



**Renewable Portfolio Standard Program Purchase of  
Renewable Energy Attributes  
Request for Proposals (RFP) No. 2226**

**Application Packages Due: Thursday, February 10, 2011 by 5:00 pm Eastern Time\***

**APPROXIMATELY \$250 MILLION AVAILABLE**

The New York State Energy Research and Development Authority (NYSERDA) seeks to procure the environmental attributes created by eligible generation resources under the Renewable Portfolio Standard Program (RPS Attributes). While not required, NYSEDA encourages entities interested in participating in this procurement to submit the attached Notice of Intent to Bid Form (Attachment F) as soon as possible. Those entities filing a Notice of Intent to Bid Form will be notified by email of any changes to this RFP.

NYSERDA was created in 1975 by the New York State Legislature as a public benefit corporation. As designated in the Public Service Commission (PSC) *Order Regarding Renewable Portfolio Standard*, issued and effective September 24, 2004, NYSEDA acts as the Central Administrator of the RPS program. RFP 2226 will be implemented through a two-step process, consisting of (1) an application step that will prequalify bidders, and (2) a competitive Bid Proposal submission step. **Only those bidders found prequalified through the Step One application process will be permitted to submit Bid Proposals or otherwise participate in Step Two.**

NYSERDA seeks to purchase, under the terms and conditions of RFP 2226, RPS Attributes associated with electricity generated on or after May 1, 2011 from eligible Bid Facilities that enter Commercial Operation after January 1, 2003 and on or before July 31, 2012 (unless extended to December 31, 2012; see Section XIV).

**Application Package Submission:** Bidders must submit an original and three (3) copies of the Application Package with a completed and signed Application Package Checklist (Attachment A to the RFP) attached to the front of each copy. Application Packages must be **received** by NYSEDA by 5:00 p.m. Eastern Time\* on February 10, 2011. Application packages must be clearly labeled and submitted to:

**Roseanne Viscusi, RFP 2226  
NYS Energy Research and Development Authority  
17 Columbia Circle  
Albany, NY 12203-6399**

Program questions should be directed to [rps@nyserda.org](mailto:rps@nyserda.org) (no phone calls).  
Contractual questions should be directed to **Nancy Marucci, ext. 3335**, e-mail [nsm@nyserda.org](mailto:nsm@nyserda.org)

No communication intended to influence this procurement is permitted except by contacting **Kevin Hale at (518) 862-1090, ext. 3266 or [kch@nyserda.org](mailto:kch@nyserda.org) (Designated Contact)**. Contacting anyone other than the 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 offerer and (2) may result in the proposer not being awarded a contract.

\*Late packages will be returned and those lacking the appropriate completed and signed package Checklist may be returned. **Faxed or e-mailed packages will not be accepted.** Packages will not be accepted at any NYSERDA location other than the address above. If changes are made to this solicitation, notification will be posted on NYSERDA's web site at [www.nyserda.org](http://www.nyserda.org). Please check the website immediately before submitting an application package.

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## **I. BACKGROUND ON THE NEW YORK STATE RENEWABLE PORTFOLIO STANDARD**

The New York State Public Service Commission (Commission) adopted the Renewable Portfolio Standard (RPS) program to address the energy, economic, and environmental objectives of New York State by procuring the rights to the environmental attributes created by diverse, environmentally responsible energy technologies. *See* Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, and the various orders issued under that proceeding (Orders).

The Orders designate the New York State Energy Research and Development Authority (“NYSERDA”) as the Central Procurement Administrator of the RPS Program. Under this RFP, and in future offerings, NYSEDA seeks to accomplish the RPS objectives by contracting with suppliers, on a competitive basis, for the environmental attributes created by eligible generation resources under the Renewable Portfolio Standard (RPS Attributes). The most recent Order, issued and effective December 3, 2010, authorizes NYSEDA to issue this Request for Proposals (RFP). The December 3 Order further directs NYSEDA to conduct competitive solicitations at least annually, and, with the concurrence of the Department of Public Service, as frequently as is deemed necessary and advisable in pursuit of achieving program goals by 2015.

Information regarding future solicitations can be found at:

<http://www.nyserda.org/rps/PastSolicitations.asp> The RPS Orders can be accessed at the Commission’s RPS webpage at [www.dps.state.ny.us/03e0188.htm](http://www.dps.state.ny.us/03e0188.htm). All Bidders are strongly advised to review the Orders before participating in this RFP.

## **II. OBJECTIVE OF THIS RFP**

NYSERDA seeks to purchase, under the terms and conditions of RFP 2226, RPS Attributes associated with electricity generated on or after May 1, 2011. Bid Facilities awarded contracts under RFP 2226 must enter Commercial Operation on or before July 31, 2012 (unless extended to December 31, 2012; see Section XIV, Commercial Operation Milestone Date). To accomplish this objective, NYSEDA has designed this procurement as a two-step process, consisting of (1) an application step that will prequalify bidders, and (2) a competitive Bid Proposal submission step. **Only those bidders found prequalified through the Step One application process will be permitted to submit Bid Proposals or otherwise participate in Step Two.**

**CAPITALIZED TERMS AND ABBREVIATIONS USED IN THIS RFP ARE DEFINED IN SECTION XXV (DEFINITIONS). BIDDERS SHOULD REFER TO SECTION XXII WHEN READING THIS DOCUMENT.**

## **III. INTENT TO BID**

Submittal of a Notice of Intent to Bid Form (Attachment F) is optional but encouraged, as it will enable communication of any changes in process or documents to prospective Bidders.

Notification of such change(s) will be posted on the RPS website and sent via email to those parties who have submitted a Notice of Intent to Bid Form.

#### IV. BIDDERS' TELECONFERENCE

NYSERDA will conduct a teleconference on **Tuesday, February 1, 2011 at 3:00 p.m. Albany, NY time**. On the teleconference, NYSERDA will review the bid process, the Application Package requirements, the Bid Proposal Requirements, and the RPS Standard Form Contract. Questions will be taken and, to the extent possible, responses will be provided during the conference. **Bidders who intend to participate must send an email indicating such to [rps@nyserda.org](mailto:rps@nyserda.org), by 12:00 noon on Friday, January 28, 2011, with the subject line "Bidders' Teleconference."** Respondents will be provided with a teleconference dial-in number and pass code. Those parties who submit an Intent to Bid form (Attachment F to this RFP) will automatically be provided with the teleconference number and pass code.

#### V. SCHEDULE

The schedule for this RFP process is established to provide an expedited process for proposals, evaluations, and contract execution. The time-line for the RFP 2226 process is as follows:

RFP Release	Thursday, January 20, 2011
Notice of Intent to Bid Form (optional) due	Immediately
Bidders' Teleconference	Tuesday, February 1, 2011
Deadline to submit Application Packages	Thursday, February 10, 2011
Deadline to submit Provisional Certification Applications	Thursday, February 10, 2011
NYSERDA notifies Qualified Bidders	Friday, February 25, 2011
Deadline to submit Bid Proposals	Wednesday, March 16, 2011
NYSERDA notifies winning Bidders (on or about)	Wednesday, April 13, 2011

Please note that the above dates are subject to change. Submittal of the Notice of Intent to Bid Form (Attachment F) is optional but encouraged, as it will enable communication of any changes in process or documents to prospective Bidders. Notification of such change(s) will be posted on the RPS website and sent via email to those parties who have submitted a Notice of Intent to Bid Form.

#### VI. NYSERDA'S RPS FUNDING

The contracts awarded through this RFP will be funded through the non-bypassable "RPS surcharge" levied on the delivery portion of electricity bills of all New York retail customers who pay the System Benefits Charge ("SBC"). The RPS surcharge is collected by the State's investor-owned utilities, pursuant to the Orders. The September 24, 2004 Order directed each of the State's investor-owned utilities to collect a fixed dollar amount through the rate surcharge on an annual basis, in varying amounts for calendar years 2006 through 2013, and to make the fixed

dollar payments set forth at Appendix E of the September 24, 2004 Order to NYSERDA on a quarterly schedule beginning in 2006 and continuing through 2013. In an order dated April 2, 2010, the Commission established a new schedule of payments to NYSERDA for funding of the RPS program that, in the aggregate, total approximately \$3 billion through 2024.<sup>1</sup> This collection process and the surcharge pass-through transfer payments to NYSERDA are similar to the process that has been used successfully for SBC funds since 1998. As directed by the Orders, each of the five investor-owned utilities has entered an agreement with NYSERDA to make transfer payments of the RPS surcharge funds.

NYSERDA funds are maintained by the New York State Commissioner of Taxation and Finance, NYSERDA's fiscal agent pursuant to the Public Authorities Law (Section 1859); the RPS surcharge funds are maintained in a segregated account. The RPS revenues and expenditures are separately reported in NYSERDA's annual financial statements, which are public and subject to annual independent audit. The RPS funds cannot be used for any purpose other than the funding of the RPS Program.

## **VII. ELIGIBILITY**

### **A. Provisional Certification**

Each Bid Facility designated in an Application Package for the supply of RPS Attributes under this RFP must qualify as an eligible resource under the "Main Tier Eligible Electric Generation Sources" rules, as set forth at Appendix B of the September 24, 2004 Order as amended by the attachment to the June 28, 2006 "Order on Customer Sited Tier Implementation," and as further defined and clarified within the body of the Orders.

Pursuant to the Commission's "Order Approving Petition with Modifications," issued and effective November 22, 2010, clean wood separated from construction and demolition debris at approved material reclamation facilities is eligible for use as biomass fuel, provided that all of the requirements listed within the November 22, 2010 Order (see Order pp. 16-17) are fulfilled.

To be eligible for an award under RFP 2226, a Bid Facility must have first commenced Commercial Operation on or after January 1, 2003, or must produce new, incremental RPS-eligible Attributes from new Bid Capacity above a historical baseline, as established through the Provisional Certification process.

In addition, each Bid Facility must meet all of the requirements of the Provisional Certification process. Provisional Certification affirms that a project can meet the RPS Program's eligibility criteria. Only after the project is provisionally certified may it be considered for the award of an RPS contract. Such certification will be made through the Provisional Certification process, as outlined on NYSERDA's website at <http://www.nyserda.org/rps/appIntroProcess.asp>

Bidders must include in their Provisional Certification submissions to NYSERDA data pertaining to facility and fuel characteristics, as appropriate to the resource, in sufficient detail to

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<sup>1</sup> See "Order Authorizing Customer-Sited Tier Program Through 2015 and Resolving Geographic Balance and Other Issues Pertaining to the RPS Program," issued and effective April 2, 2010, Appendix, Table 16.

enable a full evaluation regarding eligibility. After analyzing the submissions, NYSERDA will forward the results of its analyses and recommendations to the Director, Office of Energy Efficiency and Environment (“OEEE”), Department of Public Service, who will make a determination regarding Provisional Certification and notify each Bidder of such determination.

**It is strongly recommended that Bidders visit this website and apply for Provisional Certification as soon as possible. Please note that facilities granted Provisional Certification under a previous RFP must reapply for provisional certification.**

## **B. Operational Certification**

Operational Certification must be applied for and granted before payments under the RPS Standard Form Contract will be made by NYSERDA. Operational Certification verifies that the Bid Facility has been constructed and/or will operate in accordance with the proposal submitted, and for which Provisional Certification was granted. To become Operationally Certified, information and documentation must be provided to NYSERDA. NYSERDA will recommend to the OEEE Director whether or not Operational Certification should be granted. Once Operationally Certified, NYSERDA will make payments based on monthly invoicing, in accordance with the terms of the RPS Standard Form Contract. Payments for RPS Attributes from Bid Facilities electing to use clean wood separated from construction and demolition debris from approved material reclamation facilities will be further conditioned on the acceptance of third-party feedstock testing results, in accordance with the Commission’s November 22, 2010 Order.

Verification by NYSERDA that the Bid Facility has entered Commercial Operation and is eligible for Operational Certification may be based in part on documentation, audits, site visits, and attestations. For Fuel-Based Bid Facilities, the Seller must provide procedures and maintain detailed recordkeeping on the use of both eligible and ineligible fuels and the energy produced by each fuel category, as described in Exhibit F of the RPS Standard Form Contract (see Attachment H to this RFP) and/or pursuant to Commission orders. Bid Facilities using clean wood separated from C&D debris at an approved material reclamation facility (MRF) must prepare a fuel procurement plan specifically for the use of this resource and additional fuel quality tests will be required. Specific requirements are listed in the recent PSC Order with regard to this resource (source). Exhibit F to the standard form contract (Attachment H to this RFP) will be amended to include those requirements for facilities that plan to use MRF separated wood. For more information on the Operational Certification process see <http://www.nyserdera.org/rps/mainTierParticipation.asp>.

## **C. Eligibility Limitations**

**State/Local Investments.** Offers of RPS Attributes produced by projects or Bid Facilities that have collected New York State System Benefits Charge (“SBC”) funding or incentives, grants, financial guarantees, or debt financing support for investment in any electric or gas plant, as such terms are defined under Section 2 of the New York State Public Service Law, except for equipment or appurtenances designed to measure, assess or lessen the environmental impact of such facilities in a manner or to an extent not already required under law, regulation or an existing permit, are ineligible for participation in RFP 2226.

RPS Attributes produced by External Bid Facilities that have been the basis or subject of any award of provincial, state and/or local-based SBC-like payments or incentives, grants, financial guarantees, or debt financing support are also ineligible for RFP 2226. If selected under RFP 2226, Bidders offering RPS Attributes produced by an External Bid Facility will be required to certify on an annual basis that the Bid Facility(s) have received no such support with regard to the facility or project associated with such bid. Bidders offering RPS Attributes from External Bid Facilities which accept such support or assistance at any time during the Contract Delivery Term will become ineligible at such time, and associated RPS contracts will be subject to contract termination.

No facility or project may simultaneously collect both RPS incentive payments and production-based incentives or subsidy payments from any other state or local source for the Quantity Obligations created as the result of a Standard Form Contract executed under RFP 2226.

All Bid Facilities are subject to the Bid Facility Electricity Delivery Requirements as set forth at Section XIX. RPS Attributes that are the subject of a current award or contract from a previous RFP are not eligible for RFP 2226.

#### **D. Subsequent Changes**

Bid Proposals and/or Bid Facilities selected under this RFP will not be subject to subsequent changes in RPS eligibility rules; however, in the event that the Bid Facility fails to maintain eligibility consistent with the RPS requirements as they existed on January 20, 2011, such ineligibility will extend to the RPS Attributes associated with the Bid Facility's production during the period in which the Bid Facility fails to maintain eligibility.

### **VIII. PARTICIPATING IN THIS RFP**

NYSERDA has designed this procurement as a two-step process, consisting of (1) an application step that will prequalify bidders, and (2) a competitive Bid Proposal submission step. **Only those bidders found prequalified through the Step One application process will be permitted to submit Bid Proposals or otherwise participate in Step Two.**

### **IX. STEP ONE – APPLICATION PACKAGES**

#### **A. Submitting an Application Package**

To be considered for qualification to participate in Step Two (Bid Proposal), Bidders must provide NYSERDA with one complete original Application Package and three (3) copies for each Bid Facility from which RPS Attributes may be used for performance under a Standard Form Contract. NYSERDA will review each Application Package and make determinations as to qualification for participation in Step Two. It is anticipated that all bidders will be notified of such determinations no later than Friday, February 25, 2011.

A complete Application Package consists of:

1. Signed Application Package Checklist (Attachment A hereto); (**Application Packages lacking a completed and signed Checklist may be rejected.**)
2. Disclosure of Prior Findings of Non-Responsibility Form (Attachment B hereto);
3. Bid Deposit, as specified below;
4. Provisional Certification Application Form or copy of proof of certification. Bidders must have applied for or have been granted Provisional Certification for the proposed Bid Facility(ies). Applications for Provisional Certification can be obtained on NYSERDA's website at <http://www.nyserda.org/rps/appIntroProcess.asp>. **It is strongly recommended that Bidders visit this website and apply for Provisional Certification as soon as possible. Please note that facilities granted Provisional Certification under a previous RFP must reapply for provisional certification.**

**Bid Deposit.** Except as described below, each Application Package must include a Bid Deposit, in the form of electronic wire deposit or certified funds, in an amount determined by the Nameplate Capacity of the Bid Facility. Electronic deposit information and instructions can be obtained by emailing [rps@nyserda.org](mailto:rps@nyserda.org)

The amounts are as follows:

<b>Nameplate Capacity:</b>	<b>Bid Deposit Required:</b>
Less than 5.00 MW	None
5.00 – 19.99 MW:	\$15,000
20.00 – 49.99 MW:	\$25,000
50.00 MW or more:	\$50,000

Bid Deposits will be refunded to Bidders whose Bid Proposals have been selected by NYSERDA for contract upon execution of the RPS Standard Form Contract (Attachment G or H) and NYSERDA's receipt of the Contract Security as described in Section XV (Contract Security). Bid Deposits will be refunded to Bidders whose Bid Proposals have not been selected by NYSERDA, if not before, immediately upon the expiration of the time during which the Bid Proposal remains an open offer (45 days from submittal. See Section X; A). No interest will be paid on any Bid Deposit.

**Deadline for Submitting an Application Package:** One (1) original and three (3) copies of each Application Package must be **received** by NYSERDA no later than 5 p.m. on Thursday, February 10, 2011. All information must be provided; all information provided must be legible. All signatures must be provided and notarized as indicated. Failure to provide any information requested may result in the Application Package being declared non-responsive and rejected. Additional information and materials beyond those requested may be submitted only if necessary for clarification. Additional information and materials beyond what is identified in this RFP may be requested by NYSERDA.

## **B. Application Package Evaluation**

NYSERDA will evaluate Application Packages for completeness and against the qualification criteria specified in Section IX; A (Submitting an Application Package). All Bidders will be contacted by NYSERDA on or before Friday, February 25, 2011 with determinations as to the qualification of Bid Facilities identified in Application Packages. Bidders deemed qualified to submit a Bid Proposal as a result of this review will be assigned a "Bidder Number" and invited to submit one or more Bid Proposals according to instructions that will be provided.

## **X. STEP TWO – BID PROPOSALS**

### **A. Submitting a Bid Proposal**

At the time that Bidders are notified of their qualification status, qualified bidders will be provided with Bid Proposal and Bid Price forms, and will be invited to submit one or more Bid Proposals. Each Bid Proposal must designate a single Bid Facility. Up to four (4) alternative Bid Proposals, none of which shall be for a Bid Quantity Percentage less than 30% or more than 95%, may be submitted for a single Bid Facility, only one of which can be awarded.

The submittal of a Bid Proposal will constitute a binding offer to contract under the RPS Standard Form Contract terms (attached hereto as Attachments G and H) and such offer must remain open for a period of at least forty-five (45) days from the deadline for submittal or such time as designated by NYSERDA at the time of notification of qualification for Step Two. All Bid Proposals become the property of NYSERDA.

**NYSERDA RETAINS THE RIGHT TO ACCEPT ANY OR ALL BIDS, TO REJECT ANY OR ALL BIDS, TO SOLICIT RE-BIDS, AND TO MAKE COUNTEROFFERS TO SUCH BID(S) AS IT DEEMS APPROPRIATE.**

Bid Proposals packages, including each alternative Bid Proposal, must contain the following forms and information, without exception, and must be organized as indicated below.

1. Section 1: Cover Letter
2. Section 2: General Description of the Bidder and Bid Facility including a fully completed Project Schedule Form (Attachment C to this RFP).
3. Section 3: Economic Benefits to New York State Created by the Bid Facility
  - a. Long Term Jobs created in New York State
  - b. Payments to New York State and/or its Municipalities
  - c. Royalties and/or Payments for Fuel and Resource Access
  - d. In-State Purchases or Consumption of Goods
  - e. Short Term Employment of New York State Workers
4. Verification Plan
5. Completed Bid Proposal Form (see Sample Form, Attachment D to this RFP)
6. Completed Bid Price Form (see Sample Form, Attachment E to this RFP) (submit as part of package but in separate envelope, one copy only).

Bid Proposals should be concise and clearly organized in the format listed above. Bid Proposals should be no longer than 20 pages in length, not including the Bid Proposal Form and Bid Price Form. Information may be provided either single or double-sided, but a page is considered one side of an 8-1/2" x 11" piece of paper. The font size should not be smaller than 11 point.

Bidders must submit one original and nine (9) copies of each Bid Proposal. Bid Proposals must be received by NYSERDA by 5:00 pm Eastern Time on Wednesday, March 16, 2011; this date will be confirmed at the time Bidders are notified that they have qualified for participation in Step Two (expected February 25, 2011). Bidders will not be reimbursed by NYSERDA for any costs associated with the preparation of their proposals.

**Section 1: Cover Letter (1 page)** The cover letter must include all signatures necessary to approve and submit the Bidder's Proposal by a representative having the authority to contractually commit the Bidder for Bidder's offer provided in the Bid Proposal. Additionally, the cover letter should also include the following declaration:

*[Insert legal name of Bidder] (the "Bidder") hereby acknowledges receipt of the NYSERDA's 2011 Request for Proposals 2226 (the "RFP") and acknowledges that it has read and agrees to be fully bound by, all of the terms, conditions and other provisions set forth in RFP 2226 and the RPS Standard Form Contract. Additionally, the Bidder hereby makes the following representations to NYSERDA:*

1. *all of the statements and representations made in this proposal are true to the best of the Bidder's knowledge and belief;*
2. *the Bidder has sufficient rights in title to the RPS Attributes emanating from the Bid Facility identified in the Bid Proposal to perform under the RPS Standard Form Contract;*
3. *the Bidder has obtained all necessary corporate authorizations, approvals and waivers that will enable the Bidder to commit to the terms provided in this proposal;*
4. *In accordance with Section 2878 of the New York State Public Authorities Law, Bidder warrants, under penalty of perjury, that its bid was arrived at independently and without*

*collusion aimed at restricting competition.*

- 5. The proposal is a firm and binding offer, for a period of at least 45 days from the date Bid Proposals are due.*

**Section 2: General Description of the Bidder and Bid Facility (up to 3 Pages)** Each Bidder must fully address the following: Provide a profile of the Bidder's company and its parent company, if any. Describe the relationship between the Bidder and the investors, sponsors and owner(s) of the Bid Facility. Identify and explain any Federal grants or tax incentives that have been applied for or are expected to be applied for and fully describe the status of such applications. Provide a description of the Bid Facility including resource type, location, expected fuel supply type, Nameplate Capacity, projected capacity factor, major permits/approvals necessary to build and operate the Bid Facility, and the major equipment manufacturers/providers. Describe how it is expected that the electrical output of the Bid Facility will be delivered, sold and consumed (see Sections VII and XIX). Also, provide a fully completed Project Schedule Form (Attachment C to this RFP).

Bidders who intend to satisfy the Bid Facility Electricity Delivery Requirement through options A.2 or A.3 of Section XIX must include documentation demonstrating that arrangements have been made for measurement, verification and tracking of the electricity associated with the Quantity Obligation.

**Section 3: Economic Benefits Created by the Bid Facility (up to 12 Pages)** For evaluation and scoring purposes, Bidders have an opportunity to claim and describe the economic benefits expected to accrue to New York as a result of the development, construction/modification, and operation of the Bid Facility.

Only those economic benefits falling within the categories defined below will be considered, and in no instance will NYSEERDA or its Technical Evaluation Panel ("TEP") consider any indirect benefits or those created by any "multiplier effect" or other attribution method under which the creation of peripheral spending and jobs might be credited to direct capital infused into the economy. Bidders are not permitted to apply escalation rates or cost of living adjustments when calculating the Expected Total Dollars in each category. Bidders not seeking credit for economic benefits in any category may leave the section blank. Any responses left blank will receive zero points for the applicable category.

**Economic benefits previously claimed with respect to a Bid Facility that was awarded a contract in a previous solicitation are not eligible for evaluation.**

Bidders offering RPS-eligible Attributes from Repowering, hydroelectric upgrades and co-firing applications, the Bid Capacity must be calculated as the product of: (i) the Bid Quantity divided by the Expected Average Annual Production, and (ii) the Nameplate Capacity.

The following categories are listed in order of importance from the highest weighted category to the lowest weighted category.

- a. **Long-Term NYS Jobs:** Describe the degree to which the operation of the Bid Facility will directly create (add) long term jobs (jobs lasting more than 3 years) in New York. Examples of such jobs include, but are not limited to, those associated with operations and maintenance, plant management, or similar. List and describe the type of jobs including the position title, specific role and responsibilities, and the expected duration of such jobs. Provide the number of jobs, in Full Time Equivalents (FTEs), and the expected average annual salary/and or total compensation and direct benefits (excluding overhead for normal operations) for all jobs. Provide expected total dollars for compensation/salaries and benefits **during the first three (3) Contract Years of operation** (Expected Total Dollars). Divide the Expected Total Dollars by the Bid Capacity, and provide the result.
- b. **Payments to New York State and/or its Municipalities:** Describe the degree to which the operation of the Bid Facility will provide new or increased local property tax revenues to school districts, cities, towns or other taxing jurisdictions in New York, or alternatively, Payments in Lieu of Taxes (PILOT) or other alternative taxing mechanisms and forms of compensation. List and describe separately all tax payment, PILOT arrangements and/or “host” community payment agreements with all affected jurisdictions. Provide expected total dollars paid to all taxing jurisdictions and municipal entities through the first three (3) Contract Years of operation (Expected Total Dollars) Divide the Expected Total Dollars by the Bid Capacity, and provide the result. NYSERDA reserves the right to reduce, for evaluation purposes only, the amount of dollars reported by the amount of any benefits under any NYS Empire State Development sponsored business program.
- c. **Payments for Fuels and Resource Access:** Describe the degree to which the operation of the Bid Facility will provide royalties, production-based payments, land lease or land use payments or other forms of compensation to residents and companies in New York, associated with securing rights to or directly acquiring fuel or access to wind resources for the Bid Facility (e.g., wind, biomass, biogas). Examples include payments for leases of land in New York, payments associated with the production of electricity, fuel purchases of biomass sourced or harvested in New York, and purchases for landfill gas produced in New York. Provide total dollars expected to be paid through the first three (3) Contract Years of operation (Expected Total Dollars). Divide the Expected Total Dollars by the Bid Capacity, and provide the result.
- d. **In-State Purchases or Consumption of Goods:** Describe the degree to which local and state economic activity will increase as a result of:
- i. the purchase and consumption of local goods and services (other than those in e., below) by non-NY-resident workers, such as, but not limited to, food, lodging, vehicles, equipment, fuel, and/or
  - ii. the purchase of materials sourced from within New York such as, but not limited to, gravel, steel, concrete and similar materials and/or the purchase and use of equipment and products manufactured or assembled from within New York and/or the use of rental equipment or similar supplies sourced from within New

York. Wind turbine components not produced or assembled within New York State will not be considered and should not be included.

List each type of purchase or service that will be used and provide total dollars expected to be spent on all the purchases or consumption of local/in-state goods from this category through the first three (3) Contract Years of operation (Expected Total Dollars). Divide the Expected Total Dollars by the Bid Capacity, and provide the result.

- e. **Short-Term Employment of NYS Workers:** Describe the degree to which New York workers will be employed on a short-term basis. Illustrative examples include direct employment of NYS construction, rail and port workers, contractors and laborers, engineering or environmental service providers, consultants, financial service advisors, and legal service providers associated with the development and construction/modification of the Bid Facility. List and describe the type of jobs and the expected duration of such jobs. Provide the number of jobs, in Full Time Equivalents (FTEs), and the expected average annual salary and benefits for all jobs. Provide expected total dollars for salaries and benefits through the first three (3) Contract Years of operation (Expected Total Dollars). Divide the Expected Total Dollars by the Bid Capacity, and provide the result.
- f. Divide the Expected Total Dollars from all categories listed above (a through e) by the Bid Capacity, and provide the result.

**Section 4: Verification Plan (up to 3 pages).** Bidders must provide a detailed verification plan specifying how the economic benefits claimed for evaluation (see 3a-3e above) will be documented for contract compliance (see Section XII). Specifically Bidders should include a description of all documents, reports, contracts, subcontracts, invoices, or other information/documentation that may be submitted to verify the economic benefits claimed hereunder. In doing so, Bidders should identify the entity issuing such documentation (subcontractor, taxing jurisdiction, equipment service company, etc.) and explain how the Bidder intends to attain such documentation for ultimate submission to NYSERDA for compliance under Section XII of this RFP.

**Section 5: Bid Proposal Form; Bid Price Form.** At the time Bidders are notified of qualification (Section IX; B), NYSERDA will provide Qualified Bidders with a Bid Proposal Form and a Bid Price Form, in the formats provided in the Sample Bid Proposal and Bid Price Forms, Attachments D and E to this RFP. Bidders will be responsible for submitting one (1) fully completed and signed Bid Proposal Form and one (1) fully completed and signed Bid Price Form with each Bid Proposal.

**THE BID PRICE FORM MUST BE SUBMITTED IN A SEPARATE SEALED ENVELOPE MARKED “RFP 2226 BID PRICE FORM” CLEARLY IDENTIFYING THE BIDDER, BID FACILITY, AND BIDDER NUMBER.**

## **XI. BID PROPOSAL EVALUATION**

NYSERDA will employ a scoring system comprised of two evaluation components totaling 100 points:

1. Expected Economic Benefits to New York: 30 points
2. Bid Price: 70 points

Alternate Bid Proposals for a single Bid Facility will be evaluated and scored independently; only one Bid Proposal for a single Bid Facility may be awarded.

**NYSERDA has developed and will employ a Maximum Acceptable Bid Price (MABP); NYSERDA will not award a contract at a Bid Price above the maximum acceptable Bid Price.**

#### **A. Economic Benefits Evaluation**

Bid Proposals will be scored on the ability of the Bid Facility to contribute positively to the economy of New York State in the categories listed in Section X; A (Submitting a Bid Proposal).

A Technical Evaluation Panel (TEP), consisting of NYSERDA staff, Department of Public Service staff, and outside reviewers will evaluate and award points (up to 30) to Bid Proposals based on the degree to which each Bid Proposal demonstrates a contribution to the economic benefits categories listed in Section X; A (Submitting a Bid Proposal).

