

Attachment D

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**COMBINED HEAT & POWER  
PERFORMANCE PROGRAM AGREEMENT**

*BETWEEN*

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

*AND*

**CUSTOMER**

**Agreement No. #####**

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**AGREEMENT**

This Agreement dated and effective as of the XX day of XXXX, 2013 by and between the **New York State Energy Research and Development Authority** (hereinafter referred to as "NYSERDA") with its principal office located at 17 Columbia Circle, Albany New York, 12203-6399, and XXXXXX [Applicant] (hereinafter referred to as the "Applicant"), with offices located at XXXXXXXXXXXXXXXXXX. The Applicant is responsible for fulfilling CHP Performance Program requirements as outlined in the CHP Performance Program Systems Manual and is the entity that receives incentive payments. From time to time, NYSERDA and the Applicant may be individually referred herein as a "Party" and collectively as the "Parties."

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

**ARTICLE 1: DEFINITIONS**

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

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

Bill of Lading. A document issued by a carrier to a shipper, listing and acknowledging receipt of goods and specifying terms of delivery.

Clean CHP. A proposed Combined Heat and Power (CHP) meeting the Clean Distributed Generation ("Clean DG") definition, prescribed by the New York State Public Service Commission's Order (Order) on Demand Management Action Plan (Case 04-E-0572), effective March 16, 2006 ([www.dps.ny.gov/fileroom.html](http://www.dps.ny.gov/fileroom.html)).

CHP System. A Clean CHP comprised of all electricity generating prime movers at a site and balance of plant equipment.

Combined Heat and Power (CHP). The simultaneous production of both electricity and thermal energy to be utilized within the host facility.

Commencement Date. The start of the Performance Phase, at the time of NYSERDA's acceptance of the Project Installation Report (PIR).

## AGREEMENT FOR CHP SYSTEMS

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Commissioning. A systematic process of detailed documentation and verification designed to ensure that systems are installed and perform interactively according to the owner's programmatic and operational needs and the design intent.

Contracted Peak kW Reduction (kW<sub>SPC</sub>). The projected peak demand reduction, agreed to between the Applicant and NYSERDA in this Agreement, and attached as Exhibit A.

Demand Savings. Summer On-Peak Period baseline electric demand (kW) less Summer On-Peak Period post-installation electric demand (kW). For CHP Systems, the demand savings are equal to the on-peak period power (kW) generated by the system net of any power use by parasitic or ancillary equipment associated with the CHP System.

Electricity Generated. Electricity generated net of any system parasitic or ancillary equipment use.

Electricity Generated (kW<sub>a</sub>). Total electricity generated by the CHP System in a 12-month period net of parasitic electricity use.

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

Energy Analysis (EA). Refers to the required detailed information about the Applicant's proposed CHP System, including equipment surveys, projected electricity generated and peak demand reduction. The EA shall be prepared in accordance with the CHP Systems Manual.

Energy Savings. The amount of electric energy savings expressed in kilowatt-hours (kWh), kilowatts (kW), and/or the amount of net thermal energy savings expressed in mmBtus, made available during the time periods specified herein through load reduction by the Project as measured and verified according to the NYSERDA-approved Measurement and Verification (M&V) Plan. For CHP Systems the electric energy savings are equal to the electric energy generated net of any system parasitic or ancillary equipment use. NYSERDA's incentive will not be paid for electricity generated beyond on-site electricity usage. The comparison between the electricity generated by the CHP System and that used on-site will be assessed on an hourly basis.

CHP Performance Program Systems Manual. The NYSERDA CHP Performance Program Systems Manual in effect at the time the application is received by NYSERDA. The CHP Performance Program Systems Manual incorporates PON 2701 by reference.

Fuel Conversion Efficiency (FCE): The fuel conversion efficiency is determined by the formula:

$$\frac{((\text{kWh generated} - \text{kWh ancillary loads}) * 3,412 \text{ btu/kWh}) + (\text{btus of reclaimed heat used on site} / 0.80)}{\text{Btus of fuel consumed (Higher Heating Value (HHV))}}$$

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Installation Phase. The phase of the Agreement that includes preparation of proposed CHP System designs and specifications, equipment procurement and installation, commissioning and completion of the PIR.

kW. One kilowatt of electricity.

kW Incentive. Financial incentive attributable to electrical power generated during the Summer On-Peak Period.

kW nameplate. The full-load, net, continuous-rated generating capacity of the CHP System minus ancillary generating system loads, as indicated in the PA.

kWh. One (1) kilowatt-hour of electricity.

kWh incentive. Financial incentive attributable to annual electrical energy generated.

Measurement and Verification (M&V). The process of monitoring and measuring the performance of the CHP System. Such M&V shall be set forth in an M&V Plan prepared in accordance with the CHP Performance Program Systems Manual.

