

**Sample Agreement**

**New York State Energy Research and Development Authority  
("NYSERDA")**

**BULK STORAGE INCENTIVE STANDARD AGREEMENT FOR CONTRACTORS AWARDED  
A UTILITY BULK STORAGE DISPATCH RIGHTS CONTRACT**

1. Agreement Number:
2. Contractor:
3. Project Director:
4. Effective Date:
5. Total Amount of Award:
6. Project Period:
7. Commitment Terms and Conditions

This Agreement consists of this form plus the following documents:

- Exhibit A, Total Incentive;
- Exhibit B, Standard Terms and Conditions;
- Exhibit C, Prompt Payment Policy Statement;
- Exhibit D, Vendor Assurance of No Conflict of Interest or Detrimental Effect;

8. ACCEPTANCE. THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNLESS EXECUTED BELOW BY NYSERDA.

**[CONTRACTOR]**

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

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

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

NYSERDA Authorized Signatory  
Name \_\_\_\_\_

Title \_\_\_\_\_

## STANDARD BULK ENERGY STORAGE INCENTIVE AGREEMENT FOR CONTRACTORS AWARDED A UTILITY BULK STORAGE DISPATCH RIGHTS CONTRACT

This Bulk Energy Storage Incentive Agreement (hereinafter referred to as the "Agreement"), dated and effective as of the \_\_\_ day of \_\_\_\_\_, 202\_ ("Effective Date") by and between the New York State Energy Research and Development Authority (hereinafter referred to as "NYSERDA") with its principal office located at 17 Columbia Circle, Albany, New York, 12203-6399, and \_\_\_\_\_ [Contractor], (hereinafter "Contractor") with offices located at \_\_\_\_\_. NYSEDA and the Contractor may be individually referred herein as a "Party" and collectively as the "Parties."

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

### ARTICLE 1: DEFINITIONS

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

Agreement: This Standard Agreement, including Exhibits A (Total Incentive), B (Standard Terms and Conditions), C (Prompt Payment Policy Statement), and the applicable requirements in Sections 4, 6, 7, 8, and 9 of the NYSEDA Bulk Energy Storage Incentive Program Manual, which is incorporated herein and made part hereof as though herein set forth in full, as it may be revised from time to time.

Authority Having Jurisdiction (AHJ): The local organization, department, office, or individual responsible for issuing permits, approvals, variances, or certificates of occupancy or completion; enforcing local codes, ordinances, laws, or standards; or approving layout drawings, site plans, materials, installations, or procedures.

Bankruptcy: With respect to either Party, (a) the filing of a petition or commencement, authorization, or acquiescence in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization, or similar law by a Party, or the filing of any such petition or commencement of any such proceeding against a Party; (b) the assignment or general arrangement for the benefit of creditors; (c) otherwise becoming bankrupt or insolvent, however evidenced; (d) when a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets; or (e) the inability to pay debts when due.

Bid Capacity: The total capacity of the Project that is submitted to the New York State investor owned utility ("utility") in response to the utility's Bulk Dispatch Rights Request for Proposals (RFP). The Bid Capacity under this Agreement shall be \_\_\_ MW/ \_\_\_ MWh.

Bulk Dispatch Rights: The rights acquired by a utility through a dispatch rights contract, pursuant to the New York State Public Service Commission's *Order Establishing Energy Storage Goal and Deployment Policy*, issued December 13, 2018, and as modified by the *Order Directing Modification to Energy Storage Solicitations*, issued April 16, 2021, in Case 18-E-0130, to schedule and dispatch storage resources constructed thereunder.

Commercial Operation: The earlier to occur of the date on which the Project has (i) begun being dispatched by the NYISO into the wholesale day-ahead, real-time, or ancillary services markets, excluding dispatch for purposes of completing testing and commissioning of all components of the Project to ensure the project is mechanically, electrically and structurally capable of performing under the utility's Dispatch Rights contract, including completion of end-to-end systems controls test and verification, or (ii) achieved Commercial Operation as defined by the utility in the utility's Bulk Dispatch Rights contract.

Installed Capacity: The total amount of useable energy capable of being discharged, expressed in MW and MWh, by the Project based on the capacity of the installed Project at the time of Commercial Operation. Contractor shall maintain the Installed Capacity for the duration of the Project Term.

NYISO: The New York State Independent System Operator, Inc.

Performance Data: Interval data showing at least fifteen (15) minute charge and discharge data from the Project that is submitted to a NYSERDA quality assurance contractor to be identified by NYSERDA through an automated data transfer from the time the Project enters Commercial Operation and for at least ten (10) years thereafter.

Project: The newly constructed, commercially available [# MW] energy storage system approved by NYSERDA to receive the Total Incentive pursuant to this Agreement, and owned, operated, and maintained by the Contractor, that is capable of receiving electric energy and storing that energy or a portion of that energy for later injection of electricity back to the grid regardless of where the energy storage system is located on the electrical system.

Project Site: The site at which the Project is located, injects into the electric grid, and where the utility meter, which is generally interconnected with the grid, is located.

Project Term: The term of this Agreement as defined in Section 2.1 hereof.

SBC Surcharge: A delivery charge levied by the utilities to recover costs associated with providing financial incentives for the development of energy storage and renewable resources in New York State.

Total Incentive: The dollar amount listed in Exhibit A of this Agreement, representing the incentive payable under this Agreement subject to §3.4.

