



**Emerging Insulation Practices for Existing Residential Buildings, Pilot  
Program Opportunity Notice (PON) 1232  
\$ 70,000 Available**

**Proposals Due: July 21, 2009 by 5:00 PM Eastern Time**

**OBJECTIVES:** The New York State Energy Research and Development Authority (NYSERDA) seeks proposals from Building Science Teams (BST) to develop a methodology of implementing “deep” energy retrofit strategies for the benefit of existing low-income single family residential buildings in New York State. Working with NYSERDA personal on the methodology, the BST will then develop, conduct and monitor a comprehensive training course to be administered to a group of Building Performance Institute (BPI) accredited Contractors enabling the necessary skills to perform the “deep” energy retrofits. The primary focus of the project and training will emphasize exterior insulation techniques that greatly improve the performance of the building shell. The comprehensive training will involve both classroom and field components, at actual jobsite(s) where the “deep” retrofit practices will be exemplified to the participants and provide hands-on experience to the participants.

**ELIGIBILITY:** The BST will have experience in lecturing, giving educational presentations and demonstrating from field examples the skills necessary to achieve “deep” energy retrofits. Proposers submitting must demonstrate the following expertise:

- Full understanding of the whole house system approach for energy flows associated with an existing building.
- Building science principles including heat, air and moisture movement through envelopes.
- Importance of combustion, makeup air and ventilation for occupancy health and safety.
- Importance of air barriers and thermal bridges at connection points such as: foundations, sill plates, walls, roofs, windows and doors.
- Mechanical systems, including whole house ventilation and point source systems.

Successful proposals will exemplify the BST’s experience level with “deep” retrofits, their understanding of the challenges associated with this work, and a portfolio of examples demonstrating the outcomes of work they have influenced.

NYSERDA may make multiple awards to BST’s, depending on the nature of their capabilities, resources offered and availability to teach selected BPI Contractors.

Proposers must submit one (1) paper copy and one (1) electronic version (CD) of the proposal with a completed and signed proposal checklist attached to the front of paper copy. Proposals must be clearly labeled and submitted to:

Roseanne Viscusi, PON 1232  
NYS Energy Research and Development Authority  
17 Columbia Circle  
Albany, NY 12203-6399

Address technical questions for PON 1232, to Greg Pedrick at (518) 862-1090, ext. 3378, [gap@nyserda.org](mailto:gap@nyserda.org)  
Address contractual questions for PON 1232, to Nancy Marucci, ext. 3335, [nsm@nyserda.org](mailto:nsm@nyserda.org).

No communication intended to influence this procurement is permitted except by contacting Greg Pedrick at contact above. Contacting anyone other than this designated contact (either directly by the proposer or indirectly through a lobbyist or other person acting on the proposer’s behalf) in an attempt to influence the procurement: (1) may result in a proposer being deemed a non-responsible offer, and (2) may result in the proposer not being awarded a contract.

*\*\* Late proposals and proposals lacking the appropriate completed and signed Proposal Checklist will be returned. Faxed or emailed proposals will not be accepted. Proposals will not be accepted at any other NYSERDA location other than the address above. If changes are made to this solicitation, notification will be posted on NYSERDA’s website at [www.nyserda.org](http://www.nyserda.org)*

## **I. Program Overview**

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The NYSERDA Buildings R&D Group introduced the Advanced Buildings Program (ABP) in 2006, with an objective to drastically improve the building envelopes and insulation techniques found in a residential building. The program started by attempting to influence the design and build of newly constructed residential buildings. The focus is now broadening to employ these same objectives to the existing residential building stock found in New York State. Much of New York's housing stock was built before the first energy crisis of 1973, and will remain in use for many years ahead. This project will explore the opportunity to apply "deep" energy retrofit techniques to this housing stock, and represents a great opportunity to make significant improvements.

The term "*deep*" energy retrofit refers to a practice that goes well above and beyond the current common practice of performing energy efficiency work. This involves substantially improving the exterior building envelope with aggressive, emerging insulating practices (*e.g.* installation of non-CFC/HCFC boardstock insulation, application of open cell spray foam insulation with alternatives to CFC/HCFC blowing agents), installing new or relocating existing windows, sealing the below grade foundation to the wall connections and sealing the roof to the wall connection with insulation that also provides an air barrier. The following mechanical practices are then implemented to complete the overall retrofit; incorporation of whole house ventilation and downsizing the mechanical plant typically found in residential buildings. Performing this retrofit with attention to detail and comprehensively, will typically reduce the whole building energy load by 60 – 75%. It is important for the methods to exemplify truly sustainable practices when at all possible to achieving the intended large reductions.

These energy load reductions are necessary and offer a great opportunity to teach BPI Contractors of the possibilities and raise the awareness of homeowners to request this work. The objective of the ABP is to always educate, lead by example and prime the resources for deployment to a larger group.

## **II. Program Requirements**

NYSERDA specifically seeks proposals from Building Science Teams (BST) well versed in the area of retrofitting residential buildings to achieve the reductions mentioned above. The Team should possess skills in "*deep*" retrofit, with primary focus on exterior insulation improvements, and be able to conduct and monitor a training program which enables a selected group of BPI Contractors to enhance their skills aligning with the objectives of the "*deep*" retrofit. Each proposing BST must outline and describe their personal experiences in performing "*deep*" retrofits, and demonstrate how they will transfer this knowledge to the BPI Contractors in a classroom setting, then in-field setting where hands-on experience will be taught and evaluated. The field work will be an extension of the classroom, and the BPI Contractors once trained, must demonstrate the implementation skills of the knowledge gained.

Developing a strategy and establishing a training curriculum is the initial step in the overall objective of this Pilot project. NYSERDA's Residential Energy Affordability Program (REAP) will then select BPI accredited Contractors to attend this training, with the intent of utilizing them to influence and effect up to 20 existing low-income single family residential buildings within New York State. The development and application of the "*deep*" retrofit techniques, monitoring of the process and tracking the project outcomes will provide the required data and research necessary to determine whether this type of program could be offered on a broader scale.

The program intent is to have trained BPI Contractors identify candidate buildings which will benefit from the "*deep*" energy retrofits, while performing within their existing NYSERDA contractual obligations of whole house energy surveys. The BPI Contractors will assess whether a "*deep*" retrofit is viable, and if undertaken they will capture the associated costs, and track the work sequence involved through to completion. This type of work is typically overlooked, for fear of it being costly, invasive and not viable. This program hopes to alleviate those concerns by collecting actual data associated with the retrofits and sharing it with the public. Retrofit of existing building stock, represents a great, vast opportunity to bring existing buildings significantly above energy code and reduce the burden they place on energy supplies. The solutions involved in these "*deep*" retrofits and the work done is more a challenge

of will, than a challenge of technology. The attendees of the training will have expressed a desire to overcome these challenges, and exemplified their desire to take the extra necessary steps towards achieving the results associated with a carefully planned and executed “*deep*” retrofit.

This solicitation encourages the BST to address the following requirements:

- Review practiced and proven retrofit insulation techniques/strategies and select the most appropriate methodology to teach for the BPI Contractors.
- Develop a curriculum in workshop style, to be administered in both a classroom and field setting, to educate and enable the BPI Contractors to adequately learn, and formally demonstrate the skills needed to perform this work.
- Review and comment on NYSERDA’s developing screening criteria for identifying existing low income single family residential building candidates which will be selected for the “*deep*” retrofit projects.
- Provide guidance via an appropriate level of visits per project, and consulting to the BPI Contractor’s as they engage in the 20 possible retrofit projects.
- Track material and labor costs associated with each “*deep*” retrofit project the BPI Contractor initiates.

**Project Awards** – NYSERDA will select the proposal(s) which have best exemplified the ability to develop a cost effective methodology and provide training to accomplish this task. Background, field experience, and practical application of the concept will be considered when reviewing the submitted proposals.

*It is important to follow “Proposal Requirements” carefully and answer all questions.*

### III. Proposal Requirements

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- Proposers must submit one (1) paper copy of their completed proposal (double-sided preferred), and one (1) electronic version on CD (preferably combined into 1 pdf file) to the attention of Roseanne Viscusi at the address indicated on the first page of this PON.
- A completed and signed Proposal Checklist must be attached as the front cover of your proposal.
- ***Bindings, report covers, or other presentation materials should not be used (a single staple in the upper left-hand corner is preferred).***
- ***Limit your proposal to 10 pages (12-point font) excluding letters of support, resumes, and NYSERDA forms (Attachments A, B, and C).***
- Do not include unnecessary attachments beyond those sufficient to present a complete, comprehensive, and effective response.
- Each page of the proposal should state the name of the proposer, the PON number, and the page number.
- **Late proposals and proposals lacking the appropriate completed and signed Proposal Checklist will be returned.**
- Faxed or e-mailed copies will not be accepted.

*Please provide the information requested in each section below.*

- ***Each required section below is followed by questions, which are the criteria by which the Technical Evaluation Panel (TEP) will evaluate your proposal.***

**1. Executive Summary (one page)** - Provide a brief response to each of the following:

- The approach to the topic and the opportunity you will provide.
- What you will do, to address the opportunity, and why that is good.
- Likely educational and economic benefits to you and New York State.
- Team qualifications

**Criteria:**

- Does the BST understand the requested service, and possess the skills and competency to deliver?

**2. Method of Training and Proposed Approach** – Please discuss:

- The method of training you will use to educate the attendees, and how it will be administered
- The proposed curriculum and how it addresses opportunity, including:
  - Description of course curriculum
  - Innovative characteristics of the curriculum, *e.g.* use of case studies, field examples, etc.
  - Alternative methods, and why the proposed method of teaching will be superior, and
  - Barriers to success and project risks

**Criteria:**

- Is the curriculum well defined, comprehensive and described clearly?
- Is the approach practical and technically feasible?
- Are the techniques to be taught innovative, practical and achievable?
- Will there be measurement of an attendee’s comprehension of the curriculum?