**Only those economic benefits falling within the defined categories in Section X; A (Submitting a Bid Proposal) will be considered for evaluation. NYSERDA reserves the right to reduce, for evaluation purposes only, the amount of dollars reported in Section 3(b) of the Bid Proposal (“Payments to New York State and/or its Municipalities”) by the amount of any benefits under any Empire State Development program, including any NYS Empire State Development sponsored business program.**

Please review Section XII: Post-Award Demonstration of Actual Economic Benefits for further details.

Scoring on the basis of expected economic benefits will be conducted independently (without knowledge of bid prices) of Bid Price evaluation.

#### **B. Bid Price Evaluation**

Bids will be sorted in ascending order by Bid Price (per MWh). The lowest Bid Price will receive the maximum points available for the Bid Price component (70 points). Bid Prices above the MABP will receive zero (0) points; such Bid Proposals will be ineligible for award. Points awarded to all other Bid Prices will be awarded in proportion to where the Bid Price falls within the range from lowest Bid Price to the highest eligible Bid Price.

### **C. Selection**

A ranking of Bid Proposals will be developed based on the sum of points awarded for Bid Price and points awarded on the basis of the economic benefits evaluation. Selection will be based on this final ranking, subject to NYSERDA's procurement target and available funds except that: **NYSERDA will not award a contract to any Bidder offering a Bid Price above the maximum acceptable Bid Price.**

NYSERDA reserves the right to reject or accept any or all bids. NYSERDA also reserves the right to solicit revised Bid Prices and/or to make counteroffers as it deems appropriate. **Notification of a re-bid, counteroffer or selection will be made by voice communication and electronic mail to the Bidder's Designated Agent(s), as identified on Attachment E, Bid Price Form. Bidder's Designated Agent(s) must be authorized to respond and to commit to counteroffers on behalf of Bidder.**

Upon notification of an award, NYSERDA will prepare a conformed copy of the RPS Standard Form Contract, which shall be delivered to Bidder in a manner to be agreed upon, for Bidder's execution and return.

**NYSERDA may withdraw and rescind awards to Bidders who fail to execute the RPS Standard Form Contract within a reasonable amount of time.**

**NYSERDA RETAINS THE RIGHT TO ACCEPT ANY OR ALL BIDS, TO REJECT ANY OR ALL BIDS, TO SOLICIT RE-BIDS, AND TO MAKE COUNTEROFFERS TO SUCH BID(S) AS IT DEEMS APPROPRIATE.**

## **XII. POST-AWARD DEMONSTRATION OF ACTUAL ECONOMIC BENEFITS**

Within sixty (60) days of the third anniversary of the Commercial Operation Date, Seller will be required to submit a report including documentation demonstrating the actual economic benefits that resulted from the construction and operation of the Bid Facility. Such report should include sufficient records and documents relating to employment, purchases, and other payments necessary to demonstrate the economic benefits created by the Bid Facility under the categories listed in Section 3 of the Bid Proposal (Economic Benefits Created by the Bid Facility).

Should a Seller fail to reasonably demonstrate at least 85% of the Expected Total Dollars (in dollars per MW of Bid Capacity) of the economic benefits included at Section 3 of the Bid Proposal (Economic Benefits Created by the Bid Facility), NYSERDA may reduce the Bid Price payable for the remainder of the Contract Delivery Term. Such reduction in the Bid Price payable for the remainder of the Contract Delivery Term will be made by an amount equal to the percentage shortfall of the economic benefits actually demonstrated compared to the Expected Total Dollars included in Section 3 of the Bid Proposal.

### **XIII. CONTRACT DURATION, COMMENCEMENT DATE, COMMERCIAL OPERATION**

Contract awards will be for a fixed contract duration of ten (10) Contract Years. Fuel-based Bid Facilities, excluding Maintenance Tier Bid Facilities, awarded contracts with Contract Delivery Terms of less than 10 years under a previous RPS procurement are eligible to bid the remainder of the 10 year term; such bids must be for the balance of the 10 year term

Contracts for Fuel-Based Bid Facilities (See Attachment H to this RFP) include a unilateral termination clause maturing upon each 30 month anniversary of the commencement date of the Contract Delivery Term, exercisable by Seller should Seller be unable to secure a continuous bio fuel supply at a price that supports the contract. Notice of Seller's intention to terminate must be received by NYSERDA at least 30 days prior to each such 30 month anniversary date.

The Contract Delivery Term for all contracts awarded under this RFP will commence on the later of: (i) May 1, 2011 or, (ii) on the first day of the month after the Bid Facility commences Commercial Operation, which shall be no later than the Commercial Operation Milestone Date (July 31, 2012, unless extended; See Sections XIV and XV, below).

Commercial Operation is defined as a state of operational readiness under which (i) the Bid Capacity is available and physically able to produce electric energy, and (ii) all rights, abilities, permits and approvals to schedule and deliver energy to the Injection Point have been obtained.

### **XIV. COMMERCIAL OPERATION MILESTONE DATE**

All Bid Facilities must enter Commercial Operation on or before the Commercial Operation Milestone Date of July 31, 2012. Seller may elect to extend the Commercial Operation Milestone Date from July 31, 2012 to December 31, 2012, on condition that such election is made by written Notice to NYSERDA, on or before July 2, 2012, and that Seller provides to NYSERDA, one of the following:

- (1) Contract Security, in addition to the amounts provided under "A" and "B," of Section XV, below, in the amount of three dollars (\$3.00) multiplied by the Bid Quantity;
- (2) for Bid Facilities from which the electricity associated with the Quantity Obligation will be delivered into a market administered by the NYISO, proof that an interconnection agreement (for External Bid Facilities, a comparable agreement with the local grid operator) has been entered into by the NYISO, the Connecting Transmission Owner, and the Bidder or a legal representative of the Bidder, with respect to the Bid Facility;
- (3) for Bid Facilities seeking to satisfy the Electricity Delivery Requirement through options 2 or 3 of Section XIX; A, a comparable interconnection agreement has been entered into with all the necessary sites, service providers and parties that will be enable and permit the transmission of the energy from the Bid Facility to the point of its consumption.

### **XV. CONTRACT SECURITY**

All Contract Security amounts, as described below, must be provided in the form of (a) cash, (b) certified funds, or (c) an irrevocable stand-by letter of credit, payable to NYSERDA, and drawn

on an institution acceptable to NYSERDA, in substantially the form provided at Exhibit C to the RPS Standard Form Contract. Note: once the Standard Form Contract has been executed, "Bidder" becomes "Seller."

- A. Bidders must provide to NYSERDA, within 10 business days of notification of selection, Contract Security in an amount equal to \$6.00 per MWh times the Bid Quantity. Unless otherwise agreed by NYSERDA in writing, if Bidder does not provide the required Contract Security within 10 business days of notification of selection, its selection may be rescinded, and Bidder will forfeit the Bid Deposit, which will be retained by NYSERDA.
- B. On or before January 17, 2012, Seller must provide additional Contract Security in an amount equal to \$3.00 per MWh multiplied by the Bid Quantity. **Failure to provide the additional Contract Security by January 17, 2012 will constitute a default and will result in termination of the Standard Form Contract.**
- C. On or before July 2, 2012, Sellers electing to extend the Commercial Operation Milestone Date to December 31, 2012 under Section XIV; 1, above, must provide Contract Security, in addition to the amounts provided under "A" and "B," above, in the amount of three dollars (\$3.00) multiplied by the Bid Quantity.

#### **D. Refund/Retention of Contract Security**

As provided by Article XV of the RPS Standard Form Contract (Attachment G and H), amounts provided by the Bidder as Contract Security will be returned or refunded to the Bidder by NYSERDA:

- a. In its entirety if the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date is equal to or greater than the Bid Capacity of the Bid Facility described in the Bid Proposal.
- b. At a prorated amount if the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal. Such amount that will be returned, expressed as a percentage of the total Contract Security, will be equal to Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

As provided by Article XV of the RPS Standard Form Contract, amounts provided by Bidder as Contract Security will be retained by NYSERDA:

- a. In their entirety if Seller fails to provide to NYSERDA, on or before January 17, 2012, Contract Security in the amount required under Section XV; B, above.
- b. At a prorated amount if the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal. Such amount that will be

retained, expressed a percentage of the total Contract Security, will be equal to the Bid Capacity of the Bid Facility described in the Bid Proposal minus the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date; divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

## **XVI. NYSERDA'S ACQUISITION OF RIGHTS/TITLE TO RPS ATTRIBUTES**

Under the RPS Standard Form Contract, Bidder (as Seller) will deliver and NYSERDA will acquire title and exclusive rights to all RPS Attributes for the Contract Delivery Term, as defined herein, along with the exclusive rights to claim, consistent with New York State Environmental Disclosure rules: (i) that the energy associated with RPS Attributes was generated by the Bid Facility during the Contract Delivery Term; (ii) that all RPS Attributes produced by the Bid Facility are conveyed to NYSERDA; and (iii) that New York State and/or the RPS Program is responsible for the reductions in emissions and/or other pollution resulting from the generation of the Bid Facility's energy and its delivery into, and use within, the NYCA. NYSERDA will NOT acquire energy, capacity or ancillary services from any Bid Facility.

Each invoice submitted and requesting payment for the delivery of the RPS Attributes must be accompanied by a Certification and Assignment of Rights Form, in the form provided at Exhibit B to the RPS Standard Form Contract, which will identify the number and vintage of all RPS Attributes for which payment is requested, bear a certification as to the eligibility of such RPS Attributes, and transfer and assign all title and rights to such RPS Attributes to NYSERDA.

In the event that Bidder (as Seller) must apply for or take some other action under any emission-trading or other regime other than the NY RPS in order to secure a claim, title, ownership, or rights of any type, nature or sort to any RPS-eligible Attributes associated with Quantity Obligations, or any certification, registration, verification or other memorialization of the creation of such RPS-eligible Attributes by the Bid Facility to which Bidder (as Seller) may be entitled (Title), Bidder (as Seller) shall (i) take all actions necessary to apply for and secure such Title, to the maximum extent to which Bidder (as Seller) is entitled, (ii) provide NYSERDA with evidence of taking such action; and (iii) convey such Title to NYSERDA whenever so secured.

**Except as may be permitted under Section XX, Suspension of Delivery, Sellers may not apply for or otherwise seek to achieve compliance under Section 242-8.7 (CO2 budget units that co-fire eligible biomass) of the CO2 Budget Trading Program (6 NYCRR Part 242), or any other state program operating as a part of the Regional Greenhouse Gas Initiative, on the basis of any MWh or emission of CO2 or reduction in emissions of CO2 or other benefit associated with RPS Attributes or for any activity constituting performance under an RPS Standard Form Contract.**

## **XVII. VERIFICATION OF RIGHTS TO RPS ATTRIBUTES**

Throughout the Contract Delivery Term, NYSERDA will require certification and verification of the delivery of the RPS Attributes, as follows:

1. In order to enable NYSERDA and the administrator of the NYS Environmental Disclosure Program (Department of Public Service)(DPS) to verify delivery of RPS Attributes and associated electricity, NYSERDA will require the Seller to provide independent access to detailed monthly market accounting settlement or other pertinent data from either:
  - a) the administrator(s) of the wholesale energy market into which energy from the Bid Facility was produced and/or delivered,
  - b) the operator of the transmission/distribution utility/public authority or municipal electric company into which energy from the Bid Facility was produced and/or delivered, or
  - c) an independent, third party that measures energy generation and usage by a Customer-Sited Bid Facility.

Seller will be required to waive confidentiality as applicable, as to NYSERDA, for the direct transfer to NYSERDA by such entities of transactional and/or delivery information and data pertinent to the verification of RPS Attribute and associated electricity delivery.

2. Should the Commission, DPS or NYSERDA create, sanction, adopt or begin participation in a system for the accounting of generation attributes or certificates associated with generation in the New York Control Area, transfer will also include the delivery of the attributes or certificates associated with each RPS Attribute, at the earliest time such certificates or attributes become available for delivery, to an account designated by NYSERDA. Seller will be responsible for and will pay all fees and charges, if any, for the delivery and registration of the attributes or certificates associated with each RPS Attribute into such account, inclusive of accounts in New York State.
3. Sellers with External Bid Facilities located in a control area with an environmental attribute accounting system must deliver any and all certificates, verifications or RECs associated with the Quantity Obligation to an account designated by NYSERDA; or if so allowed or required pursuant to the rules of any future New York attribute accounting system or Renewable Energy Certificate (“REC”) registry or tracking system, to convert RECs from such source-area system into RECs created by the New York system and deliver such RECs into an account designated by NYSERDA, at the earliest time such certificates or attributes become available for delivery. Seller will be responsible for and will pay all fees and charges, if any, for the delivery and registration of the attributes or certificates associated with each RPS Attribute into such account, inclusive of accounts in New York State.
4. NYSERDA’s obligations to purchase RPS Attributes and to make payment are conditional on the ability of Seller to demonstrate to the satisfaction of the DPS that the creation of and title to the RPS-eligible Attributes is sufficiently verifiable for purposes of the Environmental Disclosure Program. Solely for purposes of this Agreement, Bid Facilities participating in the NEPOOL Generation Information System or the Pennsylvania-Jersey-Maryland Generation Attribute Tracking System are deemed sufficient for this purpose.

Sellers with External Bid Facilities in control areas other than the NYISO, NEPOOL, or PJM may seek a determination of sufficiency from the DPS.

5. In no event shall the RPS Attributes of the generation associated with a contract with NYSERDA under this RFP be assigned by Seller to any entity other than NYSERDA. Any assignment or application by Seller of the RPS Attributes associated with a contract with NYSERDA to any other entity, program, or jurisdiction, whether associated with a publicly administered program or a voluntary transaction, is strictly prohibited by, and will constitute a default under, the RPS Standard Form Contract.

## **XVIII. QUANTITY OBLIGATIONS**

Should an Intermittent Bid Facility's Quantity Obligation fail to achieve 80% of the Bid Quantity for three (3) consecutive Contract Years, the Bid Quantity will be modified for the remainder of the Contract Delivery Term to equal the average Actual Annual Eligible Production over that three-year period multiplied by the Bid Percentage.

Should the Quantity Obligation of a Fuel-Based Bid Facility that established its Bid Quantity under Option 1 (Incremental Generation Above the Average Baseline) of the Provisional Certification Process fail to achieve 90% of the Bid Quantity for two (2) consecutive Contract Years, the Bid Quantity will be modified for the remainder of the Contract Delivery Term to equal the average Actual Annual Eligible Production over that two-year period multiplied by the Bid Percentage.

Should the Quantity Obligation of a Fuel-Based Bid Facility that established its Bid Quantity under Option 2 (Incremental Capacity Above Baseline) of the Provisional Certification Process fail to achieve 90% of its Bid Quantity during any Contract Year, such failure will constitute a default under the Standard Form Contract executed as a result of this RFP.

Failure by any Bid Facility's Quantity Obligation to achieve 65% of the Bid Quantity during any Contract Year will constitute a default under the Standard Form Contract executed as a result of this RFP.

## **XIX. BID FACILITY ELECTRICITY DELIVERY REQUIREMENTS**

- A.** For all Bid Facilities, the electricity associated with the Quantity Obligation must be:
  1. delivered into a market administered by the NYISO for end-use in New York State; or
  2. delivered through a wholesale meter under the control of a utility, public authority or municipal electric company such that it can be measured, and such that consumption within New York State can be tracked and verified by such entity or by the NYISO; or
  3. delivered through a Bid Facility dedicated generation meter, which shall be approved by and subject to independent verification by NYSERDA, to a customer in New York State

(excluding customers in the service territory of the Long Island Power Authority) whose electricity was obtained through the NYISO/utility system as of January 20, 2011.

For Bid Facilities seeking to satisfy the Electricity Delivery Requirement through options 2 or 3, above, all costs associated with measurement, tracking, and verification, to the satisfaction of NYSERDA and DPS Staff must and will be borne by Bidder. See also Section XXI; D, Metering.

#### **B. Non-Intermittent External Bid Facilities**

During each hour in which a non-intermittent External Bid Facility generates Actual Eligible Production, the Seller must schedule and transmit the electricity representing the Quantity Obligation and associated with the RPS Attributes from the Injection Point to the Delivery Point for end-use in New York. This Delivery Requirement will be applied to each hour during which the Bid Facility produces Actual Eligible Production; electricity delivered during each hour will be recognized as delivered only during such hour; deliveries in excess of the Quantity Obligation during any given hour will not be recognized, for purposes of this requirement, for delivery during any other hour. This rule applies to bilateral and NYISO spot market transactions. The Seller must demonstrate to the satisfaction of the PSC and/or NYSERDA that it is the financially responsible party for the transaction from the Injection Point to the Delivery Point.

#### **C. Intermittent External Bid Facilities**

During each hour in which an Intermittent External Bid Facility generates Actual Eligible Production, the Seller must schedule and transmit from the control area of its location to the Delivery Point for end-use in New York, an amount of electricity, in MWh, equal to the Quantity Obligation during such hour. This Delivery Requirement will be applied to each hour during which the Bid Facility produces Actual Eligible Production; electricity delivered during any given hour will be recognized as delivered only during such hour; deliveries in excess of the Quantity Obligation during one hour will not be recognized, for purposes of this requirement, for delivery during any other hour. This rule applies to bilateral and NYISO spot market transactions. The Seller must demonstrate to the satisfaction of the DPS and/or NYSERDA that it is the financially responsible party for the transaction from the Bid Facility's local control area to the Delivery Point.

Failure by any Seller of RPS Attributes from External Bid Facilities to meet these delivery requirements for a minimum of 90% of the hours in which the Bid Facility produces Actual Eligible Production during any Contract Year will constitute a default under the RPS Standard Form Contract.

#### **D. Bilateral Sales**

Bilateral sales for electricity associated with the Quantity Obligation produced by any Bid Facility are permissible provided the Seller can demonstrate that:

1. the purchaser of the electricity is a NYS Load Serving Entity (LSE) serving an equal or greater amount of load than the Bid Quantity, or

2. the purchaser is one or more NYS end-users consuming an aggregate amount of electricity equal to or greater than the Bid Quantity.

## **XX. SUSPENSION OF DELIVERY**

Upon prior approval by NYSERDA, a Seller may suspend deliveries of RPS-eligible Attributes to NYSERDA in order to (1) make sales of RPS-eligible Attributes to the New York Voluntary Market or pursuant to New York State Executive Order 111 or other mandated New York State governmental procurement, or (2) for compliance under the CO2 Budget Trading Program (6 NYCRR Part 242), subject to terms and conditions set forth at Article II of the RPS Standard Form Contract.

## **XXI. PAYMENT**

### **A. General Payment Terms**

In order to receive payments under the RPS program, a Bid Facility must first be Operationally Certified by the Director of the Department of Public Service Office of Energy Efficiency and Environment (OEEE). Once Operationally Certified, NYSERDA will make payments based on monthly invoicing, in accordance with NYSERDA's Prompt Payment Policy (Exhibit to Attachments G and H). NYSERDA will not pay for more than 95% of any Bid Facility's Actual Eligible Production during any month in any Contract Year. Amounts payable in a given month shall be calculated as follows:

1. for Bid Facilities in the NYCA, the multiplicative product of (a) the Actual Eligible Production of the Bid Facility during the prior month; (b) the Bid Quantity Percentage; and (c) the Bid Price.
2. for Non-Intermittent External Bid Facilities, for each hour during such month, NYSERDA shall first determine, for that hour, the lesser of: (1) the Actual Eligible Production during such hour, metered at the Injection Point, multiplied by the Bid Quantity Percentage, and (2) the amount of electricity (in MWh) delivered by Seller from the Injection Point to the Delivery Point in conformance with the Delivery Requirement during such hour. The amount payable shall be the sum of the amounts determined for each hour multiplied by the Bid Price.
3. for Intermittent External Bid Facilities, for each hour during such month, NYSERDA shall first determine, for that hour, the lesser of: (1) the Actual Eligible Production during such hour, metered at the Injection Point, multiplied by the Bid Quantity Percentage, and (2) the amount of electricity (in MWh) delivered by Seller from the local control area to the Delivery Point in conformance with the Delivery Requirement during such hour. The amount payable shall be the sum of the amounts determined for each hour multiplied by the Bid Price.

Notwithstanding the above, NYSERDA will not pay for any RPS Attribute for which Seller has not transferred title to NYSERDA by the Certificate and Assignment of Rights Form (Exhibit B to the RPS Standard Form Contract) for such month. Further, all payments will be conditioned on the provision by Seller of all additional documentation, including but not limited the Certification and Assignment of Rights Form and Hourly Data Report. For Bid Facilities electing to use clean wood separated from construction and demolition debris from approved material reclamation facilities, payment will be further conditioned on NYSERDA's acceptance of third-party feedstock testing results.

## **B. Adjustments**

NYSERDA may adjust payments to subsequent invoices consistent with NYISO or other control-area billing settlement true-up procedures, based on actual metered production data at the Injection Point and data demonstrating compliance with the Bid Facility Electricity Delivery Requirements. Successful bidders offering RPS Attributes from External Bid Facilities will be paid such amount less any and all reasonable costs borne by NYSERDA to verify Operational Certification throughout the Contract Delivery Term and any and all costs for NYSERDA's participation in any renewable energy attribute accounting system operating in the local control area. Should the Nameplate Capacity of the Bid Facility that achieves Operational Certification be less than the Nameplate Capacity included in the Bid Proposal Form, NYSERDA may adjust the Bid Quantity and/or Bid Quantity Percentage to secure the rights to RPS Attributes in a quantity equal to or approximating the Expected Annual Eligible Production.

## **C. Maximum Payment**

NYSERDA will not make payment for more than 100% of the product of the Bid Quantity multiplied by the total number of Contract Years multiplied by the Bid Price.

## **D. Metering**

The Actual Production and Actual Eligible Production of the Bid Facility must be capable of accurate and verifiable measurement at the Injection Point by the local ISO, a transmission utility, public authority, municipal electric company, and in the case of a Customer-Sited Bid Facility, an independent third party. Unless specifically agreed to by NYSERDA in writing, all Bid Facilities that are the subject of an award under this RFP must be separately metered and must be functionally represented by a single and discrete Injection Point.

## **XXII. PERMITS/APPROVALS**

The Seller shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Bid Facility over the duration of the Contract Delivery Term. Neither the RPS Program nor selection under this RFP in any way replaces or modifies the necessity or applicability of any permit or approval process by any jurisdiction.

NYSERDA is subject to the State Environmental Quality Review Act (SEQRA), and is thereby required to assess the potential environmental impacts, *to New York State*, of any project funded

through RFP 2226, wherever such project may be located. Upon selection, Sellers under contracts with Bid Facilities as to which no SEQR proceeding has been commenced will be required to provide a “full” Environmental Assessment Form (EAF), (1) evaluating the potential environmental impacts *to New York State* of construction and operation of such Bid Facility, and (2) demonstrating that construction and operation of the Bid Facility will not create a significant potential for violation of Article 11 of the Environmental Conservation Law.

A description of the State Environmental Quality Review Act and the associated regulations, as well as the full EAF, is available at <http://www.dec.ny.gov/permits/57228.html>. NYSERDA’s obligations to make payments to Sellers under contracts entered as a result of RFP 2226 will be conditional on the acquisition of all such permits and approvals. Upon request by NYSERDA Seller must demonstrate such acquisition and/or provide copies of all permits and approvals acquired.

### **XXIII. GENERAL CONDITIONS**

#### **A. 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 Application Package 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.

#### **B. 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.ny.gov/pdf/current\\_forms/st/st220td\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220td_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.ny.gov/pdf/current\\_forms/st/st220td\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220td_fill_in.pdf)). The Department has developed guidance for contractors which is available at <http://www.tax.ny.gov/pdf/publications/sales/pub223.pdf>.

### **C. 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

### **D. 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.

### **E. Confidentiality**

NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL;" see Public Officers' Law Article 6). Information in any tangible form including any document that Bidder wishes to be protected from disclosure to third parties, including any information provided as a part of a Bid Proposal Package, must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA.

The FOIL Law (Public Officers Law § 87(2)(d)) provides an exception to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If NYSERDA

receives a request from a third party for information or a document received from Seller and which has been marked “Confidential” or “Proprietary,” NYSERDA will process such request under the procedures provided by NYSERDA’s FOIL regulations (see [www.nyserdera.org/About/NYSERDA.Regulations.pdf](http://www.nyserdera.org/About/NYSERDA.Regulations.pdf)).

#### **XXIV. LIST OF ATTACHMENTS**

- Attachment A – Application Package Checklist
- Attachment B – Disclosure of Prior Findings of Non-Responsibility Form
- Attachment C – Project Schedule Form
- Attachment D – Sample Bid Proposal Form
- Attachment E – Sample Bid Price Form
- Attachment F – Notice of Intent to Bid Form
- Attachment G – RPS Standard Form Contract – Non-Fuel-Based Bid Facilities
- Attachment H – RPS Standard Form Contract – Fuel-Based Bid Facilities

## XXV. DEFINITIONS

In evaluating and responding to this RFP, please note that the terms and definitions used in this RFP have identical meanings to those in the RPS Standard Form Contracts (Attachments G and H to this RFP); in the case of conflict the meanings in the RPS Standard Form Contract will govern. This RFP and the RPS Standard Form Contract should be read in conjunction with each other.

Actual Annual Production: The amount, in MWh, of the total electric energy produced by the Bid Facility during any Contract Year, measured at the Injection Point.

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

Actual Eligible Production: The amount, in MWh, of the electric energy produced by the Bid Facility during any period within a Contract Year, measured at the Injection Point, except that:

- (i) for a Repowering or Hydroelectric upgrade, the Actual Eligible Production shall be the product of (a) Actual Production of the Bid Facility, multiplied by (b) the percentage of the Actual Production resulting from the upgrade or Repowering established through the Provisional/Operational Certification Process.
- (ii) for a Fuel-Based Bid Facility that has never used eligible fuels, the Actual Eligible Production shall reflect the eligible biomass generation only, determined as the Actual Production of the entire Bid Facility, multiplied by the BTU input ratio of (a) the biomass fuel heat input to (b) the total fuel heat input, consistent with how such terms are applied for Provisional/Operational Certification;
- (iii) for a Fuel-Based Bid Facility that used eligible fuels, including co-firing with ineligible fuels, on or before January 1, 2003, the Actual Eligible Production shall reflect only that Actual Production using eligible biomass, biogas, or liquid bio-fuel above the historical baseline production established through the Provisional/Operational Certification Process.

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

Bid Capacity: Bid Capacity shall equal the Bid Quantity Percentage multiplied by the Nameplate Capacity of the Bid Facility. In the case of repowering, hydroelectric upgrades and co-firing, the Bid Capacity shall equal the Bid Quantity divided by the Expected Average Annual Production, multiplied by the Name Plate Capacity.

Bidder: An entity submitting an Application Package and Bid Proposal in response to this RFP. Such entity need not be the owner of the Bid Facility, but must have secured rights to the RPS Attributes from the Bid Facility sufficient to satisfy all performance requirements stated in this RFP and the RPS Standard Form Contract.

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

Bid Price: A single fixed production payment, expressed in \$/MWh, applicable to each MWh of RPS Attributes offered as performance throughout the Contract Delivery Term.

Bid Quantity: The amount, in MWh, of RPS Attributes the Bid Facility expects to proffer as performance under the RPS Standard Form Contract over each Contract Year during the Contract Delivery Term. The Bid Quantity must be the same for each Contract Year throughout the Contract Delivery Term, subject to adjustments pursuant to Section XVIII (Quantity Obligations). This number will equal the Expected Annual Eligible Production multiplied by the Bid Quantity Percentage.

Bid Quantity Percentage: The percentage of the Bid Facility's Expected Annual Eligible Production that will be committed to performance under an RPS Standard Form Contract. The Bid Quantity Percentage must be at least 30% and may not exceed 95%, and will be applied to Actual Eligible Production in any period during the Contract Delivery Term to establish compliance with contract requirements.

Capacity Factor: The ratio, expressed as a percentage up to two decimal places, of the total electricity that the Bid Facility expects to produce during a Contract Year compared to the total potential electricity that could be produced if the Bid Facility operates at 100 percent of the Name Plate Capacity during every hour of the Contract Year.

Commercial Operation: A state of operational readiness under which (i) the Bid Capacity is available and physically able to produce electric energy, and (ii) all rights, abilities, permits and approvals to schedule and deliver energy to the Injection Point have been obtained.

Commercial Operation Milestone Date: The Commercial Operation Milestone Date is July 31, 2012. The Commercial Operation Milestone Date may be extended (see Section XV, Contract Security).

Contract Delivery Term: All contract awards will be for a fixed contract duration of ten (10) Contract Years. The Contract Delivery Term for all contracts awarded under this RFP will commence on the later of: (i) May 1, 2011 or, (ii) on the first day of the month after the Bid Facility commences Commercial Operation.

Contract Security: All amounts provided to NYSERDA as defined in Section XV (Contract Security) of this RFP.

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

Customer-Sited Bid Facility: A Bid Facility interconnected on the customer side of a retail electric meter.

Delivery Point: For Bid Facilities located in the New York Control Area (NYCA), the Delivery Point shall be the Injection Point. For External Bid Facilities the Delivery Point will be the bus where the Seller delivers electricity to the NYCA for end use in New York.

Expected Annual Eligible Production: The amount, in MWh, of the Expected Average Annual Production of the Bid Facility, measured or compensated to the Injection Point, except that:

- (i) for a Repowering or Hydroelectric upgrade, the Expected Annual Eligible Production shall be the product of (a) Expected Average Annual Production multiplied by (b) the percentage of the Expected Average Annual Production resulting from the upgrade or Repowering established through Provisional Certification;
- (ii) for a Fuel-Based Bid Facility that has never used eligible fuels, the Expected Annual Eligible Production shall reflect the eligible biomass generation only, determined as the Expected Average Annual Production of the entire Bid Facility, multiplied by the BTU input ratio of (a) the biomass fuel heat input to (b) the total fuel heat input, consistent with how such terms are applied for Provisional Certification;
- (iii) for a Fuel-Based Bid Facility that used eligible fuels, including co-firing with ineligible fuels, on or before January 1, 2003, the Expected Annual Eligible Production shall reflect that Expected Annual Eligible Production using eligible biomass, biogas, or liquid bio-fuel that is above the historical baseline production established through Provisional Certification.

