of this Agreement and for a period of seven (7) years following the expiration of this Agreement, full and detailed books, accounts, and records pertaining to Seller's performance under the Agreement, including without limitation, all bills, invoices, payrolls, subcontracting efforts and other data evidencing, or in any material way related to, the direct and indirect costs and expenses incurred by Seller in the course of such performance. The foregoing records may be kept, maintained, or preserved on any information storage device, or one or more electronic networks or databases, provided that such records can be converted into clearly legible form within a reasonable time. Seller may destroy or otherwise dispose of a record falling within the scope of this Section no earlier than seven (7) years following the creation thereof with the written consent of NYSERDA, such consent not to be unreasonably withheld.

## Article VII

### Audit

Section 7.01. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and a period of seven (7) years thereafter, upon reasonable notice to Seller, to inspect and audit any and all books, accounts and records pertaining to Seller's performance under this Agreement, at the office or offices of Seller where they are then being kept, maintained and preserved in accordance with Section 6.04. 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, Seller 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 Seller by an agency of the United States, the State of New York or NYSERDA not to constitute a properly invoiced amount.

Section 7.02. Eligibility Audit. NYSERDA may require periodic audits of the Bid Facility to verify that the Bid Facility remains eligible under Tier 2 of the RES. Seller shall provide NYSERDA with written Notice prior to any material modification of the Bid Facility, including but not limited to any modification that is expected to result in a change in the Nameplate Capacity of the Bid Facility, and shall provide to NYSERDA a written description of the planned modification.

## Article VIII

### Assignment and Change of Control

Section 8.01. General Restrictions. Except as specifically permitted by this Article VIII, the assignment, transfer, conveyance, or other disposal of this Agreement or any of Seller's rights, obligations, interests or responsibilities hereunder, in whole or in part, without the prior express written consent of NYSERDA is prohibited and shall be void and of no effect as to NYSERDA. Such consent shall not be unreasonably withheld, conditioned, or delayed. Seller agrees to reimburse NYSERDA for NYSERDA's reasonable costs and expenses incurred by its use of outside attorneys, consultants, accountants and advisors in connection with this Agreement in response to Seller's requests made pursuant to this Section 8.01, without regard to whether such consent is provided. NYSERDA shall provide an invoice to Seller for such charges, with appropriate documentation, and Seller shall pay such invoice within thirty (30) days. When assignable, this Agreement shall be binding upon, shall inure to the benefit of, and may be performed by, the successors and assignees of the Parties; provided, however, that no assignment, pledge or other transfer of this Agreement by Seller shall operate to release Seller from any of its obligations under this Agreement unless such assignee, pledgee or transferee agrees in writing to assume all of Seller's obligations under this Agreement.

Section 8.02. Permitted Assignments by Seller. NYSERDA's consent shall not be required for Seller to either (a) pledge or assign the Selected Project, this Agreement, or the accounts, revenues, or proceeds from this Agreement in connection with financing arrangements, or (b) assign the Selected Project and this Agreement to an affiliate if the then-current Contract Security remains in place. Upon Seller's reasonable request, NYSERDA shall execute a consent to assignment associated with a financing in a commercially reasonable form acceptable to NYSERDA and Seller. For purposes of this Section 8.02, the term "affiliate" shall include any company, corporation, or other entity that controls, is controlled by, or is under common control with Seller, but only for so long as such control, directly or indirectly, meets the following definition. For purposes of this definition, "control" shall mean ownership or control, directly or indirectly, of at least fifty percent (50%) of the shares having voting rights, or other equivalent rights of the subject entity entitled to vote.

Section 8.03. Assignment with Change of Control. Seller may, upon written notice and delivery to NYSERDA of a letter of assignment substantially in the form of Exhibit G and duly executed by Seller and the assignee entity, assign its rights and obligations hereunder, or transfer such rights and obligations by operation of law, to any entity (a) with which or into which such Seller merges or consolidates; (b) which acquires greater than fifty percent (50%) of Seller's equity interests or actual control of Seller; or (c) to which Seller transfers all or substantially all of its assets; in each case provided that such other entity agrees to be bound by the terms hereof; and provided further, that such other entity's creditworthiness is comparable to or superior to that of Seller at the time this Agreement was executed and such Party is not relieved of any obligation or liability hereunder as a result of such assignment.