**3. Project Benefits:** - Provide:

- Quantify estimated energy benefits to the extent possible as if 20 buildings will be influenced by a “*deep*” retrofit (*e.g.* kWh and MMBtu savings)
- Estimate other benefits, for example:
  - Increased: revenue, productivity, contracts obtained, or new/retained jobs; or
  - Decreased: non-energy related greenhouse gas emissions, maintenance costs, capital, etc.
  - Provide a cost/benefit projection
  - Discuss what entity/entities will reap these benefits

**Criteria:**

- Are energy and economic benefits significant (for proposer and New York State)?
- Do estimates of benefits seem reasonable, and their associated costs?
- Is there a plan to quantify actual benefits after project completion?

**4. Tech Transfer of the Tabulated Results to be monitored:** - Please discuss:

- Distribution of course curriculum, both classroom and field components, possibility of broadening the curriculum to reach large number of Contractors in future
- Method for capturing the results of the project work, *e.g.* photos, video of unique applications of materials, field problems solved
- How audio/visual material will be transmitted to NYSERDA’s Advanced Buildings Program for posting on website and brochures
- If papers will be submitted to relevant conferences (*e.g.* ACI, NESEA Buildings Conf.) that promote the work engaged and its associated costs

**Criteria:**

- How likely will the results from this teaching effort, gain traction in the Building Contractor’s portfolio of scheduled work over the next 5 years?
- How likely will the “*deep*” retrofit solutions be recognized and requested for by homeowners looking to make energy improvements?
- How likely is the potential for project results to be demonstrated to a given community of homeowners?

**5. Scope of Work and Schedule:**

- Describe each task required to accomplish goals and who will perform each task.
- Prepare a schedule of when each task will be performed, milestones and budget for each milestone, using the format below (add as many lines as necessary; give total on bottom line):

Milestone Description	Labor (hours)	Labor (\$)	Materials & Equipment (\$)	Other (\$)	Total (\$)	Start Date	End Date

*Total milestone budget should be the same as the total budget on the Contract Pricing Proposal Form.*

**Criteria:**

- Is the approach likely to meet the proposal’s goals?
- Is the schedule reasonable for the scope defined?
- Does the Statement of Work include tasks for: acquiring materials, developing a curriculum, accessing a facility for the instruction (preferably in the field), collecting representative data (costs, time), and outlining a tech-transfer strategy?
- Are the benefits quantified realistic?

**6. Cost Sharing:**

- The proposal should show non-NYSERDA funding of preferably 25% of the total cost of the project. Cost sharing can be from the proposer, other team members, and other government or private sources. Contributions of direct labor (for which the laborer is paid as an employee) and purchased materials may be considered “cash” contributions to proposer’s cost share. Unpaid labor, indirect labor, or other general overhead may be considered “in-kind” contributions.
- NYSERDA will NOT fund efforts that have already been undertaken. The proposing teams CAN NOT claim as cost-share any expenses that have already been incurred.
- Show the cost-sharing plan in the following format (expand table as needed).

Source	Cash	In-Kind Contributions	Total
NYSERDA	\$		\$
Proposer	\$	\$	
Others (list individually)			
Total	\$	\$	\$

**Criteria:**

- Do the level, type and source of cost sharing indicate a sufficient commitment to the project by the proposer and proposing team?
- Are there any supplier donations indicated to offset equipment/material cost sharing?

**7. Budget** - Complete the **Contract Pricing Proposal Form** (Attachment C) (see CPPF instructions). Indicate requested NYSERDA funding in the column labeled “Funding & Co-funding via NYSERDA.” Include non-NYSERDA cash and in-kind contributions in the column labeled “Cost-sharing and other co-funding.”

**If you include indirect costs in your budget, you MUST attach supporting documentation to support indirect cost (overhead) rate(s) in your proposal** as follows:

1. Describe the basis for the rates proposed (*e.g.* based on: prior period actual results, projections, federal government, or other independently approved rates).
2. If rates are approved by an independent organization, such as the federal government, provide a copy of such approval.
3. If rates are based on estimated costs or prior period actual results, include calculations to support proposed rates. Calculation should provide enough information for NYSERDA to evaluate and confirm that rates are consistent with generally accepted accounting principles for indirect costs.

NYSERDA reserves the right to audit indirect rates presented in the proposal and adjust for differences. Requests for financial statements or other financial information may be made if deemed necessary.

Product developers may be required to repay NYSERDA through a royalty agreement. (see Attachment D, sample agreement. Article VIII 8.03 Payments to NYSERDA)

***Criteria:***

- Is cost reasonable when measured against project goal, scope of work, and expected benefits?
- Are costs clearly specified?

**8. Business Description:**

- Describe your business: number of employees, what you produce, or what services you provide; what kind of facilities you have.

***Criteria:***

- Is the business financially sound and stable?

**9. Project Team:** the following is important for the team description:

- List team members, including the project manager, subcontractors and other participants and co-funders involved in the project.
- Explain their roles and responsibilities.
- Describe qualifications and relevant experience or expertise.
- Identify any special facility, equipment or capability possessed by the project participants that is relevant to the project.

***Criteria:***

- Does the project team have the qualifications and resources needed to succeed?
- Does the team give examples of their experience with this work?

**10. Letters of Commitment or Support:**

- If other organizations or businesses are doing some of the work, providing services or equipment, serving as a demonstration site, or share in the non-NYSERDA cost, include a signed letter from that organization or business (on their letterhead) describing their commitment (include cash/in-kind dollar commitment if applicable). If you will solicit for donated building materials or equipment, include letters of interest from potential providers.

***Criteria:***

- if applicable, do letters of support exist and do they reflect the level of involvement (e.g., co-funding, potential interest in promoting services, etc.) from the supporter(s)/potential customer(s)/ partner(s), commercialization supporter(s)?
- If a site is proposed for the field portion of training, is there a letter of interest/commitment from that potential site to host field training of “*deep*” retrofit?

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**IV. PROPOSAL EVALUATION**

Proposals will be reviewed by a Technical Evaluation Panel (TEP) and will be scored and ranked according to the **criteria** indicated above in the Proposal Requirements. After the proposals are reviewed, NYSERDA will issue a letter to each proposer indicating whether the proposal was recommended for funding. A proposer receiving a favorable evaluation will be invited to enter into contract negotiations with NYSERDA. The proposer may also be asked to address specific questions or recommendations of the TEP before contract award.

**V. GENERAL CONDITIONS**

**Proprietary Information** - Careful consideration should be given before confidential information is submitted to NYSERDA as part of your proposal. Review should include whether it is critical for evaluating a proposal, and whether general, non-confidential information, may be adequate for review purposes. The NYS Freedom of Information Law, Public Officers law, Article 6, provides for public access to information NYSERDA possesses. Public Officers Law, Section 87(2)(d) provides for exceptions to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Information submitted to NYSERDA that the proposer wishes to have treated as proprietary, and confidential trade secret information, should be identified and labeled "Confidential" or "Proprietary" on each page at the time of disclosure. This information should include a written request to accept it from disclosure, including a written statement of the reasons why the information should be excepted. See Public Officers Law, Section 89(5) and the procedures set forth in 21 NYCRR Part 501 [www.nyserda.org/nyserda.regulations.pdf](http://www.nyserda.org/nyserda.regulations.pdf). However, NYSERDA cannot guarantee the confidentiality of any information submitted.

**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 Agreements. Information on the availability of New York subcontractors and suppliers is available from: Empire State Development, Division for Small Business, 30 South Pearl Street, Albany, NY 12245. A directory of certified minority- and women-owned business enterprises is available from: Empire State Development, Minority and Women's Business Development Division, 30 South Pearl Street, Albany, NY 12245.

**State Finance Law sections 139-j and 139-k** - NYSERDA is required to comply with State Finance Law sections 139-j and 139-k. These provisions contain procurement lobbying requirements which can be found at <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/StatutoryReferences.html>

The attached Proposal Checklist calls for a signature certifying that the proposer will comply with State Finance Law sections 139-j and 139-k and the Disclosure of Prior Findings of Non-responsibility form includes a disclosure statement regarding whether the proposer has been found non-responsible under section 139-j of the State Finance Law within the previous four years.

**Tax Law Section 5-a** - NYSERDA is required to comply with the provisions of Tax Law Section 5-a, which requires a prospective contractor, prior to entering an agreement with NYSERDA having a value in excess of \$100,000, to certify

to the Department of Taxation and Finance (the "Department") whether the contractor, its affiliates, its subcontractors and the affiliates of its subcontractors have registered with the Department to collect New York State and local sales and compensating use taxes. The Department has created a form to allow a prospective contractor to readily make such certification. *See*, ST-220-TD (available at [http://www.tax.state.ny.us/pdf/2006/fillin/st/st220td\\_606\\_fill\\_in.pdf](http://www.tax.state.ny.us/pdf/2006/fillin/st/st220td_606_fill_in.pdf)). Prior to contracting with NYSERDA, the prospective contractor must also certify to NYSERDA whether it has filed such certification with the Department. The Department has created a second form that must be completed by a prospective contractor prior to contacting and filed with NYSERDA. *See*, ST-220-CA (available at [http://www.tax.state.ny.us/pdf/2006/fillin/st/st220ca\\_606\\_fill\\_in.pdf](http://www.tax.state.ny.us/pdf/2006/fillin/st/st220ca_606_fill_in.pdf) ). The Department has developed guidance for contractors which is available at [http://www.tax.state.ny.us/pdf/publications/sales/pub223\\_606.pdf](http://www.tax.state.ny.us/pdf/publications/sales/pub223_606.pdf).

**Contract Award** - NYSERDA anticipates making multiple awards under this solicitation. It may award a contract based on initial proposals without discussion, or following limited discussion or negotiations pertaining to the Statement of Work. Each offer should be submitted using the most favorable cost and technical terms. NYSERDA may request additional data or material to support proposals. NYSERDA will use the Sample Agreement to contract successful proposals. NYSERDA, at its soles discretion, will decide whether to contract successful projects using time and materials terms or milestone delivery terms. NYSERDA reserves the right to limit any negotiations to exceptions to standard terms and conditions in the Sample Agreement to those specifically identified in the submitted proposal. NYSERDA expects to notify proposers in approximately 10 weeks from the proposal due date whether your proposal has been selected to receive an award.