## ARTICLE 2: PROJECT ORGANIZATION

§2.1. Project Term. The term of this Agreement shall begin on the Effective Date and continue until NYSERDA has received ten (10) consecutive years of Performance Data, unless extended or terminated under the terms hereof.

§2.2. Extensions of Time. The Project Term or other deadlines for submittal of documentation to NYSERDA, including those described under Article 3 hereto, with the exception of the Commercial Operation Date under §3.1, may be extended for good cause at NYSERDA's discretion. NYSERDA may extend the Commercial Operation Date at its sole discretion. As used herein, "good cause" means an unanticipated circumstance or event, which despite the due diligence of the Contractor, renders compliance with project term or other deadline impracticable. A request for an extension must be submitted in writing to NYSERDA no less than 30 calendar days prior to the expiration of the applicable deadline. Extensions

may be granted or denied at NYSERDA's sole discretion. Any such extension shall be communicated in writing.

§2.3. Manner of Performance. The Contractor shall perform its responsibilities under this Agreement in an efficient and expeditious manner and in accordance with all of the terms and provisions of this Agreement and the applicable rules and requirements of the Bulk Energy Storage Incentive Program Manual. The Contractor shall perform all responsibilities in accordance with the current professional standards and with the diligence and skill expected for the performance of work of the type described in this Agreement. The Contractor shall furnish such personnel and shall procure such materials, machinery, supplies, tools, equipment and other items as may reasonably be necessary or appropriate to perform its responsibilities in accordance with this Agreement. Contractor shall comply with all applicable codes, accepted industry standards, and best practices.

### ARTICLE 3: PROJECT DEVELOPMENT

§3.1. Commercial Operation Date. Projects shall achieve Commercial Operation by no later than December 31, 2025. Projects that do not achieve Commercial Operation by the required date will be cancelled.

§3.2. Installation and Commissioning. Regardless of subcontracting arrangements, the Contractor shall be responsible for installation and commissioning of the Project, which shall include interconnection of the system with the transmission, sub-transmission or distribution grid, as applicable. Installations must comply with all manufacturers' installation requirements, applicable laws, regulations, codes, licensing, and permit requirements, and the applicable requirements of the Bulk Energy Storage Incentive Program Manual in effect at the time of NYSERDA's issuance of an award letter for the Project.

§3.3. Demonstrating Project Viability. The Project must maintain good standing in the NYISO or utility interconnection queue in order to continue reserving the NYSERDA Bulk Energy Storage Incentive in Exhibit A. Contractor shall provide documentation to NYSERDA within thirty (30) days of achieving each of the following project viability milestones:

- i. Acceptance of the Project's interconnection cost allocation;
- ii. Execution of the Project's interconnection agreement;
- iii. Receipt of all required government permits and approvals, including State Environmental Quality Review Act (SEQRA), Article 10 if applicable, Building Permit, Electrical Permit, and Fire Permit;
- iv. Completion of project financing;
- v. Commencement of construction;
- vi. Completion of construction;
- vii. Receipt of manufacturer's commissioning report;
- viii. Entering Commercial Operation, as defined in Article I of this Agreement. Documentation that the Project has achieved Commercial Operation under the utility Bulk Dispatch Rights contract shall include notice from the utility that all requirements under the utility's Bulk Dispatch Rights contract for the Project to achieve Commercial Operation have been satisfied, other than any requirement for

confirmation from NYSERDA that Contractor is entitled to the payment under § 5.3 . Contractor is responsible for submitting such notice to NYSERDA.

NYSERDA may verify project viability. Such verification may include, but is not limited to, confirming project placement in the interconnection queue, discussing the Project with the NYISO or the utility, or requesting additional information or documentation from the Contractor. Contractor agrees to provide additional documentation as requested by NYSERDA. Should Contractor either miss a milestone deliverable or if NYSERDA requires additional information to verify that the milestone deliverable has been met, NYSERDA will provide notice to Contractor within 30 days of receipt of milestone documentation or of the passing of the milestone.

§3.4. Adjustments. NYSERDA reserves the right to adjust the Incentive if: (a) Contractor fails to demonstrate project viability pursuant to §3.3; (b) the Project is relocated to another location in New York State that is not eligible for incentives, such as a municipal electric utility or electric cooperative whose customers do not pay the SBC Surcharge, or if the Project is relocated outside New York State; (c) an adjustment is exercised by NYSERDA pursuant to §5.5.

§3.5. Permits. Contractor shall be responsible for the acquisition and maintenance, of any and all permits, approvals, licenses, easements, waivers and permissions of every nature necessary to perform the obligations required under this Agreement.

§3.6. Operation and Maintenance. Contractor shall be responsible for operation and maintenance of the Project for a minimum of ten (10) years, regardless of whether the installation was performed partially or completely by others.

§3.7. Permanent Installation in New York State. The Project must be installed in New York State, electrically interconnected within New York State, and permanently installed for ten (10). Physical permanence is determined by physical and electrical connections in accordance with industry practice for permanently installed equipment and securing the system to a permanent surface. Barge-based Projects, or those designed to provide seasonal services at different interconnection points, are considered permanently installed. Relocation of the Project outside of New York State or to an otherwise ineligible location during this term shall be subject to payment terms under §5.5 of this Agreement.