## Article IX

### Seller's Representations, Warranties and Guarantees

Section 9.01. Seller Representations, Warranties and Guarantees. As a material inducement to NYSERDA to enter into this Agreement, Seller makes the following representations, warranties and guarantees, as of the Effective Date, all of which shall survive the execution and delivery of this Agreement:

- (a) that Seller (i) is a [corporation/limited liability company/partnership] duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization; (ii) has or will have all requisite corporate power, and has or will have all material governmental permits necessary to own its assets or lease and operate its properties and carry on its business as now being or as proposed to be conducted, to construct, finance, own, maintain and operate the Bid Facility, to execute and deliver this Agreement, and to consummate the transactions contemplated herein; and (iii) is qualified to do business and is in good standing in all jurisdictions in which the nature of the business conducted by it makes such qualification necessary;
- (b) that the execution, delivery and performance by Seller, the entry into this Agreement by Seller, and the consummation of the transactions contemplated by this Agreement will not violate (i) Applicable Law or any provision of the limited liability company agreement or other governing documents of Seller; (ii) violate, conflict with, result in a breach of or constitute (alone or with notice or lapse of time or both) a default or an event of default under any indenture, agreement (including the limited liability company agreement of Seller), mortgage, deed of trust, note, lease, contract or other instrument to which Seller is a party or by which it or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of Seller;
- (c) that the Tier-2 RECs Transferred to NYSERDA under this Agreement, will be free and clear of any liens, encumbrances and/or defects of title as of the date of Transfer;
- (d) that the attributes included in the Tier-2 RECs Transferred to NYSERDA under this Agreement shall not have otherwise been, nor will be sold, retired, claimed or represented

as part of electricity output or sales, or used to satisfy obligations in any other jurisdiction;

(e) that this Agreement will be duly executed and delivered by Seller and will constitute the legal, valid and binding obligation of Seller enforceable against Seller in accordance with the terms thereof;

(f) as of the Effective Date, to the best of Seller's knowledge after due inquiry, that there are no existing undisclosed or threatened material legal actions, claims, or encumbrances, or liabilities that may adversely affect Seller's performance of this Agreement or NYSERDA's rights hereunder;

(g) as of the Effective Date, that Seller has no knowledge that any information or document or statement furnished by Seller in connection with this Agreement or the documents submitted to NYSERDA under T2RFP21-1 contain any untrue statement of a material fact or omits to state a material fact necessary to make the statement not misleading;

(h) that Seller shall not, and shall not cause or permit any voluntarily abandonment of the development, construction or operation of the Bid Facility; and

(i) Seller certifies that all information provided to NYSERDA with respect to State Finance Law Sections 139-j and 139-k is complete, true and accurate; and

(j) that Seller is familiar with and will comply with NYSERDA's Code of Conduct for Contractors, Consultants, and Vendors with respect to the performance of this Agreement (<http://www.nyserda.ny.gov/-/media/Files/About/Board-Governance/NYSERDA-Code-of-Conduct-Contractors.pdf>).

Section 9.02. Continuing Nature of Representations, Warranties and Guarantees. The representations, warranties and guarantees set forth in this Article are made as of the Effective Date and deemed made continually throughout the Contract Delivery Term, except to the extent that such representation and warranty states that it is permitted or required to be made only as of a specific date. If at any time during the Contract Delivery Term, Seller has knowledge of any event or information that causes any of the representations and warranties of an ongoing nature in this Article IX to be untrue or misleading, Seller shall provide NYSERDA with prompt written notice of the event or information, the representations and warranties affected, and the corrective action Seller shall take. The notice required pursuant to this Section shall be given as soon as practicable after the occurrence of each such event.

Section 9.03. Limitation on Representations, Warranties and Guarantees. Except as expressly set forth herein, there is no warranty of merchantability or fitness for a particular purpose with respect to the Tier-2 RECs transferred hereunder, and any and all implied warranties are disclaimed.