**Recoupment** - For any new product development projects requesting NYSERDA funding over \$50,000, NYSERDA will require a royalty based on sales of the new product developed. NYSERDA's standard royalty terms are 1.5% of sales for products produced in New York State (for a period of fifteen years or until the Contractor pays NYSERDA an amount equal to the amount of funds paid by NYSERDA to the Contractor, whichever comes first) and 5% of sales for products produced outside of New York State (for a period of fifteen years or until the Contractor pays NYSERDA an amount equal to the amount of funds paid by NYSERDA to the Contractor, whichever comes first).

**Limitation** - This solicitation does not commit NYSERDA to award a contract, pay any costs incurred in preparing a proposal, or to procure or contract for services or supplies. NYSERDA reserves the right to accept or reject any or all proposals received, to negotiate with all qualified sources, or to cancel in part or in its entirety the solicitation when it is in NYSERDA's best interest. NYSERDA reserves the right to reject proposals based on the nature and number of any exceptions taken to the standard terms and conditions of the Sample Agreement.

**Disclosure Requirement** - The proposer shall disclose any indictment for any alleged felony, or any conviction for a felony within the past five years, under the laws of the United States or any state or territory of the United States, and shall describe circumstances for each. When a proposer is an association, partnership, corporation, or other organization, this disclosure requirement includes the organization and its officers, partners, and directors or members of any similarly governing body. If an indictment or conviction should come to the attention of NYSERDA after the award of a contract, NYSERDA may exercise its stop-work right pending further investigation, or terminate the agreement; the contractor may be subject to penalties for violation of any law which may apply in the particular circumstances. Proposers must also disclose if they have ever been debarred or suspended by any agency of the U.S. Government or the New York State Department of Labor.

## **Attachments**

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Attachment A: Proposal Checklist

Attachment B: Disclosure of Prior Findings of Non-responsibility Form

Attachment C: Contract Pricing Proposal Form

Attachment D: Sample Agreement



ATTACHMENT A - PON No. 1232 PROPOSAL CHECKLIST (MANDATORY)

Proposal Title		Due Date	
Primary Contact (Prime Contractor)		Title	
Company		Phone	Fax
		e-mail	
Address	City	State or Province	Zip
<p>THE PRIME CONTRACTOR MUST SIGN THIS FORM BELOW and ANSWER THE FOLLOWING QUESTIONS:</p> <p>Do you accept all Terms &amp; Conditions in the Sample Agreement? (if no, explain on separate pg) <span style="float:right">___ Yes ___ No</span>          (NYSERDA anticipates considering only specifically listed exceptions in negotiations.)</p> <p>Have you been indicted/convicted for a felony within the past 5 years? (if yes, explain on separate pg) <span style="float:right">___ Yes ___ No</span></p> <p>Are you a Minority or Women-Owned Business Enterprise? <span style="float:right">___ Yes ___ No</span></p> <p>Does your proposal contain Minority or Women-Owned Business enterprises as subcontractors? <span style="float:right">___ Yes ___ No</span></p> <p>Are you submitting the required electronic version (CD) of your proposal? <span style="float:right">___ Yes ___ No</span></p> <p>Is other public funding pending/awarded on this and/or very similar topic (prior and/or competing proposals)? <span style="float:right">___ Yes ___ No</span>          (if yes, explain on separate page)</p> <p>Have you ever contracted with NYSERDA before? (if yes, provide contract numbers and project titles) <span style="float:right">___ Yes ___ No</span></p> <p>Does the proposed demonstration site pay into the System Benefits Charge (SBC) noted on electricity bill? <span style="float:right">___ Yes ___ No</span></p>			
ON WHAT PAGE IN YOUR PROPOSAL CAN THESE ITEMS BE FOUND?			
Executive Summary	___	Budget: Completed and Signed Contract Pricing	___
Problem Statement/Proposed Solution	___	Proposal Form(s)	___
Benefits	___	Letters of commitment	___
Technology Transfer or Commercialization Plan	___		
Scope of Work	___	Indictment/Conviction of Felony (if applicable)	___
Schedule	___	Prior NYSERDA Contracts Awarded (if applicable)	___
Cost-Sharing Chart	___	Prior and/or Competing Proposals (if applicable)	___
Business Description	___	Exceptions to Terms & Conditions (if applicable)	___
Project Team/Qualifications	___	Disclosure of Prior Findings (mandatory)	___
<b>COST SHARE TOTALS</b>			
Proposer \$ _____	NYSERDA \$ _____	Others \$ _____	Total \$ _____
<b>AUTHORIZED SIGNATURE &amp; CERTIFICATION</b>			
I certify that the above information, and all information submitted in connection with State Finance Law §139-j and §139-k, is complete, true, and accurate, and that the proposal requirements noted have been completed and are enclosed. I affirm that I understand and will comply with NYSERDA's procedures under §139-j(3) and §139-j(6)(b) of the State Finance Law. I understand that this proposal may be disqualified if the solicitation requirements are not met. I the undersigned am authorized to commit my organization to this proposal.			
Signature		Name	
Title		Organization	
Phone			

**NOTE:** This completed form **MUST** be signed and attached to the front of your proposal.



Attachment B
Disclosure of Prior Findings of Non-responsibility Form
(Mandatory)

Name of Individual or Entity seeking to enter the procurement contract:
Address:
Date:
Solicitation or Agreement Number:
Name and Title of Person Submitting this Form:
Has any Governmental Entity made a finding of non-responsibility regarding the Individual or Entity seeking to enter the Procurement Contract in the last four years? (Please indicate with an "X")
Was the basis for the finding of non-responsibility due to due to a violation of §139-j of the State Finance Law? (Please indicate with an "X")
Was the basis for the finding of non-responsibility due to the intentional provision of false or incomplete information to a Governmental Entity? (Please indicate with an "X")
If you answered yes to any of the above questions, please provide details regarding the finding of non-responsibility below.
Government Agency or Authority:
Date of Finding of Non-responsibility:

Basis of Finding of Non-responsibility: (Add additional pages as necessary)

Has any Government al Entity or other governmental agency terminated or withheld a Procurement Contract with the above-named Individual or Entity due to the intentional provision of false or incomplete information ? (Please indicate with an "X") (Please indicate with an "X")		Yes
		No

If you answered yes, please provide details below.

Government Agency or Authority:

Date of Termination or Withholding of Contract:

Basis of Termination or Withholding: (Add additional pages as necessary)

Offerer certifies that all information provided to NYSERDA with respect to State Finance Law §139-k is complete, true, and accurate.

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Signature

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



## ATTACHMENT C

### INSTRUCTIONS FOR PREPARATION OF COST ESTIMATE

Your cost proposal may be the basis of contract negotiation; it should be specific and complete in every detail. Supporting schedules (as described in Section B) providing the basis for your estimates must be provided.

#### A. GENERAL

The schedule must be submitted on NYSERDA's Contract Pricing Proposal Form.

#### B. INSTRUCTIONS AND DESCRIPTION OF REQUIRED SUPPORT DETAIL

(Title each supporting schedule and cross-reference it to the item number on the Contract Pricing Proposal Form)

##### 1a. DIRECT MATERIALS - PURCHASED PARTS

Provide the following information for each proposed item with an estimated unit cost in excess of \$15,000.

- o Description of item
- o Proposed vendor
- o Quantity needed
- o Unit cost
- o Basis for cost (i.e., catalog, prior purchase, quote, etc.)
- o Total cost
- o Evidence of a competitive selection process in accordance with the requirements of the Subcontract Procedures section of the attached Sample Agreement.

##### 1b. OTHER DIRECT MATERIALS

In accordance with the requirements of the Subcontract Procedures section of the attached Sample Agreement, for all items in excess of \$5,000, provide whatever information would be necessary to understand what is being obtained, how it is being obtained, what it will cost and how the estimated cost was determined with justification for all items.

##### 2. MATERIALS OVERHEAD (also applicable to other Indirect Rate categories: 4. LABOR OVERHEAD and 10. G&A EXPENSE)

- o If Government-approved indirect rates are proposed, then supply a copy of an appropriate Government document verifying those rates.
- o If Government-approved rates are not proposed, supply the following, unless previously provided, for the years comprising the proposed period of contract performance.
  - o A description (chart or other) of the organization of the indirect cost center.
  - o The budget of indirect costs, by account, for each proposed indirect expense rate.
  - o The budget for the base, for each proposed rate, (direct labor dollars, hours, costs, etc.) itemized as to contract hours or costs, research and development hours of costs, and any other direct base effort.
  - o Actual incurred rates for the prior three years, including actual base and pool amounts.

##### 3. DIRECT LABOR

###### a. Commercial Enterprises

- (1) Attach supporting schedules showing:
  - o Each category or type of labor being estimated
  - o Applicable labor rates per hour (straight-time)
- (2) Explain the method used for computing the rates (i.e., actual of an individual, actual average of a category or other grouping, etc.) Also identify any proposed labor escalation and the bases for it.

###### b. Educational Institutions

Provide the following for each calendar year of the contract:

- (1) For individuals not on an "actual hours worked" basis:

- o individual's name
  - o annual salary and the period for which the salary is applicable (preferably in weeks)
  - o the proportionate time to be charged to this effort.
- (2) For individuals who maintain time records as the basis for charging costs, supply the detail as requested in Instructions 3(a)(1)

4. LABOR OVERHEAD (Same as Instructions for 2. MATERIALS OVERHEAD)

5. OUTSIDE SPECIAL TESTING

- a. Describe the effort.
- b. Provide the units of time (hours, days, weeks), cost rates, and the vendor.
- c. In accordance with the requirements of the Subcontract Procedures section of the attached Sample Agreement, provide the basis for selection of the vendor. Identify M/WBE vendors contacted for quotes and if none, explain why. Explain and justify the basis for any non-competitive selection.

