

RESRFP18-1 – ATTACHMENT H

RES STANDARD FORM AGREEMENT

BY AND BETWEEN

THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY

AND

[NAME OF SELLER]

Dated: _____, 2018

This Agreement ("Agreement") is entered into as of _____, 2018 (the "Effective Date") by and between the New York State Energy Research and Development Authority ("NYSERDA"), a public benefit corporation, having a principal business address of 17 Columbia Circle, Albany, New York 12203, and _____ ("Seller"), a [insert as appropriate], having a principal business address of _____. NYSERDA and Seller are each referred to herein as a "Party" and are collectively referred to herein as the "Parties."

WHEREAS, the New York State Public Service Commission ("PSC") through its "Order Adopting a Clean Energy Standard"¹ (August Order) established a Clean Energy Standard Program, to consist of a Renewable Energy Standard (RES) and a Zero-Emissions Credit (ZEC) requirement; and

WHEREAS, the RES requires each New York electric load-serving entities to serve their retail customers by procuring new renewable resources, evidenced by the procurement of qualifying RES Tier-1 Renewable Energy Certificates; and

WHEREAS, the August Order directs and authorizes NYSERDA, as the central procurement administrator of the RES program, to issue and conduct solicitations for the procurement of RES Tier-1 Renewable Energy Certificates for sale to New York electric load-serving entities; and

WHEREAS, on February 22, 2017² the PSC approved the proposed Clean Energy Standard Phase 1 Implementation Plan, with revisions; and

WHEREAS, on March 24, 2017, NYSERDA and the Department of Public Service filed the Clean Energy Standard Final Phase 1 Implementation Plan, which includes implementation mechanisms regarding, among other things, eligibility, long term procurement through the issuance of competitive Request for Proposals (RFP); and

WHEREAS, NYSERDA has conducted a competitive solicitation in the form of RESRFP18-1 to procure Tier-1 Renewable Energy Certificates; and

WHEREAS, NYSERDA RESRFP18-1, which is incorporated herein and made part hereof, provided, among other things, that this RES Standard Agreement ("Agreement") would be employed to govern the rights and obligations of the Parties; and

WHEREAS, Seller has participated in RESRFP18-1 and has been selected by NYSERDA as a winning Proposer with respect to the [name of facility] ("Bid Facility"); and

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

² *Id.* "Order Approving Phase 1 Implementation Plan," issued and effective February 22, 2017 (February Order).

WHEREAS, the Seller agrees to sell to NYSERDA, and NYSERDA agrees to purchase from Seller, the Tier-1 Renewable Energy Certificates associated with the energy production of the Bid Facility described in the Bid Proposal submitted in response to RESRFP18-1 during the Contract Delivery Term, on the terms and subject to the conditions set forth herein;

NOW, THEREFORE, this Agreement has been entered into by the Parties to define, among other things, their rights and obligations concerning the Tier-1 Renewable Energy Certificates associated with the generation of electric energy by the Bid Facility, the delivery by Seller of Tier-1 Renewable Energy Certificates to NYSERDA, and payments by NYSERDA 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/Upgrade during any period within a Contract Year, measured at the Injection Point, [except that:

- (i) for an 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 established through Provisional/Operational Certification. Should the Installed Bid Capacity equal the Bid Capacity, the Actual Eligible Production percentage shall equal [percentage]% of the Actual Production.
- (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 TBD], 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, before January 1, 2015, 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 Provisional/Operational Certification (See Exhibit TBD, 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.

Article 10: Article 10 provides for the siting review of new or modified major electric generating facilities in New York State by the Board on Electric Generation Siting and the Environment (Siting Board) in a unified proceeding for the application of numerous state and local permits. See NYS Public Service Law §§ 160, *et seq.*

Award Notification Date: For purposes of this Agreement, the Award Notification Date will be [Month] [Day], 2018.

Bid Capacity: Bid Capacity shall equal the Bid Quantity Percentage multiplied by the Nameplate Capacity of the Bid Facility. [In the case of Upgrades, the Bid Capacity shall equal the Bid Quantity divided by the Expected Average Annual Production, multiplied by the Nameplate Capacity.] The Bid Capacity under this Agreement shall be ___ MW.

Bid Facility: The electric generating station that has been identified and described in the Application for Qualification submitted by Seller through which the Bid Facility was found to be qualified for participation in RESRFP18-1.