## Article X

NYSERDA's Representations, Warranties and Guarantees

Section 10.01. NYSERDA Representations, Warranties and Guaranties. As a material inducement to Seller to enter into this Agreement, NYSERDA makes the following representations, warranties and guarantees, as of the Effective Date, all of which shall survive the execution and delivery of this Agreement:

- (a) that NYSERDA is an instrumentality of the State of New York and a public authority and public benefit corporation, created under the New York State Public Authorities Law, validly existing and in good standing under the laws of the State of New York;
- (b) that NYSERDA has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by NYSERDA of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, and no other actions or proceedings on the part of NYSERDA are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby;
- (c) that the execution, delivery and performance by NYSERDA of this Agreement will not (i) violate Applicable Law; (ii) violate, conflict with, result in a material breach of or constitute (alone or with notice or lapse of time or both) a material default or event of default under any indenture, agreement, mortgage, deed of trust, note, lease, contract or other instrument to which NYSERDA is a party or by which NYSERDA or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of NYSERDA. This Agreement will not conflict with any other agreement or contract to which NYSERDA is a party;
- (d) that this Agreement has been duly executed and delivered by NYSERDA and constitutes the legal, valid and binding obligation of NYSERDA enforceable against NYSERDA in accordance with the terms thereof;
- (e) that NYSERDA is familiar with and in compliance with all Applicable Law, except where the failure to so comply would not result in a material adverse effect on NYSERDA's ability to perform its obligations; and
- (f) that there is no action, suit or claim at law or in equity, or before or by a governmental authority pending or, to the best knowledge of NYSERDA after due inquiry, threatened against NYSERDA or affecting any of its properties or assets which could reasonably be expected to result in a material adverse effect on NYSERDA's ability to perform its obligations.

Section 10.02. Continuing Nature of Representations, Warranties and Guarantees. The representations, warranties and guarantees set forth in this Article are made as of the Effective Date and deemed made continually throughout the Contract Delivery Term, except to the extent

that such representation and warranty states that it is permitted or required to be made only as of a specific date. If at any time during the Contract Delivery Term, NYSERDA has knowledge of any event or information that causes any of the representations and warranties in this Article X to be untrue or misleading, NYSERDA shall provide Seller with prompt written notice of the event or information, the representations and warranties affected, and the corrective action NYSERDA shall take. The notice required pursuant to this Section shall be given as soon as practicable after the occurrence of each such event.

## Article XI

### Indemnification

**Section 11.01. Indemnification.** Seller 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, reasonable attorneys' and/or experts' 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 Seller's breach of this Agreement or to the extent caused by any alleged negligence, unlawful act or omission, or intentional misconduct of Seller in the course of the development of Bid Facility, or the production or delivery of Tier-2 RECs under this Agreement. Seller shall have no obligation to protect, indemnify, or hold harmless NYSERDA or the State of New York with respect to any claims asserted against NYSERDA or the State of New York challenging (a) the legal validity of (i) this Agreement, (ii) the purchase or sale of Tier-2 RECs, or (iii) the competitive solicitation process held by NYSERDA to procure Tier-2 RECs; or (b) the administration of NYGATS and/or Clean Energy Standard program (including any dispute arising out of the resale of Tier-2 RECs by NYSERDA). The obligations of Seller under this Article shall survive any expiration or termination of this Agreement and shall not be limited by the amount of Seller's insurance coverage.

**Section 11.02. Indemnification Procedures.** NYSERDA shall give reasonable notice to Seller of any claim or notice of the commencement of any action, administrative or legal proceeding or investigation as to which indemnification under this Article may apply or promptly after NYSERDA has actual knowledge of any other Loss that would result in a claim for indemnification. NYSERDA shall reasonably cooperate with Seller in the defense of any such claim. Seller shall use counsel reasonably satisfactory to NYSERDA to defend any such claim (with consent to counsel not to be unreasonably withheld, conditioned, or delayed) and shall control the defense of any such claim. NYSERDA may participate in the defense of any such claim at its own expense. Seller may not agree to any settlement or compromise of any claim without NYSERDA's prior written consent (which consent may not be unreasonably withheld, conditioned, or delayed) that is not an unconditional release of NYSERDA from any and all liabilities upon the payment of money that will be paid by Seller.

**Section 11.03. Failure to Defend.** If Seller fails to assume the defense of a claim meriting indemnification, NYSERDA may at the expense of Seller contest, settle or pay such claim, and Seller shall promptly reimburse NYSERDA for all costs reasonably incurred and documented by NYSERDA associated therewith.

## Article XII

### Insurance

Section 12.01. Maintenance of Insurance; Policy Provisions. Seller, at no cost to NYSERDA, shall maintain or cause to be maintained, on or before the date upon which construction begins and continuing throughout the duration of the Contract Delivery Term, insurance of the types and in the amounts specified in Section 12.02 (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 insureds;
- (b) provide that such policy may not be cancelled or modified until at least 30 days after receipt by NYSERDA of written notice thereof; and
- (c) be reasonably satisfactory to NYSERDA in all other respects.