6. EQUIPMENT

Capability to perform the work with existing facilities and equipment is assumed. It is NYSERDA's policy not to compensate for general purpose facilities or equipment. If some special purpose items are needed solely for this contract and are not available by other means (contractor assets, lease, etc.), then provide the following information for each item of required equipment.

- o vendor
- o model number
- o quantity
- o competitive selection process
- o unit cost and source of cost/price (i.e., quote, catalog, purchase history)
- o description of the use or application (NYSERDA dedicated, contract dedicated, other)

7. TRAVEL

- a. NYSERDA will accept as a direct charge only that travel required to perform the statement of work.
- b. Attach a schedule indicating the need for the proposed travel, the estimated number of person-trips required, destinations, mode and cost of transportation, and number of days subsistence per trip for each destination.
- c. Identify and support any other special transportation costs required in the performance of this project.

8. OTHER DIRECT COSTS

- a. Identify the type of cost (i.e. postage, telephone, publications, graphics, etc.)
- b. Provide cost details for the amounts estimated (hours or units, rates, etc.)
- c. If any internal service center rates are applied, provide details similar to that required in Instruction #B.
- d. For computer costs identify the make, model and type of computer, hours of service and appropriate rates, and whether the machine is company owned or leased.

9. SUBCONTRACTORS/CONSULTANTS

- a. Explain the specific technical area in which such service is to be used and identify the contemplated consultants.
- b. State the number of days and the hours per day of such service estimated to be required and the consultant's quoted rate per day. Document when/where the consultant has received the proposed rate in performing similar services for others.

10. GENERAL & ADMINISTRATIVE (G&A) EXPENSE (Same as instructions for 2. MATERIALS OVERHEAD)

11. FEE OR PROFIT

List the rate proposed for profit. No fee or profit is allowed under product development, demonstration or other certain cost-sharing projects.

## Attachment D - SAMPLE AGREEMENT

Agreement No:

Amount:

Type: **Cost-Sharing**

### Agreement

**Agreement** dated this \_\_\_ day of \_\_\_\_\_, 2\_\_\_ by and between the **NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY** ("NYSERDA"), a New York public benefit corporation having its principal office and place of business at 17 Columbia Circle, Albany, New York 12203-6399, and \_\_\_\_\_ having its principal office and place of business at \_\_\_\_\_ (the "Contractor").

In consideration of the premises and of the mutual covenants and agreements hereinafter set forth, the parties do hereby agree as follows:

#### Article I

##### Definitions

Section 1.01. 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.

(a) General Definitions:

Agreement: This Agreement and Exhibits A, B, C, and D hereto, all of which are made a part hereof as though herein set forth in full.

Budget: The Budget set forth in Exhibit A hereto.

Contract Administrator: NYSERDA's Director of Contract Management, Cheryl L. Earley, or such other person who may be designated, in writing, by NYSERDA.

Effective Date: The effective date of this Agreement shall be the date in the first paragraph of page one, above.

Final Report: The Final Report required by the Statement of Work hereof.

Person: An individual, a corporation, an association or partnership, an organization, a business or a government or political subdivision thereof, or any governmental agency or instrumentality.

Progress Reports: The Progress Reports required by the Statement of Work hereof.

Statement of Work: The Statement of Work attached hereto as Exhibit A.

Subcontract: An agreement for the performance of Work by a Subcontractor, including any purchase order for the procurement of permanent equipment or expendable supplies in connection with the Work.

Subcontractor: A person who performs Work directly or indirectly for or on behalf of the Contractor (and whether or not in privity of contract with the Contractor) but not including any employees of the Contractor or the Subcontractors.

Work: The Work described in the Exhibit A (including the procurement of equipment and supplies in connection therewith) and the performance of all other requirements imposed upon the Contractor under this Agreement.

(b) Data Rights and Patents Definitions:

Contract Data: Technical Data first produced in the performance of the contract, Technical Data which are specified to be delivered under the contract, or Technical Data actually delivered in connection with the contract.

Practical Application: To manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system, and under conditions which indicate that the benefits of the invention are available to the public on reasonable terms.

Proprietary Data: Technical Data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

- (i) are not generally known or available from other sources without obligation concerning their confidentiality;
- (ii) have not been made available by the owner to others without obligation concerning its confidentiality; and
- (iii) are not already available to NYSERDA without obligation concerning their confidentiality.

Subject Invention: Any invention or discovery of the Contractor conceived or first actually reduced to practice in the course of or under this Agreement, and includes any art,

method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plants, whether patented or unpatented, under the Patent Laws of the United States of America or any foreign country.

Technical Data: Recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental or developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents or computer software (including computer software programs, computer software data bases, and computer software documentation). Examples of Technical Data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical Data as used herein does not include financial reports, cost analyses, and other information incidental to contract administration.

Unlimited Rights: Rights to use, duplicate, or disclose Technical Data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

***[If Section 8.03 of this Sample Agreement is applicable, the following Definitions shall be included:]***

(c) Payments to NYSERDA Definitions:

Product: [PRODUCT OR TECHNOLOGY DEFINITION]

New York State Manufacturer: Any manufacturer which provides in excess of 50% value added to the manufacture of the Product, and/or any manufacturer which provides in excess of 50% value added to the manufacture of a Subject Invention, as developed in this Project, within the geographical boundaries of the State of New York. Such value added shall be capable of being proven by an audit conducted in accordance with generally accepted auditing standards. "Value added" means any separable component of the Product or a Subject Invention, paid for by the Contractor to others, for parts, components, and services, and all manufacturing costs, including but not limited to labor, labor overhead, materials, and G&A, but excluding profit.

***OR***

Any manufacturer that (produces/assembles) the Product within the geographic boundaries of New York State.

Sale: A sale or lease of the Product or a Subject Invention.

Sale Price: Gross revenue, excluding returns and allowances such as sales tax, freight, and insurance, if applicable, derived from a Sale.

Seller: The Contractor, or any parent, subsidiary, affiliate, franchisee, licensee or assignee thereof.

## Article II

### Performance of Work

Section 2.01. Manner of Performance. Subject to the provisions of Article XII hereof, the Contractor shall perform all of the Work described in the Statement of Work, or cause such Work to be performed in an efficient and expeditious manner and in accordance with all of the terms and provisions of this Agreement. The Contractor shall perform the Work in accordance with the current professional standards and with the diligence and skill expected for the performance of work of the type described in the Statement of Work. 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 the Work in accordance with this Agreement.

Section 2.02. Project Personnel. It is understood and agreed that Mr./Ms. \_\_\_\_\_ shall serve as Project Director and as such shall have the responsibility of the overall supervision and conduct of the Work on behalf of the Contractor and that the persons described in the Statement of Work shall serve in the capacities described therein. Any change of Project Director by the Contractor shall be subject to the prior written approval of NYSERDA. Such approval shall not be unreasonably withheld, and, in the event that notice of approval or disapproval is not received by the Contractor within thirty days after receipt of request for approval by NYSERDA, the requested change in Project Director shall be considered approved. In the event that NYSERDA requires additional time for considering approval, NYSERDA shall notify the Contractor within thirty days of receipt of the request for approval that additional time is required and shall specify the additional amount of time necessary up to 180 days.

## Article III

### Deliverables

Section 3.01. Deliverables. All deliverables shall be provided in accordance with the Exhibit A Statement of Work.

## Article IV

### Compensation

***[CASE 1: If Milestone Compensation terms, the following Sections 4.01 thru 4.08]:***

Section 4.01. Payments. The Contractor will be paid, upon submission of proper invoices, the prices stipulated herein for Work delivered or rendered and accepted, less deductions, if any as herein provided. The total price which NYSERDA will pay to the Contractor represents the price of the Work. Subject to the limiting provisions of Article XII hereof, as NYSERDA's price of the Work, NYSERDA will pay to the Contractor the total price of \$\_\_\_\_\_, payment of which will be made according to the Schedule of Payments contained in Section 4.02 hereof.

Section 4.02. Schedule of Payments. At the completion of each Milestone Billing Event so identified, the Contractor may submit invoices requesting payment by NYSERDA of the amounts corresponding to the amounts indicated below. NYSERDA shall make payment to the Contractor in accordance with and subject to its Prompt Payment Policy Statement attached hereto as Exhibit C. The Contractor shall be notified by NYSERDA in accordance with Section 504.4 (b)(2) of such Exhibit C, of any information or documentation which the Contractor did not include with such invoice.

Milestone Event

Price

Section 4.03. Title to Equipment. Title shall vest in the Contractor to all equipment purchased hereunder.

***[OR, if specific equipment has been identified by the Project Manager for NYSERDA to retain title in, then use the following:]***

Section 4.03. Title to Equipment. Title shall vest in NYSERDA to all of the following equipment purchased hereunder:

- 1)
- 2)
- 3)
- 4)

Upon the request of NYSERDA, the Contractor shall execute, acknowledge, deliver and perform, or cause to be executed, acknowledged, delivered or performed, all such bills of sale, assignments, conveyances or other documents or acts as NYSERDA may reasonably request in order to assure the better vesting in and confirming to NYSERDA, its successor and assigns, of title to and possession of such equipment. If, after six months following the completion of the Work or the termination of this Agreement, NYSERDA has not removed any such equipment, it will be deemed abandoned and become the property of the Contractor. Any such removal of equipment by NYSERDA shall be at NYSERDA's expense.

Section 4.04. Final Payment. Upon final acceptance by NYSERDA of the Final Report and all other deliverables contained in Exhibit A, Statement of Work pursuant to Section 6.02 hereof, the Contractor shall submit a request for final payment with respect to the Work, together with such supporting information and documentation as, and in such form as, NYSERDA may require. A request for final payment shall include a statement as to whether any invention or patentable devices have resulted from the performance of the Work. All requests for final payment hereunder must, under any and all circumstances, be received by NYSERDA within six months following Acceptance of Work pursuant to Section 6.02 hereof. In accordance with and subject to the provisions of NYSERDA's Prompt Payment Policy Statement, attached hereto as Exhibit D, NYSERDA shall pay to the Contractor within the prescribed time after receipt of such request for final payment, the total amount payable pursuant to Section 4.01 hereof, less all Milestone Billing payments previously made to the Contractor with respect thereto.