Parasitic Power. Electricity consumption by a component that, in the absence of the CHP System, would not be required at the facility. This includes controls, pumps, fuel compressors and fans associated with the generator used to provide heat recovery to the load, or used to reject unneeded heat. Parasitic power can be the sum of several power measurements, or be derived from one-time power readings with component runtime information.

Peak Demand Reduction ( $kW_p$ ). Average power produced by the CHP System during the summer capability period, net of parasitic electricity use. Electricity generated beyond on-site electricity usage shall not be included in the calculation of  $kW_p$ . The comparison between the electricity generated by the CHP System and that used on-site will be assessed on an hourly basis.

Performance Phase. The final phase of the Agreement that commences on the approval of the PIR.

Power Ratio. The ratio of the achieved peak demand reduction to the projected peak demand reduction ( $kW_p/kW_{SPC}$ ). This ratio will be applied to determine the kW Incentive at the end of Year 1 and Year 2.

Project. The CHP System contemplated herein and set forth in Exhibit A of this Agreement, and as further described in the Project Application (PA). It consists of the CHP System and all associated equipment or improvements that are installed by the Applicant to achieve the Total Contracted Project Incentive claimed within this Agreement.

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Project Application (PA). The Applicant's initial submission to NYSERDA which includes a EA, an environmental assessment form (EAF), and, if applicable, a copy of recent electric utility and fuel bills.

Project Installation Report (PIR). The detailed description of the installed Project including an equipment inventory, the operating conditions and schedule, updated savings calculations, and a commissioning report for the installed CHP System.

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

Receptor. Location where potential air emissions would have an impact; it could include one (1) or more operable window(s), balconies, and air intake(s) on nearby buildings (residential and commercial).

Schematic Design. Preliminary design documents (drawings and/or specifications) describing the scope and primary components of the project. Schematic Design documents identify the major design issues and layout how these issues will be addressed.

Site. One (1) or several adjacent buildings, or group of buildings on a contiguous site, owned or operated by a single entity.

Summer On-Peak or Summer Capability Period. The period May 1 to October 31, and the hours between 12 PM and 6 PM, Monday to Friday, excluding legal holidays.

Total Contracted Project Incentive. The dollar amount listed in Exhibit A of this Agreement. It is the not-to-exceed amount that the Applicant can receive for delivering the projected Electricity Generated, Peak Demand Reduction, and Fuel Conversion Efficiency. Exhibit A defines the Total Contracted Project Base and Bonus Incentive dollar values.

Total Project Cost. All costs directly associated with the Energy Savings and Demand Savings of the Project, including, but not limited to: the cost of the EA; CHP System design, procurement and installation; associated overhead and profit; and costs of any sensors or meters installed by Applicant for the purpose of M&V.

### Useful Heat Recovery

- Thermal output that displaces fuel use in a boiler, furnace or other system,
- Thermal input into chiller, desiccant system, or other system that provides a useful output or service such as cooling or dehumidification.

## ARTICLE 2: PROJECT ORGANIZATION

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§2.1. Project Organization. The Project contemplated herein shall be implemented in accordance with the Agreement and in three (3) phases: Design, Installation and Performance. The Design Phase shall include preparation, delivery and review of schematic design, air permits, proof of interconnection request to the Customer's utility company, complete design, and engineering. The Installation Phase shall begin with the Effective Date and include the procurement, fabrication, installation, and commissioning of the CHP System set forth in the approved EA and continue through the preparation of the PIR. The Performance Phase shall begin with the Commencement Date and continue through the completion of the M&V activities required by the approved M&V plan.

§2.2. Project Term. The term of this Agreement shall begin on the Effective Date and shall run continuously for two (2) years after the Commencement Date, as provided for in the approved M&V plan, unless extended or terminated pursuant to this Agreement.

§2.3. Project Extensions. The Project Term, defined in Section 2.2 hereof, may be extended for good cause by NYSERDA. As used herein, "good cause" means an unanticipated circumstance or event which, despite the due diligence of the Applicant, renders compliance with such term impracticable. A request for an extension must be submitted in writing to NYSERDA no less than thirty (30) calendar days prior to the expiration of this Agreement. Any such extension shall be in writing.

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

### ARTICLE 3: PROJECT PAYMENTS

§3.1. Payments to the Applicant. Milestone payments as defined in the CHP Systems Manual are contemplated to be made to the Applicant under this Agreement. Payments will be requested by the Applicant by submitting an invoice to NYSERDA. NYSERDA shall make payments to the Applicant in accordance with and subject to its Prompt Payment Policy Statement attached hereto as Exhibit D. Payments shall be made in accordance with the payment process set forth below:

Progress Payment Invoices. NYSERDA may make two (2) progress payments totaling up to thirty percent (30%) of the Total Contracted Project Base Incentive.

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1. The first progress payment will be made upon receipt of an invoice, which may be submitted at the option of the Applicant, upon proof of purchase and delivery of the CHP System and ancillary equipment (i.e. bill of lading).