Expected Average Annual Production: The expected electric energy production of the entire Bid Facility during any Contract Year post-upgrade/repowering for which Provisional Certification was granted.

External Bid Facility: Any Bid Facility not located within the New York Control Area (NYCA); such Bid Facilities are subject to the delivery requirement specified in Section XIX (Bid Facility Electricity Delivery Requirement).

Fuel-Based Bid Facility: For purposes of this RFP, Fuel-Based Bid Facilities are those where Actual Annual Eligible Production is derived from the use of eligible biomass, biogas or liquid bio-fuels.

Hydroelectric Upgrade: A hydroelectric upgrade results from investments made to an existing hydroelectric renewable electric generating facility that cause an increase in renewable generation incremental to a historical baseline level of generation, as determined through the Provisional/Operational Certification process.

Injection Point: The generator bus or location where (a) the administrator of the wholesale power market, (b) the operator of the transmission/distribution utility, public authority or municipal electric company, or (c) in the case of customer-sited generation, the dedicated generation meter at which a third party, measures, or otherwise determines, energy production from the Bid Facility.

Intermittent Bid Facility: For purposes of this RFP, Intermittent Bid Facilities shall include the following: wind, solar, tidal, ocean, and run-of-river hydroelectric.

Nameplate Capacity: The gross generating capacity of the entire Bid Facility, post upgrade/repowering, in MW.

New York Control Area (NYCA): The control area that is under the control of the NYISO which includes transmission facilities listed in the ISO/TO Agreement Appendices A-1 and A-2, as amended from time-to-time.

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

Quantity Obligation: Shall mean, for any period during the Contract Delivery Term, the number of MWh calculated as the Bid Quantity Percentage multiplied by the Actual Eligible Production; subject, however, to adjustments pursuant to Section XVIII (Quantity Obligations).

Repowering: Shall mean a generation unit other than a Hydroelectric Upgrade, with an initial date of Commercial Operation no later than December 31, 2002, that has been or will be substantially and verifiably repowered on or after January 1, 2003, such that the Actual Annual Production from the facility after Repowering is or will be demonstrably greater than the Actual Annual Production prior to the 2003 level by at least five percent.

RPS-eligible Attributes: Shall mean all environmental characteristics, claims, credits, benefits, emissions reductions, offsets, allowances, allocations, howsoever characterized, denominated, measured or entitled, attributable to the generation of Actual Eligible Production by a Bid Facility. One RPS-eligible Attribute shall be created upon the generation by a Bid Facility of one MWh of Actual Eligible Production. RPS-eligible Attributes include but are not limited to: (i) any direct emissions of pollutants to the air, soil or water; (ii) any avoided emissions of pollutants to the air, soil or water including but not limited to sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), particulate matter and other pollutants; (iii) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases (GHGs) that have been or may be determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (iv) all set-aside allowances and/or allocations from emissions trading programs made unnecessary for compliance in such program as a result of performance under an RPS agreement, including but not limited to allocations available under 6 NYCRR §§ 204, 237 and 238; and (v) all credits, certificates, registrations, recordations, or other memorializations of whatever type or sort, representing any of the above. If the Bid Facility is a biomass or landfill gas facility and the Seller receives any tradable credits, benefits, emissions reductions, offsets, and allowances based on the greenhouse gas reduction benefits attributed not to the production of electricity but rather to its fuel production, collection, conversion or usage, it shall provide NYSERDA or its designee with sufficient credits, benefits, emissions reductions, offsets, and

allowances to ensure that there are zero net GHGs associated with the production of electricity from such Bid Facility.

RPS-eligible Attributes do not include (i) any energy, capacity, reliability or other power products, such as ancillary services; (ii) production tax credits associated with the construction or operation of the Bid Facility or other financial incentives in the form of credits, reductions, or allowances associated with the Bid Facility that are applicable to a state or federal income taxation obligation; (iii) fuel-related subsidies or “tipping fees” that may be paid to the Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular pre-existing pollutants or the promotion of local environmental benefits; or (iv) emission reduction credits encumbered or used by the Bid Facility for compliance with local, state, or federal operating and/or air quality permits.

RPS Attributes: The RPS-eligible Attributes offered and delivered as performance during the Contract Delivery Term. See Section XVI of this RFP (NYSERDA’s Acquisition of Rights/Title to RPS Attributes).

RPS Standard Form Contract: The standard contractual document to be entered into by NYSERDA and selected Bidders, which shall define, among other things, their rights and obligations concerning the generation of RPS Attributes, the delivery of all right and title to RPS Attributes to NYSERDA, and the payments by NYSERDA during the term of the agreement.

Voluntary Market: The market through which sales are made of renewable attributes, including RPS Attributes, for purposes other than compliance.

# ATTACHMENT A APPLICATION PACKAGE CHECKLIST RFP 2226

NOTE: This completed form **MUST** be signed and attached to the front of all copies of your application package.

Bid Facility Name:		Date:	
Legal Name of Bidder:			
Primary Contact:		Title:	
Company:	Phone:	Fax:	
Address:	City:	State or Province:	Zip:
<b>Checklist:</b> Please submit one signed original and 3 copies of the following:			
<input type="checkbox"/> Application Package Checklist (Attachment A) <input type="checkbox"/> Disclosure of Prior Findings of Non-Responsibility Form (Attachment B) <input type="checkbox"/> Provisional Certification Application Form (if not previously submitted) <input type="checkbox"/> Bid Deposit			
<b>Facility Nameplate Capacity:</b>		<b>Bid Deposit Required:</b>	
<input type="checkbox"/> Less than 5.00 MW:		None	
<input type="checkbox"/> 5.00 – 19.99 MW:		\$15,000	
<input type="checkbox"/> 20.00 – 49.99 MW:		\$25,000	
<input type="checkbox"/> 50.00 MW or more:		\$50,000	
<b>THE BIDDER MUST ANSWER THE FOLLOWING QUESTIONS:</b>			
Have you been indicted/convicted for a felony within the past 5 years? (if yes, explain on separate pg.)		<input type="checkbox"/> Yes	<input type="checkbox"/> No
Are you a Minority or Women-Owned Business Enterprise?		<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your proposal contain Minority or Women-Owned Business enterprises as subcontractors?		<input type="checkbox"/> Yes	<input type="checkbox"/> No
Has the Bid Facility been the basis or subject of any award of state and/or local-based financial assistance as described in Section VII, Subsection C of RFP 2226? (If yes, attach a description of such assistance or support.)		<input type="checkbox"/> Yes	<input type="checkbox"/> No
<b>AUTHORIZED SIGNATURE</b>			
I hereby certify that all of the statements and representations made in this Application Package are true to the best of my knowledge and belief, and agree to be bound by the representations, terms, and conditions contained in RFP 2226. I affirm that I understand and will comply with §139-j(3) of the State Finance Law. I understand that this proposal may be disqualified if the solicitation requirements are not met. I the undersigned am an Officer or otherwise authorized representative of the above-noted Bidder and hereby submit this Application Package on behalf of the Bidder.			
Signature:			
Name:		Date:	
Title:		Phone:	
Organization:		Email:	

**ATTACHMENT B  
DISCLOSURE OF PRIOR FINDINGS OF NON-RESPONSIBILITY FORM  
RFP 2226**

**(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")	Yes
	No
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")	Yes
	No
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")	Yes
	No
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:	



**ATTACHMENT C  
PROJECT SCHEDULE FORM  
RFP 2226**

Bid Facility Name:
Legal Name of Bidder:

Instructions: Complete this form in its entirety and attach extra sheets if necessary.

<b>Milestone Date (actual or anticipated)</b>	<b>Development and Construction Milestones</b>	<b>Describe Status</b>
	Execution of lease, purchase and/or option agreements, as applicable, which provide Bidder with site control for the Bid Facility.	
	Completion of all interconnection studies for the Bid Facility.	
	Execution of interconnection agreement for the Bid Facility.	
	All governmental permits that are required to commence construction of (or, if applicable, modification of) the Bid Facility are filed and have been deemed complete by such governing entity.	
	Execution of binding contract(s) for major equipment of the Bid Facility (or major equipment required for modification of the Bid Facility).	
	Closing of financing for the Bid Facility (or conditions for self-financing of construction of Bid Facility have been met).	
	Commencement of construction of the Bid Facility (or planned modifications to the Bid Facility), including all ground and civil work.	
	Foundations for the Bid Facility are laid (if applicable).	
	Major equipment is delivered to the site of the Bid Facility.	
	Start-up testing of the Bid Facility commences (if applicable, after planned modifications).	
	Commercial Operation Date (if applicable, after planned modifications).	
	Other, please specify.	

# ATTACHMENT D SAMPLE BID PROPOSAL FORM RFP 2226

*Instructions: Fill in all fields, print and sign.*

Bid Facility Name: Highlands Wind Farm	Bidder #: 21
Legal Name of Bidder: Highlands Wind, LLC	
Principal Business Address of Bidder: 2103 Windy Way, Anytown, NY 12345	
State of Incorporation: New York	
Tax ID Number (must match Legal Name listed above): 12-345-6789	
Please identify the name and address for the individual to be named under the Notices Section of the RPS Standard Form Contract: Bob Smith, General Counsel 2103 Windy Way, Anytown, NY 12345	
Please identify the name and title of the individual who will be executing the RPS Standard Form Contract on behalf of Seller: John Doe, President and CEO	
Please provide a description of the status of any State Environmental Quality Review proceeding with respect to the Bid Facility, including the name and address of the entity serving as the "Lead Agency" under such proceeding: Draft Environmental Impact Statement Completed Lead Agency: Smith County	

**For definitions of terms below, refer to Definitions Section of RFP 2226.**

Nameplate Capacity (MW, up to two decimal places)  <input style="width: 100%; height: 20px;" type="text" value="100.00"/>	Capacity Factor (%, up to two decimal places)  <input style="width: 100%; height: 20px;" type="text" value="30.00%"/>	Expected Average Annual Production (MWh/yr)  <input style="width: 100%; height: 20px;" type="text" value="262,800"/>	Expected Annual Eligible Production (MWh/yr)  <input style="width: 100%; height: 20px;" type="text" value="262,800"/>
Percent of Expected Average Production attributable for upgrade or repowering (%)*  <input style="width: 100%; height: 20px;" type="text"/>	Bid Capacity (MW)  <input style="width: 100%; height: 20px;" type="text" value="95.00"/>	Bid Quantity Percentage (whole % only)**  <input style="width: 100%; height: 20px;" type="text" value="95%"/>	Bid Quantity (MWh/yr)  <input style="width: 100%; height: 20px;" type="text" value="249,660"/>

*\*As stated in  
Provisional Certification  
(leave blank if N/A)*

*\*\*Must be at least 30%  
and may not exceed 95%*

Submittal of a Bid Proposal will constitute a binding offer to contract under the RPS Standard Form Contract terms (Attachments G and H of RFP 2226) and must remain open for a period of at least forty-five (45) days from the deadline for submittal or such time as designated by NYSERDA. Bid Proposals will become the property of NYSERDA.

**NYSERDA RETAINS THE RIGHT TO ACCEPT ANY OR ALL BIDS, TO REJECT ANY OR ALL BIDS, TO SOLICIT RE-BIDS, AND TO MAKE COUNTEROFFERS TO SUCH BID(S) AS IT DEEMS APPROPRIATE.**

Authorized Representative Name: John Doe \_\_\_\_\_

Title: President and CEO \_\_\_\_\_

Signature: *John Doe* \_\_\_\_\_

Date Signed: January 20, 2011 \_\_\_\_\_

**ATTACHMENT E  
SAMPLE BID PRICE FORM  
RFP 2226**

*Instructions: Fill in all fields, print and sign. Submit this form in a **separate** sealed envelope clearly identifying the Bidder Number and Bid Facility and marked "RFP 2226 BID PRICE FORM".*

Bid Facility Name: Highlands Wind Farm	Bidder #: 21
Legal Name of Bidder: Highlands Wind, LLC	

Bid Price (\$/MWh)

\$ 5.00

Submittal of a Bid Proposal will constitute a binding offer to contract under the RPS Standard Form Contract terms (Attachments G and H of RFP 2226) and must remain open for a period of at least forty-five (45) days from the deadline for submittal or such time as designated by NYSERDA. Bid Proposals will become the property of NYSERDA.

**NYSERDA RETAINS THE RIGHT TO ACCEPT ANY OR ALL BIDS, TO REJECT ANY OR ALL BIDS, TO SOLICIT RE-BIDS, AND TO MAKE COUNTEROFFERS TO SUCH BID(S) AS IT DEEMS APPROPRIATE.**

Authorized Representative Name: John Doe \_\_\_\_\_  
Title: President and CEO \_\_\_\_\_  
E-mail: johndoe@highlandswind.com \_\_\_\_\_  
Signature: *John Doe* \_\_\_\_\_  
Date Signed: January 20, 2011 \_\_\_\_\_

**DESIGNATED AGENT (SEE BID PROPOSAL EVALUATION, SECTION XI; C, OF RFP 2226):**

Name: Bob Smith	Company: Highlands Wind, LLC
Phone: 123-456-7890	E-mail: bobsmith@highlandswind.com

**ATTACHMENT F  
NOTICE OF INTENT TO BID  
RFP 2226**

This form is **optional** and **non-binding**. However, returning it to NYSERDA will ensure that you will be notified when information on the RFP is released or updated.  
Please submit to NYSERDA as soon as possible via mail, fax or e-mail.

**Attn: RPS Program - RFP No. 2226**  
New York State Energy Research and Development Authority  
17 Columbia Circle, Albany, NY 12203-6399  
fax: (518) 862-1091      e-mail: rps@nyserda.org

Bid Facility Name: \_\_\_\_\_ Date: \_\_\_\_\_

Legal Name of Bidder: \_\_\_\_\_

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

Address: \_\_\_\_\_

City: \_\_\_\_\_ County: \_\_\_\_\_ State: \_\_\_\_\_ Zip + 4: \_\_\_\_\_

E-mail Address: \_\_\_\_\_ Phone Number: \_\_\_\_\_

Brief Description of Bid Facility:

\_\_\_\_\_

Please check all that apply:

- We **do** intend to bid.
- We **do not** intend to bid because: \_\_\_\_\_
- I did not receive a notice for this RFP. Please **add** me to NYSERDA's mailing list.
- Please **delete** me from NYSERDA's mailing list.

How did you receive information about this solicitation? (Please check all that apply.)

- |   |   |
|---|---|
| <input type="checkbox"/> announcement notice in mail          | <input type="checkbox"/> email announcement |
| <input type="checkbox"/> notice in NYS Contract Reporter      | <input type="checkbox"/> NYSERDA's website  |
| <input type="checkbox"/> notice in other media (please list): | <input type="checkbox"/> word-of-mouth      |
|   | <input type="checkbox"/> Other:             |

\_\_\_\_\_

**RFP 2226 – ATTACHMENT G**

**RPS STANDARD FORM CONTRACT**

**(NON-FUEL BASED BID FACILITIES)**

**BY AND BETWEEN**

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

**AND**

**[NAME OF SELLER]**

**Dated: APRIL \_\_, 2011**

This Agreement ("Agreement") is entered into as of April \_\_, 2011 (the "Effective Date") by and between the New York State Energy Research and Development Authority ("NYSERDA"), a public benefit corporation, having a principal business address of 17 Columbia Circle, Albany, New York 12203, and [Offeror] ("Seller"), a [insert as appropriate], having a principal business address of \_\_\_\_\_. NYSEDA and Seller are each referred to herein as a "Party" and are collectively referred to herein as the "Parties."

WHEREAS, the New York State Public Service Commission ("PSC") adopted a Renewable Portfolio Standard ("RPS") program to address the energy, economic, and environmental objectives of New York State by creating the potential to build new industries in the State based on clean, environmentally responsible energy technologies (*See* Case 03-E-0188, "Order Regarding Retail Renewable Portfolio Standard" issued and effective September 24, 2004, and subsequent orders under Case No. 03-E-0188 (the "Orders")) and the Orders designate NYSEDA as the Central Procurement Administrator of the RPS Program and all associated funding; and

WHEREAS, NYSEDA has conducted a competitive Request for Proposals ("RFP 2226") to procure rights to RPS-eligible renewable energy attributes; and

WHEREAS, NYSEDA RFP 2226, which is incorporated herein and made part hereof, provided, among other things, that this RPS Standard Form Contract ("Agreement") would be employed to govern the rights and obligations of the Parties; and

WHEREAS, Seller has participated in such competitive solicitation and has been selected by NYSEDA as a winning bidder with respect to the [name of facility] ("Bid Facility"); and

WHEREAS, the Seller agrees to sell to NYSEDA, and NYSEDA agrees to purchase from Seller, the RPS-eligible renewable energy attributes ("RPS Attributes," as defined herein) associated with the energy production of the Bid Facility described in the Bid Proposal (which has been attached hereto and incorporated herein as Exhibit D) during the Contract Delivery Term, on the terms and subject to the conditions set forth herein;

NOW, THEREFORE, this Agreement has been entered into by the Parties to define, among other things, their rights and obligations concerning the generation of RPS Attributes by Seller and delivery of all right and title to RPS Attributes to NYSEDA, and the payments by NYSEDA to Seller during the term of this Agreement.

## Article I

### Definitions

The terms defined in this Article I, whenever used in this Agreement (including in any Exhibit hereto), shall have the respective meanings indicated below for all purposes of this Agreement (each such meaning to be equally applicable to the singular and the plural forms of the respective terms so defined). All references herein to a Section, Article or Exhibit are to a Section, Article or Exhibit of or to this Agreement, unless otherwise indicated. The words

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

Actual Annual Production: The amount, in MWh, of the total electric energy produced by the Bid Facility during any Contract Year, measured at the Injection Point.

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

Actual Eligible Production: The amount, in MWh, of the electric energy produced by the Bid Facility during any period within a Contract Year, measured at the Injection Point, except that:

- (i) for a Customer-Sited Bid Facility, the Actual Eligible Production shall reflect only the amount in excess of the on-site energy consumption met with generation from the Bid Facility;
- (ii) for a Repowering or Hydroelectric upgrade, the Actual Eligible Production shall be the product of (a) Actual Production of the Bid Facility, multiplied by (b) the percentage of the Actual Production resulting from the upgrade or Repowering established through the Provisional/Operational Certification Process. The incremental upgrade under this Agreement shall be \_\_\_\_%

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

Bid Capacity: Bid Capacity shall equal the Bid Quantity Percentage multiplied by the Nameplate Capacity of the Bid Facility. In the case of repowering and hydroelectric upgrades, the Bid Capacity shall equal the Bid Quantity divided by the Expected Average Annual Production, multiplied by the Name Plate Capacity. The Bid Capacity under this Agreement shall be \_\_ MW.

Bidder: An entity submitting an Application Package and Bid Proposal in response to RFP 2226. Such entity need not be the owner of the Bid Facility, but must have secured rights to the RPS Attributes from the Bid Facility sufficient to satisfy all performance requirements stated in this RFP and the RPS Standard Form Contract.

Bid Facility: The electric generating station that has been identified and described in the Provisional Certification Form submitted to NYSERDA.

Bid Price: A single fixed production payment, expressed in \$/MWh, applicable to each RPS Attribute offered as performance throughout the Contract Delivery Term. For all transactions contemplated and consummated under this Agreement the Bid Price shall be \$ \_\_\_\_\_.

Bid Quantity: The amount, in MWh, of RPS Attributes the Bid Facility expects to proffer as performance under the RPS Standard Form Contract over each Contract Year during the Contract Delivery Term. The Bid Quantity must be the same for each Contract Year throughout the Contract Delivery Term, subject to adjustments pursuant to Article V (Adjustments). This number will equal the Expected Annual Eligible Production multiplied by the Bid Quantity Percentage. Subject to Article V, for all transactions contemplated and consummated under this Agreement the Bid Quantity shall be \_\_\_\_ MWh.

Bid Quantity Percentage: The percentage of the Bid Facility's Expected Annual Eligible Production that will be committed to performance under an RPS Standard Form Contract. The Bid Quantity Percentage must be at least 30% and may not exceed 95%, and will be applied to Actual Eligible Production in any period during the Contract Delivery Term to establish compliance with contract requirements. For all transactions contemplated and consummated under this Agreement the Bid Quantity Percentage shall be \_\_\_\_%.

Capacity Factor: The ratio, expressed as a percentage up to two decimal places, of the total electricity that the Bid Facility expects to produce during a Contract Year compared to the total potential electricity that could be produced if the Bid Facility operates at 100 percent of the Name Plate Capacity during every hour of the Contract Year.

Commercial Operation: A state of operational readiness under which (i) the Bid Capacity is available and physically able to produce electric energy, and (ii) all rights, abilities, permits and approvals to schedule and deliver energy to the Injection Point have been obtained.

Commercial Operation Milestone Date: The Commercial Operation Milestone Date shall be July 31, 2012. The Commercial Operation Milestone Date may be extended (see Article II, Purchase and Sale of Rights to RPS Attributes; Section 2.09).

Contract Delivery Term: The period of performance under this Agreement which shall have a fixed duration of ten (10) Contract Years; the Contract Delivery Term shall begin on the later of: (i) May 1, 2011 or, (ii) on the first day of the month following the date upon which the Bid Facility commences Commercial Operation.

Contract Security: All amounts provided to NYSERDA as defined in Article XV (Contract Security) of this Agreement.

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

Customer-Sited Bid Facility: A Bid Facility interconnected on the customer side of a retail electric meter.

Delivery Point: For Bid Facilities located in the New York Control Area (NYCA), the Delivery Point shall be the Injection Point. For External Bid Facilities the Delivery Point will be the bus at which the Seller delivers electricity to the NYCA for end use in New York.

Expected Annual Eligible Production: The amount, in MWh, of the Expected Average Annual Production of the Bid Facility, measured or compensated to the Injection Point, except that:

- (i) for a Customer-Sited Bid Facility, the Expected Annual Eligible Production shall reflect only the amount of Expected Average Annual Production in excess of the on-site annual energy consumption met with generation from the Bid Facility;
- (ii) for a Repowering or Hydroelectric upgrade, the Expected Annual Eligible Production shall be the product of (a) Expected Average Annual Production multiplied by (b) the percentage of the Expected Average Annual Production resulting from the upgrade or Repowering established through Provisional Certification. The incremental upgrade under this Agreement shall be \_\_\_\_%.

Expected Average Annual Production: The expected electric energy production of the entire Bid Facility during any Contract Year post-upgrade/repowering for which Provisional Certification was granted.

External Bid Facility: Any Bid Facility not located within the New York Control Area (NYCA); such Bid Facilities are subject to the delivery requirement specified in Article III (Bid Facility Electricity Delivery Requirement).

Hydroelectric Upgrade: A hydroelectric upgrade results from investments made to an existing hydroelectric renewable electric generating facility that cause an increase in renewable generation incremental to a historical baseline level of generation, as determined through the Provisional/Operational Certification process.

Injection Point: The generator bus or location where (a) the administrator of the wholesale power market, (b) the operator of the transmission/distribution utility, public authority or municipal electric company, or (c) in the case of customer-sited generation, the dedicated generation meter at which a third party, measures, or otherwise determines, energy production from the Bid Facility.

Intermittent Bid Facility: For purposes of this Agreement the Bid Facility identified herein is an Intermittent Bid Facility.

Nameplate Capacity: The gross generating capacity of the entire Bid Facility, post upgrade/repowering, in MW. The Nameplate Capacity under this Agreement shall be \_\_ MW.

New York Control Area (NYCA): The control area that is under the control of the NYISO which includes transmission facilities listed in the ISO/TO Agreement Appendices A-1 and A-2, as amended from time-to-time.

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

Quantity Obligation: Shall mean, for any period during the Contract Delivery Term, the number of MWh calculated as the Bid Quantity Percentage multiplied by the Actual Eligible Production; subject, however, to adjustments pursuant to (See Article V, Adjustments).

Repowering: Shall mean a generation unit other than a Hydroelectric Upgrade, with an initial date of Commercial Operation no later than December 31, 2002, that has been or will be substantially and verifiably repowered on or after January 1, 2003, such that the Actual Annual Production from the facility after Repowering is or will be demonstrably greater than the Actual Annual Production prior to the January 1, 2003 level by at least five percent.

RPS-eligible Attributes: Shall mean all environmental characteristics, claims, credits, benefits, emissions reductions, offsets, allowances, allocations, howsoever characterized, denominated, measured or entitled, attributable to the generation of Actual Eligible Production by a Bid Facility. One RPS-eligible Attribute shall be created upon the generation by a Bid Facility of one MWh of Actual Eligible Production. RPS-eligible Attributes include but are not limited to: (i) any direct emissions or any avoided emissions of pollutants to the air, soil or water including but not limited to sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), particulate matter and other pollutants; (iii) any direct or avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases (GHGs) that have been or may be determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (iv) all set-aside allowances and/or allocations from emissions trading programs made unnecessary for compliance in such program as a result of performance under an RPS agreement, including but not limited to allocations available under 6 NYCRR §§ 204, 237 and 238; and (v) all credits, certificates, registrations, recordations, or other memorializations of whatever type or sort, representing any of the above. If the Bid Facility is a biomass or landfill gas facility and the Seller receives any tradable credits, benefits, emissions reductions, offsets, and allowances based on the greenhouse gas reduction benefits attributed not to the production of electricity but rather to its fuel production, collection, conversion or usage, it shall provide NYSERDA or its designee with sufficient credits, benefits, emissions reductions, offsets, and allowances to ensure that there are zero net GHGs associated with the production of electricity from such Bid Facility.

RPS-eligible Attributes do not include (i) any energy, capacity, reliability or other power products, such as ancillary services; (ii) production tax credits associated with the construction or operation of the Bid Facility or other financial incentives in the form of credits, reductions, or allowances associated with the Bid Facility that are applicable to a state or federal income taxation obligation; (iii) fuel-related subsidies or "tipping fees" that may be paid to the Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular pre-existing pollutants or the promotion of local environmental benefits; or (iv) emission reduction credits encumbered or used by the Bid Facility for compliance with local, state, or federal operating and/or air quality permits.

RPS Attributes: The RPS-eligible Attributes associated with the Quantity Obligation which shall be delivered as performance during the Contract Delivery Term. (See Article II, Purchase and Sale of Rights to RPS Attributes).

RPS Standard Form Contract: The standard contractual document to be entered into by NYSERDA and selected Bidders, which shall define, among other things, their rights and obligations concerning the generation of RPS Attributes, the delivery of all right and title to RPS Attributes to NYSERDA, and the payments by NYSERDA during the term of the agreement.

Voluntary Market: The market through which sales are made of renewable attributes, including RPS-eligible Attributes, for purposes other than compliance.

## Article II

### Purchase and Sale of Rights to RPS Attributes

Section 2.01. On the terms and subject to the conditions and provisions of this Agreement, Seller agrees to sell, assign, convey and deliver to NYSERDA, and NYSERDA agrees to purchase from the Seller, all right, title and interest in the RPS Attributes associated with the Quantity Obligation of the Bid Facility during each month of the Contract Delivery Term.

Section 2.02. Such right, title and interest shall include perpetual and exclusive rights to all RPS Attributes, including but not limited to the exclusive rights to claim or represent, consistent with New York State Environmental Disclosure rules: (a) that the energy associated with RPS Attributes was generated by the Bid Facility; and (b) that New York State and or the RPS Program is responsible for the reductions in emissions and/or other pollution or any other environmental benefit resulting from the generation of the energy associated with RPS Attributes.

Section 2.03. At the time of such sale, assignment and conveyance by Seller to NYSERDA, the RPS Attributes shall be free and clear of all liens, judgments, encumbrances and restrictions.

Section 2.04. Assignment and Transfer of Rights to RPS Attributes. The assignment and transfer (“Transfer”) of RPS Attributes to NYSERDA shall be accomplished through their inclusion on the Certification and Assignment of Rights Form, which must accompany each invoice. Should the PSC or NYSERDA create, sanction, adopt or begin participation in a tracking system for accounting for generation attributes or certificates associated with generation in the New York Control Area, Transfer will also include the delivery of the attributes or certificates associated with each RPS Attribute, at the earliest time such certificates or attributes become available for delivery, to an account designated by NYSERDA.

Section 2.05. Except as may be permitted under Section 2.11, Suspension of Performance, Sellers agrees that it may not and shall not apply for or otherwise seek to achieve compliance under Section 242-8.7 (CO<sub>2</sub> budget units that co-fire eligible biomass) of the CO<sub>2</sub> Budget Trading Program (6 NYCRR Part 242), or any other state program operating as a part of the Regional Greenhouse Gas Initiative, on the basis of any MWh or emission of CO<sub>2</sub> or reduction in emissions of CO<sub>2</sub> or other benefit associated with RPS Attributes or for any activity constituting performance under this Agreement.

Section 2.06. In the event that Seller becomes entitled to or must apply for or take some other action under any emission-trading, emission recordation or other regime other than the NY RPS in order to secure a claim, title, credit, ownership, or rights of any type, nature or sort to any RPS-eligible Attributes associated with Quantity Obligations, or any certification, registration, verification or other memorialization of the creation of such RPS-eligible Attributes by the Bid Facility to which Seller may be entitled (Title), Seller shall (i) take all actions necessary to apply for and secure such Title, to the maximum extent to which Seller is entitled, (ii) provide NYSERDA with evidence of taking such action; and (iii) Transfer such Title to NYSERDA whenever so secured.