Bid Price: A single fixed production payment, expressed in \$/MWh, applicable to each Tier-1 Renewable Energy Certificate offered as performance throughout the Contract Delivery Term. Subject to Article V, for all transactions contemplated and consummated under this Agreement the Bid Price shall be \$ _____.

Bid Proposal: Documents submitted by Seller in response to RESRFP18-1 and received by NYSERDA including the Step Two Application for Qualification, and the Step Three Bid Proposal.

Bid Quantity: [The amount, in MWh, of Tier-1 Renewable Energy Certificates the Bid Facility expects to proffer as performance under this Agreement during each Contract Year during the Contract Delivery Term. The Bid Quantity must be the same for each Contract Year throughout the Contract Delivery Term, subject to adjustments pursuant to Article IV (Payment) and 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 Actual Eligible Production that will be committed to performance under this Agreement. The Bid Quantity Percentage must be

at least 30% and may not exceed 100% of the Expected Annual Eligible Production 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 ___%.

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

Commercial Operation: A state of operational readiness under which (i) generating capacity is available and physically producing electric energy and associated Tier-1 Renewable Energy Certificates, 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 November 30, 2020. The Commercial Operation Milestone Date may be extended (see Article II, Purchase and Sale of Rights to Tier-1 Renewable Energy Certificate, Section 2.07 and Article XV, Contract Security).

Contract Delivery Term: The period of performance under this Agreement. The Contract Delivery Term will commence on the first day of the month after the Bid Facility commences Commercial Operation. [For Bid Facilities in Commercial Operation as of the Award Notification Date, unless otherwise agreed to in writing by NYSERDA, the Contract Delivery Term shall commence on the first day of the month after the Effective Date of this Agreement. The Contract Delivery Term shall extend for the term of the Contract Tenor.]

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

Contract Tenor: The duration, in years, of the Contract Delivery Term as defined on the Bid Proposal form submitted for the Bid Facility. The Contract Tenor under this Agreement shall be ___ years.

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 within the New York Control Area, 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. For Bid Facilities located outside of the New York Control Area, the generator bus or location where the NYISO measures energy delivery from the Bid Facility into the New York market.

Defined Percentage(s): The percentages free of overlap selected by Seller in the Project Viability, Site Character section of the Step Three Bid Proposal.

Energy Storage: A commercially available resource capable of receiving electric energy and storing that energy or a portion of that energy for later injection of electricity back to the grid regardless of where the resource is located on the electrical system.

Expected Total Dollars: The total dollar amount of Incremental Economic Benefits, as presented in the Bid Proposal and accepted by NYSERDA, expected to accrue to New York as a result of the development, construction, modification, and operation of the Bid Facility from the Award Notification Date through the end of the first three (3) Contract Years. The Expected Total Dollars under this Agreement shall be \$_____.

Fuel-Based Bid Facility: Fuel-Based facilities include biogas, biomass, liquid biofuel, and fuel cells.

Incremental Economic Benefits: Incremental Economic Benefits are financial expenditures benefitting New York State within the categories specified in Section IX of RESRFP18-1 and are those that a Seller can demonstrate: (1) will accrue subsequent to an award under RESRFP18-1, and (2) would not have accrued but for the award of this Agreement. Economic benefits previously claimed with respect to a Bid Facility that are subject to a pending award under a previous solicitation or that is the subject of a current NYSERDA Agreement are not Incremental Economic Benefits.

Injection Point: For Bid Facilities located within the New York Control Area, the Injection Point shall be the Delivery Point. For Bid Facilities located outside of the New York Control Area, Injection Point shall be the generator bus or location where the administrator of the local control area measures energy delivery from the Bid Facility into the local market.

Installed Bid Capacity: Installed Bid Capacity shall equal the gross generating capacity, in MW, of the [Bid Facility/Upgrade] that achieves Operational Certification (SoQ) multiplied by the Bid Quantity Percentage. [In the case of co-firing, the Installed Bid Capacity shall equal the Bid Quantity Percentage multiplied by the portion of the gross generating capacity (MW) that has been repowered, upgraded and or retrofitted as determined by Operational Certification (SoQ).]

Nameplate Capacity: The gross generating capacity of the entire Bid Facility, post upgrade, 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 may be amended from time-to-time.