Section 12.02. Types of Insurance. Seller shall be required to maintain 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 [insert: \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of personal injury or sickness or death of any one person; [insert \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of personal injury, sickness or death in any one accident or disaster; and [insert \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of property damage in any one accident or disaster.

Section 12.03. Delivery of Policies; Insurance Certificates. Prior to the date upon which constructions begins, Seller shall deliver to NYSERDA certificates of insurance issued by the respective insurers, indicating the Agreement number thereon, evidencing the insurance required by this Article XII and bearing notations evidencing the payment of the premiums thereon or accompanied by other evidence of such payment satisfactory to NYSERDA. In the event that any policy furnished or carried pursuant to this Article XII will expire on a date prior to the expiration date of this Agreement, Seller, not less than 15 days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and Seller 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, upon request Seller shall deliver to NYSERDA a certified copy of each policy.

## Article XIII

### Events of Default

Section 13.01. Event of Default. For the purposes of this Agreement, “Event of Default” shall mean any of the following:

- (a) Representations and Warranties. Any representation or warranty made in this Agreement that shall prove to have been false or misleading in any material respect as of the time made or deemed to be made and such false or misleading representation, warranty, or guarantee is not fully cured within ten (10) days after the responsible Party discovers its error, provided, however, that such period shall be extended for an additional period of up to sixty (60) days if the responsible Party is unable to cure within the initial ten (10) day period so long as such cure is diligently pursued by the responsible Party until such breach has been corrected; or
- (b) Voluntary Proceedings. A Party shall (i) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property; (ii) make a general assignment for the benefit of its creditors; (iii) commence a voluntary case under the Bankruptcy Code; (iv) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts; (v) fail to convert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in an involuntary case under the Bankruptcy Code; or (vi) take any corporate action for the purpose of effecting any of the foregoing; or
- (c) Involuntary Proceedings. A proceeding or case shall be commenced against a Party, without its application or consent, in any court of competent jurisdiction, seeking (i) its liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts; (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of all or any substantial part of its assets; or (iii) similar relief under any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, and such proceeding or case shall continue un-dismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of 60 or more days; or an order for relief against a Party, shall be entered in an involuntary case under the Bankruptcy Code; or
- (d) Unauthorized Transfer. The transfer or attempted transfer by Seller to any transferee other than NYSERDA of any Tier-2 RECs associated with the Quantity Obligation or any attribute included in any Tier-2 REC Transferred to NYSERDA; or
- (e) Abandonment. Seller’s abandonment of the Bid Facility or its intentional delay of completion of construction in connection therewith; or
- (g) Failure to Transfer Tier-2 RECs. The failure by Seller to Transfer Tier-2 RECs, in conformity with Article II; or
- (h) Payment. The failure to make, when due, any undisputed payment required pursuant to this Agreement, in accordance with NYSERDA’s Prompt Payment Policy (Exhibit C), if such failure is not remedied within ten (10) Business Days after a notice of such failure is provided by the non-defaulting Party to the defaulting Party.

Section 13.02. Effect of an Event of Default. In addition to any other remedy available to it under this Agreement or under applicable Law, upon any occurrence of an Event of Default, the non-defaulting Party shall be entitled to suspend performance of its obligations under this Agreement until the earlier of such time as (a) such Event of Default has been cured, or (b) the non-defaulting Party has elected to terminate this Agreement pursuant to Article XIV below.

#### Article XIV

##### Termination

Section 14.01. Termination. This Agreement may be terminated:

- (a) at any time by either NYSERDA or Seller if: (i) an Event of Default occurs (and following the expiration of any applicable cure period), (ii) the Party seeking to terminate this Agreement hereunder is the non-defaulting Party, and (iii) the non-defaulting Party has not waived such Event of Default in writing;
- (b) at any time by the mutual written consent of Seller and NYSERDA;
- (c) unless otherwise mutually agreed upon by NYSERDA and Seller in writing, on the expiration of the Contract Delivery Term (subject to Section 18.03 of this Agreement);
- (d) by NYSERDA in the event it is found that the certification filed by Seller in accordance with New York State Finance Law Sections 139-j and 139-k was intentionally false or intentionally incomplete; or
- (e) by NYSERDA in the event it is found that Seller made material misrepresentations in the certification filed by Seller in accordance with New York State Tax Law Section 5-a that were intentionally false when made.