§3.8. Energy Storage System Warranty. The Project's energy storage equipment must consist of commercial products carrying a manufacturer warranty. Contractor shall provide documentation of such warranty from the original equipment manufacturer. The warranty must cover the entire Project, including ancillary equipment and power electronics. Equipment that is repaired or replaced under warranty shall be additionally covered by the warranty. The warranty must cover the Project Term.

#### ARTICLE 4: PERFORMANCE MEASUREMENT

§4.1. Measurement and Verification. The Project shall be required to undergo ninety (90) days of Measurement and Verification to verify that the Project is operating as intended. Measurement and Verification shall begin when the Project has entered Commercial Operation. Contractor shall provide NYSERDA's quality assurance contractor with Performance Data through an automated data transfer prior to the quality assurance inspection. Certain Performance Data will be displayed on NYSERDA's

Distributed Energy Resources Integrated Data System Website, as detailed in the Bulk Energy Storage Incentive Program Manual.

§4.2. Third-Party Case Study. Contractor hereby grants NYSERDA permission to generate a third-party case study of the Project. If a Project is selected for case study analysis, NYSERDA or NYSERDA's quality assurance contractor may request additional non-proprietary project data from the Contractor to clearly describe the use case and benefits. Contractor agrees to provide such data to NYSERDA and/or its quality assurance contractor to the extent such data is available.

§4.3. Inspection and Investigation. The Contractor agrees to provide to NYSERDA, NYSERDA's technical contractor(s) and/or data agent, throughout the Project Term, access to the Project Site(s) facility, equipment, data (including metering and energy management system data), and personnel as necessary to facilitate quality assurance of the Project installation. NYSERDA or its technical contractor(s) may conduct a site inspection at a Project Site at any time. All installations are subject to random field or photo inspections. The selection of installations for inspection will be determined by NYSERDA according to standard NYSERDA protocol and the status of the Contractor. NYSERDA, its technical contractor, or data agent may choose to visit the Project Site to verify that the information provided in any of the required documentation is accurate. Written complaints received by NYSERDA from customers will be documented and investigated by NYSERDA or its representatives. Complaints from customers will be shared with the Contractor unless determined by NYSERDA to be frivolous and/or have no merit. If NYSERDA deems an inspection necessary, any milestone deliverables that are under review by NYSERDA will not be approved until the inspection has been completed. NYSERDA may charge the Contractor for any costs incurred by NYSERDA for additional design review, photo or field inspections that are required due to the failure by the Contractor to submit a complete application, repetitive errors in design or installation, or to make corrections or modifications as requested by NYSERDA.

§4.4. Prior Notice. NYSERDA or its agent may choose to visit the Project Site to verify that any information provided by Contractor, including data generated by the Project, is accurate with regard to project equipment, site conditions, and monitoring configurations. Inspections may occur at any time after project installation, in accordance with § 4.3 and the Bulk Energy Storage Incentive Program Manual. Should NYSERDA decide to inspect a site, NYSERDA, or its agent may or may not contact the Contractor to schedule the inspection. In other words, an inspection may occur without advance notice given to the Contractor.

## ARTICLE 5: INCENTIVE PAYMENTS

§5.1. Incentive Payments. Incentive Payments due to Contractor will be paid to the Contractor, unless NYSERDA has approved payment be made to an assignee or payment assignee. Requests to assign incentive payments shall be made in accordance with the requirements set forth in the Bulk Energy Storage Incentive Program Manual. Acceptance by the Contractor, assignee, or payment assignee of final payment shall release NYSERDA from all claims and liability of the Contractor, representatives, and assigns to this Agreement.

§ 5.2. Invoicing. Contractor shall submit to NYSERDA invoices or requests for payment for incentive payments payable under this Agreement. Documentation shall be submitted electronically via email to the assigned Project Manager along with a statement "I hereby request that upon NYSERDA's approval of these deliverable(s), payment of the corresponding milestone payment amount be made in accordance with NYSERDA's Prompt Payment Policy, as detailed in the NYSERDA Agreement."

Invoices must be accompanied by all additional required information and documentation. NYSERDA shall make payments to the Contractor in accordance with terms of this Agreement and subject to its Prompt Payment Policy Statement, attached hereto as Exhibit C. No invoice may be submitted, and no payment will become payable unless and until NYSERDA has approved Contractor's milestone deliverables associated with the applicable incentive payment. No invoices will be accepted nor paid if received more than 90 days after the expiration of the Project Term.

§5.3. Milestone Payment 1: Commercial Operation. The Contractor may request payment of Milestone Payment 1: Commercial Operation Payment (certain percentage of the Total Incentive) upon submission to and approval by NYSERDA of documentation sufficient to demonstrate that the system has achieved Commercial Operation. No payment will be made until the system has passed a Quality Assurance inspection, as described in the Bulk Energy Storage Incentive Program Manual.