Section 2.07. NYSERDA's obligations under this Agreement are expressly conditioned on the eligibility of Seller's Bid Facility, at the time of execution of this Agreement and throughout the duration of the Contract Delivery Term, under the Main Tier eligibility rules and requirements, as such requirements existed on January 20, 2011, as originally stated at Appendix C to the September 24, 2004 Order and as amended by the attachment to the June 28, 2006 "Order on Customer Sited Tier Implementation," and as further defined and clarified by subsequent Orders. Bid Facilities selected under this RFP will not be subject to subsequent changes in RPS eligibility rules; however, in the event that the Bid Facility fails to maintain eligibility consistent with the RPS requirements as they existed on January 20, 2011 such ineligibility will extend to the attributes emanating from the Bid Facility

Section 2.08. NYSERDA's obligations to purchase RPS Attributes and to make payment under this Agreement are conditional on the ability of Seller to demonstrate to the satisfaction of the DPS that the creation of and title to the RPS-eligible Attributes is sufficiently verifiable for purposes of the New York Environmental Disclosure Program. Solely for purposes of this Agreement, RPS Attributes emanating from Bid Facilities participating in the NEPOOL Generation Information System or the Pennsylvania-Jersey-Maryland Generation Attribute Tracking System are deemed sufficiently verifiable for this purpose.

Section 2.09. Commercial Operation Milestone Date. NYSERDA's obligations to purchase RPS Attributes and to make payment under this Agreement are conditional on the commencement by the Bid Facility of Commercial Operation at a minimum of 80 percent of the Bid Capacity on or before the Commercial Operation Milestone Date. The Commercial Operation Milestone date shall be July 31, 2012. Seller may elect to extend the Commercial Operation Milestone Date from July 31, 2012 to December 31, 2012, on condition that such election is made by written Notice to NYSERDA, on or before July 2, 2012, and that Seller provides to NYSERDA, one of the following:

- (1) Contract Security, in addition to the amounts provided under Section 15.01(a) and (b), below, in the amount of three dollars (\$3.00) multiplied by the Bid Quantity; or
- (2) for Bid Facilities from which the electricity associated with the Quantity Obligation will be delivered into a market administered by the NYISO, proof that an interconnection agreement has been entered into by the NYISO, the Connecting Transmission Owner, and the Bidder or a legal representative of the Bidder, with respect to the Bid Facility (for External Bid Facilities, a comparable binding agreement); or
- (3) for Bid Facilities seeking to satisfy the Electricity Delivery Requirement through options 2 or 3 of Section 3.01, below, a comparable interconnection agreement has been entered into

with all the necessary sites, service providers and parties that will be enable and permit the transmission of the energy from the Bid Facility to the point of its consumption.

Section 2.10. Subject to authorization by the PSC, NYSERDA shall be free to sell, assign, transfer or otherwise subject to any encumbrance, any of the RPS Attributes or the right, title and interest to the RPS Attributes NYSERDA shall acquire under this Agreement, at any time and from time to time to any entity and on such terms and conditions as NYSERDA may desire. Any financial or other consideration received by NYSERDA from any such action shall inure solely to NYSERDA's benefit, to be applied as determined by NYSERDA as the Central Procurement Administrator of the RPS Program, and shall not affect the Seller's rights or obligations under the terms of this Agreement.

Section 2.11. Suspension of Performance. Seller may, at its option, and upon sufficient notice to NYSERDA, suspend its obligation to deliver RPS-eligible Attributes to NYSERDA, in whole or in part, if such RPS-eligible Attributes are sold into the New York State Voluntary Market or pursuant to a New York State Executive Order 111 or other mandated New York State governmental procurement. Such notice must be written, as provided under Section 19.01 hereto, must be provided to NYSERDA at least one month prior to the commencement of the requested suspension period, must identify the quantity of the RPS-eligible Attributes as to which delivery is to be suspended and the duration of such suspension, which shall be no less than six (6) months in duration. The quantity suspended may be either a specific percentage of the Quantity Obligation or a specific quantity of RPS Attributes to be suspended each month during the suspension period; in either case the quantity to be suspended must exceed the lower of (i) ten percent (10%) of the Bid Quantity or (ii) one thousand (1,000) RPS-eligible Attributes per month. During each month during the period of suspension, Seller shall present documentation to NYSERDA establishing that the RPS-eligible Attributes created during the prior month as to which delivery has been suspended were either (a) settled into an account of an entity serving retail load in New York ("LSE") or otherwise accounted for as a part of the residual system mix for purposes of the Environmental Disclosure Program administered by the Department of Public Service, or (b) should a New York renewable energy generation certificate system ("REC") or other automated tracking system enter operation during the suspension period, documentation from such system administrator verifying the retirement of such RPS-eligible Attributes and/or RECs into a voluntary customer account in New York, including accounts associated with compliance with a mandated New York State governmental procurement. For all quantities suspended, Seller shall apply to and shall pursue with the New York State Department of Environmental Conservation a Voluntary Renewable Energy Market Set Aside Allocation under 6 NYCRR Part 242, Subpart 242-5; CO2 Budget Trading Program. The suspension of RPS-eligible Attributes shall not relieve or excuse Sellers from compliance with the Bid Facility Electricity Delivery Requirements for suspended RPS Attributes. Seller shall continue to provide reports and data throughout the duration of any period of suspension. Seller will be required to submit invoices monthly regardless if 100% of the Bid Quantity is suspended or if there is no production for the previous month. NYSERDA shall not be obligated to purchase or pay for suspended RPS-eligible Attributes during the suspension period; however, RPS-eligible Attributes suspended will be credited to the Quantity Obligation.

Section 2.12. Verification/Metering. The Actual Production and Actual Eligible Production of the Bid Facility must be capable of accurate and verifiable measurement at the

Injection Point by the local ISO, a transmission utility, public authority, municipal electric company, and in the case of a Customer-Sited Bid Facility, an independent third party. Unless specifically agreed to by NYSERDA in writing, all Bid Facilities that are the subject of an award under this RFP must be separately metered and must be functionally represented by a single and discrete Injection Point.

### Article III

#### Bid Facility Electricity Delivery Requirements.

Section 3.01. For all Bid Facilities, the electricity associated with the Quantity Obligation must be:

1. delivered into a market administered by the NYISO for end-use in New York State; or
2. delivered through a wholesale meter under the control of a utility, public authority or municipal electric company such that it can be measured, and such that consumption within New York State can be tracked and verified by such entity or by the NYISO; or
3. delivered through a Bid Facility dedicated generation meter, which shall be approved by and subject to independent verification by NYSERDA, to a customer in New York State (excluding customers in the service territory of the Long Island Power Authority) whose electricity was obtained through the NYISO/utility system as of January 20, 2011.

For Bid Facilities seeking to satisfy the Electricity Delivery Requirement through options 2 or 3, above, all costs associated with measurement, tracking, and verification, to the satisfaction of NYSERDA and DPS Staff must and will be borne by Seller. See also Section 2.12. Verification/Metering.

Section 3.02. Bilateral Sales. Bilateral sales for electricity associated with the RPS Attributes produced by the Bid Facility are permissible provided Seller demonstrates that: (a) the purchaser of such electricity is a NYS Load Serving Entity (LSE) serving an equal or greater amount of load than the Bid Quantity, or (b) the purchaser is one or more NYS end-users consuming an aggregate amount of electricity equal to or greater than the Bid Quantity.

Section 3.03. Intermittent External Bid Facilities. During each hour in which an Intermittent External Bid Facility generates Actual Eligible Production, the Seller must schedule and transmit from the control area of its location to the Delivery Point for end-use in New York, an amount of electricity, in MWh, equal to the Quantity Obligation during such hour. This Delivery Requirement will be applied to each hour during which the Bid Facility produces Actual Eligible Production; electricity delivered during any given hour will be recognized as delivered only during such hour; deliveries in excess of the Quantity Obligation during one hour will not be recognized, for purposes of this requirement, for delivery during any other hour. This rule applies to bilateral and NYISO spot market transactions. The Seller must demonstrate to the satisfaction of the PSC and/or NYSERDA that it is the financially responsible party for the transaction from the Bid Facility's local control area to the Delivery Point.

Section 3.04. Failure by any Seller of RPS Attributes from External Bid Facilities to meet these delivery requirements for a minimum of 90% of the hours in which the Bid Facility produces Actual Eligible Production during any Contract Year will constitute a default under Article XIII.

#### Article IV

#### Payment

Section 4.01. Invoices. Seller shall submit monthly invoices throughout the term of this Agreement for RPS Attributes created in the prior month during the Contract Delivery Term. Such invoices shall be addressed to the attention of “Accounts Payable,” and shall include a statement of the amount due and payable by NYSERDA to Seller, which amount shall be calculated in accordance with Section 4.02. All such invoices must and shall be accompanied by a completed Certification and Assignment of Rights Form, in the form provided at Exhibit B hereto, and must otherwise demonstrate the Transfer of the RPS Attributes. All invoices must be accompanied by a completed Hourly Data Report.

Section 4.02. Payment. NYSERDA will make payment to Seller of the amount of Quantity Obligation in whole MWh invoiced. NYSERDA may adjust payments to subsequent invoices consistent with NYISO or other local control area billing settlement true-up procedures, based on actual metered production data measured at the injection point, actual and verified data reflecting compliance with the Bid Facility Electricity Delivery Requirements, and/or based on the number of RPS Attributes Transferred. NYSERDA will not pay for RPS Attributes beyond the maximum it is required to purchase under this Agreement, in accordance with Section 4.04. Amounts payable in a given month shall be calculated as follows:

- (a) for Bid Facilities in New York State, the multiplicative product of (a) the Actual Eligible Production of the Bid Facility during the prior month; (b) the Bid Quantity Percentage; and (c) the Bid Price.
- (b) for Intermittent External Bid Facilities, for each hour during such month, NYSERDA shall first determine, for such hour, the lesser of: (1) the Actual Eligible Production during such hour, metered at the Injection Point, multiplied by the Bid Quantity Percentage, and (2) the amount of electricity (in MWh) delivered by Seller from the local control area to the Delivery Point in conformance with the Bid Facility Electricity Delivery Requirements during such hour. The amount payable shall be the sum of the amounts determined for each hour multiplied by the Bid Price.

Section 4.03. Prompt Payment Policy. NYSERDA will make payments to the Seller in accordance with and subject to its Prompt Payment Policy Statement, attached hereto as Exhibit E. The Seller shall be notified by NYSERDA in accordance with Section 504.4 of such Exhibit E, of any information or documentation that the Seller did not include with such invoice. Such payments shall be made by check or wire transfer to an account designated by the Seller. NYSERDA will not pay any invoice not accompanied by a completed Certification and Assignment of Rights Form, a complete Hourly Data Report, and, if required, a Monthly Fuel Report, with regard to the RPS Attributes for which payment is requested.

Section 4.04. Maximum Commitment/Limitation. The maximum number of RPS Attributes NYSERDA shall be obligated to purchase under this Agreement shall be equal to the Bid Quantity multiplied by the number of years in the Contract Delivery Term. The maximum aggregate amount payable by NYSERDA to Seller hereunder is (\$ \_\_\_\_\_). Should Seller elect to suspend performance under Section 2.11, such maximum aggregate amounts will be modified by subtracting any periods of Suspension from the number of Contract Years, and by reducing the Bid Quantity by the number of RPS Attributes suspended. NYSERDA shall not be obligated to purchase or pay for suspended RPS-eligible Attributes during the suspension period.

## Article V

### Adjustments

Section 5.01. True-Up Adjustments. NYSERDA may adjust payments to subsequent invoices consistent with NYISO or other control-area billing settlement true-up procedures, based on actual metered production data at the Injection Point and data demonstrating compliance with the Bid Facility Electricity Delivery Requirements.

Section 5.02. Other Adjustments. NYSERDA may adjust its contractual Payment obligations under this Agreement under the following circumstances:

- (a) NYSERDA may adjust amounts payable to Sellers to reflect any costs borne by NYSERDA for participation in any renewable energy attribute accounting system operating in the Bid Facility's local control area, including all fees and charges, if any, for the delivery and registration of the attributes or certificates associated with each RPS Attribute into a NYSERDA account, inclusive of accounts in New York State. NYSERDA may adjust amounts payable to Sellers with External Bid Facilities to reflect the reasonable costs borne by NYSERDA to verify Operational Certification throughout the Contract Delivery Term,
- (b) Should an Intermittent Bid Facility's Quantity Obligation fail to achieve 80% of the Bid Quantity for three (3) consecutive Contract Years, the Bid Quantity will be modified for the remainder of the Contract Delivery Term to equal the average Actual Annual Eligible Production over that three-year period multiplied by the Bid Percentage.
- (c) Should a Seller fail to reasonably demonstrate the actualization of at least 85 percent of the sum of the Expected Total Dollars (in dollars per MW of Bid Capacity) of the projected economic benefits included at Section 3 of the Bid Proposal (Economic Benefits Created by the Bid Facility)(attached hereto and made part hereof as Exhibit D), NYSERDA may reduce the Bid Price payable for the remainder of the Contract Delivery Term to an amount equal to the Bid Price multiplied by (the demonstrated amount divided by the Expected Total Dollars).
- (d) Should the Nameplate Capacity of the Bid Facility that achieves Operational Certification be less than the Nameplate Capacity included in the Bid Proposal Form, NYSERDA may

adjust the Bid Quantity and/or Bid Quantity Percentage to secure the rights to RPS Attributes in a quantity equal to or approximating the Expected Annual Eligible Production included on such Form.

## Article VI

### Records and Reports

Section 6.01. Monthly Reports. Sellers shall submit with each invoice an hourly data report (“Hourly Data Report”) including hourly electricity generation data measured at the Injection Point, in Microsoft Excel format or such other format to be agreed upon. NYSERDA will also require the Seller to provide detailed monthly market accounting settlement or other pertinent data from the administrator(s) of the energy market into which energy from the Bid Facility was delivered, from the entity or party in control of any meter through which the energy associated with the Quantity Obligation was delivered, and from the administrator of any attribute accounting system operating in such control area. Seller may be required to waive confidentiality, as to NYSERDA, for the direct transfer to NYSERDA by an energy market administrator or the operator of the transmission and/or distribution system into which the energy from the Bid Facility is delivered of transactional and/or delivery information and data pertinent to the verification of RPS Attribute creation and electricity delivery. Should the Quantity Obligation of any Bid Facility be zero for any month Seller shall submit a statement stating such for such month.

Section 6.02. Progress Reports. Beginning on the first such date following the Effective Date, and continuing through the commencement of the Contract Delivery Term, Seller shall provide quarterly written Progress Reports to NYSERDA, on March 1, June 1, September 1, and December 1, which reports shall be in letter form, and which shall describe at a minimum (1) Seller’s progress in obtaining and securing all required environmental or other permits and/or local approvals; (2) the status of development and/or construction planning or activities with regard to the Bid Facility; (3) the status of the interconnection process between the Bid Facility and the administrator of the control area; (4) purchases, delivery, and/or installation of any major equipment associated with the Bid Facility; and (5) an estimated date for Commercial Operation. Such reports shall also include an updated Project Schedule Form (RFP 2226 Attachment C), copies of any permits or approvals granted and/or copies of any correspondence of any type denying or refusing any permit or approval.

Section 6.03. Economic Benefits Report. Sellers shall submit a report including documentation demonstrating the actual economic benefits that resulted from the construction and operation of the Bid Facility. Such report should include copies of sufficient records and documentation relating to employment, purchases, and other payments necessary to demonstrate the economic benefits created by the Bid Facility under the categories listed under X, Section 3 of RFP 2226. Seller will be required to submit such report within sixty (60) days of the third anniversary of the commencement of the Contract Delivery Term.

Section 6.04. Annual Reports. Sellers shall submit, annually for the duration of the Contract Delivery Term, a detailed report identifying and describing the number of short and long-term jobs actually created as a result of the development, operation and/or construction of the Bid Facility. Such report shall also include an accounting of total expenditures incurred for

all short and long-term jobs created, and shall identify, describe and quantify all payments made to any State, municipal or local governmental entity, any payments made for the usage of land or fuel purchases, and all in-state purchases made as a result of the development, construction, and operation of the Bid Facility. Such report shall be filed with NYSERDA within sixty (60) days of each anniversary of the commencement of the Contract Delivery Term. Such report shall also identify, describe, and quantify any and all Federal or local tax incentives received or awarded for the construction and/or operation of the Bid Facility including grants, government backed loans, tax credits or similar government sponsored financial assistance.

Section 6.05. Additional Documents. Within 10 business days of Notice from NYSERDA of selection under RFP 2226, Seller shall provide to NYSERDA:

- (a) certificates, dated as of the most recent practicable date prior to the Effective Date, issued by the [insert - jurisdiction of Seller's organization] Secretary of State confirming the corporate good standing of the Seller;
- (b) a certificate of an appropriate officer of the Seller, dated as of the Effective Date, in form and substance reasonably satisfactory to NYSERDA and certifying: (1) the names and signatures of the officers of the Seller authorized to sign a Certification and Assignment of Rights Form and any other documents to be delivered hereunder, and (2) the accuracy and completeness of resolutions of the Seller, authorizing and approving all matters in connection with the transactions contemplated thereby.

Seller shall promptly provide NYSERDA with updated and corrected versions of the above-referenced certificates upon any change in the information provided therein.

Section 6.06. Maintenance of Records. The Seller shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of seven (7) years following the expiration of this Agreement, full and detailed books, accounts, and records pertaining to Seller's performance under the Agreement, including without limitation, all bills, invoices, payrolls, subcontracting efforts and other data evidencing, or in any material way related to, the direct and indirect costs and expenses incurred by the Seller in the course of such performance.

## Article VII

### Audit

Section 7.01. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and such period thereafter to inspect and audit any and all books, accounts and records pertaining to Seller's performance under this Agreement, at the office or offices of the Seller where they are then being kept, maintained and preserved. If such books, accounts and records are not kept at an office within the State of New York, within a reasonable time of a request by NYSERDA, Seller shall make such books, accounts and records available to NYSERDA at NYSERDA's offices or at an agreed upon location within the State of New York. Any payment made under this Agreement shall be subject to retroactive adjustment (reduction or increase) regarding amounts included therein

which are found by NYSERDA on the basis of any audit of the Seller by an agency of the United States, the State of New York or NYSERDA not to constitute a properly invoiced amount.

Section 7.02. Eligibility Audit. NYSERDA may require periodic audits of the Bid Facility to verify that the Bid Facility remains eligible under the eligibility rules and requirements, as such requirements existed on January 20 2011. Prior to any material modification of the Bid Facility, including but not limited to any modification that is expected to result in a change in the Nameplate Capacity of the Bid Facility, Seller shall provide NYSERDA with written Notice and will provide to NYSERDA a written description of the planned modification.

## Article VIII

### Assignments

Section 8.01. 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 Seller'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. Such consent shall not be unreasonably withheld.

Section 8.02. Seller may, without NYSERDA's prior written consent, grant a security interest in or assign this Agreement as collateral in connection with financing arrangements. Seller shall promptly notify of the completion and the nature of any such grant or assign.

Section 8.03. Either Party may, upon written notice, assign its rights and obligations hereunder, or transfer such rights and obligations by operation of law, to any entity with which or into which such Party shall merge or consolidate or to which such Party shall transfer all or substantially all of its assets, provided that such other entity agrees to be bound by the terms hereof and provided further, that such other entity's creditworthiness is comparable to or higher than that of such Party at the time this Agreement was executed and such Party is not relieved of any obligation or liability hereunder as a result of such assignment.

## Article IX

### Seller's Warranties and Guarantees

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

- (a) (1) that Seller is [corporation/limited liability company/partnership] duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization; (2) has or will have all requisite corporate power, and has or will have all material governmental permits necessary to own its assets or lease and operate its properties and carry on its business as now being or as proposed to be conducted, to

construct, finance, own, maintain and operate the Bid Facility, to execute and deliver this Agreement, and to consummate the transactions contemplated herein; and (3) is qualified to do business and is in good standing in all jurisdictions in which the nature of the business conducted by it makes such qualification necessary.

- (b) that the execution, delivery and performance by Seller, the entry into this Agreement by Seller, and the consummation of the transactions contemplated by this Agreement: (1) have been duly authorized by all requisite corporate action (including any required action of its members); and (2) will not (i) violate any applicable provision of law, statute, rule, regulation or order of any governmental agency or any provision of the limited liability company agreement or other governing documents of Seller; (ii) violate, conflict with, result in a breach of or constitute (alone or with notice or lapse of time or both) a default or an event of default under any indenture, agreement (including the respective limited liability company agreements of Seller), mortgage, deed of trust, note, lease, contract or other instrument to which Seller is a party or by which it or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of the Seller.
- (c) that the Bid Facility is or will be eligible under the Orders and that it will remain so throughout the Contract Delivery Term.
- (d) that the RPS Attributes, as to which right and title is to be transferred to NYSERDA under this Agreement, are eligible and compliant with the Renewable Portfolio Standard;
- (e) that the RPS Attributes, as to which right and title is to be transferred to NYSERDA under this Agreement, are free and clear of any liens, encumbrances and/or defects of title;
- (f) that the RPS Attributes, as to which right and title is to be Transferred to NYSERDA under this Agreement shall not have otherwise been, nor will be sold, retired, claimed or represented as part of electricity output or sales, or used to satisfy obligations in any other jurisdiction;
- (g) that Seller 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;
- (h) that this Agreement and each Certification and Assignment of Rights Form will be duly executed and delivered by Seller and will constitute the legal, valid and binding obligation of Seller enforceable against Seller in accordance with the terms thereof;
- (i) that the Seller has no 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 Seller's performance under this Agreement will infringe any patent or otherwise interfere with any other right of any Person;

- (j) that there are no existing undisclosed or threatened legal actions, claims, or encumbrances, or liabilities that may adversely affect Seller's performance of this Agreement or NYSERDA's rights hereunder;
- (k) that Seller has no knowledge that any information or document or statement furnished by the Seller 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;
- (l) that Seller shall not, and shall not cause or permit any voluntarily abandonment of the development, construction or operation of the Facility;
- (m) Seller certifies that all information provided to NYSERDA with respect to State Finance Law Sections 139-j and 139-k is complete, true and accurate.

## Article X

### NYSERDA's Warranties and Guarantees

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

- (a) that NYSERDA is an instrumentality of the State of New York and a public authority and public benefit corporation, created under the New York State Public Authorities Law, validly existing and in good standing under the laws of the State of New York.
- (b) that NYSERDA has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by NYSERDA of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, and no other actions or proceedings on the part of NYSERDA are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby.
- (c) that the execution, delivery and performance by NYSERDA of this Agreement will not (1) violate any applicable provision of law, statute, rule, regulation or order of any governmental agency or, any provision of the Public Authorities Law; (2) violate, conflict with, result in a material breach of or constitute (alone or with notice or lapse of time or both) a material default or event of default under any indenture, agreement, mortgage, deed of trust, note, lease, contract or other instrument to which NYSERDA is a party or by which NYSERDA or any of its property is bound; or (3) result in the creation or imposition of any lien upon any property or assets of NYSERDA. This Agreement will not conflict with any other agreement or contract to which NYSERDA is a party.

- (d) that this Agreement has been duly executed and delivered by NYSERDA and constitutes the legal, valid and binding obligation of NYSERDA enforceable against NYSERDA in accordance with the terms thereof.
- (e) that NYSERDA is familiar with and in compliance with all general and specific laws, except where the failure to so comply would not result in a material adverse effect on NYSERDA's ability to perform its obligations.
- (f) that there is no action, suit or claim at law or in equity, or before or by a governmental authority pending or, to the best knowledge of NYSERDA after due inquiry, threatened against NYSERDA or affecting any of its properties or assets which could reasonably be expected to result in a material adverse effect on NYSERDA's ability to perform its obligations.

## Article XI

### Indemnification

Section 11.01. Indemnification. Seller shall protect, indemnify and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' and/or experts' fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to Seller's performance under this Agreement. The obligations of Seller 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 XII

### Insurance

Section 12.01. Maintenance of Insurance; Policy Provisions. The Seller, at no cost to NYSERDA, shall maintain or cause to be maintained, commencing with the Effective Date and continuing throughout the duration of the Contract Deliver Term, insurance of the types and in the amounts specified in Section 12.02 (Types of Insurance). All such insurance shall be evidenced by insurance policies, each of which shall:

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

Section 12.02. Types of Insurance. Seller shall be required to maintain commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of

[insert: \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of personal injury or sickness or death of any one person; [insert \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of personal injury, sickness or death in any one accident or disaster; and [insert \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of property damage in any one accident or disaster.

Section 12.03. Delivery of Policies; Insurance Certificates. Within 30 days of the effective date of this Agreement, Seller shall deliver to NYSERDA certificates of insurance issued by the respective insurers, indicating the Agreement number thereon, evidencing the insurance required by this Article and bearing notations evidencing the payment of the premiums thereon or accompanied by other evidence of such payment satisfactory to NYSERDA. In the event that any policy furnished or carried pursuant to this Article will expire on a date prior to the expiration date of this Agreement, Seller, not less than 15 days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and Seller shall promptly pay all premiums thereon due. In the event of threatened legal action, claims, encumbrances, or liabilities that may affect NYSERDA hereunder, or if deemed necessary by NYSERDA due to events rendering a review necessary, upon request Seller shall deliver to NYSERDA a certified copy of each policy.

### Article XIII

#### Events of Default

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

- (a) Representations and Warranties. Any representation or warranty made in this Agreement that shall prove to have been false or misleading in any material respect as of the time made or deemed to be made; or
- (b) Other Obligations. A Party shall default in the performance of any of its obligations under this Agreement and such default shall continue unremedied for a period of 30 days after Seller receives Notice or otherwise has actual knowledge thereof; or
- (c) Voluntary Proceedings. A Party shall (a) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property; (b) make a general assignment for the benefit of its creditors; (c) commence a voluntary case under the Bankruptcy Code; (d) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts; (e) fail to convert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in an involuntary case under the Bankruptcy Code; or (f) take any corporate action for the purpose of effecting any of the foregoing; or
- (d) Involuntary Proceedings. A proceeding or case shall be commenced against a Party, without its application or consent, in any court of competent jurisdiction, seeking (a) its

liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts; (b) the appointment of a trustee, receiver, custodian, liquidator or the like of all or any substantial part of its assets; or (c) similar relief under any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, and such proceeding or case shall continue undismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of 60 or more days; or an order for relief against a Party, shall be entered in an involuntary case under the Bankruptcy Code; or

- (e) Judgments. A judgment or judgments for the payment of money in the amount of \$1,000,000 or more shall be rendered by a court or courts against Seller, and the same shall not be paid or otherwise discharged for a period of more than 60 days unless such judgment has been stayed, released or vacated; or
- (f) Unauthorized Transfer. The transfer or attempted transfer by Seller to any transferee other than NYSERDA of any RPS Attribute associated with this Agreement, except as authorized pursuant to Section 2.11 of this Agreement.
- (g) Commercial Operation. Failure of the Bid Facility to commence Commercial Operation at a minimum of 80 percent of the Bid Capacity on or before the Commercial Operation Milestone Date (July 31, 2012, unless extended pursuant to Article II, Section 2.09 of this Agreement).
- (h) Abandonment. Seller's abandonment of the Facility or its intentional delay of completion of construction in connection therewith;
- (i) Failure to Produce. The failure of the Quantity Obligation of any Bid Facility to achieve at least 65 percent of the Bid Quantity during any Contract Year;
- (j) Failure to Deliver. The failure by Seller of RPS Attributes from an External Bid Facility to meet and conform to the Bid Facility Electricity Delivery Requirements for a minimum of 90 percent of the hours during any Contract Year.
- (k) Failure to Transfer RPS Attributes. The failure by Seller to Transfer rights to NYSERDA in the RPS Attributes associated with the Quantity Obligation of the Bid Facility, in conformity with Article II.
- (l) State/Local Incentives. Where the Bid Facility is an External Bid Facility, the acceptance by Seller at any time during the Contract Delivery Term of provincial, state and/or local incentives or other grants, subsidies or investments, as described at Subsection C to Section V of RFP 2226, with respect to such External Bid Facility.
- (m) Failure to Provide Additional Contract Security. Failure by Seller to provide to NYSERDA, on or before January 17, 2012, additional Contract Security, in an amount equal to three dollars (\$3.00) per MWh multiplied by the Bid Quantity (See Section 15.01(b)).

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

#### Article XIV

#### Termination

Section 14.01. Termination. This Agreement may be terminated:

- (a) at any time by either NYSERDA or Seller if: (1) an Event of Default occurs (and following the expiration of any applicable cure period), (2) the Party seeking to terminate this Agreement hereunder is the non-defaulting Party, and (3) the non-defaulting Party has not waived such Event of Default in writing;
- (b) at any time by the mutual written consent of Seller and NYSERDA;
- (c) unless otherwise mutually agreed upon by NYSERDA and Seller in writing, on the expiration of the Contract Delivery Term (subject to Section 18.03 of this Agreement);
- (d) by NYSERDA in the event it is found that the certification filed by the Seller in accordance with State Finance Law Sections 139-j and 139-k was intentionally false or intentionally incomplete;
- (e) by NYSERDA in the event it is found that the certification filed by the Seller in accordance with New York State Tax Law Section 5-a was intentionally false when made.

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

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

## Article XV

### Contract Security

Section 15.01. (a) Within ten (10) days of Notice from NYSERDA of selection under RFP 2226, Seller shall provide to NYSERDA Contract Security, in the form of cash, certified funds, or a Letter of Credit conforming to the requirements below, in an amount equal to the product of (1) Bid Quantity and (2) six dollars (\$6.00). (b) On or before January 17, 2012, Seller must provide additional Contract Security in an amount equal to three dollars \$3.00 multiplied by the Bid Quantity. **Failure to provide the additional Contract Security by January 17, 2012 will constitute a default and will result in termination of this Agreement.** (c) On or before July 2, 2012, Sellers electing to extend the Commercial Operation Milestone Date to December 31, 2012 under Section 2.09(1), above, must provide Contract Security, in addition to the amounts provided under Sections 15.01(a) and (b), above, in an amount equal to three dollars (\$3.00) multiplied by the Bid Quantity.