Section 4.05. Release by the Contractor. The acceptance by the Contractor of final payment shall release NYSERDA from all claims and liability that the Contractor, its representatives and assigns might otherwise have relating to this Agreement.

Section 4.06. Maintenance of Records. The Contractor shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of three years after acceptance of the Work, full and detailed books, accounts, and records pertaining to the performance of 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 the Contractor in the course of such performance. Further, the Contractor shall keep, maintain, and preserve at its principal office until such time as the Contractor's payment obligations to NYSERDA pursuant to Section 8.03 of the Agreement have been met, full and detailed books, accounts and records in connection with Sales.

Section 4.07. Maximum Commitment. The maximum aggregate amount payable by NYSERDA to the Contractor hereunder is \$\_\_\_\_\_. NYSERDA shall not be liable for any costs or expenses in excess of such amount incurred by the Contractor in the performance and completion of the Work.

Section 4.08. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and such period thereafter to inspect and audit any and all books, accounts and records at the office or offices of the Contractor where they are then being kept, maintained and preserved pursuant to Section 4.06 hereof. Any payment made under the Agreement shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Contractor by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder. Further, the Contractor shall provide to NYSERDA, on a reasonable basis, access to its books and records and those of any parent, subsidiary, affiliate, franchisee, licensee, or assignee to assure compliance with the payment provisions contained in Section 8.03 of the Agreement.

***[If Time & Materials Compensation terms, the following Sections 4.01 thru 4.08]:***

#### Article IV

#### Compensation

Section 4.01. Cost-Sharing. It is understood and agreed that NYSERDA and the Contractor are sharing the costs for the Work to be performed. In consideration for this Agreement and as full compensation for NYSERDA's share of the costs for the performance of all Work, and in respect of all other direct and indirect costs, charges or expenses incurred in connection therewith, NYSERDA shall pay to the Contractor a maximum amount of \$\_\_\_\_\_ for the cost elements identified in the Budget to be funded with NYSERDA funds, subject to the provisions and restrictions contained herein. Such amount shall be paid only to the extent that costs are incurred by the Contractor in performance of the Work in accordance with the provisions of this Agreement, the Budget and the following:

(a) Staff Charges: The Contractor shall be compensated for the services performed by its employees under the terms of this Agreement at the employee's actual wage rate.

(b) Direct Charges: The Contractor shall be reimbursed for reasonable and necessary actual direct costs incurred (e.g., equipment, supplies, travel and other costs directly associated with the performance of the Agreement) to the extent required in the performance of the Work in accordance with the provisions of the Budget. Travel, lodging, meals and incidental expenses shall be reimbursed for reasonable and necessary costs incurred. Costs should generally not exceed the daily per diem rates published in the Federal Travel Regulations. Reimbursement for the use of personal vehicles shall be limited to the Internal Revenue Service business standard mileage rate.

(c) Indirect Costs: The Contractor shall be reimbursed for fringe benefits, overhead, general and administrative (G&A), and other indirect costs included in the Budget at such rates as the Contractor may periodically calculate, consistent with appropriate federal guidelines or generally accepted accounting principles.

Section 4.02. Title to Equipment. Title shall vest in the Contractor to all equipment purchased hereunder.

***[OR, if specific equipment has been identified by the Project Manager for NYSERDA to retain title in, then use the following:]***

Section 4.02. Title to Equipment. Title shall vest in NYSERDA to all of the following equipment purchased hereunder:

- 1)
- 2)
- 3)
- 4)

Upon the request of NYSERDA, the Contractor shall execute, acknowledge, deliver and perform, or cause to be executed, acknowledged, delivered or performed, all such bills of sale, assignments, conveyances or other documents or acts as NYSERDA may reasonably request in order to assure the better vesting in and confirming to NYSERDA, its successor and assigns, of title to and possession of such equipment. If, after six months following the completion of the Work or the termination of this Agreement, NYSERDA has not removed any such equipment, it will be deemed abandoned and become the property of the Contractor. Any such removal of equipment by NYSERDA shall be at NYSERDA's expense.

Section 4.03. Progress Payments. The Contractor may submit invoices for progress payment no more than once each month or no less than once each calendar quarter for Work performed during such period. Invoices shall be addressed to NYSERDA, "Attention: Accounts Payable." Such invoices shall make reference to the Agreement number shown on the upper right hand corner of page one of the Agreement. Invoices shall set forth total project costs incurred. These shall be broken down into NYSERDA's Funding share and into the Cost-Share and Other Cofunding share, and they shall be in a format consistent with the cost categories set

forth in the Budget. Invoices shall provide reasonable documentation for the above to provide evidence of costs incurred, including:

- (a) Staff charges: for each employee, the name, title, number of hours worked, hourly rate and labor extension;
- (b) Direct charges: all direct costs shall be itemized on the invoice and supported by documentation, such as vendor invoices, travel vouchers or other documentation; and
- (c) Indirect charges: indirect cost rates and method by which rates are applied.

The Contractor shall be notified by NYSERDA in accordance with Section 504.4 (b)(2) of NYSERDA's Prompt Payment Policy Statement, attached hereto as Exhibit C, of any such information or documentation which the Contractor did not include with such invoice.

In accordance with and subject to the provisions of such Exhibit D, NYSERDA shall pay to the Contractor, within the prescribed time after receipt of an invoice for a progress payment, 90% of NYSERDA's share of the amount so requested, unless NYSERDA should determine that any such payment or any part thereof is otherwise not properly payable pursuant to the terms of the Agreement or the Budget.

Section 4.04. Final Payment. Upon final acceptance by NYSERDA of the Final Report and all other deliverables contained in Exhibit A, Statement of Work, pursuant to Section 6.02 hereof, the Contractor shall submit an invoice for final payment with respect to the Work, together with such supporting information and documentation as, and in such form as, NYSERDA may require. An invoice for final payment shall include, in addition to the material required pursuant to Section 4.03 hereof, a statement as to whether any invention or patentable devices have resulted from the performance of the Work. All invoices for final payment hereunder must, under any and all circumstances, be received by NYSERDA within six months following Acceptance of Work pursuant to Section 6.02 hereof. In accordance with and subject to the provisions of NYSERDA's Prompt Payment Policy Statement, attached hereto as Exhibit D, NYSERDA shall pay to the Contractor within the prescribed time after receipt of such invoice for final payment, the total amount payable pursuant to Section 4.01 hereof, less all progress payments previously made to the Contractor with respect thereto and subject to the maximum commitment of \$\_\_\_\_\_ set forth in Section 4.07 hereof.

Section 4.05. Release by the Contractor. The acceptance by the Contractor of final payment shall release NYSERDA from all claims and liability that the Contractor, its representatives and assigns might otherwise have relating to this Agreement.

Section 4.06. Maintenance of Records. The Contractor shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of three years after acceptance of the Work, full and detailed books, accounts, and records pertaining to the performance of 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 the Contractor in the course of such performance.

Section 4.07. Maximum Commitment. The maximum aggregate amount payable by NYSERDA to the Contractor hereunder is \$\_\_\_\_\_. NYSERDA shall not be liable for any costs or expenses in excess of such amount incurred by the Contractor in the performance and completion of the Work.

Section 4.08. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and such period thereafter to inspect and audit any and all books, accounts and records at the office or offices of the Contractor where they are then being kept, maintained and preserved pursuant to Section 4.06 hereof. Any payment made under the Agreement shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Contractor by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

## Article V

### Assignments, Subcontracts and Purchase Orders

Section 5.01. General Restrictions. Except as specifically provided otherwise in this Article, the assignment, transfer, conveyance, subcontracting 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.

Section 5.02. Subcontract Procedures. Without relieving it of, or in any way limiting, its obligations to NYSERDA under this Agreement, the Contractor may enter into Subcontracts for the performance of Work or for the purchase of materials or equipment. Except for a subcontractor or supplier specified in a team arrangement with the Contractor in the Contractor's original proposal, and except for any subcontract or order for equipment, supplies or materials from a single subcontractor or supplier totaling under \$15,000, the Contractor shall select all subcontractors or suppliers through a process of competitive bidding or multi-source price review. A team arrangement is one where a subcontractor or supplier specified in the Contractor's proposal is performing a substantial portion of the Work and is making a substantial contribution to the management and/or design of the Project. In the event that a competitive bidding or multi-source price review is not feasible, the Contractor shall document an explanation for, and justification of, a sole source selection. The Contractor shall document the process by which a subcontractor or supplier is selected by making a record summarizing the nature and scope of the work, equipment, supplies or materials sought, the name of each person or organization submitting, or requested to submit, a bid or proposal, the price or fee bid, and the basis for selection of the subcontractor or supplier. An explanation for, and justification of, a sole source selection must identify why the work, equipment, supplies or materials involved are obtainable from or require a subcontractor with unique or exceptionally scarce qualifications or experience, specialized equipment, or facilities not readily available from other sources, or patents, copyrights, or proprietary data. All Subcontracts shall contain provisions comparable to those set forth in this Agreement applicable to a subcontractor or supplier, and those set forth in Exhibit B to the extent required by law, and all other provisions now or hereafter required by law to be contained therein. The Contractor shall submit to NYSERDA's Contract Administrator for

review and written approval any subcontract(s) specified in the Statement of Work as requiring NYSERDA approval.

Section 5.03. Performance. The Contractor shall promptly and diligently comply with its obligations under each Subcontract and shall take no action which would impair its rights thereunder. The Contractor shall not assign, cancel or terminate any Subcontract without the prior written approval of the Contract Administrator as long as this Agreement remains in effect. Such approval shall not be unreasonably withheld and, in the event that notice of approval or disapproval is not received by the Contractor within thirty days after receipt of request for approval by NYSERDA, the requested assignment, cancellation, or termination of the Subcontract shall be considered approved by NYSERDA. In the event that NYSERDA requires additional time for considering approval, NYSERDA shall notify the Contractor within thirty days of receipt of the request for approval that additional time is required and shall specify the additional amount of time necessary up to 180 days.