The first progress payment shall not exceed fifteen percent (15%) of the Total Contracted Project Base Incentive.

2. The second progress payment will be made upon receipt of an invoice, which may be submitted at the option of the Applicant, following submission to NYSERDA of a copy of the Applicant's receipt of the interconnection letter from their applicable utility.

The second progress payment shall not exceed fifteen percent (15%) of the Total Contracted Project Base Incentive.

Progress Payments may not exceed fifty percent (50%) of the Project costs incurred.

Project Installation Payment Invoice. NYSERDA agrees to make a payment of up to forty percent (40%) of the Total Contracted Project Base Incentive, less any amount paid on a Progress Payment Invoice, if the Project, as installed, is substantially the same as the Project in the NYSERDA-approved EA and all requirements of the program have been met, including all permit approvals and interconnection approval from the Customer's utility company. This payment will be based on the Energy Savings estimates in the PIR. This invoice is to be submitted following NYSERDA's approval of the PIR and when the Applicant requests to begin the first years M&V period. The Applicant has up to three (3) months from the time of project installation to begin the M&V period.

- If the Project applied for and is serving Critical Infrastructure, the 10% bonus incentive will be released.
- If the Project applied for and is operating in a Targeted Zone, the 10% bonus incentive will be released.

Performance Invoices. NYSERDA agrees to make two (2) performance payments based on verified Energy Savings following the procedures and schedule of the approved M&V Plan. The maximum allowable payment amount for the first performance invoice is up to thirty percent (30%) of the Total Contracted Project Base Incentive. The maximum allowable payment amount for the second performance invoice is up to thirty percent (30%) of the Total Contracted Project Base Incentive. The performance payment may be reduced if the installed Project fails to meet the CHP Performance Program requirements as outlined in the CHP Systems Manual or achieve the Energy Savings agreed to in Exhibit A.

- If applicable, the superior performance bonus incentive will be paid at the completion of M&V Year 1 and M&V Year 2.
  - Each year is capped at 5%. The sum of the first year and second year

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Superior Performance Bonus Incentive must not exceed 10% of the Base Incentive

Applicant Refund of Overpayments. The Applicant shall repay, within thirty (30) calendar days of notification by NYSERDA, any overpayments made by NYSERDA for progress and installation payments based upon estimated Energy Saving that are not achieved, as provided herein.

Invoice Acceptance. No invoices will be accepted more than ninety (90) days after the end of the Project Term.

§3.2. Maximum Payment. The Total Contracted Project Incentive for a Project shall not exceed \$XXXXXXX

ARTICLE 4: DESIGN PHASE

§4.1. EA Requirements. The EA shall be accomplished in accordance with the requirements outlined in the CHP Performance Program Systems Manual. The EA shall be submitted as part of the application.

§4.2. Schematic Design Requirements. The Schematic Design shall be accomplished in accordance with the requirements outlined in the CHP Performance Program Systems Manual.

§4.3. Schematic Design Submission. The Applicant shall deliver to NYSERDA Schematic Design documents within ninety (90) days of receipt of the Agreement. Unless the deadline to submit the Schematic Design is extended in writing by the NYSERDA Project Manager, failure to submit the Schematic Design within the specified time frame may result in the termination of the Agreement. The Schematic Design shall include equipment specifications, preliminary plan drawings, installation details and permitting and inspection information as detailed in the CHP Performance Program Systems Manual.

§4.4. Schematic Design Acceptance. NYSERDA, in accordance with the CHP Performance Program Systems Manual, will review the Schematic Design and either approve the Schematic Design as submitted, request clarification or additional information, or reject it. An Applicant will have up to thirty (30) days to respond to an initial request for clarification or additional information during the Schematic Design review. If the clarification or additional information is not provided, NYSERDA may elect to declare the Applicant in default. If the additional information is insufficient, the Applicant is allowed two (2) subsequent requests for such information. An Applicant will have up to ten (10) days to respond to each subsequent request for clarification or additional information. If all necessary information is not received by NYSERDA following the third and final request for information, NYSERDA may elect to declare the Applicant in default under this Agreement.

§4.5. Construction Documents Requirements. The Construction Documents shall consist of the final design drawings and specifications. This shall include the final M&V plan. Deviations and concept changes from the Schematic Design shall be highlighted.

§4.6. Construction Document Submission. The Applicant shall deliver to NYSERDA Construction Documents within sixty (60) days of NYSERDA's approval of the Schematic Design. Unless the deadline to submit the Construction Documents is extended in writing by the NYSERDA Project Manager, failure to submit the Construction Documents within the specified time frame may result in the termination of the Agreement.