New York Generation Attribute Tracking System (NYGATS): The tracking system that records electricity generation attribute information within New York State, and processes generation attribute information from energy imported and consumed within New York State, as a basis for creating generation attribute certificates, including Tier-1 Renewable Energy Certificates.

NYGATS will create exactly one Tier-1 Renewable Energy Certificate per MWh of RES eligible generation.

Non-Fuel Based Bid Facility: Non-Fuel based facilities include hydroelectric, solar, tidal/ocean, and wind.

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

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

NYSERDA NYGATS Account: The NYGATS account established by NYSERDA into which Seller shall transfer Tier-1 Renewable Energy Certificates as performance under this Agreement.

Operational Certification: Under the Orders, a Statement of Qualification (SoQ) must be granted through the Operational Certification process before payment under this Agreement may be made by NYSERDA. Operational Certification verifies that the Bid Facility has been constructed and/or will operate in accordance with the proposal submitted, for which Provisional Certification (PSoQ) was granted and for which an award was made. An Operational Certification application should be submitted after the Bid Facility enters Commercial Operation and the Bid Facility is registered in NYGATS. NYSERDA will also determine whether Seller has complied with Section 18.10 and determine compliance with any Site Character claims. [For Bid Facilities including Energy Storage, NYSERDA will verify the installed Energy Storage capacity and confirm that it has been installed consistent with the Bid Proposal (see Article IV)]. [For Fuel-Based Bid Facilities, the Seller will be required to provide additional information as outlined in Exhibit D to this Agreement.] Once a SoQ has been issued, NYSERDA will make payments consistent with Section IV.

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

Permanent Physical Footprint: The area covered by the permanent generation, interconnection and, if applicable, Energy Storage equipment as verified by NYSERDA through the Operational Certification process.

Proposer: An individual or entity submitting an Application for Qualification Package and Bid Proposal in response to RESRFP18-1. Such entity need not be the owner of the Bid Facility, but must have secured rights to the Tier-1 Renewable Energy Certificates from the Bid Facility sufficient to satisfy all performance requirements stated in RESRFP18-1 and this Agreement.

Prevailing Wage: Shall have the meaning set forth at and shall be interpreted in accordance with Section 18.10 hereto.

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, or the Bid Quantity multiplied by one hundred and twenty percent, whichever is lower; subject, however, to adjustments pursuant to Article V, Adjustments.

RES Standard Agreement: This standard contractual document issued as a part of RESRFP18-1 to be entered into by NYSERDA and selected Sellers, which shall define, among other things, their rights and obligations concerning the Transfer of Tier-1 Renewable Energy Certificates to NYSERDA, and the payments by NYSERDA during the term of the agreement. The RES Standard Agreement includes this document and Exhibit A (Standard Terms and Conditions for all NYSERDA Agreements); B (Letter of Credit Form); C (Prompt Payment Policy Statement) [and (D) Requirements for Biomass-fueled Bid Facilities].

SEQRA: New York's State Environmental Quality Review Act.

Storage Capacity: Shall mean the maximum amount of energy that is capable of being stored in an Energy Storage device, measured in Megawatt hours (MWh).

Tier-1 Renewable Energy Certificate: The electronic record of generation data created by NYGATS and representing all of the attributes of one MWh of electricity generation from a RES Tier-1 Bid Facility registered with the NYGATS tracking system. The attributes represented in each Tier-1 Renewable Energy Certificate include 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, include but not limited to: (i) any direct emissions or any avoided emissions of pollutants to the air, soil or water including but not limited to sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO), particulate matter and other pollutants; (ii) any direct or avoided emissions of carbon dioxide (CO₂), methane (CH₄) and other greenhouse gases (GHGs) that have been or may be determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (iii) all set-aside allowances and/or allocations from emissions trading programs made unnecessary for compliance in such program as a result of performance under this Agreement, including but not limited to allocations available under 6 NYCRR §§ 204, 237 and 238; and (iv) all credits, certificates, registrations, recordations, or other memorializations of whatever type or sort, representing any of the above. [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.]