## Article VI

### Schedule; Acceptance of Work

Section 6.01. Schedule. The Work shall be performed as expeditiously as possible in conformity with the schedule requirements contained herein and in the Statement of Work. The draft and final versions of the Final Report shall be submitted by the dates specified in the Exhibit A Schedule. It is understood and agreed that the delivery of the draft and final versions of such reports by the Contractor shall occur in a timely manner and in accordance with the requirements of the Exhibit A Schedule.

Section 6.02. Acceptance of Work. The completion of the Work shall be subject to acceptance by NYSERDA in writing of the Final Report and all other deliverables as defined in Exhibit A, Statement of Work.

## Article VII

### Force Majeure

Section 7.01. 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, acts of God or the public enemy, expropriation or confiscation of land or facilities, compliance with any law, order or request of any Federal, State, municipal or local governmental authority, acts of war, rebellion or sabotage or damage resulting therefrom, fires, floods, storms, explosions, accidents, riots, 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.

## Article VIII

### Technical Data; Patents; Payments to NYSERDA

Section 8.01. Rights in Technical Data

(a) Technical Data: Rights in Technical Data shall be allocated as follows:

(1) NYSERDA shall have:

- (i) unlimited rights in Contract Data except as otherwise provided below with respect to Proprietary Data; and
- (ii) no rights under this Agreement in any Technical Data which are not Contract Data.

(2) The Contractor shall have:

***[CASE I: If there are no pre-existing patents -- Sections (i), (ii) and (iii)]:***

- (i) the right to withhold Proprietary Data except as otherwise provided in paragraph (ii) below;
- (ii) the right to make, use and sell the Product. If the Contractor fails to make, use, and sell the Product within five years from the Contractor's receipt of Final Payment as described in Section 4.04 hereof, under conditions which indicate that the benefits of the Product are available to the public on reasonable terms, NYSERDA shall have a royalty-free, exclusive, worldwide license sufficient in scope to allow NYSERDA to make, use or sell the Product and to allow others to do so, including a non-exclusive right in Proprietary Data incorporated into or necessary for use in connection with the making, use, or sale of the Product by NYSERDA or its sublicensees. The Contractor agrees to disclose such Proprietary Data to NYSERDA, and NYSERDA may disclose such Proprietary Data to its sublicensees who have agreed to keep such Proprietary Data confidential; and
- (iii) the right to use for its private purposes subject to patent, or other provisions of this Agreement, Contract Data it first produces in the performance of this Agreement provided the data requirements of this Agreement have been met as of the date of the private use of such data.

***[CASE II: If there are pre-existing patents -- Sections (i), (ii) and (iii)]:***

- (i) the right to withhold Proprietary Data except as otherwise provided in paragraph (ii) below; and
- (ii) the right to make, use and sell the Product. If, within five years from the Contractor's receipt of Final Payment as described in Section 4.04 hereof, the Contractor fails to make, use, and sell the Product under conditions which indicate that the benefits of the Product are available to the public on reasonable terms, NYSERDA shall have a royalty-free, exclusive,

worldwide license sufficient in scope to allow NYSERDA to make, use or sell the Product and to allow others to do so, including a non-exclusive right in Proprietary Data and a non-exclusive right throughout the world to United States Patent No. \_\_\_\_\_ incorporated into or necessary for use in connection with the making, use, or sale of the Product by NYSERDA or its sublicensees. The Contractor agrees to disclose such Proprietary Data to NYSERDA, and NYSERDA may disclose such Proprietary Data to its sublicensees who have agreed to keep such Proprietary Data confidential; and

- (iii) the right to use for its private purposes subject to patent, or other provisions of this Agreement, Contract Data it first produces in the performance of this Agreement provided the data requirements of this Agreement have been met as of the date of the private use of such data.

The Contractor agrees that to the extent it receives or is given access to Proprietary Data or other technical, business or financial data in the form of recorded information from NYSERDA or a NYSERDA contractor or subcontractor, the Contractor shall treat such data in accordance with any restrictive legend contained thereon, unless another use is specifically authorized by prior written approval of the Contract Administrator.

#### Section 8.02. Patents.

(a) The Contractor may elect to retain the entire right, title and interest throughout the world to each Subject Invention of the Contractor conceived or first actually reduced to practice in the performance of the Work under the Agreement; except, that with respect to any Subject Invention in which the Contractor elects to retain title, NYSERDA shall have a non-exclusive, non-transferrable, irrevocable, paid-up license for itself, the State of New York and all political subdivisions and other instrumentalities of the State of New York, to practice or have practiced for or on their behalf the Subject Invention throughout the world, exclusively for their own use of the Subject Invention.

(b) Within six months of the time a Subject Invention is made, or as part of the request for final payment, whichever shall occur first, the Contractor shall submit to NYSERDA a written invention disclosure. Within twelve months of the time a Subject Invention is made, or as part of the request for final payment, whichever shall occur first, the Contractor shall advise NYSERDA in writing whether the Contractor elects to retain principal rights in the Subject Invention. The Contractor shall file the patent application for a Subject Invention within two years of the date of election. If the Contractor fails to disclose a Subject Invention, fails to elect to retain principal rights thereto, or to file a patent application within the time specified in this paragraph, or if the Contractor elects not to retain principal rights in a Subject Invention, the Contractor shall convey to NYSERDA title to the Subject Invention unless NYSERDA shall waive in writing its right to take title. In the event the Contractor elects not to retain principal rights in a Subject Invention, the Contractor shall retain a non-exclusive, royalty-free license throughout the world in such Subject Invention transferable only with the written approval of NYSERDA. Such approval shall not be unreasonably withheld, and, in the event that notice of approval or disapproval is not received by the Contractor within thirty days after receipt of

request for approval, the requested transfer shall be considered approved. In the event that NYSERDA requires additional time for considering approval, NYSERDA shall notify the Contractor within thirty days of receipt of the request for approval that additional time is required and shall specify the additional amount of time necessary up to 180 days.

(c) The Contractor shall submit to NYSERDA, not less frequently than annually, written reports which indicate the status of utilization of Subject Inventions in which the Contractor retains principal rights. The reports shall include information regarding the status of development, date of first commercial sale or use, and gross royalties received by the Contractor. Such report shall be furnished to NYSERDA not later than February 1 following the calendar year covered by the report. The Contractor may include the information required by this Section in the Annual Report required by Section 8.03 of this Agreement. In the event the Contractor fails to demonstrate that the Contractor has taken effective steps within three years after a patent is issued to bring the Subject Invention to the point of Practical Application, then NYSERDA shall have the right to grant a non-exclusive or exclusive license to responsible applicants under terms that are reasonable under the circumstances, or to require the Contractor to do so.

(d) The Contractor shall include the foregoing patent clauses, suitably modified to identify the parties, in all subcontracts which involve the performance of Work under this Agreement. The Subcontractor shall retain all rights provided for the Contractor, and the Contractor shall retain all rights provided for NYSERDA, as set forth above.

***[If payments to NYSERDA are required from Contractor's revenues derived from the successful commercialization of a product/service, the following Section 8.03 shall apply:]***

Section 8.03. Payments to NYSERDA.

(a) Payments to NYSERDA: The Contractor agrees to pay to NYSERDA the following amounts:

- (1) When a Sale is made by a Seller when the Seller is a New York State Manufacturer: 1.5% of the Sale Price.
- (2) When a Sale is made by a Seller when the Seller is not a New York State Manufacturer: 5% of the Sale Price.

The Contractor's obligation to make payments to NYSERDA shall commence from the date of the first Sale and shall extend for a period of time as follows:

- (i) in the event of Sales made by a Seller when the Seller is a New York State Manufacturer, for a period of fifteen years thereafter, or until the Contractor pays NYSERDA an amount equal to one times the amount of funds actually paid by NYSERDA to the Contractor under this Agreement, whichever comes first; or
- (ii) in the event of Sales made by a Seller when the Seller is not a New York State Manufacturer, for a period of fifteen years thereafter, or until the Contractor pays

NYSERDA an amount equal to three times the amount of funds actually paid by NYSERDA to the Contractor under this Agreement, whichever comes first.

Such payments shall be payable in annual installments and shall be paid by the first day of March in the calendar year immediately following the year during which the Contractor receives revenues as described above (the "Due Date"). Any payment not received by the applicable Due Date shall be deemed delinquent. A delinquent payment shall be made with interest with such interest computed commencing with the Due Date of such payment. The interest rate payable shall be the "Prime Rate" existing as of the Due Date of such payment plus five (5) percentage points. Such interest shall be compounded monthly.

(b) Annual Reports. The Contractor shall provide NYSERDA an annual report detailing, by manufacturer, the number of items sold or leased, or the payment or other receipts received, and the resultant amount earned by, and paid to, NYSERDA in accordance with paragraph (a) hereof. Such report shall be furnished to NYSERDA not later than February 1 following the calendar year covered by the report. The Contractor's obligation to provide Annual Reports shall commence on February 1 of the calendar year following either the Contractor's receipt of Final Payment pursuant to Section 4.04 hereto, or upon the first Sale, whichever event occurs first. In the event that, for a period of five consecutive years, the annual reports indicate that no Sales are made and no payment is due to NYSERDA, the Contractor may cease submittal of annual reports. If, however, Sales are made in subsequent years, the Contractor's obligation to submit annual reports shall resume.