Section 14.02. Effect of Termination. Except as otherwise set forth in Section 18.03 below, in the event of a termination of this Agreement as provided in Section 14.01 above, neither Party shall have any further right or obligation hereunder. In addition, the Parties agree that, in the case of a termination based on the default of Seller, irreparable damage would occur in the event that NYSERDA could not obtain Tier-2 RECs pursuant to this Agreement from the date of Event of Default in which Seller was the defaulting Party, and accordingly, each Party hereby agrees that NYSERDA shall be entitled to elect to compel specific performance of this Agreement to compel the Transfer of all Tier-2 RECs associated with the Quantity Obligation Bid Facility produces following the date of any termination for such an Event of Default in accordance with the terms hereof, including Payment, together with any other remedy at law or equity available to NYSERDA in connection therewith, without the necessity of demonstrating the inadequacy of money damages. Notwithstanding the foregoing, for any termination by NYSERDA or Seller prior to the date of commencement of Commercial Operations, NYSERDA shall be entitled only to Stipulated Damages pursuant to Article XV.

Section 14.03. Good Faith Negotiation. Both Parties agree that, should any dispute arise during the term of this Agreement, the Parties will make a good faith, though non-binding effort to reconcile any difference or dispute before the filing of an action in any court.

Section 14.04. Damages. Neither Party shall be liable to the other for consequential, incidental, punitive, exemplary, or indirect damages, lost profits or other business interruption damages arising from the breach of this Agreement; provided, however, that nothing in this Section 14.04 shall limit (a) Seller's obligations under Section 11.01 of this Agreement, or (b) either Party's liability for fraud.

## Article XV

### Force Majeure

Section 15.01. Force Majeure. 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, (i) acts of God or the public enemy, (ii) expropriation or confiscation of land or facilities, (iii) compliance with any law, order, regulation or request of any Federal, State, municipal or local governmental authority, including NYSEERDA (but only with respect to a Force Majeure Event claimed by Seller), (iv) acts of war, rebellion or sabotage or damage resulting therefrom, (v) major equipment failure, and (vi) fires, floods, storms, explosions, accidents, riots, or strikes (a "Force Majeure Event"); provided, however, that the occurrence of a Force Majeure Event shall not excuse a Party from any payment obligations hereunder with respect to services previously rendered or partial payment to the extent some portion of the Tier-2 RECs continue to be rendered during a period in which a Force Majeure Event renders a Party only partially able to perform. Variability in the frequency or force of the wind, of the sun, of rainfall, or of water levels will in no event constitute a Force Majeure Event. 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 XVII

### Compliance with Certain Laws

Section 17.01. Governing Law; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed in New York State without regard to its conflicts of laws principles. 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 a 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.

Section 17.02. Laws of the State of New York. Seller shall comply with all of the requirements set forth in Exhibit A hereto.

Section 17.03. All Legal Provisions Deemed Included. It is the intent and understanding of Seller 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 Seller, 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. In such event, the Parties shall negotiate such amendment in good faith with the intent that such amendment reflects, as closely as possible, the terms and conditions of this Agreement in effect prior to such amendment; provided that such amendment shall not in any event alter (a) the purchase and sale obligations of the Parties pursuant to this Agreement, or (b) the pricing and payment provisions of this Agreement.

Section 17.04. Permits and Approvals. Seller shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Bid Facility over the duration of the Contract Delivery Term. Neither the RES Program nor selection under T2RFP21-1 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 Seller are conditional on the acquisition by Seller of all such permits and approvals. Upon request by NYSERDA Seller must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Seller 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 Bid Facility, 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, in either case which actual or alleged violation, modification, penalty and or fine, if true or imposed, would substantially impair Seller's performance of obligations under this Agreement. Upon the filing by Seller of an application for a permit to site the Bid Facility, Seller shall promptly notify NYSERDA and shall comply with any restrictions NYSERDA may impose regarding communication with NYSERDA staff.

Section 17.05. 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 such Article, Exhibit and Agreement shall be deemed to modify the obligations of Seller to comply with all legal requirements.