§5.4. Milestone Payments: Annual Payments. *The compensation structure and schedule under the utility Bulk Dispatch Rights Contract and NYSERDA Contract shall be the same.*

§5.5. Payment Reserved Rights. Notwithstanding any other provision of this Agreement, NYSERDA reserves the right to deny or alter payment of an Incentive, to exercise its set-off rights, or to seek reimbursement of incentives paid if, at any time, it learns that the approved Project was not actually installed; was not installed as required under the applicable Bulk Energy Storage Incentive Program rules, the Bulk Energy Storage Incentive Program Manual, as applicable, or this Agreement; was not installed according to the approved system design; was completely installed prior to notification of NYSERDA's acceptance of the Project; if a system is no longer operating in accordance with the applicable rules of the Bulk Energy Storage Incentive Program, the Bulk Energy Storage Incentive Program Manual, as applicable, or this Agreement; or if Contractor assigns, transfers, conveys, or otherwise disposes of this Agreement or any of Contractor's rights, obligations, interests or responsibilities hereunder, in whole or in part, without the express consent in writing by NYSERDA. NYSERDA may: (a) elect to not pay the incentive; (b) require changes before making any payments; (c) require reimbursement of incentives already paid unless the requested changes are made; (d) withhold approval of project applications for other Projects under the Bulk Storage Incentive Program; or (e) exercise its set-off rights. If a Project is relocated outside of New York, or relocated to another location that is ineligible for the NYSERDA incentive due to its customers not paying the SBC Surcharge, during the term required in §3.6 of this Agreement, NYSERDA shall seek a return of the incentive funding from the Contractor, developer, or asset owner of record that shall be calculated based on a pro-rata share of the ten (10) years that the system would not be located at an eligible New York State location.

§5.6. Adjustment. If inspection, investigation, and/or measurement and verification activities find that the Project was not installed as approved, NYSERDA may deem the Project ineligible for future incentive payments, may adjust the Total Incentive, and may prohibit Contractor from submitting additional project applications. If the Project does not acquire NYISO Capacity Resource Interconnection Service (CRIS) rights to bid into the capacity market, NYSERDA reserves the right to adjust the incentive payment accordingly.

## ARTICLE 6: FORCE MAJEURE

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

#### ARTICLE 7: TERMINATION

§7.1. This Agreement shall remain in effect for the term defined in §2.1, unless there is an event of default and the Agreement is terminated in accordance with this Article. Events of default include either Party's breach of any provision of this Agreement, including provisions incorporated by reference, and including, but not limited to, the following:

- a. failure of the Contractor to perform its responsibilities in a timely manner, including, but not limited to, failure to provide the required submittals within the required time frames, including responses to requests for clarification or additional information, or failure complete the required inspections within the time limits and manner set forth in the Bulk Energy Storage Incentive Program Manual;
- b. failure of the Contractor to provide NYSERDA or its agent sufficient access to the Project Site's facility for inspection and/or observation of the Contractor's field performance measurement activities;
- c. failure of the Contractor to cure any deficiency in a material term or cure any material breach of this Agreement within 30 calendar days after written notice;
- d. failure of the Contractor to acquire or maintain any necessary permit, license or failure to maintain insurance as required under this Agreement;
- e. submittal by the Contractor of false, misleading or incorrect information;
- f. the Bankruptcy of either Party;
- g. failure by NYSERDA to make payments due pursuant to the terms of this Agreement to the Contractor within the time limits set forth in this Agreement; and
- h. an event of default by either Contractor or the utility under the Bulk Dispatch Rights contract between Contractor and the utility.

§7.2. Once an event of default occurs, and at any time thereafter so long as the default continues, the non-defaulting Party may, by written notice to the defaulting Party, specify the nature of such default, and declare this Agreement to be in default. The defaulting Party must remedy the default within the time



specified in the written notice of default, or 30 calendar days from the date such written notice was given if no time is specified, or within any further period to which the parties may agree. In no event, however, will the defaulting Party be required to remedy a default in less than 30 calendar days from the date the written notice of default was given. In the case of a default event under § 7.1(h) of this Agreement, NYSEERDA shall withhold any payment due and owing to the Contractor until the event of default under the utility Bulk Dispatch Rights contract has been remedied, as documented by the utility's attestation to NYSEERDA that such default event has been remedied. Contractor is responsible for providing such attestation to NYSEERDA.

§7.3. Notwithstanding the provisions of this Article, NYSEERDA may terminate this Agreement on notice, and without providing an opportunity for cure, for (i) Contractor's failure to fulfill, adhere to, or comply with the applicable Bulk Energy Storage Incentive Program rules, as detailed in the Bulk Energy Storage Program Manual in effect at the time of contract execution, and/or (ii) for termination of the Bulk Dispatch Rights contract by Contractor or the utility.

§7.4. Survival. Notwithstanding the foregoing, the following provisions shall survive the termination or expiration of this Agreement: §§ 3.6, 3.7, 3.8, 5.5, 5.6, 7.1, 8.1, Articles 12 and 13, and § 14.6.

#### ARTICLE 8: INDEMNIFICATION

§8.1. The Contractor shall protect, indemnify, and hold harmless NYSEERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against NYSEERDA or the State of New York resulting from, arising out of or relating to the Contractor's performance of this Agreement. The Contractor agrees that such obligations under this Article shall survive any expiration or termination of this Agreement and shall not be limited by any insurance coverage required under this Agreement.