(c) Licensing or Franchise Agreements. The Contractor shall not enter into any agreement with any party with respect to the licensing, franchising, or assignment of rights in the \_\_\_\_\_ or any Subject Invention which contains provisions inconsistent with the Contractor's obligation as set forth in this Section. Further, any such agreement shall specifically provide NYSERDA the right to review the books and records of any party to such agreement to assure compliance with the payment provisions contained in paragraph (a) hereof. The Contractor shall provide copies of any proposed licensing or franchise agreements to NYSERDA and shall not execute any such agreements without the prior written consent of NYSERDA. Such consent shall not be unreasonably withheld, and, in the event that notice of consent or disapproval is not received by the Contractor within thirty days after receipt of request for approval by NYSERDA, such licensing or franchise agreement shall be considered approved. In the event that NYSERDA requires additional time for considering approval, NYSERDA shall notify the Contractor within thirty days of receipt of the request for approval that additional time is required and shall specify the additional amount of time necessary up to 180 days.

## Article IX

### Warranties and Guarantees

Section 9.01. Warranties and Guarantees. The Contractor warrants and guarantees that:

(a) it is financially and technically qualified to perform the Work;

(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 Work shall be in accordance with sound and currently accepted scientific standards and engineering practices;

(d) all materials, equipment and workmanship furnished by it and by Subcontractors in performance of the Work or any portion thereof shall be free of defects in design, material and workmanship, and all such materials and equipment shall be of first-class quality, shall conform with all applicable codes, specifications, standards and ordinances and shall have service lives and maintenance characteristics suitable for their intended purposes in accordance with sound and currently accepted scientific standards and engineering practices;

(e) neither the Contractor nor any of its employees, agents, representatives or servants has actual knowledge of any patent 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 Work or any part thereof infringes any patent or otherwise interferes with any other right of any Person;

(f) there are no existing undisclosed or threatened legal actions, claims, or encumbrances, or liabilities that may adversely affect the Work or NYSERDA's rights hereunder;

(g) 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 Work;

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

***[If Section 8.03 applies, the following Paragraph (i) is required:]***

(i) during the time the Contractor has obligations to NYSERDA pursuant to Section 8.03 the Contractor will not permit its current or future principals to engage in any competing activities for so long as such principals are employed by the Contractor and for a period of three years thereafter (excluding teaching and research.) Also, during the time the Contractor has obligations to NYSERDA pursuant to Section 8.03 the Contractor will not, and it will not permit its current or future principals to loan monies to entities competing in the development, enhancement, or revision of the Product or any Subject Invention.

## Article X

### Indemnification

Section 10.01. Indemnification. The Contractor shall protect, indemnify and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to the performance of this Agreement. The obligations of the Contractor under this Article shall survive any expiration or termination of this Agreement, and shall not be limited by any enumeration herein of required insurance coverage.

## Article XI

### Insurance

***[Under NYSERDA'S risk management program, projects are defined according to the following categories: Category A (low risk; no insurance or indemnification required); Category B (medium risk; "standard" insurance requirements); and Category C (high risk; insurance to be negotiated on a case-by-case basis). The following language represents NYSERDA'S "standard" insurance requirements. Depending on the type and nature of the proposed project, NYSERDA may also require the following types of insurance: professional liability, product liability, fire and casualty insurance and/or key person insurance.]***

Section 11.01. Maintenance of Insurance; Policy Provisions. The Contractor, at no additional cost to NYSERDA, shall maintain or cause to be maintained throughout the term of this Agreement, insurance of the types and in the amounts specified in the Section hereof entitled Types of Insurance. All such insurance shall be evidenced by insurance policies, each of which shall:

- (a) name or be endorsed to cover NYSERDA, the State of New York and the Contractor 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 11.02. Types of Insurance. 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 in respect of claims arising out of personal injury or sickness or death of any one person, \$1,000,000 in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$1,000,000 in respect of claims arising out of property damage in any one accident or disaster; and
- (b) Commercial automobile liability insurance in respect of motor vehicles owned, licensed or hired by the Contractor and the Subcontractors for bodily injury liability, including death and property damage, incurred in connection with the performance of this Agreement, with

minimum limits of \$500,000 in respect of claims arising out of personal injury, or sickness or death of any one person, \$1,000,000 in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$500,000 in respect of claims arising out of property damage in any one accident or disaster.

Section 11.03. Delivery of Policies; Insurance Certificates. Prior to commencing the Work, the Contractor shall deliver to NYSERDA certificates of insurance issued by the respective insurers, indicating the Agreement number thereon, evidencing the insurance required by Article XI hereof and bearing notations evidencing the payment of the premiums thereon or accompanied by other evidence of such payment satisfactory to NYSERDA. In the event any policy furnished or carried pursuant to this Article will expire on a date prior to acceptance of the Work by NYSERDA pursuant to the section hereof entitled Acceptance of Work, the Contractor, not less than 15 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, upon request the Contractor shall deliver to NYSERDA a certified copy of each policy.

## Article XII

### Stop Work Order; Termination

#### Section 12.01. Stop Work Order.

(a) NYSERDA may at any time, by written Order to the Contractor, require the Contractor to stop all or any part of the Work called for by this Agreement for a period of up to 90 days after the Stop Work Order is delivered to the Contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a Stop Work Order issued pursuant to this Section. Upon receipt of such an Order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the Work covered by the Order during the period of work stoppage consistent with public health and safety. Within a period of 90 days after a Stop Work Order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, NYSERDA shall either:

- (i) by written notice to the Contractor, cancel the Stop Work Order, which shall be effective as provided in such cancellation notice, or if not specified therein, upon receipt by the Contractor, or
- (ii) terminate the Work covered by such order as provided in the Termination Section of this Agreement.

(b) If a Stop Work Order issued under this Section is cancelled or the period of the Order or any extension thereof expires, the Contractor shall resume Work. An equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, if any, or a combination

thereof, and in any other provisions of the Agreement that may be affected, and the Agreement shall be modified in writing accordingly, if:

- (i) the Stop Work Order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this Agreement, and
- (ii) the Contractor asserts a claim for such adjustments within 30 days after the end of the period of Work stoppage; provided that, if NYSERDA decides the facts justify such action, NYSERDA may receive and act upon any such claim asserted at any time prior to final payment under this Agreement.

(c) If a Stop Work Order is not cancelled and the Work covered by such Order is terminated, the reasonable costs resulting from the Stop Work Order shall be allowed by equitable adjustment or otherwise.

(d) Notwithstanding the provisions of this Section 12.01, the maximum amount payable by NYSERDA to the Contractor pursuant to this Section 12.01 shall not be increased or deemed to be increased except by specific written amendment hereto.

#### Section 12.02. Termination.

(a) This Agreement may be terminated by NYSERDA at any time during the term of this Agreement with or without cause, upon 30 days prior written notice to the Contractor. In such event, compensation shall be paid to the Contractor for Work performed and expenses incurred prior to the effective date of termination in accordance with the provisions of the Article hereof entitled Compensation and in reimbursement of any amounts required to be paid by the Contractor pursuant to Subcontracts; provided, however, that upon receipt of any such notice of termination, the Contractor shall cease the performance of Work, shall make no further commitments with respect thereto and shall reduce insofar as possible the amount of outstanding commitments (including, to the extent requested by NYSERDA, through termination of subcontracts containing provisions therefor). Articles VIII, IX, and X shall survive any termination of this Agreement, and Article XVI shall survive until the payment obligations pursuant to Article VIII have been met.

(b) NYSERDA reserves the right to terminate this agreement in the event it is found that the certification filed by the Contractor in accordance with State Finance Law Sections 139-j and 139-k was intentionally false or intentionally incomplete. Upon such finding, NYSERDA may exercise its termination right by providing written notification to the Contractor as set forth in Article XV of this Agreement.

(c) NYSERDA reserves the right to terminate this agreement in the event it is found that the certification filed by the Contractor in accordance with New York State Tax Law Section 5-a, was intentionally false when made. Upon such finding, NYSERDA may exercise its termination right by providing written notification to the Contractor as set forth in Article XV of this Agreement.

*[If Section 8.03 applies, the following Paragraph (d) will be included:]*

(d) In the event of termination, the Contractor's payment obligations set forth in Section 8.03 of the Agreement shall be adjusted as of the effective date of termination, with such payment obligations being calculated as follows:

$$\begin{array}{r} \text{Total Energy Authority} \\ \text{funds actually paid} \\ \text{to the Contractor} \\ \hline \end{array} \quad \times \quad \begin{array}{l} \text{Payments defined} \\ \text{in Section 8.03 of the} \\ \text{Agreement} \end{array}$$

$$\frac{\text{Energy Authority total maximum commitment set forth in Section 4.07 of the Agreement}}{\text{Energy Authority total maximum commitment set forth in Section 4.07 of the Agreement}}$$

(e) Nothing in this Article shall preclude the Contractor from continuing to carry out the Work called for by the Agreement after receipt of a Stop Work Order or termination notice at its own election, provided that, if the Contractor so elects, (1) any such continuing Work after receipt of the Stop Work Order or termination notice shall be deemed not to be Work pursuant to the Agreement and (ii) NYSERDA shall have no liability to the Contractor for any costs of the Work continuing after receipt of the Stop Work Order or termination notice.

### Article XIII

#### Independent Contractor

Section 13.01. 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, the 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.

### Article XIV

#### Compliance with Certain Laws

Section 14.01. Laws of the State of New York. The Contractor shall comply with all of the requirements set forth in Exhibit B hereto.

Section 14.02. 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.

Section 14.03. Other Legal Requirements. The references to particular laws of the State of New York in this Article, in Exhibit B 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 the Contractor to comply with all legal requirements.

## Article XV

### Notices, Entire Agreement, Amendment, Counterparts

Section 15.01. 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 \_\_\_\_\_, or such other address as the Contractor shall have furnished to NYSERDA in writing.

Section 15.02. Entire Agreement; Amendment. This Agreement embodies the entire agreement and understanding between NYSERDA and the Contractor and supersedes all prior agreements and understandings relating to the subject matter hereof. Except as otherwise expressly provided for herein, this Agreement may be changed, waived, discharged or terminated only by an instrument in writing, signed by the party against which enforcement of such change, waiver, discharge or termination is sought.

Section 15.03. 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.