## Article XVIII

### Additional Provisions

Section 18.01. Forward Contract. Each Party represents and warrants to the other that it is a “forward contract merchant” within the meaning of the United States Bankruptcy Code, that this Agreement is a “forward contract” within the meaning of the United States Bankruptcy Code, and that the remedies identified in this Agreement shall be “contractual rights” as provided for in 11 U.S.C. § 556 as that provision may be amended from time to time.

Section 18.02. Taxes/Costs. Seller shall be responsible for and obligated to pay all present and future taxes, fees, levies and costs that may be assessed by any entity including but not limited to NYGATS with respect to Seller’s provision of Tier-2 RECs to NYSERDA, or with respect to the measurement, tracking, and verification and participation in NYGATS necessary for the creation and Transfer of the Tier-2 RECs and/or the energy with which they are associated, into the NYSERDA NYGATS account.

Section 18.03. Term. Unless terminated earlier under this Article, this Agreement shall expire upon the expiration of the Contract Delivery Term. Upon such date or upon earlier Termination of this Agreement under Article XIV, neither Party shall have any further obligation to the other, except that Article I, Sections 2.02, 2.03, 5.01, 7.01, 11.01, 11.02, 11.03, 14.02, 17.01, 18.03, and 18.04, and all payment obligation under Article IV shall survive.

Section 18.04. Waiver. Either Party to this Agreement may (a) extend the time for the performance of any of the obligations or other acts of the other Party, (b) waive any inaccuracies in the representations and warranties of the other Party contained herein or in any document delivered by the other Party pursuant hereto, or (c) waive compliance with any of the agreements or conditions of the other Party contained herein. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the Party to be bound thereby. Any waiver of any term or condition shall not be construed as a waiver of any subsequent breach or a subsequent waiver of the same term or condition, or a waiver of any other term or condition, of this Agreement. No provision of this Agreement will be deemed to have been waived unless the waiver is in writing; no delay by either Party in exercising its rights hereunder, including the right to terminate this Agreement, shall be deemed to constitute or evidence any waiver by such Party of any right hereunder. The rights granted in this Agreement are cumulative of every other right or remedy that the enforcing Party may otherwise have at law or in equity or by statute.

Section 18.05. Independent Contractor. The status of Seller under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, Seller and its 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. Nothing in this Agreement shall be construed as creating a partnership, joint venture or other relationship between NYSERDA and Seller for any reason.

Section 18.06. Severability. If any provision of this Agreement shall be declared by any court of competent jurisdiction to be illegal, void or unenforceable, all other provisions of this

Agreement shall not be affected and shall remain in full force and effect. If any provision of this Agreement is so broad as to be unenforceable, that provision shall be interpreted to be only so broad as will enable it to be enforced.

Section 18.07. Seller Expense. Seller shall, at its own expense, make all arrangements necessary to: (a) register the Bid Facility and Transfer Tier-2 RECs to the NYSERDA NYGATS Account, and (b) interconnect the Bid Facility with a transmission or distribution system and to comply with the Bid Facility Electricity Delivery Requirements. This requirement encompasses Seller's purchasing or arranging for all services including without limitation transmission, ancillary services, any control area services, line losses and transaction fees necessary to deliver energy to the New York Control Area, in accordance with all rules and protocols of the NYISO, throughout the Contract Delivery Term.

Section 18.08. Environmental Disclosure. The Parties agree that, at the time of the execution of this Agreement, New York employs NYGATS for the tracking, registration, and trading of generation attributes, including renewable or environmental attributes or credits, and that NYGATS will be used by the New York State Department of Public Service to accomplish verification of the transactions consummated hereunder as part of the Environmental Disclosure Program.

Section 18.09. Covenant. Seller hereby covenants and promises that the Bid Facility is or will be eligible under the October Order and that it will remain so throughout the Contract Delivery Term.

Section 18.10. No Third-Party Beneficiaries. Nothing herein is intended to or should be construed to create any rights of any kind whatsoever in any persons not party to this Agreement.

## Article XIX

### Notices, Entire Agreement, Amendment, Counterparts

#### Section 19.01. 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 personal delivery;
- (iii) by expedited delivery service; or
- (iv) by e-mail, return receipt requested.