Transfer/Transferred: The delivery of Tier-1 Renewable Energy Certificates to the NYSERDA NYGATS Account designated by NYSERDA. Seller shall register the Bid Facility in NYGATS

and deliver the Tier-1 Renewable Energy Certificates by NYGATS Forward Certificate Transfer. Transfer shall be a necessary part of Seller Performance. See Article II; Section 2.03; and Article IV.

Upgrade: The [Name of Bid Facility], as proposed by Seller in the Application for Qualification and Bid Proposal in response to RESRFP18-1.

Verified Total Dollars: The total dollar amount of Incremental Economic Benefits verified by NYSERDA to have accrued to New York as a result of the development, construction, modification, and operation of the [Bid Facility/Upgrade] from the Award Notification Date through the end of the first three (3) Contract Years.

Article II

Purchase and Sale of Tier-1 Renewable Energy Certificates

Section 2.01. On the terms and subject to the conditions and provisions of this Agreement, Seller agrees to sell, assign, convey, deliver and Transfer to NYSERDA, and NYSERDA agrees to purchase from the Seller, all right, title and interest in the Tier-1 Renewable Energy Certificates associated with the Quantity Obligation generated by the [Bid Facility/Upgrade] during each month of the Contract Delivery Term.

Section 2.02. Such right, title and interest shall include perpetual and exclusive rights to the Tier-1 Renewable Energy Certificates and the underlying attributes, including but not limited to the exclusive rights to claim or represent, consistent with New York State Environmental Disclosure rules: (a) that the energy associated with Tier-1 Renewable Energy Certificates was generated by the Bid Facility; and (b) that New York State and or the RES Program is responsible for the environmental benefits including reductions in emissions and/or other pollution or any other environmental benefit resulting from the generation of the energy associated with the Tier-1 Renewable Energy Certificates.

Section 2.03. Seller shall Transfer the Tier-1 Renewable Energy Certificates to the NYSERDA NYGATS Account via a Forward Certificate Transfer on a monthly basis in a percentage equal to the Bid Quantity Percentage. At the time of Transfer by Seller to NYSERDA, the Tier-1 Renewable Energy Certificates shall be free and clear of all liens, judgments, encumbrances and restrictions.

Section 2.04. [Seller agrees that it may not and shall 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 the Tier-1 Renewable Energy Certificates or for any activity constituting performance under this Agreement.]

Section 2.05. In the event that Seller becomes entitled to or must apply for or take some other action under any emission-trading, emissions recordation or other regime other than the RES in order to secure a claim, title, credit, ownership, or rights of any type, nature or sort (“Title”) to any attributes associated with the Tier-1 Renewable Energy Certificates, or any certification, registration, verification or other memorialization of the creation of such attributes by the Bid Facility to which Seller may be entitled, Seller shall (i) notify NYSERDA of such opportunity, and, if requested to do so by NYSERDA, Seller shall (ii) take all actions necessary to apply for and secure such Title, to the maximum extent to which Seller is entitled, (iii) provide NYSERDA with evidence of taking such action; and (iv) convey such Title to NYSERDA whenever so secured.

Section 2.06. 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 RES eligibility rules and requirements as stated at Appendix A to the August Order [and, where appropriate, upon

compliance by Seller with the requirements of Exhibit D]. NYSEERDA and/or its designee shall have reasonable access to the Bid Facility for the purpose of verifying the continuing eligibility of the Bid Facility and its operation. Bid Facilities selected under this RFP will not be subject to subsequent changes in RES eligibility rules; however, in the event that the Bid Facility fails to maintain eligibility consistent with the RES requirements as adopted by the August Order, such ineligibility will extend to the attributes emanating from the Bid Facility. See also Section 17.04 Permits and Approvals.

Section 2.07. Commercial Operation Milestone Date. NYSEERDA's obligations to purchase Tier-1 Renewable Energy Certificates and to make payment under this Agreement are conditional on the commencement by the Bid Facility of Commercial Operation at a minimum of 80% of the Bid Capacity on or before the Commercial Operation Milestone Date. The Commercial Operation Milestone date shall be November 30, 2020. Seller may elect to extend the Commercial Operation Milestone Date; See Article XV.

Section 2.08. NYSEERDA shall be free to sell, assign, transfer or otherwise subject to any encumbrance, any of the Tier-1 Renewable Energy Certificates NYSEERDA shall acquire under this Agreement, at any time and from time to time to any entity and on such terms and conditions as NYSEERDA may desire. Any financial or other consideration received by NYSEERDA from any such action shall inure solely to NYSEERDA's benefit, to be applied as determined by NYSEERDA as the central procurement administrator of the RES Program or a successor and shall not affect the Seller's rights or obligations under the terms of this Agreement.