***[If Section 8.03 applies, the following Article XVI is required:]***

## Article XVI

### Business Reorganizations

Section 16.01. Business Reorganizations. In the event the Contractor proposes to consolidate or merge into or with another corporation or entity, or to sell or dispose of all or a majority of the assets of the Contractor, or to otherwise undertake a reorganization which alters or changes the rights of NYSERDA as provided in this Agreement, before any such action shall be taken, the Contractor shall either:

(a) buy out its obligation to make payments to NYSERDA as described in Section 8.03 of this Agreement by paying NYSERDA an amount equal to three times the amount of funds actually paid by NYSERDA to the Contractor under this Agreement; or

(b) assign or otherwise transfer to a new entity the Contractor's obligations under this Agreement, including, but not limited to, the obligation to make payments to NYSERDA as described in Section 8.03 of this Agreement. Such assignment or transfer shall be subject to the prior written approval of NYSERDA. Such approval shall not be unreasonably withheld, and, in the event that notice of approval or disapproval is not received by the Contractor within thirty days after receipt of request for approval, the assignment or transfer shall be considered approved. In the event that NYSERDA requires additional time for considering approval, NYSERDA shall notify the Contractor within thirty days of receipt of the request for approval that additional time is required and shall specify the additional amount of time necessary up to 180 days.

## Section XVII

### Publicity

#### Section 17.01. Publicity.

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

(b) It is recognized that during the course of the Work under this Agreement, the Contractor or its employees may from time to time desire to publish information regarding scientific or technical developments made or conceived in the course of or under this Agreement. In any such information, the Contractor shall credit NYSERDA's 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." Notwithstanding anything to the contrary contained herein, the Contractor shall have the right to use and freely disseminate project results for educational purposes, if applicable, consistent with the Contractor's policies.

(c) Commercial promotional materials or advertisements produced by the Contractor shall credit NYSERDA, as stated above, and shall be submitted to NYSERDA for review and recommendations to improve their effectiveness prior to use. The wording of such credit can be approved in advance by NYSERDA, and, after initial approval, such credit may be used in subsequent promotional materials or advertisements without additional approvals for the credit, provided, however, that all such promotional materials or advertisements shall be submitted to NYSERDA prior to use for review, as stated above. Such approvals shall not be unreasonably withheld, and, in the event that notice of approval or disapproval is not received by the Contractor within thirty days after receipt of request for approval, the promotional materials or advertisement shall be considered approved. In the event that NYSERDA requires additional time for considering approval, NYSERDA shall notify the Contractor within thirty days of

receipt of the request for approval that additional time is required and shall specify the additional amount of time necessary up to 180 days. If NYSERDA and the Contractor do not agree on the wording of such credit in connection with such materials, the Contractor may use such materials, but agrees not to include such credit.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day, month and year first above written.

NEW YORK STATE ENERGY RESEARCH  
AND DEVELOPMENT AUTHORITY

By \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

By \_\_\_\_\_

Jeffrey J. Pitkin  
Treasurer

EXHIBIT B

REVISED 1/05

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 attached agreement, contract, license, lease, amendment, modification or other agreement of any kind (hereinafter, "the Agreement" or "this Agreement") agree to be bound by the following clauses which are hereby made a part of the Agreement (the word "Contractor" herein refers to any party other than NYSERDA, whether a contractor, licensor, licensee, lessor, lessee or any other party):

1. NON-DISCRIMINATION REQUIREMENTS. In accordance with 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, age, disability 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.

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. 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 B, the terms of this Exhibit B shall control.

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

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. COMPLIANCE WITH TAX LAW SECTION 5-a. The following provisions apply to contractors that have entered into agreements in an amount exceeding \$15,000 for the purchase of goods and services:

- (i) Prior to entering into such an agreement, the Contractor is required to provide NYSERDA with a completed Contractor Certification Form (New York State Department of Taxation and Finance Form ST-220).
- (ii) Annually, during the term of the Agreement, and prior to any renewal period (if applicable) and annually thereafter during any renewal period, the Contractor is required to provide NYSERDA with a completed Form ST-220.
- (iii) Certifications referenced in paragraphs (a) and (b) above will be maintained by NYSERDA and made a part hereof and incorporated herein by reference.
- (iv) 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.

## EXHIBIT C

### PART 504

#### PROMPT PAYMENT POLICY STATEMENT

Section 504.1 Purpose and applicability. (a) The purpose of this Part is to implement section 2880 of the Public Authorities Law by detailing the authority's policy for making payment promptly on amounts properly due and owing by the authority under contracts. This Part constitutes the authority's prompt payment policy statement as required by that section.

(b) This Part generally applies to payments due and owing by the authority to a person or business in the private sector under a contract it has entered into with the authority on or after May 1, 1988. This Part does not apply to payments due and owing:

- (1) under the Eminent Domain Procedure Law;
- (2) as interest allowed on judgments rendered by a court pursuant to any provision of law except Section 2880 of the Public Authorities Law;
- (3) to the Federal government; to any state agency or its instrumentalities; to any duly constituted unit of local government, including but not limited to counties, cities, towns, villages, school districts, special districts or any of their related instrumentalities; to any other public authority or public benefit corporation; or to its employees when acting in, or incidental to, their public employment capacity;
- (4) if the Authority is exercising a legally authorized set-off against all or part of the payment; or
- (5) if other State or Federal law or rule or regulation specifically requires otherwise.

Section 504.2 Definitions. As used in this Part, the following terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

- (a) "Authority" means the New York State Energy Research and Development Authority.
- (b) "Contract" means an enforceable agreement entered into between the Authority and a contractor.
- (c) "Contractor" means any person, partnership, private corporation, or association:
  - (1) selling materials, equipment or supplies or leasing property or equipment to the Authority pursuant to a contract;

- (2) constructing, reconstructing, rehabilitating or repairing buildings, highways or other improvements for, or on behalf of, the Authority pursuant to a contract; or
- (3) rendering or providing services to the Authority pursuant to a contract.

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

(e) "Designated payment office" means the Office of the Authority's Controller, located at 17 Columbia Circle, Albany, New York 12203.

(f) "Payment" means provision by the Authority of funds in an amount sufficient to satisfy a debt properly due and owing to a contractor and payable under all applicable provisions of a contract to which this Part applies and of law, including but not limited to provisions for retained amounts or provisions which may limit the Authority's power to pay, such as claims, liens, attachments or judgments against the contractor which have not been properly discharged, waived or released.

(g) "Prompt payment" means a payment within the time periods applicable pursuant to Sections 504.3 through 504.5 of this Part in order for the Authority not to be liable for interest pursuant to Section 504.6.

(h) "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 Part, in order for the Authority not to be liable for interest pursuant to Section 5.06.

(i) "Proper invoice" means a written request for a contract 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 the Authority may reasonably require, including but not limited to any requirements set forth in the contract; and addressed to the Authority's Controller, marked "Attention: Accounts Payable," at the designated payment office.

(j)(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, the Authority has actually received all the purchased goods, property or services covered by a proper invoice previously received in the designated payment office.

- (ii) if a contract 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 contract 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 the Authority for the portion working, completed or delivered, the Authority 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.

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

Section 504.3 Prompt payment schedule. Except as otherwise provided by law or regulation or in Sections 504.4 and 504.5 of this Part, the date of payment by the Authority of an amount properly due and owing under a contract shall be no later than 30 calendar days, excluding legal holidays, after such receipt.

Section 504.4 Payment procedures. (a) Unless otherwise specified by a contract provision, 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 the Authority.

(b) The Authority shall notify the contractor within 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; and
- (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 the Authority fails to notify a contractor of a defect or impropriety within the fifteen 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 the Authority 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, the Authority shall make payment, consistent with any such correction or resolution and the provisions of this Part.

Section 504.5 Exceptions and extension of payment due date. The Authority has determined that, notwithstanding the provisions of Sections 504.3 and 504.4 of this Part, any of the following facts or circumstances, which may occur concurrently or consecutively, reasonably justify extension of the payment due date:

- (a) If the case of a payment which a contract provides 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 the contract or other State or Federal mandate has not been submitted to the Authority 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 the Authority and the date when the Authority 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 the contract or by other State or Federal mandate, whether to be performed by or on behalf of the Authority or another entity, or is specifically permitted by the contract or by other State or Federal provision and the Authority 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, the Authority 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 the Authority 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 the Authority, 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 the Authority.

Section 504.6 Interest eligibility and computation. If the Authority fails to make prompt payment, the Authority shall pay interest to a contractor on the payment when such interest computed as provided herein is equal to or more than ten dollars. 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.

Section 504.7 Sources of funds to pay interest. Any interest payable by the Authority pursuant to this Part shall be paid only from the same accounts, funds, or appropriations that are lawfully available to make the related contract payment.

Section 504.8 Incorporation of prompt payment policy statement into contracts. The provisions of this Part in effect at the time of the creation of a contract shall be incorporated into and made a part of such contract and shall apply to all payments as they become due and owing pursuant to the terms and conditions of such contract, notwithstanding that the Authority may subsequently amend this Part by further rulemaking.

Section 504.9 Notice of objection. Unless a different procedure is specifically prescribed in a contract, a contractor may object to any action taken by the Authority pursuant to this Part which prevents the commencement of the time in which interest will be paid by submitting a written notice of objection to the Authority. 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 address set forth in Section 504.2(e). The Vice President of the Authority, or his or her designee, shall review the objection for purposes of affirming or modifying the Authority's action. Within 15 working days of the receipt of the objection, the Vice President, or his or her designee, shall notify the contractor either that the Authority'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 30 working days.

Section 504.10 Judicial Review. Any determination made by the Authority pursuant to this Part which 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 Part or any other review procedure that may be specified in the contract or by other law, rule, or regulation.

Section 504.11 Court action or other legal processes. (a) Notwithstanding any other law to the contrary, the liability of the Authority to make an interest payment to a contractor pursuant to this Part 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 the Authority 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.

Section 504.12 Amendments. These regulations may be amended by resolution of the Authority, provided that the Chair, upon written notice to the other Members of the Authority, may from time to time promulgate nonmaterial amendments of these regulations.