Section 15.02. Letter of Credit. A Letter of Credit shall be a clean unconditional and irrevocable standby letter of credit in favor of NYSERDA as beneficiary, issued for direct payment by a bank which is a member of the New York Clearinghouse Association, substantially in the form of the letter of credit attached hereto as Exhibit C ("Letter of Credit"), in a face amount equal to the Contract Security Amount, and which Letter of Credit shall provide that the issuing bank will pay to NYSERDA amounts in aggregate up to that same face amount upon presentation of only the Sight Draft in the amount to be drawn and the Payment Certificate, in the form of Annex A and Annex B, respectively, to the Letter of Credit, and have an expiration date not shorter than one (1) year. Should the Bid Facility not have commenced Commercial Operation by a date 30 days prior to the expiration date of the letter of Credit, and Seller not having provided NYSERDA or arranged with NYSERDA to provide a substitute Letter of Credit prior to such expiration, NYSERDA shall be thereupon entitled to draw on the Letter of Credit for the full amount then outstanding and the funds received shall be held by NYSERDA until a substitute Letter of Credit has been provided, or for application against subsequent obligations of Seller.

Section 15.03. Replacement. Any assignee within Article VIII of this Agreement shall, simultaneously with its receipt of the assignment, deliver to NYSERDA a Replacement Letter of Credit meeting the requirements of this Article, and NYSERDA shall, within twenty (20) business days after receipt of a compliant Replacement Letter of Credit, return the original Letter of Credit to Seller. Upon the failure of an assignee to deliver a compliant Replacement Letter of Credit to NYSERDA simultaneously with its receipt of the assignment, NYSERDA shall be thereupon entitled to draw on the Letter of Credit for the full amount then outstanding and the funds received shall be held by NYSERDA for application against subsequent obligations of Seller and/or the assignee under this Agreement.

Section 15.04. Refund of Security. Amounts provided by Seller as Contract Security will be returned or refunded to Seller by NYSERDA as follows:

- (a) In their entirety if the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date is equal to or greater than the Bid Capacity of the Bid Facility described in the Bid Proposal.
- (b) At a prorated amount if the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal. Such amount that will be returned, expressed as a percentage of the total Contract Security, will be equal to Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

Section 15.05. Retention Security. Amounts provided by Seller as Contract Security will be retained by NYSERDA as follows:

- (a) In their entirety if Seller fails to provide to NYSERDA, on or before January 17, 2012, Contract Security in the amount required under Section 15.01(b), above.
- (b) At a prorated amount if the Bid Capacity of the Bid Facility that is in Commercial Operation on the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal. Such amount that will be retained, expressed as a percentage of the total Contract Security, will be equal to the Bid Capacity of the Bid Facility described in the Bid Proposal minus the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date; divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

Section 15.06. Stipulated Damages. NYSERDA and Seller hereby agree, acknowledge and stipulate that NYSERDA's retention of amounts provided by Seller as Contract Security pursuant to Article XV, in the proportions stated within this Article, is fair and reasonable under the circumstances and in light of the uncertainty and inability to adequately quantify the harm that would result to NYSERDA as a result of the events that permit NYSERDA to retain such amounts of the Contract Security.

## Article XVI

### Force Majeure

Section 16.01. 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, or strikes. Variability in the frequency or force

of the wind, of rainfall, or of water levels will in no event constitute force majeure events. Failure by Seller to obtain or secure any permit or approval or delay in obtaining any permit or approval of any sort with regard to Seller's performance under the Agreement shall not constitute a force majeure event.

## Article XV

### Compliance with Certain Laws

Section 17.01. Governing Law; Venue. This Agreement shall be governed by, and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed in New York State without regard to its conflicts of laws principles. The parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in a United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

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

Section 17.03. All Legal Provisions Deemed Included. It is the intent and understanding of the Seller and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or the Seller, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

Section 17.04. Permits and Approvals. The Seller shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Bid Facility over the duration of the Contract Delivery Term. Neither the RPS Program nor selection under this RFP in any way replaces or modifies the necessity or applicability of any permit or approval process by any jurisdiction. NYSERDA's obligations to make payments to Sellers will be conditional on the acquisition of all such permits and approvals. Upon request by NYSERDA Seller must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Seller shall provide prompt Notice to NYSERDA of the initiation of any criminal or regulatory investigation, hearing, proceeding, or review process ("Process") by any federal or State entity regarding any actual or alleged violation of any permit or approval obtained or applied for with respect to the Bid Facility, as well as of any modification, penalty and/or fine that may be imposed or occur as a result of such a Process or violation.

Section 17.05. Other Legal Requirements. The references to particular laws of the State of New York in this Article and elsewhere in this Agreement are not intended to be exclusive and nothing contained in such Article, Exhibit and Agreement shall be deemed to modify the obligations of the Seller to comply with all legal requirements.

## Article XVIII

### Additional Provisions

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

Section 18.02. Taxes. Seller shall be responsible for and obligated to pay all present and future taxes, fees and levies that may be assessed by any entity upon the Seller's provision of Attributes to NYSERDA, or with respect to the creation of the RPS Attributes and/or the energy with which they are associated, up to the Delivery Point, including any and all costs for NYSERDA's participation in any renewable energy attribute accounting system operating in the Bid Facility's local control area, including all fees and charges, if any, for the delivery and registration of the attributes or certificates associated with each RPS Attribute into a NYSERDA account, inclusive of accounts in New York State.

Section 18.03. Term. Unless terminated earlier under this Article, this Agreement shall expire upon the expiration of the Contract Delivery Term, provided that payment has been made for all RPS Attributes as to which a Certification and Assignment of Rights Form has been delivered to NYSERDA. Upon such date or upon earlier Termination of this Agreement under Article XIV, neither Party shall have any further obligation to the other, except that Sections 11.01, 17.01, 20.01, 21.02, 21.03, 21.04, and NYSERDA's Payment obligation under Article IV shall survive.

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

Section 18.05. Independent Contractor. The status of the Seller under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, Seller and its respective officers, agents, employees, representatives and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such

status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives or servants of NYSERDA nor make any claim, demand or application for any right or privilege applicable to NYSERDA, including, without limitation, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage and retirement membership or credit.

Section 18.06. Severability. If any provision of this Agreement shall be declared by any court of competent jurisdiction to be illegal, void or unenforceable, all other provisions of this Agreement shall not be affected and shall remain in full force and effect. If any provision of this Agreement is so broad as to be unenforceable, that provision shall be interpreted to be only so broad as will enable it to be enforced.

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

Section 18.08. Environmental Disclosure. The Parties agree that, at the time of the execution of this Agreement, New York does not employ any registry for the tracking, registration, or trading of renewable or environmental attributes or credits, but rather has instituted the Environmental Disclosure program, under which the Department of Public Service will conduct Conversion Transactions to accomplish verification of the transactions consummated hereunder. In the event that an attribute or credit registry is adopted in the future, Seller and NYSERDA agree to: (1) take such steps as are required under such system to continue to transfer RPS Attributes to NYSERDA in accordance with the terms of this Agreement; and (2) amend this Agreement as needed to effect its intent and to comply with any requirements of such attribute or credit registry. Should the PSC create, sanction, adopt or begin participation in a tracking system for accounting for attributes or certificates associated with generation in the New York Control Area, Seller shall deliver the attributes or certificates associated with each RPS Attribute to an account designated by NYSERDA.

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

## Article XIX

### Notices, Entire Agreement, Amendment, Counterparts

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

- (1) via certified or registered United States mail, return receipt requested;

- (2) by facsimile transmission;
- (3) by personal delivery;
- (4) by expedited delivery service; or
- (5) by e-mail, return receipt requested.

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

To Seller:                    Company  
    Attn:  
    Name  
    Address Line 1  
    Address Line 2  
    City, State Zip code  
    Facsimile No.: (xxx) xxx-xxxx  
    E:mail Address:

To NYSERDA:                NYSERDA  
    Attn: Office of the General Counsel  
    17 Columbia Circle  
    Albany, New York 12203-6399  
    Facsimile No.: (518) 862-1091  
    E:mail address: [prk@nyserda.org](mailto:prk@nyserda.org)

- (b) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt.
- (c) The parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

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

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

## Article XX

### Publicity

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

## Article XXI

### Confidentiality

Section 21.01. In order to enable NYSERDA and the administrator of the NYS Environmental Disclosure Program to verify delivery of RPS Attributes, NYSERDA will require the Seller to provide detailed monthly market accounting settlement or other pertinent data from the administrator(s) of the energy market and/or the operator of the transmission/distribution utility into which energy from the Bid Facility was produced and/or delivered. Seller will be required to waive confidentiality, as to NYSERDA, for the direct transfer to NYSERDA by such entities of transactional and/or delivery information and data pertinent to the verification of RPS Attribute and associated electricity delivery.

Section 21.02. Freedom of Information Law. Seller acknowledges that NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL;" see Public Officers' Law Article 6).

Section 21.03. Claim of Confidentiality. Information of any tangible form including any document that Seller wishes to be protected from disclosure to third parties, including any information provided as a part of a Bid Proposal Package submitted in response to RFP 2226, must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA.

Section 21.04. Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If NYSERDA receives a request from a third party for information or a document received from Seller and which has



EXHIBIT A

REVISED 9/06

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 \$100,000 for the purchase of goods and services:

- a. Before such agreement can take effect, the Contractor must have on file with the New York State Department of Taxation and Finance a Contractor Certification form (ST-220-TD).
- b. Prior to entering into such an agreement, the Contractor is required to provide NYSERDA with a completed Contractor Certification to Covered Agency form (Form ST-220-CA).
- c. Prior to any renewal period (if applicable) under the agreement, the Contractor is required to provide NYSERDA with a completed Form ST-220-CA.
- d. Certifications referenced in paragraphs (b) and (c) above will be maintained by NYSERDA and made a part hereof and incorporated herein by reference.

- e. 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 B  
CERTIFICATION AND ASSIGNMENT OF RIGHTS FORM

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

Name of Seller: \_\_\_\_\_

Name of Bid Facility: \_\_\_\_\_

Invoice Number \_\_\_\_\_

Seller hereby sells, assigns, conveys and delivers to NYSERDA all right, title and interest in the RPS Attributes, such RPS Attributes having been created in the month of \_\_\_\_\_, in the year \_\_\_\_\_, for which payment is requested by the accompanying invoice. Such right, title and interest shall include perpetual and exclusive rights to the RPS Attributes for which payment is requested, including but not limited to the exclusive rights to claim, consistent with New York State Environmental Disclosure rules: (i) that the energy associated with these RPS Attributes was generated by the Bid Facility; and (ii) that New York State and or the RPS Program is responsible for the environmental benefits resulting from the generation of that portion of the Bid Facility's energy that is associated with these RPS Attributes.

Seller further certifies and guarantees that all of the information provided on the attached invoice requesting payment from NYSERDA under the terms of NYSERDA Agreement No. \_\_\_\_\_ is true and accurate; that the Bid Facility named above was at all times relevant and is now an eligible facility under the rules of the NYS Renewable Portfolio Standard; that the RPS Attributes to which all right, title and interest is transferred to NYSERDA by this instrument are free and clear of all liens, judgments, encumbrances and restrictions, and have not have otherwise been, nor will be, sold, retired, claimed or represented as part of electricity output or sales, or used to satisfy obligations in any other jurisdiction.

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

By: \_\_\_\_\_  
Signature of Seller's Authorized Officer

\_\_\_\_\_  
Name of Seller's Authorized Officer

**EXHIBIT C  
LETTER OF CREDIT**

FORM OF IRREVOCABLE STANDBY LETTER OF CREDIT

IRREVOCABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_\_

DATE: \_\_\_\_\_, 20\_\_

**BENEFICIARY:**

THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY  
17 COLUMBIA CIRCLE, ALBANY, NEW YORK 12203-6399

LADIES AND GENTLEMEN:

BY THE ORDER OF:

[SELLER]

[SELLER'S ADDRESS]

WE HEREBY ISSUE OUR IRREVOCABLE CREDIT NO: \_\_\_\_\_ IN YOUR FAVOR FOR THE ACCOUNT OF \_\_\_\_\_ (THE "SELLER") FOR AN AMOUNT OR AMOUNTS NOT TO EXCEED IN THE AGGREGATE [STATE IN WORDS] U.S. DOLLARS AVAILABLE BY YOUR DRAFTS AT SIGHT ON [INSERT NAME AND ADDRESS OF ISSUING BANK], NEW YORK, NEW YORK, USA, WHEN ACCOMPANIED BY THE FOLLOWING DOCUMENTS:

1. YOUR SIGHT DRAFT DRAWN ON US IN THE FORM OF ANNEX A HERETO (THE "SIGHT DRAFT"); AND
2. A DATED PAYMENT CERTIFICATE PURPORTEDLY SIGNED BY A DULY AUTHORIZED OFFICER OF NYSERDA IN THE FORM OF ANNEX B HERETO (THE "PAYMENT CERTIFICATE").

MULTIPLE DRAWINGS ARE PERMITTED IN AMOUNTS NOT TO EXCEED, IN COMBINATION, THE AGGREGATE AMOUNT.

DEMANDS PRESENTED BY FACSIMILE (TO FACSIMILE NUMBER \_\_\_\_\_) ARE ACCEPTABLE: PROVIDED THAT IF ANY SUCH DEMAND IS PRESENTED BY FACSIMILE, THE ORIGINAL SIGHT DRAFT, STATEMENT, AND LETTER OF CREDIT SHALL BE SIMULTANEOUSLY FORWARDED BY OVERNIGHT COURIER SERVICE TO OUR OFFICE LOCATED AT THE ADDRESS STATED ABOVE; PROVIDED FURTHER THAT THE FAILURE OF THE COURIER SERVICE TO TIMELY DELIVER SHALL NOT AFFECT THE EFFICACY OF THE DEMAND.

FUNDS UNDER THIS LETTER OF CREDIT ARE AVAILABLE TO YOU AGAINST YOUR PAYMENT CERTIFICATE AND SIGHT DRAFT PRESENTED IN FULL COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS LETTER OF CREDIT ON OR BEFORE 5:00 P.M., NEW YORK TIME, ON THE EXPIRATION DATE HEREOF. THIS LETTER OF CREDIT WILL EXPIRE ON [INSERT DATE].

PAYMENT AGAINST CONFORMING DOCUMENTS PRESENTED UNDER THIS LETTER OF CREDIT SHALL BE MADE BY US AT OR BEFORE 2:00 P.M., NEW YORK TIME, ON THE NEXT (OR, IN THE CASE OF A PRESENTATION AFTER 10:30 A.M., NEW YORK TIME, THE SECOND NEXT) BANKING DAY AFTER PRESENTATION.

ALL PAYMENTS MADE BY US UNDER THIS LETTER OF CREDIT WILL BE MADE IN IMMEDIATELY AVAILABLE FUNDS AND WILL BE DISBURSED FROM OUR OWN FUNDS. IF REQUESTED BY YOU, PAYMENT UNDER THIS LETTER OF CREDIT MAY BE MADE BY WIRE TRANSFER OF FEDERAL RESERVE BANK OF NEW YORK FUNDS TO YOUR ACCOUNT IN A BANK ON THE FEDERAL RESERVE WIRE SYSTEM. BENEFICIARY'S BANK [INSERT NAME AND ACCOUNT NUMBER].

ONLY YOU MAY MAKE ANY PAYMENT CERTIFICATE AND SIGHT DRAFT UNDER THIS LETTER OF CREDIT.

ANY SIGHT DRAFT DRAWN HEREUNDER MUST BE MARKED "DRAWN UNDER [INSERT NAME AND ADDRESS OF ISSUING BANK], STANDBY LETTER OF CREDIT NUMBER \_\_\_\_\_ DATED \_\_\_\_\_."

ALL BANK CHARGES INCLUDING BUT NOT LIMITED TO, FEES OR COMMISSIONS, SHALL BE FOR APPLICANT'S ACCOUNT.

MISCELLANEOUS

THIS LETTER OF CREDIT SETS FORTH IN FULL THE TERMS OF OUR UNDERTAKING. SUCH UNDERTAKING SHALL NOT IN ANY WAY BE MODIFIED, AMENDED OR AMPLIFIED BY REFERENCE TO ANY DOCUMENT OR INSTRUMENT REFERRED TO HEREIN OR IN WHICH THIS LETTER OF CREDIT IS REFERRED OR TO WHICH IT RELATES (INCLUDING, WITHOUT LIMITATION, THE AGREEMENT) AND ANY SUCH REFERENCE SHALL NOT BE DEEMED TO INCORPORATE HEREIN BY REFERENCE ANY DOCUMENT OR INSTRUMENT.

WE HEREBY AGREE WITH YOU THAT EACH DULY COMPLETED PAYMENT CERTIFICATE AND SIGHT DRAFT DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS LETTER OF CREDIT WILL BE DULY HONORED UPON PRESENTATION TO US ON OR BEFORE THE EXPIRY DATE.. THE OBLIGATION OF [ISSUING BANK] UNDER THIS LETTER OF CREDIT IS THE INDIVIDUAL OBLIGATION OF [ISSUING BANK], AND IS IN NO WAY CONTINGENT UPON REIMBURSEMENT WITH RESPECT THERETO.

EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, THIS LETTER OF CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993 REVISION), INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION 500 (PROVIDED, HOWEVER, THAT DRAWINGS PERMITTED HEREUNDER SHALL NOT BE DEEMED TO BE DRAWINGS BY INSTALLMENTS WITHIN ARTICLE 41 OF THE UCP) AND AS TO MATTERS NOT GOVERNED BY THE UCP, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK AND APPLICABLE U.S. FEDERAL LAW.

PLEASE ADDRESS ALL CORRESPONDENCE REGARDING THIS LETTER OF CREDIT TO THE ATTENTION OF OUR STANDBY LETTER OF CREDIT UNIT, GLOBAL TRADE SERVICE, MENTIONING OUR REFERENCE NUMBER AS IT APPEARS ABOVE.

[NAME AND ADDRESS OF ISSUING BANK]

\_\_\_\_\_  
AUTHORIZED SIGNATURE  
OF OFFICER OF ISSUING BANK

Annex A to Exhibit C - Irrevocable Standby Letter of Credit

SIGHT DRAFT

Letter of Credit No. \_\_\_\_\_

Date of Letter of Credit: \_\_\_\_\_

Date of Draft: \_\_\_\_\_

FOR VALUE RECEIVED

Pay on Demand to: THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT  
AUTHORITY, U.S. \_\_\_\_\_ Dollars (U.S. \$ \_\_\_\_\_). The amount of  
this draft does not exceed the amount available to be drawn by the Beneficiary under the Letter of Credit.

Charge to account of [Name of Seller].

Drawn under [Name of Bank] Letter of Credit No. \_\_\_\_\_.

To: [Issuing Bank]

[Address]

Attention: \_\_\_\_\_

\_\_\_\_\_  
As Beneficiary

By: \_\_\_\_\_  
[Name and Title]

Annex B to Exhibit C - Irrevocable Standby Letter of Credit

PAYMENT CERTIFICATE

To:  
[Issuing Bank]  
[Address]

Re: Irrevocable Standby Letter of Credit No: \_\_\_\_\_ [Insert]

The undersigned, a duly authorized officer of the undersigned Beneficiary, hereby certifies to [Issuing Bank], with reference to the Irrevocable Standby Letter of Credit No: [Insert] ("Letter of Credit"), that Seller, having provided the Letter of Credit to the New York State Energy Research and Development Authority ("NYSERDA") as Security for performance under NYSERDA Agreement No. \_\_\_\_\_ ("Agreement") in the aggregate amount of \$\_\_\_\_\_, ("Letter of Credit Amount") either [check the appropriate space]:

\_\_\_\_\_ Seller failed to provide to NYSERDA, on or before January 17, 2012, Contract Security in the amount required under Section 15.01(b) of the Agreement, under which circumstance NYSERDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount.

\_\_\_\_\_ Seller has failed to perform in that Seller's Bid Facility has failed to attain Operational Certification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of July 31, 2012; under which circumstance NYSERDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount;

\_\_\_\_\_ Seller has failed to perform in that Seller's Bid Facility has failed to attain Operational Certification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of December 31, 2012; under which circumstance NYSERDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount;

\_\_\_\_\_ The Bid Capacity of the Bid Facility that entered Commercial Operation on or before the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal; under which circumstance, NYSERDA is authorized to draw a percentage of the Letter of Credit Amount, such percentage will be equal to the Bid Capacity of the Bid Facility described in the Bid Proposal minus the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date; divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

\_\_\_\_\_ Seller has assigned its rights under the Agreement and the assignee has not delivered to the undersigned Beneficiary a replacement letter of credit satisfying the requirements of the Agreement; under which circumstance NYSERDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount;

\_\_\_\_\_ the Letter of Credit is currently set to expire within thirty (30) days and the Seller has not made arrangements acceptable to the undersigned Beneficiary to provide a substitute letter of credit prior to such expiration; under which circumstance NYSERDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount.

The terms used herein which are not specifically defined herein are defined in the Letter of Credit or the Agreement, a copy of which is annexed hereto.

IN WITNESS WHEREOF, the Beneficiary has executed and delivered this payment Certificate as of the \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
As Beneficiary

By: \_\_\_\_\_  
[Name and Title]

EXHIBIT D  
BID PROPOSAL

[AS SUBMITTED BY SELLER]

EXHIBIT E  
21 NYCRR 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) "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.

**RFP 2226 – ATTACHMENT H**

**RPS STANDARD FORM CONTRACT**

**(FUEL BASED BID FACILITIES)**

**BY AND BETWEEN**

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

**AND**

**[NAME OF SELLER]**

**Dated: APRIL \_\_, 2011**

This Agreement ("Agreement") is entered into as of April \_\_, 2011 (the "Effective Date") by and between the New York State Energy Research and Development Authority ("NYSERDA"), a public benefit corporation, having a principal business address of 17 Columbia Circle, Albany, New York 12203, and [Offeror] ("Seller"), a [insert as appropriate], having a principal business address of \_\_\_\_\_. NYSEDA and Seller are each referred to herein as a "Party" and are collectively referred to herein as the "Parties."

WHEREAS, the New York State Public Service Commission ("PSC") adopted a Renewable Portfolio Standard ("RPS") program to address the energy, economic, and environmental objectives of New York State by creating the potential to build new industries in the State based on clean, environmentally responsible energy technologies (*See* Case 03-E-0188, "Order Regarding Retail Renewable Portfolio Standard" issued and effective September 24, 2004, and subsequent orders under Case No. 03-E-0188 (the "Orders")) and the Orders designate NYSEDA as the Central Procurement Administrator of the RPS Program and all associated funding; and

WHEREAS, NYSEDA has conducted a competitive Request for Proposals ("RFP 2226") to procure rights to RPS-eligible renewable energy attributes; and

WHEREAS, NYSEDA RFP 2226, which is incorporated herein and made part hereof, provided, among other things, that this RPS Standard Form Contract ("Agreement") would be employed to govern the rights and obligations of the Parties; and

WHEREAS, Seller has participated in such competitive solicitation and has been selected by NYSEDA as a winning bidder with respect to the [name of facility] ("Bid Facility"); and

WHEREAS, the Seller agrees to sell to NYSEDA, and NYSEDA agrees to purchase from Seller, the RPS-eligible renewable energy attributes ("RPS Attributes," as defined herein) associated with the energy production of the Bid Facility described in the Bid Proposal (which has been attached hereto and incorporated herein as Exhibit D) during the Contract Delivery Term, on the terms and subject to the conditions set forth herein;

NOW, THEREFORE, this Agreement has been entered into by the Parties to define, among other things, their rights and obligations concerning the generation of RPS Attributes by Seller and delivery of all right and title to RPS Attributes to NYSEDA, and the payments by NYSEDA to Seller during the term of this Agreement.

## Article I

### Definitions

The terms defined in this Article I, whenever used in this Agreement (including in any Exhibit hereto), shall have the respective meanings indicated below for all purposes of this Agreement (each such meaning to be equally applicable to the singular and the plural forms of the respective terms so defined). All references herein to a Section, Article or Exhibit are to a Section, Article or Exhibit of or to this Agreement, unless otherwise indicated. The words

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

Actual Annual Production: The amount, in MWh, of the total electric energy produced by the Bid Facility during any Contract Year, measured at the Injection Point.

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

Actual Eligible Production: The amount, in MWh, of the electric energy produced by the Bid Facility during any period within a Contract Year, measured at the Injection Point, except that:

- (i) for a Customer-Sited Bid Facility, the Actual Eligible Production shall reflect only the amount in excess of the on-site energy consumption met with generation from the Bid Facility;
- (ii) for a Fuel-Based Bid Facility that has never used eligible fuels, the Actual Eligible Production shall reflect the eligible biomass generation only, determined as the Actual Production of the entire Bid Facility, multiplied by the BTU input ratio of (a) the biomass fuel heat input to (b) the total fuel heat input, consistent with how such terms are applied for Provisional/Operational Certification (See Exhibit F, which is annexed hereto and made part hereof);
- (iii) for a Fuel-Based Bid Facility that used eligible fuels, including co-firing with ineligible fuels, on or before January 1, 2003, the Actual Eligible Production shall reflect only that Actual Production using eligible biomass, biogas, or liquid bio-fuel above the historical baseline production established through the Provisional/Operational Certification Process (See Exhibit F, which is annexed hereto and made part hereof).

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

Bid Capacity: Bid Capacity shall equal the Bid Quantity Percentage multiplied by the Nameplate Capacity of the Bid Facility. The Bid Capacity under this Agreement shall be \_\_\_ MW.

Bidder: An entity submitting an Application Package and Bid Proposal in response to RFP 2226. Such entity need not be the owner of the Bid Facility, but must have secured rights to the RPS Attributes from the Bid Facility sufficient to satisfy all performance requirements stated in this RFP and the RPS Standard Form Contract.

Bid Facility: The electric generating station that has been identified and described in the Provisional Certification Form submitted to NYSERDA.

Bid Price: A single fixed production payment, expressed in \$/MWh, applicable to each RPS Attribute offered as performance throughout the Contract Delivery Term. For all transactions contemplated and consummated under this Agreement the Bid Price shall be \$ \_\_\_\_.

Bid Quantity: The amount, in MWh, of RPS Attributes the Bid Facility expects to proffer as performance under the RPS Standard Form Contract over each Contract Year during the Contract Delivery Term. The Bid Quantity must be the same for each Contract Year throughout the Contract Delivery Term, subject to adjustments pursuant to Article V (Adjustments). This number will equal the Expected Annual Eligible Production multiplied by the Bid Quantity Percentage. Subject to Article V, for all transactions contemplated and consummated under this Agreement the Bid Quantity shall be \_\_\_\_ MWh.

Bid Quantity Percentage: The percentage of the Bid Facility's Expected Annual Eligible Production that will be committed to performance under an RPS Standard Form Contract. The Bid Quantity Percentage must be at least 30% and may not exceed 95%, and will be applied to Actual Eligible Production in any period during the Contract Delivery Term to establish compliance with contract requirements. For all transactions contemplated and consummated under this Agreement the Bid Quantity Percentage shall be \_\_\_\_%.

Capacity Factor: The ratio, expressed as a percentage up to two decimal places, of the total electricity that the Bid Facility expects to produce during a Contract Year compared to the total potential electricity that could be produced if the Bid Facility operates at 100 percent of the Name Plate Capacity during every hour of the Contract Year.

Commercial Operation: A state of operational readiness under which (i) the Bid Capacity is available and physically able to produce electric energy, and (ii) all rights, abilities, permits and approvals to schedule and deliver energy to the Injection Point have been obtained.

Commercial Operation Milestone Date: The Commercial Operation Milestone Date shall be July 31, 2012. The Commercial Operation Milestone Date may be extended (see Article II, Purchase and Sale of Rights to RPS Attributes, Section 2.09).

Contract Delivery Term: The period of performance under this Agreement which shall have a fixed duration of ten (10) Contract Years; the Contract Delivery Term shall begin on the later of: (i) May 1, 2011 or, (ii) on the first day of the month following the date upon which the Bid Facility commences Commercial Operation.

Contract Security: All amounts provided to NYSERDA as defined in Article XV (Contract Security) of this Agreement.

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

Customer-Sited Bid Facility: A Bid Facility interconnected on the customer side of a retail electric meter.

Delivery Point: For Bid Facilities located in the New York Control Area (NYCA), the Delivery Point shall be the Injection Point. For External Bid Facilities the Delivery Point will be the bus at which the Seller delivers electricity to the NYCA for end use in New York.

Expected Annual Eligible Production: The amount, in MWh, of the Expected Average Annual Production of the Bid Facility, measured or compensated to the Injection Point, except that:

- (i) for a Customer-Sited Bid Facility, the Expected Annual Eligible Production shall reflect only the amount of Expected Average Annual Production in excess of the on-site annual energy consumption met with generation from the Bid Facility;
- (ii) for a Fuel-Based Bid Facility that has never used eligible fuels, the Expected Annual Eligible Production shall reflect the eligible biomass generation only, determined as the Expected Average Annual Production of the entire Bid Facility, multiplied by the BTU input ratio of (a) the biomass fuel heat input to (b) the total fuel heat input, consistent with how such terms are applied for Provisional Certification (See Exhibit F, which is annexed hereto and made part hereof);
- (iii) for a Fuel-Based Bid Facility that used eligible fuels, including co-firing with ineligible fuels, on or before January 1, 2003, the Expected Annual Eligible Production shall reflect that Expected Annual Eligible Production using eligible biomass, biogas, or liquid bio-fuel that is above the historical baseline production established through Provisional Certification (See Exhibit F, which is annexed hereto and made part hereof).

Expected Average Annual Production: The expected electric energy production of the entire Bid Facility during any Contract Year post-upgrade/repowering for which Provisional Certification was granted.

External Bid Facility: Any Bid Facility not located within the New York Control Area (NYCA); such Bid Facilities are subject to the delivery requirement specified in Article III (Bid Facility Electricity Delivery Requirement).