Such notices shall be addressed as follows, or to such different addresses as the Parties may from time-to-time designate as set forth in paragraph (c) below:

|                 |                                                                                                                                                                                                |
|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| To Seller:      | Company<br>Attn:<br>Name<br>Address Line 1<br>Address Line 2<br>City, State Zip code<br>email Address:                                                                                         |
| To NYSERDA:     | NYSERDA<br>Attn: Office of the General Counsel<br>17 Columbia Circle<br>Albany, New York 12203-6399<br>email address: <a href="mailto:pete.keane@nyserda.ny.gov">pete.keane@nyserda.ny.gov</a> |
| With a copy to: | NYSERDA<br>Attn: Tier 2 Large-Scale Renewables<br>17 Columbia Circle<br>Albany, New York 12203-6399<br>email address: <a href="mailto:res@nyserda.ny.gov">res@nyserda.ny.gov</a>               |

(b) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States [or Canadian] mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt of an email acknowledgement of receipt.

(c) The Parties may, from time to time, specify any new or different address in the United States [or Canada] as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other Party sent in accordance herewith. The Parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the Parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

Section 19.02. Entire Agreement; Amendment. This Agreement, including the Exhibits hereto, embodies the entire agreement and understanding between NYSERDA and Seller and supersedes all prior agreements and understandings relating to the subject matter hereof. Except as otherwise expressly provided for herein, this Agreement may be amended, modified, changed, waived, discharged or terminated only by an instrument in writing, signed by the Party against which enforcement of such amendment, modification, change, waiver, discharge or termination is sought.

Section 19.03. Counterparts. This Agreement may be executed in counterparts each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

Article XX

Publicity

Section 20.01. Publicity. Seller and/or the Bid Facility owner will collaborate with NYSERDA's Communications Unit, or RES program staff, with regard to the preparation of any press release, public announcement, publication or media interview with respect to the Parties' entry into this Agreement or the subject matter thereof or which concerns NYSERDA or the RES Program. Staff can be contacted by calling 518-862-1090. In any such press release, public announcement publication, or media interview Seller and/or the Owner of the Bid Facility and/or its employees shall credit NYSERDA and the funding participation of the Renewable Energy Standard in the activities of the Bid Facility. Seller will not represent that positions taken or advanced by Seller represent the opinion or position of NYSERDA, the PSC or the State of New York.

Article XXI

Confidentiality

Section 21.01. Seller Authorization. Seller may be required to authorize the direct transfer to NYSERDA by an energy market administrator or the operator of the transmission and/or distribution system into which the energy from the Bid Facility is delivered of transactional and/or delivery information and data pertinent to the verification of attribute creation and electricity delivery, and thereby to waive confidentiality with respect to the disclosure of such information to NYSERDA. To the maximum extent allowed by law, NYSERDA shall treat any such information so received in accordance with the applicable confidentiality requirements of the energy market administrator or transmission operator.

Section 21.02. Freedom of Information Law. Seller 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).

Section 21.03. 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 Seller and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations.

Section 21.04. Claim of Confidentiality. Information of any tangible form including any document that Seller wishes to be protected from disclosure to third parties, including any

information provided as a part of a Bid Proposal Package submitted in response to T2RFP21-1, must be marked “Confidential” or “Proprietary” at the time such information is provided to NYSERDA.

Section 21.05. Publication of Agreement. Seller acknowledges that NYSERDA may publish this Agreement. Prior to such publication, NYSERDA will redact any critical electric infrastructure information contained in the Agreement, if any, including in the exhibits hereto, and will consider Seller’s requests for the redaction of confidential business information; provided, however that NYSERDA shall not accept any request to redact price information contained in this Agreement, specifically the Bid Price or any terms which may contribute to the calculation of financial obligations under the Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed and delivered by their duly authorized representatives.

By:  
SELLER

By:  
NEW YORK STATE ENERGY RESEARCH  
AND DEVELOPMENT AUTHORITY

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

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

EXHIBIT A

REVISED 12/19

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 to the extent applicable:

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

2. WAGE AND HOURS PROVISIONS. If this is a public work Agreement covered by Article 8 of the Labor Law or a building service Agreement covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article

8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by NYSERDA of any NYSERDA-approved sums due and owing for work done upon the project.