Section 2.09. 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 through a Dedicated Generation Meter. Unless specifically agreed to by NYSEERDA in writing, the Bid Facility must be separately metered and must be functionally represented by a single and discrete Injection Point.

Section 2.10. Dedicated Generation Meter. Seller must provide, install, and maintain a dedicated generation meter at the Injection Point that shall be compliant with the requirements and standards stated in the NYGATS Operating Rules at Section 5.3. Revenue Metering Standards. Data collected from the meter will be available to NYSEERDA and will be used by NYSEERDA to verify the monthly Actual Eligible Production.

Article III

Bid Facility Electricity Delivery Requirements.

Section 3.01. Bid Facilities in the NYCA. The electricity associated with the Tier-1 Renewable Energy Certificates for Bid Facilities located within the New York Control Area must either be (1) delivered into a market administered by the NYISO for end-use in New York State, (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 Dedicated Generation Meter, in accordance with Section 2.10.

Section 3.02. External Bid Facilities. [The electricity associated with the Tier-1 Renewable Energy Certificates for Bid Facilities in control areas adjacent to the New York Control Area shall be scheduled, transmitted, delivered to and settled in the NYISO energy market in each hour, and be accompanied with documentation of a unit-specific contract path between the Injection Point in the control area of origin to the Delivery Point in New York that includes the provision of transmission or transmission rights for delivering the generation via the NYISO using the North American Electric Reliability Corporation (NERC) tag fields Sending and Receiving Control Areas (CA) and Purchasing/Selling Entity (PSE) Name and Number. Compliance with this Delivery Requirement shall be verified by NYGATS which shall require an attestation from the importer that the information contained in the NYISO schedule is accurate and that the electricity associated with the import is being delivered solely from the selected resource. Seller shall provide, at NYSERDA's request, the NERC tag information from the OATI (Open Access Technology International) System or the NY JESS Contract ID from the Joint Energy Scheduling System (JESS) listing the External Bid Facility name as the Source for the scheduled and transmitted electricity from the External Bid Facility into the NYISO. The Tier-1 Renewable Energy Certificates must follow the NYGATS Operating Rules for Unit-Specific Imports of Energy and Attributes under the Energy Scheduled and Delivered methodology. The number of Unit-Specific Import Certificates that will be created will be the lesser of the hourly energy schedule of the import, or the hourly meter reading of the Bid Facility.]

Section 3.03. Bilateral Sales. Bilateral sales for electricity associated with the Quantity Obligation produced by the Bid Facility are permissible provided the Seller can demonstrate that the purchaser of the electricity associated with the Quantity Obligation is a New York State Load Serving Entity (LSE), or one or more New York State end-users.

Article IV

Payment

Section 4.01. Invoices. Seller shall submit monthly invoices throughout the Contract Delivery Term of this Agreement for the Tier-1 Renewable Energy Certificates transferred by Seller into the NYSERDA NYGATS Account and associated with the Actual Eligible Production in the prior month during the Contract Delivery Term. Payments will commence after the Bid Facility has been Operationally Certified, retroactive to the commencement of the Contract Delivery Term. Invoices shall be submitted electronically to NYSERDA's online invoice system at: <https://services.nyserda.ny.gov/Invoices/> or, if this Bid Facility is managed through NYSERDA's Salesforce application, via NYSERDA's Salesforce Portal with the Seller's log-in credentials. If electronic submission is not possible, invoices may be addressed to NYSERDA, "Attention: Accounts Payable." Invoices shall reference the purchase order number, which will be generated and provided to the Seller upon contract execution, and the Agreement number shown on page 1 of this Agreement. Invoices shall include a statement of the amount due and payable by NYSERDA to Seller, which amount shall be calculated in accordance with Section 4.02. Invoices must reflect the quantity of Tier-1 Renewable Energy Certificates Transferred to the NYSERDA

NYGATS Account for the prior month. NYSERDA may not pay any Invoice submitted more than two (2) months after Transfer of Tier-1 Renewable Energy Certificates for which payment is requested. Invoices must be accompanied by information and data, as specified in Section 6.01, sufficient for NYSERDA to verify compliance with the Bid Facility Electricity Delivery Requirements and other requirements as may be outlined in this Agreement.