Fuel-Based Bid Facility: The Bid Facility identified herein is a Fuel-Based Bid Facility.

Injection Point: The generator bus or location where (a) the administrator of the wholesale power market, (b) the operator of the transmission/distribution utility, public authority or municipal electric company, or (c) in the case of customer-sited generation, the dedicated generation meter at which a third party, measures, or otherwise determines, energy production from the Bid Facility.

Nameplate Capacity: The gross generating capacity of the entire Bid Facility, post upgrade/repowering, in MW. The Nameplate Capacity under this Agreement shall be \_\_\_ MW.

New York Control Area (NYCA): The control area that is under the control of the NYISO which includes transmission facilities listed in the ISO/TO Agreement Appendices A-1 and A-2, as amended from time-to-time.

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

Quantity Obligation: Shall mean, for any period during the Contract Delivery Term, the number of MWh calculated as the Bid Quantity Percentage multiplied by the Actual Eligible Production; subject, however, to adjustments pursuant to (See Article V, Adjustments).

Repowering: Shall mean a generation unit other than a Hydroelectric Upgrade, with an initial date of Commercial Operation no later than December 31, 2002, that has been or will be substantially and verifiably repowered on or after January 1, 2003, such that the Actual Annual Production from the facility after Repowering is or will be demonstrably greater than the Actual Annual Production prior to the January 1, 2003 level by at least five percent.

RPS-eligible Attributes: Shall mean all environmental characteristics, claims, credits, benefits, emissions reductions, offsets, allowances, allocations, howsoever characterized, denominated, measured or entitled, attributable to the generation of Actual Eligible Production by a Bid Facility. One RPS-eligible Attribute shall be created upon the generation by a Bid Facility of one MWh of Actual Eligible Production. RPS-eligible Attributes include but are not limited to: (i) any direct emissions or any avoided emissions of pollutants to the air, soil or water including but not limited to sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), particulate matter and other pollutants; (iii) any direct or avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases (GHGs) that have been or may be determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (iv) all set-aside allowances and/or allocations from emissions trading programs made unnecessary for compliance in such program as a result of performance under an RPS agreement, including but not limited to allocations available under 6 NYCRR §§ 204, 237 and 238; and (v) all credits, certificates, registrations, recordations, or other memorializations of whatever type or sort, representing any of the above. If the Bid Facility is a biomass or landfill gas facility and the Seller receives any tradable credits, benefits, emissions reductions, offsets, and allowances based on the greenhouse gas reduction benefits attributed not to the production of electricity but rather to its fuel production, collection, conversion or usage, it shall provide NYSERDA or its designee with sufficient credits, benefits, emissions reductions, offsets, and allowances to ensure that there are zero net GHGs associated with the production of electricity from such Bid Facility.

RPS-eligible Attributes do not include (i) any energy, capacity, reliability or other power products, such as ancillary services; (ii) production tax credits associated with the construction or operation of the Bid Facility or other financial incentives in the form of credits, reductions, or allowances associated with the Bid Facility that are applicable to a state or federal income taxation obligation; (iii) fuel-related subsidies or "tipping fees" that may be paid to the Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular pre-existing pollutants or the promotion of local environmental benefits; or (iv) emission

reduction credits encumbered or used by the Bid Facility for compliance with local, state, or federal operating and/or air quality permits.

RPS Attributes: The RPS-eligible Attributes associated with the Quantity Obligation which shall be delivered as performance during the Contract Delivery Term. (See Article II, Purchase and Sale of Rights to RPS Attributes).

RPS Standard Form Contract: The standard contractual document to be entered into by NYSERDA and selected Bidders, which shall define, among other things, their rights and obligations concerning the generation of RPS Attributes, the delivery of all right and title to RPS Attributes to NYSERDA, and the payments by NYSERDA during the term of the agreement.

Voluntary Market: The market through which sales are made of renewable attributes, including RPS-eligible Attributes, for purposes other than compliance.

## Article II

### Purchase and Sale of Rights to RPS Attributes

Section 2.01. On the terms and subject to the conditions and provisions of this Agreement, Seller agrees to sell, assign, convey and deliver to NYSERDA, and NYSERDA agrees to purchase from the Seller, all right, title and interest in the RPS Attributes associated with the Quantity Obligation of the Bid Facility during each month of the Contract Delivery Term.

Section 2.02. Such right, title and interest shall include perpetual and exclusive rights to all RPS Attributes, including but not limited to the exclusive rights to claim or represent, consistent with New York State Environmental Disclosure rules: (a) that the energy associated with RPS Attributes was generated by the Bid Facility; and (b) that New York State and or the RPS Program is responsible for the reductions in emissions and/or other pollution or any other environmental benefit resulting from the generation of the energy associated with RPS Attributes.

Section 2.03. At the time of such sale, assignment and conveyance by Seller to NYSERDA, the RPS Attributes shall be free and clear of all liens, judgments, encumbrances and restrictions.

Section 2.04. Assignment and Transfer of Rights to RPS Attributes. The assignment and transfer (“Transfer”) of RPS Attributes to NYSERDA shall be accomplished through their inclusion on the Certification and Assignment of Rights Form, which must accompany each invoice. Should the PSC or NYSERDA create, sanction, adopt or begin participation in a tracking system for accounting for generation attributes or certificates associated with generation in the New York Control Area, Transfer will also include the delivery of the attributes or certificates associated with each RPS Attribute, at the earliest time such certificates or attributes become available for delivery, to an account designated by NYSERDA.

Section 2.05. Except as may be permitted under Section 2.11, Suspension of Performance, Sellers agrees that it may not and shall not apply for or otherwise seek to achieve compliance under Section 242-8.7 (CO<sub>2</sub> budget units that co-fire eligible biomass) of the CO<sub>2</sub> Budget Trading Program (6 NYCRR Part 242), or any other state program operating as a part of the Regional Greenhouse Gas Initiative, on the basis of any MWh or emission of CO<sub>2</sub> or reduction in emissions of CO<sub>2</sub> or other benefit associated with RPS Attributes or for any activity constituting performance under this Agreement.

Section 2.06. In the event that Seller becomes entitled to or must apply for or take some other action under any emission-trading, emissions recordation or other regime other than the NY RPS in order to secure a claim, title, credit, ownership, or rights of any type, nature or sort to any RPS-eligible Attributes associated with Quantity Obligations, or any certification, registration, verification or other memorialization of the creation of such RPS-eligible Attributes by the Bid Facility to which Seller may be entitled (Title), Seller shall (i) take all actions necessary to apply for and secure such Title, to the maximum extent to which Seller is entitled, (ii) provide NYSERDA with evidence of taking such action; and (iii) Transfer such Title to NYSERDA whenever so secured.

Section 2.07. NYSERDA's obligations under this Agreement are expressly conditioned on the eligibility of Seller's Bid Facility, at the time of execution of this Agreement and throughout the duration of the Contract Delivery Term, under the Main Tier eligibility rules and requirements, as such requirements existed on January 20, 2011, as originally stated at Appendix C to the September 24, 2004 Order and as amended by the attachment to the June 28, 2006 "Order on Customer Sited Tier Implementation," and as further defined and clarified by subsequent Orders, and upon compliance by Seller with the requirements of Exhibit F. Bid Facilities selected under this RFP will not be subject to subsequent changes in RPS eligibility rules; however, in the event that the Bid Facility fails to maintain eligibility consistent with the RPS requirements as they existed on January 20, 2011 such ineligibility will extend to the attributes emanating from the Bid Facility

Section 2.08. NYSERDA's obligations to purchase RPS Attributes and to make payment under this Agreement are conditional on the ability of Seller to demonstrate to the satisfaction of the DPS that the creation of and title to the RPS-eligible Attributes is sufficiently verifiable for purposes of the New York Environmental Disclosure Program. Solely for purposes of this Agreement, RPS Attributes emanating from Bid Facilities participating in the NEPOOL Generation Information System or the Pennsylvania-Jersey-Maryland Generation Attribute Tracking System are deemed sufficiently verifiable for this purpose.

Section 2.09. Commercial Operation Milestone Date. NYSERDA's obligations to purchase RPS Attributes and to make payment under this Agreement are conditional on the commencement by the Bid Facility of Commercial Operation at a minimum of 80 percent of the Bid Capacity on or before the Commercial Operation Milestone Date. The Commercial Operation Milestone date shall be July 31, 2012. Seller may elect to extend the Commercial Operation Milestone Date from July 31, 2012 to December 31, 2012, on condition that such election is made by written Notice to NYSERDA, on or before July 2, 2012, and that Seller provides to NYSERDA, one of the following:

- (1) Contract Security, in addition to the amounts provided under Section 15.01(a) and (b), below, in the amount of three dollars (\$3.00) multiplied by the Bid Quantity; or
- (2) for Bid Facilities from which the electricity associated with the Quantity Obligation will be delivered into a market administered by the NYISO, proof that an interconnection agreement has been entered into by the NYISO, the Connecting Transmission Owner, and the Bidder or a legal representative of the Bidder, with respect to the Bid Facility (for External Bid Facilities, a comparable binding agreement); or
- (3) for Bid Facilities seeking to satisfy the Electricity Delivery Requirement through options 2 or 3 of Section 3.01, below, a comparable interconnection agreement has been entered into with all the necessary sites, service providers and parties that will be enable and permit the transmission of the energy from the Bid Facility to the point of its consumption.

Section 2.10. Subject to authorization by the PSC, NYSERDA shall be free to sell, assign, transfer or otherwise subject to any encumbrance, any of the RPS Attributes or the right, title and interest to the RPS Attributes NYSERDA shall acquire under this Agreement, at any time and from time to time to any entity and on such terms and conditions as NYSERDA may desire. Any financial or other consideration received by NYSERDA from any such action shall inure solely to NYSERDA's benefit, to be applied as determined by NYSERDA as the Central Procurement Administrator of the RPS Program, and shall not affect the Seller's rights or obligations under the terms of this Agreement.

Section 2.11. Suspension of Performance.

- (a) Seller may, at its option, and upon sufficient notice to NYSERDA, suspend its obligation to deliver RPS-eligible Attributes to NYSERDA, in whole or in part, if such RPS-eligible Attributes are sold into the New York State Voluntary Market or pursuant to a New York State Executive Order 111 or other mandated New York State governmental procurement. Such notice must be written, as provided under Section 19.01 hereto, must be provided to NYSERDA at least one month prior to the commencement of the requested suspension period, must identify the quantity of the RPS-eligible Attributes as to which delivery is to be suspended and the duration of such suspension, which shall be no less than six (6) months in duration. The quantity suspended may be either a specific percentage of the Quantity Obligation or a specific quantity of RPS Attributes to be suspended each month during the suspension period; in either case the quantity to be suspended must exceed the lower of (i) ten percent (10%) of the Bid Quantity or (ii) one thousand (1,000) RPS-eligible Attributes per month. During each month during the period of suspension, Seller shall present documentation to NYSERDA establishing that the RPS-eligible Attributes created during the prior month as to which delivery has been suspended were either (a) settled into an account of an entity serving retail load in New York ("LSE") or otherwise accounted for as a part of the residual system mix for purposes of the Environmental Disclosure Program administered by the Department of Public Service, or (b) should a New York renewable energy generation certificate system ("REC") or other automated tracking system enter operation during the suspension period, documentation from such system administrator verifying the retirement of such RPS-eligible Attributes and/or RECs into a voluntary customer account in New York, including accounts associated with compliance with a mandated New York State governmental procurement. For all quantities suspended, Seller shall apply to and shall pursue with the New York State Department of Environmental Conservation a Voluntary

Renewable Energy Market Set Aside Allocation under 6 NYCRR Part 242, Subpart 242-5; CO2 Budget Trading Program. The suspension of RPS-eligible Attributes shall not relieve or excuse Sellers from compliance with the Bid Facility Electricity Delivery Requirements for suspended RPS Attributes. Seller shall continue to provide reports and data throughout the duration of any period of suspension. Seller will be required to submit invoices monthly regardless if 100% of the Bid Quantity is suspended or if there is no production for the previous month. NYSERDA shall not be obligated to purchase or pay for suspended RPS-eligible Attributes during the suspension period; however, RPS-eligible Attributes suspended will be credited to the Quantity Obligation.

- (b) Seller may, at its option, and upon sufficient Notice to NYSERDA, suspend its obligation to deliver RPS-eligible Attributes to NYSERDA for purposes of participation in the program and process provided by Sections 242-6.5(b)(1) and 242-8.7 of the New York State CO2 Budget Trading Program (CO2 Program). Such Notice must be written, as provided under Section 19.01 hereto, and must be provided to NYSERDA at least one month prior to the commencement of the requested suspension period. Such Notice must identify the duration of such suspension, which shall be no less than six (6) months in duration; such suspension must be for the entire Quantity Obligation. Seller and NYSERDA agree that each RPS-eligible Attribute for which Seller's obligation is suspended under this Subsection shall be entirely surrendered to the CO2 Program, notwithstanding that the CO2 Program does not make any express claim to any individual attribute other than CO2. Should a New York renewable energy generation certificate system ("REC") or other automated tracking system enter operation during the suspension period, Seller agrees to cooperate with NYSERDA to accomplish the transfer of the affected RPS-eligible Attributes to a regulatory account designated by NYSERDA. The suspension of RPS-eligible Attributes shall not relieve or excuse Seller from compliance with the Delivery Requirement for suspended RPS Attributes. Seller will be required to submit invoices monthly regardless if 100% of the Bid Quantity is suspended or if there is no production for the previous month. NYSERDA shall not be obligated to purchase or pay for suspended RPS-eligible Attributes during the suspension period;
- (c) Seller shall continue to provide the reports required under Article VI hereto throughout the duration of any period of suspension under either (a) or (b) above. For purposes of the calculations contemplated under Article V hereto, RPS-eligible Attributes suspended under either (a) or (b) above will be credited to the Quantity Obligation.

Section 2.12. Verification/Metering. The Actual Production and Actual Eligible Production of the Bid Facility must be capable of accurate and verifiable measurement at the Injection Point by the local ISO, a transmission utility, public authority, municipal electric company, and in the case of a Customer-Sited Bid Facility, an independent third party. Unless specifically agreed to by NYSERDA in writing, all Bid Facilities that are the subject of an award under this RFP must be separately metered and must be functionally represented by a single and discrete Injection Point.

## Article III

### Bid Facility Electricity Delivery Requirements.

Section 3.01. For all Bid Facilities, the electricity associated with the Quantity Obligation must be:

1. delivered into a market administered by the NYISO for end-use in New York State; or
2. delivered through a wholesale meter under the control of a utility, public authority or municipal electric company such that it can be measured, and such that consumption within New York State can be tracked and verified by such entity or by the NYISO; or
3. delivered through a Bid Facility dedicated generation meter, which shall be approved by and subject to independent verification by NYSERDA, to a customer in New York State (excluding customers in the service territory of the Long Island Power Authority) whose electricity was obtained through the NYISO/utility system as of January 20, 2011.

For Bid Facilities seeking to satisfy the Electricity Delivery Requirement through options 2 or 3, above, all costs associated with measurement, tracking, and verification, to the satisfaction of NYSERDA and DPS Staff must and will be borne by Seller. See also Section 2.12. Verification/Metering.

Section 3.02. Bilateral Sales. Bilateral sales for electricity associated with the RPS Attributes produced by the Bid Facility are permissible provided Seller demonstrates that: (a) the purchaser of such electricity is a NYS Load Serving Entity (LSE) serving an equal or greater amount of load than the Bid Quantity, or (b) the purchaser is one or more NYS end-users consuming an aggregate amount of electricity equal to or greater than the Bid Quantity.

Section 3.03. External Fuel-Based Bid Facilities. During each hour in which an External Bid Facility generates Actual Eligible Production, the Seller must schedule and transmit the electricity representing the Quantity Obligation and associated with the RPS Attributes from the Injection Point to the Delivery Point for end-use in New York. This Delivery Requirement will be applied to each hour during which the Bid Facility produces Actual Eligible Production; electricity delivered during each hour will be recognized as delivered only during such hour; deliveries in excess of the Quantity Obligation during any given hour will not be recognized, for purposes of this requirement; for delivery during any other hour. This rule applies to bilateral and NYISO spot market transactions. The Seller must demonstrate to the satisfaction of the PSC and/or NYSERDA that it is the financially responsible party for the transaction from the Injection Point to the Delivery Point.

Section 3.04. Failure by any Seller of RPS Attributes from External Bid Facilities to meet these delivery requirements for a minimum of 90% of the hours in which the Bid Facility produces Actual Eligible Production during any Contract Year will constitute a default under Article XIII.

## Article IV

### Payment

Section 4.01. Invoices. Seller shall submit monthly invoices throughout the term of this Agreement for RPS Attributes created in the prior month during the Contract Delivery Term. Such invoices shall be addressed to the attention of “Accounts Payable,” and shall include a statement of the amount due and payable by NYSERDA to Seller, which amount shall be calculated in accordance with Section 4.02. All such invoices must and shall be accompanied by a completed Certification and Assignment of Rights Form, in the form provided at Exhibit B hereto, and must otherwise demonstrate the Transfer of the RPS Attributes. All invoices must be accompanied by a completed Hourly Data Report and a Monthly Fuel Report, completed in accordance with Exhibit F (See also Section 6.01).

Section 4.02. Payment. NYSERDA will make payment to Seller of the amount of Quantity Obligation in whole MWh invoiced. NYSERDA may adjust payments to subsequent invoices consistent with NYISO or other local control area billing settlement true-up procedures, based on actual metered production data measured at the injection point, actual and verified data reflecting compliance with the Bid Facility Electricity Delivery Requirements, and/or based on the number of RPS Attributes Transferred. NYSERDA will not pay for RPS Attributes beyond the maximum it is required to purchase under this Agreement, in accordance with Section 4.04. Amounts payable in a given month shall be calculated as follows:

- (a) for Bid Facilities in New York State, the multiplicative product of (a) the Actual Eligible Production of the Bid Facility during the prior month; (b) the Bid Quantity Percentage; and (c) the Bid Price.
- (b) for Fuel-Based External Bid Facilities, for each hour during such month, NYSERDA shall first determine, for such hour, the lesser of: (1) the Actual Eligible Production during such hour, metered at the Injection Point, multiplied by the Bid Quantity Percentage, and (2) the amount of electricity (in MWh) delivered by Seller from the Injection Point to the Delivery Point in conformance with the Delivery Requirement during such hour. The amount payable shall be the sum of the amounts determined for each hour multiplied by the Bid Price.

Section 4.03. Prompt Payment Policy. NYSERDA will make payments to the Seller in accordance with and subject to its Prompt Payment Policy Statement, attached hereto as Exhibit E. The Seller shall be notified by NYSERDA in accordance with Section 504.4 of such Exhibit E, of any information or documentation that the Seller did not include with such invoice. Such payments shall be made by check or wire transfer to an account designated by the Seller. NYSERDA will not pay any invoice not accompanied by a completed Certification and Assignment of Rights Form, a complete Hourly Data Report, and a Monthly Fuel Report, with regard to the RPS Attributes for which payment is requested.

Section 4.04. Maximum Commitment/Limitation. The maximum number of RPS Attributes NYSERDA shall be obligated to purchase under this Agreement shall be equal to the Bid Quantity multiplied by the number of years in the Contract Delivery Term. The maximum

aggregate amount payable by NYSERDA to Seller hereunder is (\$ \_\_\_\_\_00). Should Seller elect to suspend performance under Section 2.11, such maximum aggregate amounts will be modified by subtracting any periods of Suspension from the number of Contract Years, and by reducing the Bid Quantity by the number of RPS Attributes suspended. NYSERDA shall not be obligated to purchase or pay for suspended RPS-eligible Attributes during the suspension period.

## Article V

### Adjustments

Section 5.01. True-Up Adjustments. NYSERDA may adjust payments to subsequent invoices consistent with NYISO or other control-area billing settlement true-up procedures, based on actual metered production data at the Injection Point and data demonstrating compliance with the Bid Facility Electricity Delivery Requirements.

Section 5.02. Other Adjustments. NYSERDA may adjust its contractual Payment obligations under this Agreement under the following circumstances:

- (a) NYSERDA may adjust amounts payable to Sellers to reflect any costs borne by NYSERDA for participation in any renewable energy attribute accounting system operating in the Bid Facility's local control area, including all fees and charges, if any, for the delivery and registration of the attributes or certificates associated with each RPS Attribute into a NYSERDA account, inclusive of accounts in New York State. NYSERDA may adjust amounts payable to Sellers with External Bid Facilities to reflect the reasonable costs borne by NYSERDA to verify Operational Certification throughout the Contract Delivery Term,
- (b) Should the Quantity Obligation of a Fuel-Based Bid Facility that established its Bid Quantity under Option 1 (Incremental Generation Above the Average Baseline) of the Provisional Certification Process fail to achieve 90% of the Bid Quantity for two (2) consecutive Contract Years, the Bid Quantity will be modified for the remainder of the Contract Delivery Term to equal the average Actual Annual Eligible Production over that two-year period multiplied by the Bid Percentage.
- (c) Should the Quantity Obligation of a Fuel-Based Bid Facility that established its Bid Quantity under Option 2 (Incremental Capacity Above Baseline) of the Provisional Certification Process fail to achieve 90% of its Bid Quantity during any Contract Year, such failure will constitute a default under Section 13.01.
- (d) Should a Seller fail to reasonably demonstrate the actualization of at least 85 percent of the sum of the Expected Total Dollars (in dollars per MW of Bid Capacity) of the projected economic benefits included at Section 3 of the Bid Proposal (Economic Benefits Created by the Bid Facility)(attached hereto and made part hereof as Exhibit D), NYSERDA may reduce the Bid Price payable for the remainder of the Contract Delivery Term to an amount equal to the Bid Price multiplied by (the demonstrated amount divided by the Expected Total Dollars).

- (e) Should the Nameplate Capacity of the Bid Facility that achieves Operational Certification be less than the Nameplate Capacity included in the Bid Proposal Form, NYSERDA may adjust the Bid Quantity and/or Bid Quantity Percentage to secure the rights to RPS Attributes in a quantity equal to or approximating the Expected Annual Eligible Production included on such Form.

## Article VI

### Records and Reports

Section 6.01. Monthly Reports. Sellers shall submit with each invoice an hourly data report (“Hourly Data Report”) including hourly electricity generation data measured at the Injection Point, in Microsoft Excel format or such other format to be agreed upon, and a completed fuel-usage report (“Monthly Fuel Report”). NYSERDA will also require the Seller to provide detailed monthly market accounting settlement or other pertinent data from the administrator(s) of the energy market into which energy from the Bid Facility was delivered, from the entity or party in control of any meter through which the energy associated with the Quantity Obligation was delivered, and from the administrator of any attribute accounting system operating in such control area. Seller may be required to waive confidentiality, as to NYSERDA, for the direct transfer to NYSERDA by an energy market administrator or the operator of the transmission and/or distribution system into which the energy from the Bid Facility is delivered of transactional and/or delivery information and data pertinent to the verification of RPS Attribute creation and electricity delivery. Should the Quantity Obligation of any Bid Facility be zero for any month Seller shall submit a statement stating such for such month.

Section 6.02. Progress Reports. Beginning on the first such date following the Effective Date, and continuing through the commencement of the Contract Delivery Term, Seller shall provide quarterly written Progress Reports to NYSERDA, on March 1, June 1, September 1, and December 1, which reports shall be in letter form, and which shall describe at a minimum (1) Seller’s progress in obtaining and securing all required environmental or other permits and/or local approvals; (2) the status of development and/or construction planning or activities with regard to the Bid Facility; (3) the status of the interconnection process between the Bid Facility and the administrator of the control area; (4) purchases, delivery, and/or installation of any major equipment associated with the Bid Facility, and (5) an estimated date for Commercial Operation. Such reports shall also include an updated Project Schedule Form (RFP 2226 Attachment C), copies of any permits or approvals granted and/or copies of any correspondence of any type denying or refusing any permit or approval.

Section 6.03. Economic Benefits Report. Sellers shall submit a report including documentation demonstrating the actual economic benefits that resulted from the construction and operation of the Bid Facility. Such report should include copies of sufficient records and documentation relating to employment, purchases, and other payments necessary to demonstrate the economic benefits created by the Bid Facility under the categories listed under X, Section 3 of RFP 2226. Seller will be required to submit such report within sixty (60) days of the third anniversary of the commencement of the Contract Delivery Term.

Section 6.04. Annual Reports. Sellers shall submit, annually for the duration of the Contract Delivery Term, a report identifying and describing the number of short and long-term jobs actually created as a result of the development, operation and/or construction of the Bid Facility. Such report shall also include an accounting of total expenditures incurred for all short and long-term jobs created, and shall identify, describe and quantify all payments made to any State, municipal or local governmental entity, and any payments made for the usage of land or fuel purchases and all in-state purchases made as a result of the development, construction, and operation of the Bid Facility. Such report shall be filed with NYSERDA within sixty (60) days of each anniversary of the commencement of the Contract Delivery Term. Such report shall also identify, describe, and quantify any and all Federal or local tax incentives received or awarded for the construction and/or operation of the Bid Facility including grants, government backed loans, tax credits or similar government sponsored financial assistance.

Section 6.05. Additional Documents. Within 10 business days of Notice from NYSERDA of selection under RFP 2226, Seller shall provide to NYSERDA:

- (a) certificates, dated as of the most recent practicable date prior to the Effective Date, issued by the [insert - jurisdiction of Seller's organization] Secretary of State confirming the corporate good standing of the Seller;
- (b) a certificate of an appropriate officer of the Seller, dated as of the Effective Date, in form and substance reasonably satisfactory to NYSERDA and certifying: (1) the names and signatures of the officers of the Seller authorized to sign a Certification and Assignment of Rights Form and any other documents to be delivered hereunder, and (2) the accuracy and completeness of resolutions of the Seller, authorizing and approving all matters in connection with the transactions contemplated thereby.
- (c) Seller shall promptly provide NYSERDA with updated and corrected versions of the above-referenced certificates upon any change in the information provided therein.

Section 6.06. Maintenance of Records. The Seller shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of seven (7) years following the expiration of this Agreement, full and detailed books, accounts, and records pertaining to Seller's performance under the Agreement, including without limitation, all bills, invoices, payrolls, subcontracting efforts and other data evidencing, or in any material way related to, the direct and indirect costs and expenses incurred by the Seller in the course of such performance.

## Article VII

### Audit

Section 7.01. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and such period thereafter to inspect and audit any and all books, accounts and records pertaining to Seller's performance under this Agreement, at the office or offices of the Seller where they are then being kept, maintained and

preserved. If such books, accounts and records are not kept at an office within the State of New York, within a reasonable time of a request by NYSERDA, Seller shall make such books, accounts and records available to NYSERDA at NYSERDA's offices or at an agreed upon location within the State of New York. Any payment made under this Agreement shall be subject to retroactive adjustment (reduction or increase) regarding amounts included therein which are found by NYSERDA on the basis of any audit of the Seller by an agency of the United States, the State of New York or NYSERDA not to constitute a properly invoiced amount.

Section 7.02. Eligibility Audit. NYSERDA may require periodic audits of the Bid Facility to verify that the Bid Facility remains eligible under the eligibility rules and requirements, as such requirements existed on January 20, 2011. Prior to any material modification of the Bid Facility, including but not limited to any modification that is expected to result in a change in the Nameplate Capacity of the Bid Facility, Seller shall provide NYSERDA with written Notice and will provide to NYSERDA a written description of the planned modification.

## Article VIII

### Assignments

Section 8.01. 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 Seller'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. Such consent shall not be unreasonably withheld.

Section 8.02. Seller may, without NYSERDA's prior written consent, grant a security interest in or assign this Agreement as collateral in connection with financing arrangements. Seller shall promptly notify of the completion and the nature of any such grant or assign.

Section 8.03. Either Party may, upon written notice, assign its rights and obligations hereunder, or transfer such rights and obligations by operation of law, to any entity with which or into which such Party shall merge or consolidate or to which such Party shall transfer all or substantially all of its assets, provided that such other entity agrees to be bound by the terms hereof and provided further, that such other entity's creditworthiness is comparable to or higher than that of such Party at the time this Agreement was executed and such Party is not relieved of any obligation or liability hereunder as a result of such assignment.

## Article IX

### Seller's Warranties and Guarantees

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

- (a) (1) that Seller is [corporation/limited liability company/partnership] duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization; (2) has or will have all requisite corporate power, and has or will have all material governmental permits necessary to own its assets or lease and operate its properties and carry on its business as now being or as proposed to be conducted, to construct, finance, own, maintain and operate the Bid Facility, to execute and deliver this Agreement, and to consummate the transactions contemplated herein; and (3) is qualified to do business and is in good standing in all jurisdictions in which the nature of the business conducted by it makes such qualification necessary.
- (b) that the execution, delivery and performance by Seller, the entry into this Agreement by Seller, and the consummation of the transactions contemplated by this Agreement: (1) have been duly authorized by all requisite corporate action (including any required action of its members); and (2) will not (i) violate any applicable provision of law, statute, rule, regulation or order of any governmental agency or any provision of the limited liability company agreement or other governing documents of Seller; (ii) violate, conflict with, result in a breach of or constitute (alone or with notice or lapse of time or both) a default or an event of default under any indenture, agreement (including the respective limited liability company agreements of Seller), mortgage, deed of trust, note, lease, contract or other instrument to which Seller is a party or by which it or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of the Seller.
- (c) that the Bid Facility is or will be eligible under the Orders and that it will remain so throughout the Contract Delivery Term.
- (d) that the RPS Attributes, as to which right and title is to be transferred to NYSERDA under this Agreement, are eligible and compliant with the Renewable Portfolio Standard;
- (e) that the RPS Attributes, as to which right and title is to be transferred to NYSERDA under this Agreement, are free and clear of any liens, encumbrances and/or defects of title;
- (f) that the RPS Attributes, as to which right and title is to be Transferred to NYSERDA under this Agreement shall not have otherwise been, nor will be sold, retired, claimed or represented as part of electricity output or sales, or used to satisfy obligations in any other jurisdiction;
- (g) that Seller 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;
- (h) that this Agreement and each Certification and Assignment of Rights Form will be duly executed and delivered by Seller and will constitute the legal, valid and binding obligation of Seller enforceable against Seller in accordance with the terms thereof;

- (i) that the Seller has no 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 Seller's performance under this Agreement will infringe any patent or otherwise interfere with any other right of any Person;
- (j) that there are no existing undisclosed or threatened legal actions, claims, or encumbrances, or liabilities that may adversely affect Seller's performance of this Agreement or NYSERDA's rights hereunder;
- (k) that Seller has no knowledge that any information or document or statement furnished by the Seller 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;
- (l) that Seller shall not, and shall not cause or permit any voluntarily abandonment of the development, construction or operation of the Facility;
- (m) Seller certifies that all information provided to NYSERDA with respect to State Finance Law Sections 139-j and 139-k is complete, true and accurate.