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

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

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

6. PROPRIETARY INFORMATION. Notwithstanding any provisions to the contrary in the Agreement, Contractor and NYSERDA acknowledge and agree that all information, in any format, submitted to NYSERDA shall be subject to and treated in accordance with the NYS Freedom of Information Law ("FOIL," Public Officers Law, Article 6). Pursuant to FOIL, NYSERDA is required to make available to the public, upon request, records or portions thereof which it possesses, unless that information is statutorily exempt from disclosure. Therefore, unless the Agreement specifically requires otherwise, Contractor should submit information to NYSERDA in a non-confidential, non-proprietary format. FOIL does provide that NYSERDA may deny access to records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." [See Public Officers Law, § 87(2)(d)]. Accordingly, if the Agreement specifically requires submission of information in a format Contractor considers a proprietary and/or confidential trade secret, Contractor shall fully identify and plainly label the information

“confidential” or “proprietary” at the time of disclosure. By so marking such information, Contractor represents that the information has actual or potential specific commercial or competitive value to the competitors of Contractor. Without limitation, information will not be considered confidential or proprietary if it is or has been (i) generally known or available from other sources without obligation concerning its confidentiality; (ii) made available by the owner to others without obligation concerning its confidentiality; or (iii) already available to NYSERDA without obligation concerning its confidentiality. In the event of a FOIL request, it is NYSERDA’s policy to consider records as marked above pursuant to the trade secret exemption procedure set forth in 21 New York Codes Rules & Regulations § 501.6 and any other applicable law or regulation. However, NYSERDA cannot guarantee the confidentiality of any information submitted. More information on FOIL, and the relevant statutory law and regulations, can be found at the website for the Committee on Open Government (<http://www.dos.ny.gov/about/foil2.html>) and NYSERDA’s Regulations, Part 501 <http://www.nyserda.ny.gov/About/New-York-State-Regulations.aspx>.

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

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

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

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

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

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

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

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

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

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

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

NYS Department of Economic Development  
Division for Small Business  
625 Broadway  
Albany, New York 12207

Telephone: 518-292-5200  
Fax: 518-292-5884  
<http://www.esd.ny.gov>

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

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

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

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

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

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

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

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

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

- 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 <https://ogs.ny.gov/iran-divestment-act-2012>).

21. COMPLIANCE WITH NEW YORK STATE DIESEL EMISSION REDUCTION ACT (DERA) OF 2006. Contractor shall comply with and, if applicable to this Agreement, provide proof of compliance with the New York State Diesel Emission Reduction Act of 2006 (“DERA”), Environmental Conservation Law (ECL) Section 19-0323, and the NYS Department of Environmental Conservation (DEC) Law implementing regulations under 6 NYCRR Part

248, Use of Ultra Low Sulfur Diesel Fuel (ULSD) and Best Available Retrofit Technology (“BART”). Compliance includes, but is not limited to, the development of a heavy-duty diesel vehicle (HDDV), maintaining documentation associated with BART evaluations, submitting to and receiving DEC approval of a technology or useful-life waiver, and maintaining records where BART-applicable vehicles are primarily located or garaged. DEC regulation under 6 NYCRR Part 248, Use of Ultra Low Sulfur Diesel and Best Available Technology for Heavy Duty Vehicles can be found at: <https://www.dec.ny.gov/regs/2492.html>.

22. ADMISSIBILITY OF REPRODUCTION OF CONTRACT. Notwithstanding the best evidence rule or any other legal principle or rule of evidence to the contrary, the Contractor acknowledges and agrees that it waives any and all objections to the admissibility into evidence at any court proceeding or to the use at any examination before trial of an electronic reproduction of this contract, regardless of whether the original of said contract is in existence.

EXHIBIT B

NYSERDA PROMPT PAYMENT POLICY STATEMENT

**504.1. Purpose and Applicability.**

(a) The purpose of this Exhibit is to provide a description of Part 504 of NYSERDA's regulations, which consists of NYSERDA's policy for making payment promptly on amounts properly due and owing by NYSERDA under this Agreement. The section numbers used in this document correspond to the section numbers appearing in Part 504 of the regulations.<sup>2</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 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 this Agreement; and addressed to NYSERDA's Controller,

---

<sup>2</sup> This is only a summary; the full text of Part 504 can be accessed at: <https://www.nyserda.ny.gov/About/New-York-State-Regulations>

marked "Attention: Accounts Payable," at the Designated Payment Office.

(g)

(i) "Receipt of an Invoice" means:

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

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

(2) 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.

(B) 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.

(ii) 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.

**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:

- (i) any defects in the delivered goods, property or services;
- (ii) any defects in the invoice; or
- (iii) 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 Article XIX of 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.