§4.7. Construction Document Acceptance. NYSERDA, in accordance with the CHP Systems Manual, will review the Construction Documents and either approve the Construction Documents as submitted or request clarification or additional information, or reject it. An Applicant will have up to thirty (30) days to respond to an initial request for clarification or additional information during the Schematic Design review. If the clarification or additional information is not provided, NYSERDA may elect to declare the Applicant in default. If the additional information is insufficient, the Applicant is allowed two (2) subsequent requests for such information. An Applicant will have up to ten (10) days to respond to each subsequent request for clarification or additional information. If all necessary information is not received by NYSERDA following the third and final request for information, NYSERDA may elect to declare the Applicant in default under this Agreement.

§4.8. Measurement and Verification Plan. For CHP Systems, NYSERDA, at no cost to the Applicant, will perform the required M&V. The Applicant, however, will be required to purchase and install the specified sensors and meters. NYSERDA's contractor will work cooperatively with the Applicant to develop an M&V Plan. The Applicant will provide a phone line, internet access or other means of communication acceptable to the NYSERDA contractor to be used for remote data collection. The Applicant shall provide access, as needed, to the NYSERDA contractor to allow the NYSERDA contractor to perform its M&V activities. The NYSERDA contractor shall provide 24 hours notice to the Applicant of all site visits. Should the Applicant fail to provide such access, NYSERDA may elect to declare the Applicant in default under this Agreement.

## ARTICLE 5: INSTALLATION PHASE

§5.1. Installation Phase Requirements. The Installation Phase, including the procurement and installation of the CHP System, shall be accomplished in accordance with the requirements outlined in the approved EA and the CHP Performance Program Systems Manual.

§5.2. Term. The Installation Phase shall be deemed to have commenced upon the Effective Date of this Agreement and shall terminate upon NYSERDA's approval of the PIR.

§5.3. Permits. It is the responsibility of the Applicant to acquire and maintain, at its own cost, any and all permits, licenses, easements, waivers and permissions of every nature necessary to perform the Project.

§5.4. PIR Requirements. The Applicant shall deliver to NYSERDA a PIR within twelve (12) months from the date of NYSERDA's approval of the Schematic Design. Failure to submit the PIR within the specified time frame shall be considered a default under this Agreement.

In the PIR, the Applicant will provide documentation that verifies that the specified CHP System has been properly installed, is functioning properly, and with proper maintenance and operation has the potential to generate the Energy Savings documented in Exhibit A.

As described more fully in the CHP Performance Program Systems Manual, the PIR shall include the results of the Commissioning process and performance tests verifying that the installed CHP System will operate as designed. CHP System designs shall conform to all applicable building, energy, and equipment efficiency standards. The tests shall be conducted in accordance with written procedures set forth in the M&V Plan.

§5.5. PIR Acceptance. NYSERDA, in accordance with the time frames set forth in the CHP Performance Program Systems Manual, will review the PIR, inspect the CHP System and either approve the PIR as submitted, approve it with minor revisions, or reject it. If the PIR is rejected, the Applicant has sixty (60) calendar days from the date of rejection to provide necessary information and resolve all outstanding issues with NYSERDA.

In any case, acceptance of the PIR shall not be unreasonably withheld. If NYSERDA is unable to accept the PIR because of the Applicant's failure to perform identified corrective action, such failure shall be considered a default under this Agreement.

## ARTICLE 6: PERFORMANCE PHASE

§6.1. Performance Phase Requirements. As a condition of receiving incentive payments under this Agreement, the Applicant is responsible for cooperating with NYSERDA in the implementation of the M&V Plan. In addition, the Applicant shall be responsible for providing the sensors and meters specified in the M&V Plan. All M&V shall be conducted in accordance with the approved M&V Plan.

§6.2. Term. The Performance Phase shall commence upon NYSERDA's approval of the PIR and the Applicant's request to begin M&V, and shall continue for two (2) full years from that date.

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§6.3. Prior Notice. NYSERDA or its Contractor shall be responsible for M&V and may choose to visit a Project site to verify that the information provided in the M&V report is accurate with regard to project equipment, site conditions, and monitoring configurations. These inspections may occur at any time after Project installation, both prior to and after the preparation of an M&V report by NYSERDA. Should NYSERDA decide to inspect the Project, NYSERDA, or its Contractor may or may not contact the Applicant to schedule the inspection; an inspection may occur without advance notice given to the Applicant. If the M&V activities are found to be different from those represented in either the M&V Plan or the M&V report, NYSERDA may refuse any further incentive payments. If NYSERDA deems an inspection necessary, an M&V report that is under review will not be approved until the inspection has been completed.

ARTICLE 7: REQUIRED CUSTOMER-CONTRACTOR AGREEMENTS

INTENTIONALLY LEFT BLANK.