Section 4.02. Payment. The amount payable in a given month shall be calculated as the lesser of: (1) 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, and (2) the number of Tier-1 Renewable Energy Certificates Transferred into the NYSERDA NYGATS Account during the prior month multiplied by the Bid Price. NYSERDA will not pay for Tier-1 Renewable Energy Certificates beyond one hundred and twenty percent (120%) of the Bid Quantity for any Contract Year.

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 C. Such payments shall be made by check or wire transfer to an account designated by the Seller. NYSERDA will not pay any invoice not accompanied by all information required in accordance with Section 6.01.

Section 4.04. Suspension. Should NYSERDA determine that Seller has failed to pay at least the Prevailing Wage in accordance with Section 18.10, NYSERDA will notify Seller in writing and will suspend payments to the Seller until any discrepancy in payment is cured; the cure period will continue for 12 months from the date of notification, after which time the Agreement shall be considered in default.

Section 4.05. Maximum Commitment/Limitation. The maximum number of Tier-1 Renewable Energy Certificates NYSERDA shall be obligated to purchase under this Agreement shall be equal to one hundred and twenty percent (120%) of the Bid Quantity (rounded down to the nearest whole REC) multiplied by the Bid Price multiplied by the number of years in the Contract Delivery Term. The maximum aggregate amount payable by NYSERDA to Seller hereunder is (\$ _____00).

Article V

Adjustments

Section 5.01. True-Up Adjustments. NYSERDA may adjust payments to subsequent invoices consistent with adjustments by NYGATS pursuant to its Operating Rules based on NYISO or other local control area billing settlement true-up procedures, based on actual metered production data measured at the Injection Point, actual and verified data reflecting compliance with the Bid Facility Electricity Delivery Requirements, and/or based on the number of Tier-1 Renewable Energy Certificates Transferred.

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 Seller to reflect any costs borne by NYSERDA, if any, 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, registration and/or retirement of the attributes or certificates in such renewable energy attribute accounting system.
- (b) Should Seller fail to Transfer Tier-1 Renewable Energy Certificates to the NYSERDA NYGATS Account in a number at least 80% of the Bid Quantity for three (3) consecutive Contract Years, NYSERDA may at its option upon Notice to Seller, modify this Agreement by adjusting the Bid Quantity for the remainder of the Contract Delivery Term to equal the highest Actual Annual Eligible Production during any Contract Year over that three-year period multiplied by the Bid Quantity Percentage.
- (c) Should Seller fail to reasonably demonstrate that the total dollar amount of Incremental Economic Benefits having accrued to New York as a result of the development, construction, modification, and operation of the [Bid Facility/Upgrade from the Award Notification Date] through the end of the first three (3) Contract Years of operation (Verified Total Dollars), divided by Installed Bid Capacity, is at least 85% of Expected Total Dollars divided by the Bid Capacity, NYSERDA may at its option upon Notice to Seller, modify this Agreement by reducing the Bid Price payable for the remainder of the Contract Delivery Term. Such reduction in the Bid Price will be made by an amount equal to the percentage shortfall between the Verified Total Dollars divided by the Installed Bid Capacity compared to the Expected Total Dollars divided by the Bid Capacity.
- (d) Should the Installed Bid Capacity differ from the Bid Capacity, Seller agrees that NYSERDA may at its option upon Notice to Seller modify the Contract by adjusting the Bid Quantity, Bid Quantity Percentage, or other relevant terms to reflect the Installed Bid Capacity.
- (e) For Bid Facilities that include Energy Storage, should the Energy Storage component not reach Commercial Operation with the proposed Storage Capacity (MWh) on or before the Commercial Operation Milestone Date, NYSERDA may, upon Notice to Seller, reduce the Bid Price by \$ _____ , an amount equal to the difference between the Bid Price proposed by Seller for the Bid Facility with Energy Storage and the Bid Price proposed by Seller for the Bid Facility without Energy Storage.