#### ARTICLE 9: INSURANCE

§9.1. Maintenance of Insurance; Policy Provisions. No work shall be performed under this Agreement without current insurance. NYSEERDA will not make payments under this Agreement without current insurance certificates. The Contractor, at no additional cost to NYSEERDA, shall maintain or cause to be maintained throughout the term of this Agreement, insurance of the types and in the amounts specified in §9.2 hereof. All such insurance shall be evidenced by insurance policies, each of which shall:

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

§9.2. Types of Insurance. Contractor shall maintain insurance in the amount equal to the greater of the insurance obligations under Contractor's Bulk Dispatch Rights contract and this Article. The types and amounts of insurance required to be maintained under this Article are as follows:

- a. Commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of \$1,000,000 per occurrence in respect of claims arising out of personal injury or sickness or death of any one person, \$1,000,000 per occurrence in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$1,000,000 per occurrence in respect of claims arising out of property damage in any one accident or disaster; and
- b. Workers Compensation coverage as required by New York State.
- c. If the project includes nProject annexed, affixed, or adjacent to a building, the Contractor is required to maintain insurance as follows:
  - (1) Commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of \$2,000,000 in respect of claims arising out of personal injury or sickness or death of any one person, \$2,000,000 in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$2,000,000 in respect of claims arising out of property damage in any one accident or disaster; and
  - (2) Workers Compensation coverage as required by New York State.

§9.3. Delivery of Policies; Insurance Certificates. Prior to beginning work under this Agreement, the Contractor shall deliver to NYSERDA certificates of insurance issued by the respective insurers, evidencing the insurance required by this Article. In the event any policy furnished or carried pursuant to this Article will expire on a date prior to the termination date established under Article 2 hereof, the Contractor, not less than thirty (30) calendar days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and the Contractor shall promptly pay all premiums thereon due. In the event of threatened legal action, claims, encumbrances, or liabilities that may affect NYSERDA hereunder, or if deemed necessary by NYSERDA due to events rendering a review necessary, the Contractor shall, upon request, deliver to NYSERDA a certified copy of each policy. Within five (5) business days, or contemporaneously with the requirements of each insurance policy, the Contractor shall notify NYSERDA in writing of the occurrence of any accident, event or incident involving personal injury or property damage that might reasonably result in any complaint or claim, in law or in equity, against the Contractor, any non-Customer party to the applicable customer agreement, or NYSERDA. NYSERDA reserves the right to request insurance documentation and copies of subcontractor agreements for any subcontractor, and to request the identity of all individuals participating in the Project installation.

ARTICLE 10: Intentionally Left Blank

ARTICLE 11: WARRANTIES AND GUARANTEES

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

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

§11.2. The Contractor also warrants and guarantees that:

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

rendering of services under this Agreement;

- h. it shall exercise reasonable care to achieve commercial standards of fitness for the use of the equipment that is installed in connection with the Project; and
- i. there is and shall be no actual or potential conflict of interest that could prevent the Contractor's satisfactory or ethical performance of duties required to be performed pursuant to the terms of this Agreement. The Contractor shall have a duty to notify NYSERDA immediately of any actual or potential conflicts of interest.

§11.3. NYSERDA does not endorse, guarantee, or warrant any particular manufacturer, product, or the Contractor, and NYSERDA disavows and provides no warranties, expressed or implied, for any product or services that may be rendered hereunder. The Contractor's reliance on warranties is limited to any warranties that may arise from, or be provided by contractors, vendors, manufacturers, etc. The Parties acknowledge that neither NYSERDA nor any of its representatives are responsible for assuring that the design, engineering, construction and/or installation of the Project is proper or in compliance with any particular laws (including patent laws), regulations, codes, or industry standards. NYSERDA does not make any representations of any kind regarding the results to be achieved by any Project, or the adequacy or safety of such measures. The scope of review by NYSERDA of the installation of the Projects is limited solely to determining whether such Projects conform to applicable Bulk Energy Storage Incentive Program terms, conditions, and requirements.

## ARTICLE 12: COMPLIANCE WITH CERTAIN LAWS

§12.1. Governing Law/Venue. This Agreement shall be interpreted according to the laws of the State of New York without regard to its conflicts of laws principles. The Contractor, its subcontractors and consultants will comply with all laws, rules, orders, regulations and requirements of federal, state and municipal governments applicable thereto, including provisions set forth in Exhibit C hereto. The Parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in the New York State Court located in Albany, New York having subject matter jurisdiction over such matters, in accordance with NY CPLR § 505, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

§12.2. All Legal Provisions Deemed Included. It is the intent and understanding of the Contractor and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall,

upon the application of either NYSERDA or the Contractor, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

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

§12.4. Equipment Requirements. All equipment and components required for the Project shall comply with all manufacturers' installation requirements, applicable laws, regulations, codes, licensing, and permit requirements. This includes, but is not limited to, SEQR; the International Building Code Series as amended by the New York State Uniform Code Supplement; the National Electric Code; New York State's Standard Interconnection Requirements; and all applicable State, city, town, or local ordinances or permit requirements, and any additional requirements of the local Authority Having Jurisdiction.

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

§12.6. Permits and Approvals. The Contractor shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Project during the Project Term. Entry into this Agreement in no way replaces or modifies the necessity or applicability of any permit or approval process by any jurisdiction. NYSERDA's obligations to make payments to Contractor will be conditional on the acquisition of all such permits and approvals. Upon request by NYSERDA, Contractor must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Contractor shall provide prompt notice to NYSERDA of the initiation of any criminal or regulatory investigation, hearing, proceeding, or review process ("Process") by any federal or State entity regarding any actual or alleged violation of any permit or approval obtained or applied for with respect to the Project, as well as of any modification, penalty and/or fine that may be imposed or occur as a result of such a Process or violation.