ARTICLE 8: FORCE MAJEURE

§8.1. Neither party hereto shall be liable for any failure or delay in the performance of its respective obligations hereunder if and to the extent that such delay or failure is due to a cause or circumstance beyond the reasonable control of such party, including, without limitation, acts of God or the public enemy, expropriation or confiscation of land or facilities, compliance with any law, order or request of any Federal, State, municipal or local governmental authority, acts of war, rebellion or sabotage or damage resulting therefrom, fires, floods, storms, explosions, accidents, riots, strikes, or the delay or failure to perform by any subcontractor by reason of any cause or circumstance beyond the reasonable control of such subcontractor.

ARTICLE 9: TERMINATION

§9.1. This Agreement shall remain in effect for the term defined in Section 2.2, unless there is an event of default and the Agreement is terminated in accordance with this Article.

Events of default include either Party's breach of any provision of this Agreement, including provisions incorporated by reference, and including, but not limited to, the following:

- a. failure of the Applicant to perform its responsibilities in a timely manner, including, but not limited to, failure to provide the required submittals, including responses to requests for clarification or additional information, or failure to complete the required inspections within the time limits and manner set forth in the CHP Performance Program Systems Manual;
- b. failure of the Applicant to provide NYSERDA or its contractors sufficient access to the Customer's facilities for inspection and/or observation of the Applicant's field M&V activities;

- c. failure of the Applicant to cure any deficiency in a material term or cure any material breach of this Agreement within thirty (30) calendar days after written notice;
- d. failure of the Applicant to maintain necessary permits, licenses or insurance required under this Agreement;
- e. assignment or subcontracting of all or part of the Applicant's obligations required under this Agreement without NYSERDA's prior written permission, except the Applicant shall not be required to obtain NYSERDA approval to subcontract all or part of the work;
- f. submission by the Applicant of false, misleading or incorrect information; and
- g. failure by NYSERDA to make payments due pursuant to the terms of this Agreement to the Applicant within the time limits set forth in this Agreement.

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

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

#### ARTICLE 10: INDEMNIFICATION

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

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ARTICLE 11: INSURANCE.

§11.1. Maintenance of Insurance; Policy Provisions. The Applicant, at no additional cost to NYSERDA, shall maintain or cause to be maintained throughout the term of this Agreement, insurance of the type and in the amounts specified in the Section hereof entitled Type of Insurance. All such insurance shall be evidenced by one (1) or more 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 canceled or modified until at least thirty (30) calendar days after receipt by NYSERDA of written notice thereof; and
- c. be reasonably satisfactory to NYSERDA in all other respects.

§11.2. Type of Insurance. (a) Commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of \$1,000,000 in respect of claims arising out of personal injury or sickness or death of any one (1) person, \$1,000,000 in respect of claims arising out of personal injury, sickness or death in any one (1) accident or disaster, and \$1,000,000 in respect of claims arising out of property damage in any one (1) accident or disaster; and

(b) Workers Compensation, Employers Liability, and Disability Benefits as required by New York State.

§11.3. Delivery of Policies; Insurance Certificates. Prior to commencing the Work, the Applicant shall deliver to NYSERDA certificates of insurance issued by the insurers, evidencing the insurance required by this Article. In the event any policy furnished or carried pursuant to this Article will expire on a date prior to the termination date established under Article 2 hereof, the Applicant, not less than thirty (30) calendar days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and the Applicant shall promptly pay all premiums thereon due. In the event of threatened legal action, claims, encumbrances, or liabilities that may affect NYSERDA hereunder, or if deemed necessary by NYSERDA due to events rendering a review necessary, upon request the Applicant shall deliver to NYSERDA a certified copy of each policy.

ARTICLE 12: WARRANTIES AND GUARANTEES

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

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

§12.2. The Applicant also warrants and guarantees that:

- a. it is financially and technically qualified to perform the Project;
- b. it is familiar with and will comply with all general and special federal, State, municipal and local laws, ordinances and regulations, if any, that may in any way affect the performance of this Agreement;
- c. the design, supervision and workmanship furnished with respect to performance of the Project shall be in accordance with sound and currently accepted engineering practices;
- d. neither the Applicant nor any of its employees, agents, representatives or servants has actual knowledge of any patent, copyright or trademark issued under the laws of the United States or any other matter which could constitute a basis for any claim that the performance of the Project or any part thereof infringes any patent, copyright, or trademark or otherwise interferes with any other right of any individual, corporation, association or partnership, organization, business or a government or political subdivision thereof, or any governmental agency or instrumentality;
- e. it has no actual knowledge that there are existing undisclosed or threatened legal actions, claims, or encumbrances, or liabilities that may adversely affect the Project or NYSERDA's rights hereunder;
- f. it has no actual knowledge that any information or document or statement furnished by the Applicant in connection with this Agreement contains any untrue statement of a material fact or

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omits to state a material fact necessary to make the statement not misleading, and that all facts have been disclosed that would materially adversely affect the Project;

g. it has no, and shall not obtain during the course of this Agreement any, interest, financial or otherwise, direct or indirect, nor is it engaged in any business or transaction or professional activity, nor has it incurred any obligation of any nature, which is in substantial conflict with the rendering of services under this Agreement; and

h. it shall exercise reasonable care to achieve commercial standards of fitness for the Customer's use of the equipment that is installed in connection with the Project.