Article VI

Records and Reports

Section 6.01. Monthly Reports. NYSERDA will require the Seller to provide access to generation data, including detailed monthly market accounting settlement or other pertinent data from the administrator(s) of the energy market into which energy from the Bid Facility was delivered, from the entity or party in control of any meter through which the energy associated with the Quantity Obligation was delivered, and from the administrator of any attribute accounting system operating in such control area. Seller may be required to waive confidentiality, as to

NYSERDA, for the direct transfer to NYSERDA by an energy market administrator or the operator of the transmission and/or distribution system into which the energy from the Bid Facility is delivered of transactional and/or delivery information and data pertinent to the verification of attribute creation and electricity delivery. [Where appropriate, Seller must also provide a Monthly Fuel Report, completed in accordance with Exhibit D.]

Section 6.02. Progress Reports/Material Change. 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, through a method specified by NYSERDA, 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 (RESRFP18-1 Attachment H), copies of any permits or approvals granted and/or copies of any correspondence of any type denying or refusing any permit or approval. Upon NYSERDA's request, Seller shall also provide an independent engineer's or similar third party's assessment of the long-term expected energy production of the Bid Facility. Seller shall notify NYSERDA within ten (10) days of any event that could reasonably cause a material delay in any of the activities listed above. Seller shall include with each Progress Report a written attestation prepared by a New York State independent certified public accountant or other qualified party, in a form to be agreed upon, confirming that the Seller is in compliance with the Prevailing Wage requirement (See Sections 4.04 and 18.10).

Section 6.03. Economic Benefits Report. Within ninety (90) days of the third anniversary of the commencement of the Contract Delivery Term, Seller shall submit an economic benefits report prepared by a New York State independent certified public accountant, demonstrating the actual Incremental Economic Benefits that resulted from the construction and operation of the Bid Facility. To fulfill this requirement, the Seller's independent certified public accountant will be required to prepare an "agreed upon procedures" report in accordance with the procedures outlined in the Economic Benefits Audit Protocol and Economic Benefits Verification Standards that were released with the Step One Notice of Qualification provided to Seller. The Economic Benefits Audit Protocol will serve as a requirements document to guide the independent audit, allowing auditors to understand the process they are asked to perform. The Economic Benefits Verification Standards will define valid expense claims and standardize submission and documentation processes and best practices. The audit will verify the economic benefits created by the Bid Facility under the categories and within the eligibility requirements listed in RESRFP18-1. The Economic Benefits Report will be funded at the Seller's expense.

Section 6.04. Additional Documents. Within 30 Business Days of Notice of Award under RESRFP18-1, 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 most recent practicable date prior to 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 any 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 6.05. Maintenance of Records. The Seller shall keep, maintain, and preserve at its principal office throughout the term of this Agreement and for a period of seven (7) years following the expiration of this Agreement, full and detailed books, accounts, and records pertaining to Seller's performance under the Agreement, including without limitation, all bills, invoices, payrolls, subcontracting efforts and other data evidencing, or in any material way related to, the direct and indirect costs and expenses incurred by the Seller in the course of such performance.

Section 6.06. Site Control. Unless otherwise agreed to by NYSERDA in writing, within one hundred and eighty (180) days of the Award Notification Date, Seller shall provide documentation demonstrating rights-of-way or full control of the acreage needed for any interconnection facilities, and, should the Bid Facility site acreage exceed fifteen (15) acres, within one hundred and eighty (180) days of the Award Notification Date, documentation demonstrating full control of the Bid Facility site acreage.

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 adopted by the PSC in the August Order. Seller shall provide NYSERDA with written Notice prior to any material modification of the Bid Facility, including but not limited to

any modification that is expected to result in a change in the Nameplate Capacity of the Bid Facility, and shall provide to NYSERDA a written description of the planned modification.

Article VIII

Assignments

Section 8.01. General Restrictions. Except as specifically provided otherwise in this Article VIII, 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 NYSERDA of the completion and the nature of any such grant or assignment.