§12.7 Decommissioning and Recycling. At the end of the useful life of the Project, Contractor is responsible for ensuring the Project, including all equipment and components, are decommissioned and, if applicable, recycled in accordance with all applicable laws, rules, and regulations, including but not limited to, the decommissioning requirements of the local Authority Having Jurisdiction, and applicable New York State Environmental Conservation Law requirements, transportation requirements from the New York State Department of Transportation, if any, and any other applicable laws or regulations, including State and Federal environmental laws, such as any Department of Environmental Conservation regulations pertaining to disposal.

## ARTICLE 13: PUBLICITY

§13.1. The Contractor shall collaborate with NYSERDA's Manager of Communications to prepare any press release and to plan for any news conference concerning the Project. In addition, the Contractor shall

notify NYSERDA's Manager of Communications regarding any media interview in which the Project is referred to or discussed.

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

§13.3. Commercial promotional materials, advertisements, informational brochures, and web site content produced by the Contractor or customer shall credit NYSERDA and shall be submitted to NYSERDA for review and recommendations to improve their effectiveness prior to use. Such content may be approved in advance by NYSERDA, and, after initial approval, such content may be used in subsequent promotional materials or advertisements without additional approvals. In the event that NYSERDA determines that the Contractor is presenting or publishing incorrect or misleading information regarding the work performed under this Agreement, the terms of this Agreement, or Contractor's status under this Agreement, the Contractor agrees to make appropriate modifications promptly upon notification by NYSERDA.

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

#### ARTICLE 14: MISCELLANEOUS

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

§14.2. Record Retention. The Contractor and subcontractors shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of six (6) years after the expiration or early termination of this Agreement, accurate records of the Project work which is performed hereunder. NYSERDA or its designated agent shall at reasonable times have access to inspect such records.

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

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

§14.5. Disputes. Where any matters related to this Agreement are in dispute, the NYSERDA Project Manager and the Contractor contact person, or their designated representatives shall promptly but in any case, within twenty (20) calendar days of written notice by either Party to the other, meet at a mutually

acceptable time and place, and thereafter as often as they reasonably deem necessary to exchange information and attempt in good faith to resolve the dispute.

§14.6. Assignment. The assignment, transfer, conveyance, or other disposal of this Agreement or any of the Contractor's rights, obligations, interests or responsibilities hereunder, in whole or in part, without the express consent in writing of NYSERDA shall be void and of no effect as to NYSERDA. Failure to obtain such approval from NYSERDA may result in a cancellation or adjustment of incentives pursuant to §5.5.

§14.7. Subcontracting. Contractor may subcontract all or any portion of the work relating to the construction, commissioning and maintenance of the Project to subcontractors. Regardless of subcontracting arrangements, Contractor shall be responsible for the performance of this Agreement, including all reporting to NYSERDA, and the continued operation and maintenance of the Project, unless this Agreement has been assigned pursuant to §14.6. Contractor shall remain ultimately responsible and liable for the acts and omissions of any subcontractor, including subcontractor's employees, that Contractor engages to the same extent as if such acts or omissions were made by Contractor or its employees. Nothing contained herein shall create any contractual rights in any subcontractor against NYSERDA. The Contractor shall not, without prior written permission from NYSERDA, knowingly subcontract with, employ or hire any individual or company to perform work under this Agreement if said individual or company is currently in a probation or suspended status or whose past participation in the Bulk Energy Storage Incentive Program or any other NYSERDA PON or program has been suspended or terminated. For each subcontract valued at \$100,000 or more, the Contractor shall obtain and maintain a completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form (Exhibit D) from such subcontractor prior to the execution of the subcontract. Such form shall be made available to the Contractor by NYSERDA. Each such subcontract shall contain a provision whereby the subcontractor warrants and guarantees that there is and shall be no actual or potential conflict of interest that could prevent the subcontractor's satisfactory or ethical performance of duties required to be performed pursuant to the terms of the subcontract and that the subcontractor shall have a duty to notify NYSERDA immediately of any actual or potential conflicts of interest.

§14.8. Notices. All notices, requests, consents, approvals and other communications which may or are required to be given by either Party to the other under this Agreement shall be deemed to have been sufficiently given for all purposes hereunder when delivered or mailed by registered or certified mail, postage prepaid, return receipt requested, (i) if to NYSERDA, at 17 Columbia Circle, Albany, New York 12203-6399, or at such other address as NYSERDA shall have furnished to the Contractor in writing, and (ii) if to the Contractor, at the address noted in the first paragraph of Page 3 of this Agreement, or such other address as the Contractor shall have furnished to it in writing.

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

§14.10. Independent Contractor. The status of the Contractor under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, the Contractor, subcontractors, and their respective officers, agents, employees, representatives and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives or servants of NYSERDA nor make any claim, demand or

application for any right or privilege applicable to NYSERDA, including, without limitation, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage and retirement membership or credit. If it is determined that the Contractor is not fairly or accurately representing the Bulk Energy Storage Incentive Program and/or its relationship with NYSERDA, the Contractor will be subject to administrative review and its status within the Bulk Energy Storage Incentive Program may be affected.