ARTICLE 13: COMPLIANCE WITH CERTAIN LAWS

§13.1. Governing Law. This Agreement shall be interpreted according to the laws of the State of New York. The Applicant, its subcontractors and consultants will comply with all laws, rules, orders, regulations and requirements of federal, state and municipal governments applicable thereto, including provisions set forth in Exhibit C, "Standard Terms and Conditions for All NYSERDA Agreements."

§13.2. All Legal Provisions Deemed Included. It is the intent and understanding of the Applicant 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 Applicant, 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.

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

§13.4. Equipment Requirements. All Equipment required for the CHP System described in the EA shall be consistent with the New York State Uniform Fire Prevention and Building Code, or the applicable local, State or Federal codes.

§13.5. CHP System Efficiency. The annual Fuel Conversion Efficiency of the CHP System, as determined by the monitoring contractor, must meet or exceed sixty percent (60%). Failure to comply will result in reduction of the incentive paid by NYSERDA as specified in the CHP Performance Program Systems Manual.

AGREEMENT FOR CHP SYSTEMS

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§13.6. CHP Clean DG. The CHP System must meet the definition of a “clean DG” system as stated in the New York State Public Service Commission’s Order (Order) on Demand Management Action Plan (Case 04-E-0572), effective March 16, 2006.

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

Activities may qualify as Type I, Type II, or unlisted actions. A Type I activity is likely to have a significant effect on the environment and requires an environmental impact statement (EIS); a Type II action has been determined not to have a significant impact on the environment; an unlisted action must be reviewed to determine if an EIS is appropriate.

CHP Systems in the CHP Performance Program are generally eligible to be treated as Type II actions. NYSERDA will require the Applicant to provide an Environmental Assessment Form (EAF) with the EA for any Unlisted action included in the Project.

ARTICLE 14: PUBLICITY

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

§14.2. It is recognized that during the course of the Project under this Agreement, the Applicant or its employees may from time to time desire to publish information regarding scientific or technical developments made or conceived in the course of or under this Agreement. In any such information, the Applicant shall credit NYSERDA’s funding participation in the Project, and shall state that "NYSERDA has not reviewed the information contained herein, and the opinions expressed in this report do not necessarily reflect those of NYSERDA or the State of New York." Notwithstanding anything to the contrary contained herein, the Applicant shall have the right to use and freely disseminate Project results for educational purposes , if applicable, consistent with the Applicant’s policies.

§14.3. Commercial promotional materials or advertisements produced by the Applicant shall credit NYSERDA as stated above, and shall be submitted to NYSERDA for review and recommendations to improve their effectiveness prior to use. The wording of such credit can be approved in advance by NYSERDA, and, after initial approval, such credit may be used in subsequent promotional materials or advertisements without additional approvals for the credit, provided, however, that all such promotional materials or advertisements shall be submitted to NYSERDA prior to use for review, as stated above. Such approvals shall not be unreasonably

## AGREEMENT FOR CHP SYSTEMS

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withheld, and, in the event that notice of approval or disapproval is not received by the Applicant within thirty days after receipt of request for approval, the promotional materials or advertisement shall be considered approved. In the event that NYSERDA requires additional time for considering approval, NYSERDA shall notify the Applicant within thirty days of receipt of the request for approval that additional time is required and shall specify the additional amount of time necessary up to 180 days. If NYSERDA and the Applicant do not agree on the wording of such credit in connection with such materials, the Applicant may use such materials, but agrees not to include such credit.

### ARTICLE 15: MISCELLANEOUS

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

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

§15.3. NYSERDA'S Right to Inspect. NYSERDA, and its designated representatives, may observe and inspect all Project work in any of the Customer's facilities.

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

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

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

AGREEMENT FOR CHP SYSTEMS

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§15.7. Assignment. The assignment, transfer, conveyance, or other disposal of this Agreement or any of the Applicant'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. An assignment of payments due to the Applicant under this Agreement for the purpose of the Applicant securing financing is subject to this Section 15.7, and NYSERDA's consent thereto will not be unreasonably withheld provided the Applicant remains responsible for fulfilling its obligations under this Agreement.

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

- (i) via certified or registered United States mail, return receipt requested;
- (ii) by facsimile transmission;
- (iii) by personal delivery;
- (iv) by expedited delivery service; or
- (v) 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:

***NYSERDA***

Name: Cheryl L. Earley  
Title: Director of Contract Management  
Address: 17 Columbia Circle, Albany, New York 12203  
Facsimile Number: 518-862-1090  
E-Mail Address: [cle@nyserda.ny.gov](mailto:cle@nyserda.ny.gov)  
Personal Delivery: Reception desk at the above address

**XXXXXXXXXX**

Name:  
Address:  
Facsimile Number:  
E-Mail Address:

(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

AGREEMENT FOR CHP SYSTEMS

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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.