## Article X

### NYSERDA's Warranties and Guarantees

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

- (a) that NYSERDA is an instrumentality of the State of New York and a public authority and public benefit corporation, created under the New York State Public Authorities Law, validly existing and in good standing under the laws of the State of New York.
- (b) that NYSERDA has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by NYSERDA of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, and no other actions or proceedings on the part of NYSERDA are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby.
- (c) that the execution, delivery and performance by NYSERDA of this Agreement will not (1) violate any applicable provision of law, statute, rule, regulation or order of any governmental agency or, any provision of the Public Authorities Law; (2) violate, conflict with, result in a material breach of or constitute (alone or with notice or lapse of time or both) a material default or event of default under any indenture, agreement, mortgage, deed of trust, note, lease, contract or other instrument to which NYSERDA is a party or

by which NYSERDA or any of its property is bound; or (3) result in the creation or imposition of any lien upon any property or assets of NYSERDA. This Agreement will not conflict with any other agreement or contract to which NYSERDA is a party.

- (d) that this Agreement has been duly executed and delivered by NYSERDA and constitutes the legal, valid and binding obligation of NYSERDA enforceable against NYSERDA in accordance with the terms thereof.
- (e) that NYSERDA is familiar with and in compliance with all general and specific laws, except where the failure to so comply would not result in a material adverse effect on NYSERDA's ability to perform its obligations.
- (f) that there is no action, suit or claim at law or in equity, or before or by a governmental authority pending or, to the best knowledge of NYSERDA after due inquiry, threatened against NYSERDA or affecting any of its properties or assets which could reasonably be expected to result in a material adverse effect on NYSERDA's ability to perform its obligations.

## Article XI

### Indemnification

Section 11.01. Indemnification. Seller shall protect, indemnify and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' and/or experts' fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to Seller's performance under this Agreement. The obligations of Seller 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 XII

### Insurance

Section 12.01. Maintenance of Insurance; Policy Provisions. The Seller, at no cost to NYSERDA, shall maintain or cause to be maintained, commencing with the Effective Date and continuing throughout the duration of the Contract Deliver Term, insurance of the types and in the amounts specified in Section 12.02 (Types of Insurance). All such insurance shall be evidenced by insurance policies, each of which shall:

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

Section 12.02. Types of Insurance. Seller shall be required to maintain commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of [insert: \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of personal injury or sickness or death of any one person; [insert \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of personal injury, sickness or death in any one accident or disaster; and [insert \$2,000,000 or \$200,000 per/MW Nameplate Capacity, whichever is lower] in respect of claims arising out of property damage in any one accident or disaster.

Section 12.03. Delivery of Policies; Insurance Certificates. Within 30 days of the effective date of this Agreement, Seller shall deliver to NYSERDA certificates of insurance issued by the respective insurers, indicating the Agreement number thereon, evidencing the insurance required by this Article and bearing notations evidencing the payment of the premiums thereon or accompanied by other evidence of such payment satisfactory to NYSERDA. In the event that any policy furnished or carried pursuant to this Article will expire on a date prior to the expiration date of this Agreement, Seller, not less than 15 days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and Seller shall promptly pay all premiums thereon due. In the event of threatened legal action, claims, encumbrances, or liabilities that may affect NYSERDA hereunder, or if deemed necessary by NYSERDA due to events rendering a review necessary, upon request Seller shall deliver to NYSERDA a certified copy of each policy.

### Article XIII

#### Events of Default

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

- (a) Representations and Warranties. Any representation or warranty made in this Agreement that shall prove to have been false or misleading in any material respect as of the time made or deemed to be made; or
- (b) Other Obligations. A Party shall default in the performance of any of its obligations under this Agreement and such default shall continue unremedied for a period of 30 days after Seller receives Notice or otherwise has actual knowledge thereof; or
- (c) Voluntary Proceedings. A Party shall (a) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property; (b) make a general assignment for the benefit of its creditors; (c) commence a voluntary case under the Bankruptcy Code; (d) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts; (e) fail to convert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in

an involuntary case under the Bankruptcy Code; or (f) take any corporate action for the purpose of effecting any of the foregoing; or

- (d) Involuntary Proceedings. A proceeding or case shall be commenced against a Party, without its application or consent, in any court of competent jurisdiction, seeking (a) its liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts; (b) the appointment of a trustee, receiver, custodian, liquidator or the like of all or any substantial part of its assets; or (c) similar relief under any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, and such proceeding or case shall continue undismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of 60 or more days; or an order for relief against a Party, shall be entered in an involuntary case under the Bankruptcy Code; or
- (e) Judgments. A judgment or judgments for the payment of money in the amount of \$1,000,000 or more shall be rendered by a court or courts against Seller, and the same shall not be paid or otherwise discharged for a period of more than 60 days unless such judgment has been stayed, released or vacated; or
- (f) Unauthorized Transfer. The transfer or attempted transfer by Seller to any transferee other than NYSERDA of any RPS Attribute associated with this Agreement, except as authorized pursuant to Section 2.11 of this Agreement.
- (g) Commercial Operation. Failure of the Bid Facility to commence Commercial Operation at a minimum of 80 percent of the Bid Capacity on or before the Commercial Operation Milestone Date (July 31, 2012, unless extended pursuant to Article II, Section 2.09 of this Agreement).
- (h) Abandonment. Seller's abandonment of the Facility or its intentional delay of completion of construction in connection therewith;
- (i) Failure to Produce. The failure of the Quantity Obligation of any Bid Facility to achieve at least 65 percent of the Bid Quantity during any Contract Year; or, for any Fuel-Based Bid Facility that established its Bid Quantity under Option 2 (Incremental Capacity Above Baseline) of the Provisional Certification Process, the failure of the Quantity Obligation to achieve 90% of its Bid Quantity during any Contract Year.
- (j) Failure to Deliver. The failure by a Seller of RPS Attributes from an External Bid Facility to meet and conform to the Bid Facility Electricity Delivery Requirements for a minimum of 90 percent of the hours during any Contract Year.
- (k) Failure to Transfer RPS Attributes. The failure by Seller to Transfer rights to NYSERDA in the RPS Attributes associated with the Quantity Obligation of the Bid Facility, in conformity with Article II.
- (l) State/Local Incentives. Where the Bid Facility is an External Bid Facility, the acceptance by Seller at any time during the Contract Delivery Term of provincial, state and/or local

incentives or other grants, subsidies or investments, as described at Subsection C to Section V of RFP 2226, with respect to such External Bid Facility.

- (m) Failure to Provide Additional Contract Security. Failure by Seller to provide to NYSERDA, on or before January 17, 2012, additional Contract Security, in an amount equal to three dollars (\$3.00) per MWh multiplied by the Bid Quantity (See Section 15.01(b)).

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

## Article XIV

### Termination

Section 14.01. Termination. This Agreement may be terminated:

- (a) at any time by either NYSERDA or Seller if: (1) an Event of Default occurs (and following the expiration of any applicable cure period), (2) the Party seeking to terminate this Agreement hereunder is the non-defaulting Party, and (3) the non-defaulting Party has not waived such Event of Default in writing;
- (b) at any time by the mutual written consent of Seller and NYSERDA;
- (c) unless otherwise mutually agreed upon by NYSERDA and Seller in writing, on the expiration of the Contract Delivery Term (subject to Section 18.03 of this Agreement);
- (d) by Seller, upon each 30 month anniversary of the commencement date of the Contract Delivery Term, exercisable by Seller upon demonstration that Seller is unable to secure a continuous bio fuel supply at a price that supports this Agreement. Notice of Seller's intention to terminate under this subsection must be received by NYSERDA at least 30 days prior to each such anniversary date.
- (e) by NYSERDA in the event it is found that the certification filed by the Seller in accordance with State Finance Law Sections 139-j and 139-k was intentionally false or intentionally incomplete;
- (f) by NYSERDA in the event it is found that the certification filed by the Seller in accordance with New York State Tax Law Section 5-a was intentionally false when made.

Section 14.02. Effect of Termination. Except as otherwise set forth in Section 18.03 below, in the event of a termination of this Agreement as provided in Section 14.01 above, neither Party shall have any further right or obligation hereunder. In addition, the Parties hereto

agree that irreparable damage would occur in the event that NYSERDA could not obtain rights to RPS Attributes pursuant this Agreement from the date of Event of Default in which Seller was the Defaulting Party, and accordingly, each Party hereby agrees that NYSERDA shall be entitled to elect to compel specific performance of this Agreement to compel the delivery of Certification and Assignment Forms and Transfer of all RPS-eligible Attributes that the Bid Facility produces following the date of any termination for such an Event of Default in accordance with the terms hereof, together with any other remedy at law or equity available to NYSERDA in connection therewith, without the necessity of demonstrating the inadequacy of money damages. In addition, for any termination by NYSERDA or Seller prior to the date of commencement of Commercial Operations, NYSERDA shall be entitled only to Stipulated Damages pursuant to Article XV.

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

## Article XV

### Contract Security

Section 15.01. (a) Within ten (10) days of Notice from NYSERDA of selection under RFP 2226, Seller shall provide to NYSERDA Contract Security, in the form of cash, certified funds, or a Letter of Credit conforming to the requirements below, in an amount equal to the product of (1) Bid Quantity and (2) six dollars (\$6.00). (b) On or before January 17, 2012, Seller must provide additional Contract Security in an amount equal to three dollars \$3.00 multiplied by the Bid Quantity. **Failure to provide the additional Contract Security by January 17, 2012 will constitute a default and will result in termination of this Agreement.** (c) On or before July 2, 2012, Sellers electing to extend the Commercial Operation Milestone Date to December 31, 2012 under Section 2.09(1), above, must provide Contract Security, in addition to the amounts provided under Sections 15.01(a) and (b), above, in an amount equal to three dollars (\$3.00) multiplied by the Bid Quantity.

Section 15.02. Letter of Credit. A Letter of Credit shall be a clean unconditional and irrevocable standby letter of credit in favor of NYSERDA as beneficiary, issued for direct payment by a bank which is a member of the New York Clearinghouse Association, substantially in the form of the letter of credit attached hereto as Exhibit C (“Letter of Credit”), in a face amount equal to the Contract Security Amount, and which Letter of Credit shall provide that the issuing bank will pay to NYSERDA amounts in aggregate up to that same face amount upon presentation of only the Sight Draft in the amount to be drawn and the Payment Certificate, in the form of Annex A and Annex B, respectively, to the Letter of Credit, and have an expiration date not shorter than one (1) year. Should the Bid Facility not have commenced Commercial Operation by a date 30 days prior to the expiration date of the letter of Credit, and Seller not having provided NYSERDA or arranged with NYSERDA to provide a substitute Letter of Credit prior to such expiration, NYSERDA shall be thereupon entitled to draw on the Letter of Credit for the full amount then outstanding and the funds received shall be held by NYSERDA until a substitute Letter of Credit has been provided, or for application against subsequent obligations of Seller.

Section 15.03. Replacement. Any assignee within Article VIII of this Agreement shall, simultaneously with its receipt of the assignment, deliver to NYSERDA a Replacement Letter of Credit meeting the requirements of this Article, and NYSERDA shall, within twenty (20) business days after receipt of a compliant Replacement Letter of Credit, return the original Letter of Credit to Seller. Upon the failure of an assignee to deliver a compliant Replacement Letter of Credit to NYSERDA simultaneously with its receipt of the assignment, NYSERDA shall be thereupon entitled to draw on the Letter of Credit for the full amount then outstanding and the funds received shall be held by NYSERDA for application against subsequent obligations of Seller and/or the assignee under this Agreement.

Section 15.04. Refund of Security. Amounts provided by Seller as Contract Security will be returned or refunded to Seller by NYSERDA as follows:

- (a) In their entirety if the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date is equal to or greater than the Bid Capacity of the Bid Facility described in the Bid Proposal.
- (b) At a prorated amount if the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal. Such amount that will be returned, expressed as a percentage of the total Contract Security, will be equal to Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

Section 15.05. Retention Security. Amounts provided by Seller as Contract Security will be retained by NYSERDA as follows:

- (a) In their entirety if Seller fails to provide to NYSERDA, on or before January 17, 2012, Contract Security in the amount required under Section 15.01(b), above.
- (b) At a prorated amount if the Bid Capacity of the Bid Facility that is in Commercial Operation on the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal. Such amount that will be retained, expressed as a percentage of the total Contract Security, will be equal to the Bid Capacity of the Bid Facility described in the Bid Proposal minus the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date; divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

Section 15.06. Stipulated Damages. NYSERDA and Seller hereby agree, acknowledge and stipulate that NYSERDA's retention of amounts provided by Seller as Contract Security pursuant to Article XV, in the proportions stated within this Article, is fair and reasonable under the circumstances and in light of the uncertainty and inability to adequately quantify the harm that would result to NYSERDA as a result of the events that permit NYSERDA to retain such amounts of the Contract Security.

## Article XVI

### Force Majeure

Section 16.01. 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, or strikes. Variability in the frequency or force of the wind, of rainfall, or of water levels will in no event constitute force majeure events. Failure by Seller to obtain or secure any permit or approval or delay in obtaining any permit or approval of any sort with regard to Seller's performance under the Agreement shall not constitute a force majeure event.

## Article XVII

### Compliance with Certain Laws

Section 17.01. Governing Law; Venue. This Agreement shall be governed by, and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed in New York State without regard to its conflicts of laws principles. The parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in a United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

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

Section 17.03. All Legal Provisions Deemed Included. It is the intent and understanding of the Seller and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or the Seller, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

Section 17.04. Permits and Approvals. The Seller shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Bid Facility over the duration of the Contract Delivery Term. Neither the RPS Program nor selection under this RFP in any way replaces or modifies the necessity or applicability of any permit or approval process by any jurisdiction. NYSERDA's obligations to make payments to Sellers will be conditional on the acquisition of all such permits and approvals.

Upon request by NYSERDA Seller must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Seller shall provide prompt Notice to NYSERDA of the initiation of any criminal or regulatory investigation, hearing, proceeding, or review process (“Process”) by any federal or State entity regarding any actual or alleged violation of any permit or approval obtained or applied for with respect to the Bid Facility, as well as of any modification, penalty and/or fine that may be imposed or occur as a result of such a Process or violation.

Section 17.05. Other Legal Requirements. The references to particular laws of the State of New York in this Article and elsewhere in this Agreement are not intended to be exclusive and nothing contained in such Article, Exhibit and Agreement shall be deemed to modify the obligations of the Seller to comply with all legal requirements.

## Article XVIII

### Additional Provisions

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

Section 18.02. Taxes. Seller shall be responsible for and obligated to pay all present and future taxes, fees and levies that may be assessed by any entity upon the Seller's provision of Attributes to NYSERDA, or with respect to the creation of the RPS Attributes and/or the energy with which they are associated, up to the Delivery Point, including any and all costs for NYSERDA’s participation in any renewable energy attribute accounting system operating in the Bid Facility’s local control area, including all fees and charges, if any, for the delivery and registration of the attributes or certificates associated with each RPS Attribute into a NYSERDA account, inclusive of accounts in New York State.

Section 18.03. Term. Unless terminated earlier under this Article, this Agreement shall expire upon the expiration of the Contract Delivery Term, provided that payment has been made for all RPS Attributes as to which a Certification and Assignment of Rights Form has been delivered to NYSERDA. Upon such date or upon earlier Termination of this Agreement under Article XIV, neither Party shall have any further obligation to the other, except that Sections 11.01, 17.01, 20.01, 21.02, 21.03, 21.04, and NYSERDA’s Payment obligation under Article IV shall survive.

Section 18.04. Waiver. Either Party to this Agreement may (a) extend the time for the performance of any of the obligations or other acts of the other Party, (b) waive any inaccuracies in the representations and warranties of the other Party contained herein or in any document delivered by the other Party pursuant hereto, or (c) waive compliance with any of the agreements or conditions of the other party contained herein. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the Party to be bound thereby. Any waiver of any term or condition shall not be construed as a waiver of any subsequent breach or a subsequent waiver of the same term or condition, or a waiver of any other term or condition, of

this Agreement. No provision of this Agreement will be deemed to have been waived unless the waiver is in writing; no delay by NYSERDA in exercising its rights hereunder, including the right to terminate this Agreement, shall be deemed to constitute or evidence any waiver by NYSERDA of any right hereunder. The rights granted in this Agreement are cumulative of every other right or remedy that the enforcing Party may otherwise have at law or in equity or by statute.

Section 18.05. Independent Contractor. The status of the Seller under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, Seller and its respective officers, agents, employees, representatives and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives or servants of NYSERDA nor make any claim, demand or application for any right or privilege applicable to NYSERDA, including, without limitation, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage and retirement membership or credit.

Section 18.06. Severability. If any provision of this Agreement shall be declared by any court of competent jurisdiction to be illegal, void or unenforceable, all other provisions of this Agreement shall not be affected and shall remain in full force and effect. If any provision of this Agreement is so broad as to be unenforceable, that provision shall be interpreted to be only so broad as will enable it to be enforced.

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

Section 18.08. Environmental Disclosure. The Parties agree that, at the time of the execution of this Agreement, New York does not employ any registry for the tracking, registration, or trading of renewable or environmental attributes or credits, but rather has instituted the Environmental Disclosure program, under which the Department of Public Service will conduct Conversion Transactions to accomplish verification of the transactions consummated hereunder. In the event that an attribute or credit registry is adopted in the future, Seller and NYSERDA agree to: (1) take such steps as are required under such system to continue to transfer RPS Attributes to NYSERDA in accordance with the terms of this Agreement; and (2) amend this Agreement as needed to effect its intent and to comply with any requirements of such attribute or credit registry. Should the PSC create, sanction, adopt or begin participation in a tracking system for accounting for attributes or certificates associated with generation in the New York Control Area, Seller shall deliver the attributes or certificates associated with each RPS Attribute to an account designated by NYSERDA.

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

## Article XIX

### Notices, Entire Agreement, Amendment, Counterparts

#### Section 19.01. Notices.

- (a) All notices, requests, consents, approvals and other communications which may or are required to be given by either party to the other under this Agreement shall be in writing and shall be transmitted either:
- (1) via certified or registered United States mail, return receipt requested;
  - (2) by facsimile transmission;
  - (3) by personal delivery;
  - (4) by expedited delivery service; or
  - (5) by e-mail, return receipt requested.

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

To Seller:                      Company  
  Attn:  
  Name  
  Address Line 1  
  Address Line 2  
  City, State Zip code  
  Facsimile No.: (xxx) xxx-xxxx  
  E:mail Address:

To NYSERDA:                NYSERDA  
  Attn: Office of the General Counsel  
  17 Columbia Circle  
  Albany, New York 12203-6399  
  Facsimile No.: (518) 862-1091  
  E:mail address: [prk@nyserda.org](mailto:prk@nyserda.org)

- (b) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt.
- (c) The parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Agreement by giving

fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

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

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

## Article XX

### Publicity

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

## Article XXI

### Confidentiality

Section 21.01. In order to enable NYSERDA and the administrator of the NYS Environmental Disclosure Program to verify delivery of RPS Attributes, NYSERDA will require the Seller to provide detailed monthly market accounting settlement or other pertinent data from the administrator(s) of the energy market and/or the operator of the transmission/distribution utility into which energy from the Bid Facility was produced and/or delivered. Seller will be required to waive confidentiality, as to NYSERDA, for the direct transfer to NYSERDA by such entities of transactional and/or delivery information and data pertinent to the verification of RPS Attribute and associated electricity delivery.

Section 21.02. Freedom of Information Law. Seller acknowledges that NYSERDA is subject to and must comply with the requirements of New York’s Freedom of Information Law (“FOIL;” see Public Officers’ Law Article 6).

Section 21.03. Claim of Confidentiality. Information of any tangible form including any document that Seller wishes to be protected from disclosure to third parties, including any information provided as a part of a Bid Proposal Package submitted in response to RFP 2226, must be marked “Confidential” or “Proprietary” at the time such information is provided to NYSERDA.

Section 21.04. Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” If NYSERDA receives a request from a third party for information or a document received from Seller and which has been marked “Confidential” or “Proprietary,” NYSERDA will process such request under the procedures provided by NYSERDA’s FOIL regulations (see [www.nyserda.org/About/NYSERDA.Regulations.pdf](http://www.nyserda.org/About/NYSERDA.Regulations.pdf)).

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

Seller:

NEW YORK STATE ENERGY RESEARCH  
AND DEVELOPMENT AUTHORITY

By \_\_\_\_\_

By \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

STATE OF \_\_\_\_\_ )

) SS:

COUNTY OF \_\_\_\_\_ )

On the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person on behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_  
Notary

## EXHIBIT A

REVISED 9/06

### 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 \$100,000 for the purchase of goods and services:

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

- d. Certifications referenced in paragraphs (b) and (c) above will be maintained by NYSERDA and made a part hereof and incorporated herein by reference.
- e. 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 B  
CERTIFICATION AND ASSIGNMENT OF RIGHTS FORM

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

Name of Seller: \_\_\_\_\_

Name of Bid Facility: \_\_\_\_\_

Invoice Number \_\_\_\_\_

Seller hereby sells, assigns, conveys and delivers to NYSERDA all right, title and interest in the RPS Attributes, such RPS Attributes having been created in the month of \_\_\_\_\_, in the year \_\_\_\_\_, for which payment is requested by the accompanying invoice. Such right, title and interest shall include perpetual and exclusive rights to the RPS Attributes for which payment is requested, including but not limited to the exclusive rights to claim, consistent with New York State Environmental Disclosure rules: (i) that the energy associated with these RPS Attributes was generated by the Bid Facility; and (ii) that New York State and or the RPS Program is responsible for the environmental benefits resulting from the generation of that portion of the Bid Facility's energy that is associated with these RPS Attributes.

Seller further certifies and guarantees that all of the information provided on the attached invoice requesting payment from NYSERDA under the terms of NYSERDA Agreement No. \_\_\_\_\_ is true and accurate; that the Bid Facility named above was at all times relevant and is now an eligible facility under the rules of the NYS Renewable Portfolio Standard; that the RPS Attributes to which all right, title and interest is transferred to NYSERDA by this instrument are free and clear of all liens, judgments, encumbrances and restrictions, and have not have otherwise been, nor will be, sold, retired, claimed or represented as part of electricity output or sales, or used to satisfy obligations in any other jurisdiction.

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

By: \_\_\_\_\_  
Signature of Seller's Authorized Officer

\_\_\_\_\_  
Name of Seller's Authorized Officer

**EXHIBIT C  
LETTER OF CREDIT**

**FORM OF IRREVOCABLE STANDBY LETTER OF CREDIT**

IRREVOCABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_\_

DATE: \_\_\_\_\_ , 20\_\_

**BENEFICIARY:**

THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY  
17 COLUMBIA CIRCLE, ALBANY, NEW YORK 12203-6399

LADIES AND GENTLEMEN:

BY THE ORDER OF:

[SELLER]

[SELLER'S ADDRESS]

WE HEREBY ISSUE OUR IRREVOCABLE CREDIT NO: \_\_\_\_\_ IN YOUR FAVOR FOR THE ACCOUNT OF \_\_\_\_\_ (THE "SELLER") FOR AN AMOUNT OR AMOUNTS NOT TO EXCEED IN THE AGGREGATE [STATE IN WORDS] U.S. DOLLARS AVAILABLE BY YOUR DRAFTS AT SIGHT ON [INSERT NAME AND ADDRESS OF ISSUING BANK], NEW YORK, NEW YORK, USA, WHEN ACCOMPANIED BY THE FOLLOWING DOCUMENTS:

1. YOUR SIGHT DRAFT DRAWN ON US IN THE FORM OF ANNEX A HERETO (THE "SIGHT DRAFT"); AND
2. A DATED PAYMENT CERTIFICATE PURPORTEDLY SIGNED BY A DULY AUTHORIZED OFFICER OF NYSEDA IN THE FORM OF ANNEX B HERETO (THE "PAYMENT CERTIFICATE").

MULTIPLE DRAWINGS ARE PERMITTED IN AMOUNTS NOT TO EXCEED, IN COMBINATION, THE AGGREGATE AMOUNT.

DEMANDS PRESENTED BY FACSIMILE (TO FACSIMILE NUMBER \_\_\_\_\_) ARE ACCEPTABLE: PROVIDED THAT IF ANY SUCH DEMAND IS PRESENTED BY FACSIMILE, THE ORIGINAL SIGHT DRAFT, STATEMENT, AND LETTER OF CREDIT SHALL BE SIMULTANEOUSLY FORWARDED BY OVERNIGHT COURIER SERVICE TO OUR OFFICE LOCATED AT THE ADDRESS STATED ABOVE; PROVIDED FURTHER THAT THE FAILURE OF THE COURIER SERVICE TO TIMELY DELIVER SHALL NOT AFFECT THE EFFICACY OF THE DEMAND.

FUNDS UNDER THIS LETTER OF CREDIT ARE AVAILABLE TO YOU AGAINST YOUR PAYMENT CERTIFICATE AND SIGHT DRAFT PRESENTED IN FULL COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS LETTER OF CREDIT ON OR BEFORE 5:00 P.M., NEW YORK TIME, ON THE EXPIRATION DATE HEREOF. THIS LETTER OF CREDIT WILL EXPIRE ON [INSERT DATE].

PAYMENT AGAINST CONFORMING DOCUMENTS PRESENTED UNDER THIS LETTER OF CREDIT SHALL BE MADE BY US AT OR BEFORE 2:00 P.M., NEW YORK TIME, ON THE NEXT (OR, IN THE CASE OF A PRESENTATION AFTER 10:30 A.M., NEW YORK TIME, THE SECOND NEXT) BANKING DAY AFTER PRESENTATION.

ALL PAYMENTS MADE BY US UNDER THIS LETTER OF CREDIT WILL BE MADE IN IMMEDIATELY AVAILABLE FUNDS AND WILL BE DISBURSED FROM OUR OWN FUNDS. IF REQUESTED BY YOU, PAYMENT UNDER THIS LETTER OF CREDIT MAY BE MADE BY WIRE TRANSFER OF FEDERAL RESERVE BANK OF NEW YORK FUNDS TO YOUR ACCOUNT IN A BANK ON THE FEDERAL RESERVE WIRE SYSTEM. BENEFICIARY'S BANK [INSERT NAME AND ACCOUNT NUMBER].

ONLY YOU MAY MAKE ANY PAYMENT CERTIFICATE AND SIGHT DRAFT UNDER THIS LETTER OF CREDIT.

ANY SIGHT DRAFT DRAWN HEREUNDER MUST BE MARKED "DRAWN UNDER [INSERT NAME AND ADDRESS OF ISSUING BANK], STANDBY LETTER OF CREDIT NUMBER \_\_\_\_\_ DATED \_\_\_\_\_."

ALL BANK CHARGES INCLUDING BUT NOT LIMITED TO, FEES OR COMMISSIONS, SHALL BE FOR APPLICANT'S ACCOUNT.

MISCELLANEOUS

THIS LETTER OF CREDIT SETS FORTH IN FULL THE TERMS OF OUR UNDERTAKING. SUCH UNDERTAKING SHALL NOT IN ANY WAY BE MODIFIED, AMENDED OR AMPLIFIED BY REFERENCE TO ANY DOCUMENT OR INSTRUMENT REFERRED TO HEREIN OR IN WHICH THIS LETTER OF CREDIT IS REFERRED OR TO WHICH IT RELATES (INCLUDING, WITHOUT LIMITATION, THE AGREEMENT) AND ANY SUCH REFERENCE SHALL NOT BE DEEMED TO INCORPORATE HEREIN BY REFERENCE ANY DOCUMENT OR INSTRUMENT.

WE HEREBY AGREE WITH YOU THAT EACH DULY COMPLETED PAYMENT CERTIFICATE AND SIGHT DRAFT DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS LETTER OF CREDIT WILL BE DULY HONORED UPON PRESENTATION TO US ON OR BEFORE THE EXPIRY DATE.. THE OBLIGATION OF [ISSUING BANK] UNDER THIS LETTER OF CREDIT IS THE INDIVIDUAL OBLIGATION OF [ISSUING BANK], AND IS IN NO WAY CONTINGENT UPON REIMBURSEMENT WITH RESPECT THERETO.

EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, THIS LETTER OF CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993 REVISION), INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION 500 (PROVIDED, HOWEVER, THAT DRAWINGS PERMITTED HEREUNDER SHALL NOT BE DEEMED TO BE DRAWINGS BY INSTALLMENTS WITHIN ARTICLE 41 OF THE UCP) AND AS TO MATTERS NOT GOVERNED BY THE UCP, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK AND APPLICABLE U.S. FEDERAL LAW.

PLEASE ADDRESS ALL CORRESPONDENCE REGARDING THIS LETTER OF CREDIT TO THE ATTENTION OF OUR STANDBY LETTER OF CREDIT UNIT, GLOBAL TRADE SERVICE, MENTIONING OUR REFERENCE NUMBER AS IT APPEARS ABOVE.