§14.11. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and such reasonable period thereafter to inspect and audit any and all books, accounts, subcontracts, and records pertaining to Contractor's performance under this Agreement, at the office or offices of the Contractor where they are then being kept, maintained and preserved. If such books, accounts and records are not kept at an office within the State of New York, within a reasonable time of a request by NYSERDA, Contractor shall make such books, accounts and records available to NYSERDA at NYSERDA's offices or at an agreed upon location within the State of New York. Any payment made under this Agreement shall be subject to retroactive adjustment (reduction or increase) regarding amounts included therein which are found by NYSERDA on the basis of any audit of the Contractor by an agency of the United States, the State of New York or NYSERDA not to constitute a properly invoiced amount.

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

§14.13. Consent to Contact. Contractor agrees and consents to receive notices at the following designated e-mail addresses of Contractor's Project Director(s):

Email: \_\_\_\_\_

§14.14. Utility Bulk Dispatch Rights Contract. Contractor acknowledges that the utility is solely responsible for payments associated with the utility Bulk Dispatch Rights contract, and NYSERDA shall have no obligation to pay to Contractor amounts in respect of the Bulk Dispatch Rights contract amount, or any part thereof, and any failure by the utility to pay amounts owed to Contractor under the Bulk Dispatch Rights contract when and as due shall not relieve Contractor of any obligation under this Agreement.

## ARTICLE 15: FREEDOM OF INFORMATION

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

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



§15.3. Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” If NYSERDA receives a request from a third party for information or a document received from Contractor and which has been marked “Confidential” or “Proprietary,” NYSERDA will process such request under the procedures provided by NYSERDA’s FOIL regulations (see [www.nyserda.org/About/NYSERDA.Regulations.pdf](http://www.nyserda.org/About/NYSERDA.Regulations.pdf)).

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EXHIBIT B

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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).

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

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

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

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

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

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

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

11. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon 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  
30 South Pearl St -- 7th Floor  
Albany, New York 12245  
Telephone: 518-292-5220  
Fax: 518-292-5884  
<http://www.esd.ny.gov>

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

NYS Department of Economic Development  
Division of Minority and Women's Business Development  
30 South Pearl St -- 2nd Floor  
Albany, New York 12245  
Telephone: 518-292-5250  
Fax: 518-292-5803  
<http://www.empire.state.ny.us>

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

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

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

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

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

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

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

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

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

- a) Before such agreement can take effect, the Contractor must have on file with the New York State Department of Taxation and Finance a Contractor Certification form (ST-220-TD).
- b) Prior to entering into such an agreement, the Contractor is required to provide NYSERDA with a completed Contractor Certification to Covered Agency form (Form ST-220-CA).
- c) Prior to any renewal period (if applicable) under the agreement, the Contractor is required to provide NYSERDA with a completed Form ST-220-CA.

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

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

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

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.

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EXHIBIT C

NYSERDA PROMPT PAYMENT POLICY STATEMENT

**504.1. Purpose and Applicability.** (a) The purpose of this Exhibit is to provide a description of Part

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504 of NYSERDA's regulations, which consists of NYSERDA's policy for making payment promptly on amounts properly due and owing by NYSERDA under this Agreement. The section numbers used in this document correspond to the section numbers appearing in Part 504 of the regulations.<sup>1</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**504.4. Payment Procedures.**

(a) Unless otherwise specified in this Agreement, a Proper Invoice submitted by the Contractor to the Designated Payment Office shall be required to initiate payment for goods, property or services. As soon as any invoice is received in the Designated Payment Office during normal business hours, such invoice shall be date-stamped. The invoice shall then promptly be reviewed by NYSERDA.

(b) NYSERDA shall notify the Contractor within fifteen (15) calendar days after Receipt of an Invoice of:

- (1) any defects in the delivered goods, property or services;
- (2) any defects in the invoice; or
- (3) suspected improprieties of any kind.

(c) The existence of any defects or suspected improprieties shall prevent the commencement of the time period specified in Section 504.3 until any such defects or improprieties are corrected or otherwise resolved.

(d) If NYSERDA fails to notify a Contractor of a defect or impropriety within the fifteen (15) calendar day period specified in subdivision (b) of this section, the sole effect shall be that the number of days allowed for Payment shall be reduced by the number of days between the 15th day and the day that notification was transmitted to the Contractor. If NYSERDA fails to provide reasonable grounds for its contention that a defect or impropriety exists, the sole effect shall be that the Payment Due Date shall be calculated using the original date of Receipt of an Invoice.

(e) In the absence of any defect or suspected impropriety, or upon satisfactory correction or resolution of a defect or suspected impropriety, NYSERDA shall make Payment, consistent with any such correction or resolution and the provisions of this Exhibit.

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

(a) If this Agreement provides Payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice, if any documentation, supporting data, performance verification, or notice specifically required by this Agreement or other State or Federal mandate has not been submitted to NYSERDA on a timely basis, then the Payment Due Date shall be extended by the number of calendar days from the date by which all such matter was to be submitted to NYSERDA and the date when NYSERDA has actually received such matter.

(b) If an inspection or testing period, performance verification, audit or other review or documentation independent of the Contractor is specifically required by this Agreement or by other State or Federal mandate, whether to be performed by or on behalf of NYSERDA or another entity, or is specifically permitted by this Agreement or by other State or Federal provision and NYSERDA or other entity with the right to do so elects to have such activity or documentation undertaken, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when any such activity or documentation has been completed, NYSERDA has actually received the results of such activity or documentation conducted by another entity, and any deficiencies identified or issues raised as a result of such activity or documentation have been corrected or otherwise resolved.