§15.9. Independent Contractor. (a) The status of the Applicant under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, the Applicant, subcontractors, and their respective officers, agents, employees, representatives and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives or servants of NYSERDA nor make any claim, demand or application for any right or privilege applicable to NYSERDA, including, without limitation, vicarious liability, professional liability coverage or indemnification, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage and retirement membership or credit. . It is understood and agreed that the personnel furnished by Applicant to perform the Work shall be Applicants's employee(s) or agent(s), and under no circumstances are such employee(s) to be considered NYSERDA's employee(s) or agent(s), and shall remain the employees of Applicant, except to the extent required by section 414(n) of the Internal Revenue Code.

(b) Applicant expressly acknowledges NYSERDA's need to be advised, on an immediate basis, of the existence of any claim or event that might result in a claim or claims against NYSERDA, Applicant and/or Applicant's personnel by virtue of any act or omission on the part of NYSERDA or its employees. Accordingly, Applicant expressly covenants and agrees to notify NYSERDA of any such claim or event, including but not limited to, requests for accommodation and allegations of harassment and/or discrimination, immediately upon Applicant's discovery of the same, and to fully and honestly cooperate with NYSERDA in its efforts to investigate and/or address such claims or events, including but not limited to, complying with any reasonable request by NYSERDA for disclosure of information concerning such claim or event even in the event that this Agreement should terminate for any reason.

§15.10. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of this Agreement and for the maintenance period set forth in Section 15.2 hereof to inspect and audit Project accounts pertaining to the financial obligation of the Customer to the Applicant and records pertaining to the Project engineering, energy savings calculations, and energy savings measurement and verification where they are then being kept, maintained and preserved pursuant to Section 15.2 hereof. Any payment made under this Agreement shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Applicant by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

## AGREEMENT FOR CHP SYSTEMS

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§15.11. Review and Disclaimer. NYSERDA's execution of this Agreement with the Applicant and any NYSERDA review of the design, construction, operation, or maintenance of the Project shall not constitute any representation as to the economic or technical feasibility, operational capability, or reliability of the CHP System. The Applicant shall in no way represent to any third party that NYSERDA's execution of this Agreement or any reviews by NYSERDA, including, but not limited to, NYSERDA's review of the design, construction, operation, or maintenance of the Project is a representation by NYSERDA as to the economic or technical feasibility, operational capability, or reliability of the Energy Efficiency Measures. The Applicant is solely responsible for the economic and technical feasibility, operational capability, and reliability of the CHP System.

§15.12. Requirement to Pay the SBC. The customer site must be paying the SBC at the time of application submittal to NYSERDA. A portion or all of the Total Contracted Project Incentive shall be forfeited if the Customer fails to pay the SBC throughout the term of this Agreement. Specifically, if the Customer fails to pay the SBC for the entire Performance Phase, the Total Contracted Project Incentive shall be reduced by the same proportion as the period of time that the SBC is not paid during the Performance Phase. If the Customer fails to pay the SBC at any time prior to the Performance Phase, all of the Total Contracted Project Incentive shall be forfeited.

AGREEMENT FOR CHP SYSTEMS

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**IN WITNESS WHEREOF**, the Parties hereto do indicate their acceptance of and agreement to the foregoing by causing their duly authorized representatives to execute this Agreement as of the day, month and year first above written.

**XXXXXXXXXX**

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

By \_\_\_\_\_

By \_\_\_\_\_

Name \_\_\_\_\_

John B. Rhodes  
President and CEO

Title \_\_\_\_\_

AGREEMENT FOR CHP SYSTEMS

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STATE OF            )  
                          ) SS.:  
COUNTY OF        )

On this \_\_\_\_\_ day of \_\_\_\_\_, 201\_ before me personally came \_\_\_\_\_, to me known, who, by me duly sworn, did depose and say that deponent resides in \_\_\_\_\_; that deponent is the of \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; and that (s)he executed the same by the authority of the Board of Directors or By-Laws of said corporation.

\_\_\_\_\_  
Notary Public        |

**EXHIBIT A**  
**CHP PERFORMANCE PROGRAM AGREEMENT**

Total Contracted Peak Demand Reduction and Project Incentive

Contract Number:

Application Name:

Project Name:

Estimated Savings		Installed kW	Total Contracted Base Incentive (\$)		
Annual kWh Generated	Contracted Peak kW Reduction (kW <sub>spc</sub> )	Nameplate	\$0.10/kWh	\$750/kW <sub>spc</sub>	Total*

Bonus Incentives** (Each Bonus Incentive component capped at 10% of the Total Estimated Base Incentive)			Total Contracted Project Incentive (\$)		
Critical Facility	Targeted Zone	Superior Performance	Base Incentive \$	Bonus Incentive \$	Total***

\*The Total Estimated Base Incentive is capped at the lesser of \$2,000,000 or 50% of Total Project Cost.