[NAME AND ADDRESS OF ISSUING BANK]

\_\_\_\_\_  
AUTHORIZED SIGNATURE  
OF OFFICER OF ISSUING BANK

Annex A to Exhibit C - Irrevocable Standby Letter of Credit

SIGHT DRAFT

Letter of Credit No. \_\_\_\_\_

Date of Letter of Credit: \_\_\_\_\_

Date of Draft: \_\_\_\_\_

FOR VALUE RECEIVED

Pay on Demand to: THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT  
AUTHORITY, U.S. \_\_\_\_\_ Dollars (U.S. \$\_\_\_\_\_). The amount of  
this draft does not exceed the amount available to be drawn by the Beneficiary under the Letter of Credit.

Charge to account of [Name of Seller].

Drawn under [Name of Bank] Letter of Credit No. \_\_\_\_\_.

To: [Issuing Bank]

[Address]

Attention: \_\_\_\_\_

\_\_\_\_\_  
As Beneficiary

By: \_\_\_\_\_  
[Name and Title]

Annex B to Exhibit C - Irrevocable Standby Letter of Credit  
PAYMENT CERTIFICATE

To:  
[Issuing Bank]  
[Address]

Re: Irrevocable Standby Letter of Credit No: \_\_\_\_\_ [Insert]

The undersigned, a duly authorized officer of the undersigned Beneficiary, hereby certifies to [Issuing Bank], with reference to the Irrevocable Standby Letter of Credit No: [Insert] ("Letter of Credit"), that Seller, having provided the Letter of Credit to the New York State Energy Research and Development Authority ("NYSERDA") as Security for performance under NYSEDA Agreement No. \_\_\_\_\_ ("Agreement) in the aggregate amount of \$ \_\_\_\_\_, ("Letter of Credit Amount") either [check the appropriate space]:

\_\_\_\_\_ Seller failed to provide to NYSEDA, on or before January 17, 2012, Contract Security in the amount required under Section 15.01(b) of the Agreement, under which circumstance NYSEDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount;

\_\_\_\_\_ Seller has failed to perform in that Seller's Bid Facility has failed to attain Operational Certification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of December 31, 2011; under which circumstance NYSEDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount;

\_\_\_\_\_ Seller has failed to perform in that Seller's Bid Facility has failed to attain Operational Certification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of December 31, 2012; under which circumstance NYSEDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount;

\_\_\_\_\_ The Bid Capacity of the Bid Facility that entered Commercial Operation on or before the Commercial Operation Milestone Date is less than the Bid Capacity of the Bid Facility described in the Bid Proposal; under which circumstance, NYSEDA is authorized to draw a percentage of the Letter of Credit Amount, such percentage will be equal to the Bid Capacity of the Bid Facility described in the Bid Proposal minus the Bid Capacity of the Bid Facility that enters Commercial Operation on or before the Commercial Operation Milestone Date; divided by the Bid Capacity of the Bid Facility described in the Bid Proposal.

\_\_\_\_\_ Seller has assigned its rights under the Agreement and the assignee has not delivered to the undersigned Beneficiary a replacement letter of credit satisfying the requirements of the Agreement; under which circumstance NYSEDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount;

\_\_\_\_\_ the Letter of Credit is currently set to expire within thirty (30) days and the Seller has not made arrangements acceptable to the undersigned Beneficiary to provide a substitute letter of credit prior to such expiration; under which circumstance NYSEDA is authorized and entitled to draw an amount equal to one-hundred (100) percent of the Letter of Credit Amount.

The terms used herein which are not specifically defined herein are defined in the Letter of Credit or the Agreement, a copy of which is annexed hereto.

IN WITNESS WHEREOF, the Beneficiary has executed and delivered this payment Certificate as of the \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
As Beneficiary

By: \_\_\_\_\_  
[Name and Title]

EXHIBIT D  
BID PROPOSAL

[AS SUBMITTED BY SELLER]

EXHIBIT E  
21 NYCRR 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.

EXHIBIT F  
MEASUREMENT AND ACCOUNTING REQUIREMENTS FOR REPORTING

This Exhibit contains the requirements and methods for the measurement and accounting of Actual Eligible Production and RPS– related Excess SO<sub>2</sub> Allowances associated therewith. Actual Eligible Production reporting requirements vary between projects using solid biomass fuels and those using Biogas fuels (Renewable Pipeline Gas (“RPG”), Landfill Gas (“LFG”), and digester gas. For fuel-based facilities that used eligible fuels, including co-firing with ineligible fuels, Actual Eligible biomass cofiring facilities require additional calculations and fuel flow measurements. Such projects must track the use of eligible fuels and ineligible fuels and the energy produced by each fuel category.

**Generation from a mix of eligible biomass and ineligible fuels**

Additional record keeping and reporting is required for plants using a mix of eligible and ineligible fuels. The amount of eligible generation from the plant (or generation unit) is proportional to the amount of input energy provided by the eligible fuel to that generation unit.

Requirements for Bid Facilities using **solid biomass fuels** include:

- For each fuel delivery the record must include the supplier name and address, the fuel source, the fuel mass, description of the composition and physical characteristics and a statement of visual inspection to determine the integrity of the fuel.
- For each fuel delivery, the Bid Facility must have in place a plan to sample/inspect fuel for compliance with eligibility specifications that includes procedures for fuel routing and accepting or rejecting such delivery. Such plan must also include procedures for managing biomass fuel stockpiles at the participating facility including injection and withdrawal of fuel stock to ensure segregation of eligible and ineligible fuels.
- Seller is required to have fuel procurement contracts to ensure that the biomass fuels specification is consistent with the definition of eligible fuels, including where required, Forest Management and harvest plans. For each supplier and source combination, an ultimate fuel composition analysis will need to be on file. This test should be performed semi-annually and must include dry heating values for the fuel. Bid Facilities using clean wood separated from C&D debris at an approved material reclamation facility (MRF) must prepare a fuel procurement plan specifically for the use of this resource and additional fuel quality tests will be required. Specific requirements are listed in the recent PSC Order with regard to this resource.<sup>1</sup> Attachment F will be amended to include those requirements for facilities that plan to use MRF separated wood.

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<sup>1</sup> In the Matter of the Petition of Niagara Generation, LLC for Rulemaking Allowing Clean Wood Separated from Construction and Demolition Waste at Material Reclamation Facilities to be Eligible for Use as Biomass Fuel in the Renewable Portfolio Standard Program. Niagara Generation, LLC, Retail Renewable Portfolio Standard, Order Approving Petition with Modifications, State of New York Public Service Commission, Case 09-E-0843, November 22, 2010.

- For Bid Facilities using Harvested or Silvicultural Waste Wood a Facility Forest Management Plan is required. Harvested/silvicultural wood suppliers are required to be in compliance with the Facility Forest Management Plan and to prepare harvest plans for each parcel.
- Seller is required to maintain sample integrity and to have fuel sampling procedures for handling, storage and shipping to the analysis lab. Grab samples from the as-fired eligible biomass fuel stream will be taken once every 3 hour period. A proximate analysis will be conducted using a daily “super sample.” Seller may either apply the same sampling and analysis routine to the blended ineligible fuels or measure mass flows of each type of ineligible fuel separately and use the semiannual ultimate analysis as the basis for calculating heat inputs daily.
- Seller shall have and maintain written procedures that are distributed to staff at the participating facility on data recording protocols, sampling protocols or other information necessary to ensure that the responsible facility staff understand their roles and responsibilities for ensuring compliance with the requirements of this Exhibit F.
- Continuous mass flow measurements are required for all fuels as fed to the boiler. A Fuel Management, Measurement, and Calibration Plan pursuant to guidelines herein must be submitted to and approved by NYSERDA before Operational Certification will be granted. Such plan must include procedures to ensure compliance with the requirements of this Exhibit F when equipment for fuel flow measurement is out of service.
- Approved test and measurement protocols for composition, moisture content and heat content are listed in the Test Methods section of this Exhibit F. If an alternative method is to be used it will have to be submitted to NYSERDA in advance for approval. Additional test protocols apply to Bid Facilities using clean wood separated from C&D debris at an MRF. Specific requirements are listed in the recent PSC Order with regard to this resource.<sup>2</sup> Attachment F will be amended to include those testing requirements for facilities that plan to use MRF separated wood.

The data collected above will be used to determine the daily heat input provided by the eligible solid biomass and the total daily heat input of all fuels to determine the Actual Eligible Production of the net electricity generated and sold in a monthly reporting period. Equations 1 through 3 are the basic equations for calculating the Actual Eligible Production (MWh/month) measured during the monthly reporting period. Use Equations 4 and 5 to calculate the daily measured Heat Input from eligible and ineligible fuels. Total Heat input on a daily basis is the sum of all fuel Heat Inputs (Equation 8).

Requirements for Bid Facilities using **non-pipeline quality bio-gas fuels** (such as landfill gas, anaerobic digester gas) include:

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<sup>2</sup> In the Matter of the Petition of Niagara Generation, LLC for Rulemaking Allowing Clean Wood Separated from Construction and Demolition Waste at Material Reclamation Facilities to be Eligible for Use as Biomass Fuel in the Renewable Portfolio Standard Program. Niagara Generation, LLC, Retail Renewable Portfolio Standard, Order Approving Petition with Modifications, State of New York Public Service Commission, Case 09-E-0843, November 22, 2010.

- The calculation of the eligible fraction of the electricity generated when co-firing eligible and ineligible gaseous fuels must be based on heat input into the boiler, with all calculations reported and documented appropriately. This method is similar to that described for co-firing solid biomass with the exception that bio-gas metering will be based on volumetric flow rates rather than mass flow rates.
- Sufficient metering must be in place at the landfill collection/processing facility to allow accurate accounting of gas produced, collected, and used in energy conversion on a daily basis. If the landfill gas generator and the electric generator are not owned and operated by the same organization and collocated, contracts must be in place to allow this information to be shared in compliance with the other requirements listed in this section.
- The volume of metered gas collected and used from either the landfill gas collection system or the anaerobic digester system should be reported in units of standard cubic feet (scf).
- If gas is being extracted from multiple landfill cells or multiple digester systems, individual metering and testing may be required if the composition of the resulting gas streams is materially different.
- The end use of the bio-gas or bio-gas mixture (electricity, thermal, flared, losses, export to end-user via common carrier, etc.) should be reported as a percentage by volume.
- The average methane content (% volume) of the bio-gas metered during the reporting period must be measured continuously using analyzers to generate a monthly weighted average or monthly using an approved sampling protocol. This value will be used for calculating heating input of the eligible fuel gas stream in the reporting periods after the sample's collection and prior to the next sample by incorporating data found in the baseline gas composition data.
- An ultimate bio-gas fuel composition analysis (annual baseline) is required. This test must be performed annually and must include trace hydrocarbons and other combustible gases in the fuel. The heating value for the fuel should be reported on a basis consistent with other reporting heating values required.
- The estimated heating value of the bio-gas (Btu/scf) used for electricity production and the basis for the estimate (higher or lower heating value) should be documented monthly through laboratory testing or may be calculated using an annual baseline test and measurement of methane content.
- A statement of the composition of any natural-gas fired at the site from the supplier, including heating value must be kept on record. Monthly supplier bills may be used to validate the composition of the delivered natural gas in lieu of gas testing if such bills contain information on the heating value of the delivered gas.

- The total (gross) amount of electricity generated using the eligible/ineligible fuel gas mixture must be reported on a daily basis.
- If bio-gas is to be fired with solid or liquid ineligible fuels, then the measurement of the non-gaseous portion will be subject to rules governing the use of the appropriate fuel type as noted in this Exhibit.
- Seller shall have written procedures that are distributed to staff at the participating facility on data recording protocols, sampling protocols or other information necessary to ensure that the responsible facility staff understand their roles and responsibilities for ensuring compliance with the requirements of this Exhibit F.
- Continuous metering of eligible and ineligible fuel flows is required. A Fuel Flow Measurement and Calibration Plan pursuant to guidelines herein must be submitted to and approved by NYSERDA before Operational Certification will be granted. This plan must include procedures to ensure compliance with the requirements of this Exhibit F when equipment for fuel flow measurement is out of service.
- Approved test and measurement protocols for composition, moisture content and heat content are listed in the Test Methods section of this Exhibit. If an alternative method is to be used it will have to be submitted to NYSERDA in advance for approval.

Requirements for Bid Facilities using **pipeline quality bio-gas fuels** (RPG) include:

- Common carrier RPG resources will be considered eligible only if sourced and used in the same state to generate power delivered to New York.
- Contracts for RPG transported over common carrier must be new contracts. The Seller must notify the gas producer as part of the new RPG contract, or modification, that the gas contract is being purchased for conversion to RPS eligible power and is subject to the accounting rules of the RPS program, that could include some of the provisions listed above for the use of non-pipeline quality gas.
- Sufficient metering must be in place at the landfill collection/processing facility to allow accurate accounting of gas produced, collected, and the resulting volumes and energy content of the gas converted to RPG on a daily basis. Additional measurement or monitoring systems required to allocate the RPG produced to RPG delivery contracts may be required.
- Metering at the point of conversion to RPG and at the end use must be sufficient to verify contract volumes associated with RPG contracts.
- Critical metering points at the point of RPG injection to the common carrier and the point of withdrawal will be subject to a calibration protocol. Operational Certification will be conditioned on a plan for such calibration being submitted to and approved by NYSERDA.

- The RPG producer/supplier must certify that the gas delivered under contract is produced from new resources (i.e., new or expanded RPG production systems).
- The Seller must keep and provide sufficient records on physical delivery from common carrier, gas consumption, and gas quality to pro rate the Bid Facility’s monthly electrical generation based on the ratio of the total RPG contract gas energy and the total gas energy used. A report detailing the use of eligible and ineligible fuels will be required.
- Seller shall provide reporting of the total net electricity<sup>3</sup> generated as a direct result of the above measured eligible bio-gas fuel delivered to the conversion system. Total electricity shall be measured in MWh or kWh.

The data collected above will be used to determine the daily heat input provided by the eligible biogas and the total daily heat input of all fuels to determine the Actual Eligible Production of the net electricity generated and sold in a monthly reporting period. Equations 1 through 3 are the basic equations for calculating the Actual Eligible Production (MWh/month) measured during the monthly reporting period. Use Equations 6 and 7 to calculate the daily measured Heat Input from eligible and ineligible fuels. Total Heat input on a daily basis is the sum of all fuel Heat Inputs (Equation 8).

The following equations will be used to calculate the amount of eligible renewable generation produced at a facility cofiring eligible and ineligible fuels.

**Equation 1: Monthly Total Eligible Production**

$$APM_e = \Sigma APD_e$$

Where:

APM<sub>e</sub> = Actual Eligible Production (MWh) during the monthly reporting period.  
 APD<sub>e</sub> = Actual Eligible Production (MWh) each day during the monthly reporting period.

**Equation 2: Daily Eligible Production**

$$APD_e = \%Cofiring * APD_T$$

Where:

APD<sub>e</sub> = Actual Daily Eligible Production (MWh)  
 %Cofiring = Daily Eligible Biomass Cofiring Percent (%)  
 APD<sub>T</sub> = Net Actual Production for the 24 Hour Period (MWh)

Net Actual Production (MWh) is the production measured at the Injection Point during each 24-hour period. Daily Eligible Biomass (%) is calculated using Equation 3.

**Equation 3: Cofiring Percentage based on a Heat Input Basis**

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<sup>3</sup> Net electricity in this context refers to the electric generation sold to the grid.

$$\% \text{Cofiring} = \frac{\text{HI}_{\text{EF}}}{\text{HI}_{\text{T}}}$$

Where:

**%Cofiring** = Daily Eligible Biomass Cofiring Percentage (%)

**HI<sub>EF</sub>** = Daily Total Heat Input from Eligible Fuels (MMBtu)

**HI<sub>T</sub>** = Daily Total Heat Input from Eligible and Ineligible Fuels (MMBtu) The key components required to solve Equation 3 are explained and provided as follows:

### **Solid Fuels: Determining heat input for eligible/ineligible fuels**

The numerator of Equation 3 requires measurement of the biomass fuel flow and heat content as-fired. A single HHV (measured on an as-fired basis from the proximate analysis) will be applied to the entire mass flow for the day.

Grab samples from the as-fired eligible biomass fuel stream will be taken once every three hour period<sup>2</sup>. A Proximate analysis will be conducted on a daily “super sample.” The “super sample” is a well mixed single sample comprised proportionately from the grab samples obtained during each 24-hour period. The proximate analysis result of the “super sample” will be used to calculate daily as-fired heat input values. The as-fired Heat Input from eligible fuels component of the numerator in Equation 3 is calculated using Equation 4.

### **Equation 4: Daily Heat Input for Eligible Fuels**

$$\text{HI}_{\text{EF}} = \text{HHV}_{\text{EF}} * \Sigma_{24} \text{M}_{\text{EF}}$$

Where:

**HHV<sub>EF</sub>** = Higher Heating Value of eligible fuel, as fired basis (MMBtu/lb)

**M<sub>EF</sub>** = Hourly Aggregate Mass flow of eligible fuels, as fired (lb/hr)

Bid Facilities may wish to employ in-line sampling technologies that are able to measure moisture content of the fuel in real-time as it feeds into the system.

The Heat Input from Ineligible fuels (HI<sub>IF</sub>) will be determined by the same method used for Eligible fuels (HI<sub>EF</sub>). If only one ineligible fuel of uniform composition (including moisture content) is used then the calculation is simplified to a single equation (5A) with no requirement for frequent proximate analysis.

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<sup>2</sup> Note that the grab samples do not have to be analyzed on a real-time basis, just collected. Seller will send samples to a lab within 24 hours of collection of the super sample. The lab will analyze s samples within 5 business days from receipt. Seller will maintain documentation of sample timeliness, analysis and actions taken if analysis is delayed. If a sample is delayed being shipped to the laboratory, the Seller shall notate any samples analyzed greater than 6 days from collection on the monthly invoice. Actual moisture analysis can take place on each “super sample” and used in downstream calculations accordingly. Each “super sample” shall be sealed/stored in an environment that prevents decomposition of biomass and prevents moisture evaporation from the biomass. Laboratory analysis of moisture content of the biomass fuel must include an accounting for any condensed moisture by adding condensed moisture in the sealed environment to the moisture measured in the biomass sample. This “super sample” must be tagged with the date on which it was collected and logged in a Seller supplied sampling log.

If multiple ineligible fuels are fired simultaneously in any day then Seller may **either** apply the same sampling and analysis routine prescribed for eligible biomass fuels to the blended ineligible fuels **or** measure mass flows of each type of ineligible fuel prior to blending and use the semiannual ultimate analysis as the basis for calculating heat inputs daily for each ineligible fuel (equation 5B).

**Equation 5: Daily Heat Input for Ineligible Fuels**

$$5A) HI_{IF} = HHV_{IF} * \Sigma_{24} M_{IF} \quad \text{OR} \quad 5B) HI_{IF} = \Sigma_{\text{ineligible fuel types}} HHV_{IF} * \Sigma_{24} M_{IF}$$

Where:

**HHV<sub>IF</sub>** = Higher Heating Value of ineligible fuel, as fired basis (MMBtu/lb)  
**M<sub>IF</sub>** = Hourly Aggregate Mass flow of ineligible fuels, as fired (lb/hr)

**Gaseous Fuels: Determining heat input for eligible/ineligible fuels**

The numerator of Equation 3 requires measurement of the bio-gas fuel flow and heat content as-fired. A single LHV or HHV will be applied to the entire volumetric flow for the day based on fuel analysis data. The necessary fuel analysis data will include a baseline bio-gas composition including gas heating value and a measured methane content.

**Equation 6: Daily Heat Input for Eligible Fuels**

$$HI_{EF} = HV_{EF} * \Sigma_{24} V_{EF}$$

Where:

**HV<sub>EF</sub>** = (Lower or Higher Heating Value of eligible fuel, (Btu/scf)  
**V<sub>EF</sub>** = Daily volumetric flow of eligible fuel, as-fired (scf/day)

The Heat Input from Ineligible fuels (HI<sub>IF</sub>) will be determined by the same method used for Eligible fuels (HI<sub>EF</sub>). If only one ineligible fuel of uniform composition is used then the calculation is simplified to a single equation (7A).

If multiple ineligible fuels are fired simultaneously in any day then the contractor must measure the flows of each type of ineligible fuel prior to blending and use. In this case, Equation (7B) is used to calculation the total heat input of ineligible fuels.

**Equation 7: Daily Heat Input for Ineligible Fuels**

$$7A) HI_{IF} = HV_{IF} * \Sigma_{24} V_{IF} \quad \text{OR} \quad 7B) HI_{IF} = \Sigma_{\text{ineligible fuel types}} HV_{IF} * \Sigma_{24} V_{IF}$$

Where:

**HV<sub>IF</sub>** = Heating Value (Lower or Higher) of ineligible fuel, as fired (Btu/scf)  
**V<sub>IF</sub>** = Daily Hourly Aggregate Mass flow of ineligible fuels, as fired (lb/hr)

**Solid and Gaseous Fuels: Determining the total heat input**

Total Heat input on a daily basis is the sum for the Heat Inputs for all fuels (Equations 4 and 5 or Equations 6 and 7 above)

## **Equation 8: Daily Total Heat Input**

$$\mathbf{HI_T} = \mathbf{HI_{EF}} + \mathbf{HI_{IF}}$$

Where:

$\mathbf{HI_T}$  = Total Heat Input from Eligible + Ineligible Fuels (MMBtu)

$\mathbf{HI_{EF}}$  = Eligible Biomass Heat Input (as described in the preceding section)

$\mathbf{HI_{IF}}$  = Ineligible Fuel Heat Input (as described in the preceding section)

## **Submission of a Fuel Management, Measurement, and Calibration Plan**

Prior to Operational Certification, Seller must submit a Fuel Flow Measurement and Calibration Plan for its fuel mass flow measurement systems. The Fuel Flow Measurement and Calibration Plan must include the following items:

### **Solid Fuel-fired Systems**

1) A detailed written description of all mass flow measurement and associated control devices needed to meet the requirements specified in Exhibit F. The description should include the manufacturer and model number and description of each system's condition and operating history. As a separate attachment, Seller should include copies of the manufacturer cut sheets, if available, specifying the system's accuracy, general operating characteristics and a written description or copy of the manufacturer's calibration requirements.

2) A calibration schedule for each of these components stating: (1) the gravimetric scales for ineligible fuels shall be calibrated no less than twice per year; and (2) the belt scales for eligible fuels shall be calibrated no less than once per month.

3) Pro forma calibration log that includes:

- description of the calibration protocol
- certifications for weighing and measurement systems used in calibration
- record of measured variance and adjustments made to the equipment as a result of calibration
- Signature and date for the calibration technician.
- If the calibration protocol deviates from the manufacturer's recommendations, such deviations should be noted and explained separately.

At a minimum, it is NYSERDA's expectation that the method of calibration will be consistent with the vendor's recommended best practices. These practices will be used as the baseline in assessing the adequacy of the Seller's recommended Fuel Flow Measurement and Calibration Plan. Both the gravimetric and belt scales will be calibrated by a third party annually, and the results of such calibration will be provided to NYSERDA with the first, subsequent invoice for program payment.

### **Gaseous Fuel-fired Systems**

1) A detailed written description and flow diagram that includes all flow measurement and associated control devices needed to meet the requirements specified in Exhibit F. The

description should include the manufacturer and model number and description of each system's condition and operating history. As a separate attachment, Seller should include copies of the manufacturer cut sheets, if available, specifying the system's accuracy, general operating characteristics and a written description or copy of the manufacturer's calibration requirements. If any metering or measurement is done by subtraction, the process and calculations should be described.

2) A calibration schedule for each of the key equipment components (namely gas meters and gas sampling equipment) should be provided. These schedules should be based on vendor recommendations but meters are to be calibrated at a minimum of once per year. Gas analysis equipment should be calibrated as specified by the vendor or industry best practices. If any meter required for the aforementioned calculations is not under the contractor's direct control, the contractor must provide other evidence of demonstrating that such meters are in proper working order.

3) Seller shall provide a pro forma calibration log that includes:

- description of the calibration protocol
- certifications for measurement systems used in calibration
- record of measured variance and adjustments made to the equipment as a result of calibration
- Signature and date for the calibration technician.
- If the calibration protocol deviates from the manufacturer's recommendations, such deviations should be noted and explained separately.

At a minimum, it is NYSERDA's expectation that the method of calibration will be consistent with the vendor's recommended best practices. These practices will be used as the baseline in assessing the adequacy of the Seller's recommended Fuel Flow Measurement and Calibration Plan. At a minimum, meters required for the calculations described above will be calibrated by a third party annually and the results of such calibration will be provided to NYSERDA with the first, subsequent invoice for program payment.

### **Test Methods for Use of Clean Wood from Construction and Demolition Debris Separated at the MRF**

- Additional test protocols apply to Bid Facilities using clean wood separated from C&D debris at a MRF. Specific requirements are listed in the recent PSC Order with regard to this resource.<sup>4</sup> Attachment F will be amended to include those testing requirements for facilities that plan to use MRF separated wood.

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<sup>4</sup> In the Matter of the Petition of Niagara Generation, LLC for Rulemaking Allowing Clean Wood Separated from Construction and Demolition Waste at Material Reclamation Facilities to be Eligible for Use as Biomass Fuel in the Renewable Portfolio Standard Program. Niagara Generation, LLC, Retail Renewable Portfolio Standard, Order Approving Petition with Modifications, State of New York Public Service Commission, Case 09-E-0843, November 22, 2010,

## **Test Methods for Solid Fuel Cofiring**

### **Eligible Fuels**

The following test methods are required to determine the values for solid biomass fuels in the above calculations are provided below. The use of alternatives may be approved, but approval must be sought in advance of using alternative methods in any report.

<b>Measurement</b>	<b>Test or Measurement Method</b>	<b>Frequency</b>
Fuel Composition	ASTM Standard E870-82(1998)e1 Standard Test Methods for Analysis of Wood Fuels	Once for each combination of Supplier and Source on a semiannual basis
Proximate Analysis	ASTM Standard Method of Proximate Analysis	Grab or in-line samples taken every 3 hour period. Such grab samples will be measured in a single "Super Sample" at the end of each 24-hour operating period.

### **Ineligible Fuels**

The following test methods are required to determine the values for ineligible fuels in the above calculations are provided below. The use of alternatives may be approved, but approval must be sought in advance of using alternative methods in any report.

<b>Measurement</b>	<b>Test or Measurement Method</b>	<b>Frequency</b>
Fuel Composition	ASTM Standard Test Methods	Once for each combination of Supplier and Source on a semiannual basis
Proximate Analysis	ASTM Standard Method of Proximate Analysis	If needed, from one "Super Sample" assembled each day from grab samples taken every three hour period

## **Test Methods for Gaseous Fuel Cofiring**

### **Eligible Fuels**

The following test methods are required to determine the values for bio-gas fuels. The use of alternatives may be approved, but approval must be sought in advance of using alternative methods in any report.

<b>Measurement</b>	<b>Test or Measurement Method</b>	<b>Frequency</b>
Fuel Composition	ASTM D2650 - 04 Standard Test Method for Chemical Composition of Gases By Mass Spectrometry	Once annually for each source (individual testing may be required by cell or digester)

Methane Content – Continuous	Continuous Methane Analyzer	Continuous
Methane Content – Sample Average	If a Continuous Methane Analyzer is not used then; 1) periodic analysis of landfill gas composition using statistically valid samples using calibrated portable gas meters and delivering a confidence level of 95% may be used.	Monthly

### Ineligible Fuels

The following test methods are required to determine the values for ineligible gaseous fuels in the above calculations are provided below. The use of alternatives may be approved, but approval must be sought in advance of using alternative methods in any report.

Measurement	Test or Measurement Method	Frequency
Fuel Composition	Heating value data from pipeline or utility supplier (may be derived from supplier invoice)	Monthly

### **METHODOLOGY FOR CALCULATING RPS-RELATED EXCESS ALLOWANCES (BIOMASS FUELS ONLY):**

The RPS-related Excess Allowances  $A_{RE} = E_{IF} - E_A$ ; where

$E_{IF}$  = Calculated emissions (SO<sub>2</sub> tons) that would have been produced from the sole use of the ineligible fuels used during the monthly reporting period.

$E_A$  = Actual Emissions (SO<sub>2</sub> tons) measured per EPA requirements during the monthly reporting period

1) Calculate the Emissions (SO<sub>2</sub> tons) attributable to eligible biomass co-fired during the monthly reporting period:

$E_{EF}$  = Calculated SO<sub>2</sub> Emissions (tons) from eligible biomass fuels

$M_{EF}$  = Measured mass of eligible biomass fuel (tons) fired daily.

$MCW_{EF}$  = Measured moisture content of eligible biomass fuel determined on a wet basis.

$[S]_{EF}$  = Fuel concentration (dry basis) of elemental sulfur as measured in the fuel ultimate analysis.

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 $E_{EF} = \sum M_{EF} * (1 - MCW_{EF}) * [S]_{EF} * (64/32)$   
(Daily totals summed over the monthly reporting period)

2) Calculate the Expected Emissions (SO<sub>2</sub> tons) produced by ineligible fuels based on the actual mix of ineligible fuels during the monthly reporting period.

$E_{IF}$  = Emissions expected to be produced by the sole use of the ineligible fuels.

AP = Actual Production (net MWh) measured at the Injection Point during the monthly reporting period.

AP<sub>EF</sub> = Actual Eligible Production (net MWh) calculated for the eligible biomass portion for the fuel mix per the reporting requirements based on cofiring percentage

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$$E_{IF} = (E_A - E_{EF}) * AP / (AP - AP_{EF})$$

3) RPS-related Excess Allowances for the Reporting Period =  $E_{IF} - E_A$

**METHODOLOGY FOR CALCULATING RPS-RELATED EXCESS ALLOWANCES (LIQUID, GASEOUS FUELS):**

On a case-by-case basis, NYSERDA will review any projects that seek to cofire eligible biomass fuels in a liquid or gaseous fueled unit that would impact the plant's SO<sub>2</sub> emissions. To the extent that such activity may result in SO<sub>2</sub> emission reductions, NYSERDA will apply the principles noted above for solid fuels to develop a methodology for measuring RPS-related excess allowances.