(c) If an invoice must be examined by a State or Federal agency, or by another party contributing to the funding of the Contract, prior to Payment, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when the State or Federal agency, or other contributing party to the Contract, has completed the inspection, advised NYSERDA of the results of the inspection, and any deficiencies identified or issues raised as a result of such inspection have been corrected or otherwise resolved.

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

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

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

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

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

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

**504.11. Court Action or Other Legal Processes.**

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

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

## EXHIBIT D

### Vendor Assurance of No Conflict of Interest or Detrimental Effect (required for any subcontract of \$100,000 or more)

The individual or entity offering to provide services pursuant to the agreement between **[insert name of NYSERDA Contractor]** “NYSERDA Contractor” and **[insert name of Subcontractor]** (“Subcontractor”) (“Agreement”), attests that its performance of the services does not and will not create a conflict of interest with nor position the individual or entity to breach any other contract currently in force with the State of New York.

Furthermore, the individual or entity attests that it will not act in any manner that is detrimental to any State project on which the individual or entity is rendering services. Specifically, the individual or entity attests that:

1. Its fulfillment of obligations does not violate any existing contracts or agreements between the individual or entity and the State;
2. Its fulfillment of obligations does not and will not create any conflict of interest, or perception thereof, with any current role or responsibility that the individual or entity has with regard to any existing contracts or agreements between the Firm and the State;
3. Its fulfillment of obligations does not and will not compromise the individual or entity’s ability to carry out its obligations under any existing contracts between it and the State;
4. Its fulfillment of any other contractual obligations it has with the State will not affect or influence its ability to perform under any contract with the State resulting from this solicitation;
5. During the negotiation and execution of the Agreement, the individual or entity will not knowingly take any action or make any decision which creates a potential for conflict of interest or might cause a detrimental impact to the State as a whole including, but not limited to, any action or decision to divert resources from one State project to another;
6. In fulfilling obligations under each of its State contracts, including the Agreement, the individual or entity will act in accordance with the terms of each of its State contracts and the Agreement and will not knowingly take any action or make any decision which might cause a detrimental impact to the State as a whole including, but not limited to, any action or decision to divert resources from one State project to another;
7. No former officer or employee of the State who is now employed by the individual or entity, nor any former officer or employee of individual or entity who is now employed by the State, has played a role with regard to the administration of the Agreement in a manner that may violate section 73(8)(a) of the State Ethics Law; and
8. The individual or entity has not and shall not offer to any employee, member or director of the State any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence said employee, member or director, or could reasonably be expected to influence said employee, member or director,

in the performance of the official duty of said employee, member or director or was intended as a reward for any official action on the part of said employee, member or director.

The individual or entity shall disclose below any existing or contemplated relationship with any other person or entity, including any known relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers of Subcontractor or former officers and employees of NYSERDA, in connection with proposer's rendering services enumerated in this solicitation. If a conflict does or might exist, please describe how you would eliminate or prevent it. Indicate what procedures will be followed to detect, notify NYSERDA of, and resolve any such conflicts.

The individual or entity must disclose whether it, or to the best of its knowledge, any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries, have been the subject of any investigation or disciplinary action by the New York State Commission on Public Integrity or its predecessor State entities (collectively, "Commission"), and if so, a brief description must be included indicating how any matter before the Commission was resolved or whether it remains unresolved.

It should be noted that the State recognizes that conflicts may occur in the future because an individual or entity may have existing or new relationships. The State will review the nature of any such new relationship and reserves the right to terminate the contract for cause if, in its judgment, a real or potential conflict of interest cannot be cured.

No Disclosure Statement Form Required     See Attached Disclosure Statement

Name, Title:

Signature:

Date:

This form must be signed by an authorized executive or legal representative.

**DISCLOSURE STATEMENT**

This Disclosure Statement is provided with respect to my Evaluation Conflict Disclosure Statement (terms used in this statement shall have the meanings given in the Evaluation Conflict Disclosure Statement) and sets forth potential conflicts of interest, either real or perceived, for myself or any member of my immediate family, partner(s), or joint venture, with the firms that have responded to the solicitation identified at the top of the Evaluation Conflict Disclosure Statement form.

Section I of this Disclosure Statement describes the potential conflicts of interest. Section II of this Disclosure Statement describes the management plan for dealing with the potential conflicts of interests as described in Section I of this form. I acknowledge that Counsel may require revisions to the management plan described in Section II of this form prior to approving it, and that the Program Counsel and each Project Sponsor has the right, in its sole discretion, to limit or prohibit my involvement, in the review and evaluation of the Solicitation submissions received by the Project Sponsors, as a result of the potential conflicts of interest described in Section I of this form. I will attach to this Disclosure Statement additional pages as necessary.

**SECTION I – DESCRIPTION OF POTENTIAL CONFLICTS OF INTEREST**

**SECTION II – REMEDY FOR DEALING WITH POTENTIAL CONFLICTS OF INTEREST**

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

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

**Approved by Counsel:**

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

**COUNSEL ASSESSMENT:**

Does Section I present a Conflict of Interest? \_\_\_\_\_

If so, does Section II present an appropriate remedy? \_\_\_\_\_

**COUNSEL DISPOSITION:**

Explain Action Taken:

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

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

DRAFT



DRAFT