\*\*Bonus Incentives cannot exceed 30% of the Total Estimated Base Incentive.

\*\*\*The Total Contracted Project Incentive is capped at the lesser of \$2,600,000 or 50% of Total Project Cost.

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**EXHIBIT B**

See Attachment B – CHP Performance Program Systems Manual

CHP Performance Program System Manual in effect at the time the Application is received by NYSERDA is incorporated herein by reference and made a part hereof as though herein set forth in full.

EXHIBIT C

REVISED 5/12

STANDARD TERMS AND CONDITIONS  
FOR ALL NYSERDA AGREEMENTS

(Based on Standard Clauses for New York State Contracts and Tax Law Section 5-a)

The parties to the Agreement agree to be bound by the following clauses which are hereby made a part of the Agreement:

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

2. WAGE AND HOURS PROVISIONS. If this is a public work Agreement covered by Article 8 of the Labor Law or a building service Agreement covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by NYSERDA of any NYSERDA-approved sums due and owing for work done upon the project.

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

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

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

6. PROPRIETARY INFORMATION. Notwithstanding any provisions to the contrary in the Agreement, Contractor and NYSERDA acknowledge and agree that all information, in any format, submitted to NYSERDA shall be subject to and treated in accordance with the NYS Freedom of Information Law ("FOIL," Public Officers Law, Article 6). Pursuant to FOIL, NYSERDA is required to make available to the public, upon request, records or portions thereof which it possesses, unless that information is statutorily exempt from disclosure. Therefore, unless the Agreement specifically requires otherwise, Contractor should submit information to NYSERDA in a non-confidential, non-proprietary format. FOIL does provide that NYSERDA may deny access to records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." [See Public Officers Law, § 87(2)(d)]. Accordingly, if the Agreement specifically requires submission of information in a format Contractor considers a proprietary and/or confidential trade secret, Contractor shall fully identify and plainly label the information "confidential" or "proprietary" at the time of disclosure. By so marking such information, Contractor represents that the information has actual or potential specific commercial or competitive value to the competitors of Contractor. Without limitation, information will not be

considered confidential or proprietary if it is or has been (i) generally known or available from other sources without obligation concerning its confidentiality; (ii) made available by the owner to others without obligation concerning its confidentiality; or (iii) already available to NYSERDA without obligation concerning its confidentiality. In the event of a FOIL request, it is NYSERDA's policy to consider records as marked above pursuant to the trade secret exemption procedure set forth in 21 New York Codes Rules & Regulations § 501.6 and any other applicable law or regulation. However, NYSERDA cannot guarantee the confidentiality of any information submitted. More information on FOIL, and the relevant statutory law and regulations, can be found at the website for the Committee on Open Government (<http://www.dos.state.ny.us/coog/foil2.html>) and NYSERDA's Regulations, Part 501 (<http://www.nyserda.ny.gov/en/About/~media/Files/About/Contact/NYSERDARegulations.ashx>).

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

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

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

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

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

11. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete

upon Contractor's actual receipt of process or upon NYSERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify NYSERDA, in writing, of each and every change of address to which service of process can be made. Service by NYSERDA to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

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

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

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

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

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

NYS Department of Economic Development  
Division for Small Business  
30 South Pearl St -- 7th Floor  
Albany, New York 12245  
Telephone: 518-292-5220  
Fax: 518-292-5884  
<http://www.esd.ny.gov>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT D

NYSERDA PROMPT PAYMENT POLICY STATEMENT

**504.1. Purpose and Applicability.** (a) The purpose of this Exhibit is to provide a description of Part 504 of NYSERDA's regulations, which consists of NYSERDA's policy for making payment promptly on amounts properly due and owing by NYSERDA under this Agreement. The section numbers used in this document correspond to the section numbers appearing in Part 504 of the regulations.<sup>1</sup>

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

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

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

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

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

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

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

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

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

(g)(1) “Receipt of an Invoice” means:

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

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

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

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

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

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

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

**504.4. Payment Procedures.**

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

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

(1) any defects in the delivered goods, property or services;

(2) any defects in the invoice; or

(3) suspected improprieties of any kind.

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

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

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

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

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

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

(c) If an invoice must be examined by a State or Federal agency, or by another party contributing to the funding of the Contract, prior to Payment, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date

when the State or Federal agency, or other contributing party to the Contract, has completed the inspection, advised NYSERDA of the results of the inspection, and any deficiencies identified or issues raised as a result of such inspection have been corrected or otherwise resolved.

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

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

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

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

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

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

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

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

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