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, as of the Effective Date, all of which shall survive the execution and delivery of this Agreement:

- (a) (1) that Seller is a [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 August Order and that it will remain so throughout the Contract Delivery Term.
- (d) that the Tier-1 Renewable Energy Certificates Transferred to NYSERDA under this Agreement, will be free and clear of any liens, encumbrances and/or defects of title as of the date of Transfer;
- (e) that the attributes included in the Tier-1 Renewable Energy Certificates 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;
- (f) 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;
- (g) that this Agreement will be duly executed and delivered by Seller and will constitute the legal, valid and binding obligation of Seller enforceable against Seller in accordance with the terms thereof;
- (h) 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;
- (i) as of the Effective Date, that there are no existing undisclosed or threatened material legal actions, claims, or encumbrances, or liabilities that may adversely affect Seller's performance of this Agreement or NYSERDA's rights hereunder;
- (j) that Seller has no knowledge that any information or document or statement furnished by the Seller in connection with this Agreement or the documents submitted to NYSERDA under RESRFP18-1 contain any untrue statement of a material fact or omits to state a material fact necessary to make the statement not misleading;
- (k) that Seller shall not, and shall not cause or permit any voluntarily abandonment of the development, construction or operation of the Facility; and

- (l) 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, as of the Effective Date all of which shall survive the execution and delivery of this Agreement:

- (a) that NYSERDA is an instrumentality of the State of New York and a public authority and public benefit corporation, created under the New York State Public Authorities Law, validly existing and in good standing under the laws of the State of New York;
- (b) that NYSERDA has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by NYSERDA of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, and no other actions or proceedings on the part of NYSERDA are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby;
- (c) that the execution, delivery and performance by NYSERDA of this Agreement will not (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; and
- (f) that there is no action, suit or claim at law or in equity, or before or by a governmental authority pending or, to the best knowledge of NYSERDA after due inquiry, threatened against NYSERDA or affecting any of its properties or assets which could reasonably be expected to result in a material adverse effect on NYSERDA's ability to perform its obligations.

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, on or before the date upon which construction begins and continuing throughout the duration of the Contract Delivery Term, insurance of the types and in the amounts specified in Section 12.02 (Types of Insurance). All such insurance shall be evidenced by insurance policies, each of which shall:

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

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

Section 12.03. Delivery of Policies; Insurance Certificates. Prior to the date upon which constructions begins, Seller shall deliver to NYSERDA certificates of insurance issued by the respective insurers, indicating the Agreement number thereon, evidencing the insurance required by this Article XII and bearing notations evidencing the payment of the premiums thereon or accompanied by other evidence of such payment satisfactory to NYSERDA. In the event that any policy furnished or carried pursuant to this Article XII will expire on a date prior to the

expiration date of this Agreement, Seller, not less than 15 days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and Seller shall promptly pay all premiums thereon due. In the event of threatened legal action, claims, encumbrances, or liabilities that may affect NYSERDA hereunder, or if deemed necessary by NYSERDA due to events rendering a review necessary, upon request Seller shall deliver to NYSERDA a certified copy of each policy.

Article XIII

Events of Default

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

- (a) Representations and Warranties. Any representation or warranty made in this Agreement that shall prove to have been false or misleading in any material respect as of the time made or deemed to be made; or
- (b) Other Obligations. A Party shall default in the performance of any of its obligations under this Agreement and such default shall continue un-remedied for a period of 30 days after the defaulting Party 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 un-dismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue un-stayed 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 \$5,000,000 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 Tier-1 Renewable Energy Certificates associated with the Quantity Obligation or any attribute included in any Tier-1 Renewable Energy Certificate Transferred to NYSERDA; or
- (g) Commercial Operation. Failure of the Bid Facility to commence Commercial Operation at a minimum of 80% of the Bid Capacity on or before the Commercial Operation Milestone Date (November 30, 2020, unless extended pursuant to Article II, Section 2.07 of this Agreement); or
- (h) Abandonment. Seller's abandonment of the Bid Facility or its intentional delay of completion of construction in connection therewith; or
- (i) Failure to Produce. The failure by the Bid Facility to generate energy in a quantity sufficient to support the creation of Tier-1 Renewable Energy Certificates in a number equaling at least 65% of the Bid Quantity during any Contract Year; or
- (j) Insufficient Transfer. The failure by the Bid Facility to Transfer Tier-1 Renewable Energy Certificates to the NYSERDA NYGATS Account in a number equaling at least 65% of the Bid Quantity during any Contract Year; or
- (k) Failure to Transfer Tier-1 Renewable Energy Certificates. The failure by Seller to Transfer Tier-1 Renewable Energy Certificates, in conformity with Article II; or
- (l) Failure to Provide Additional Contract Security. Failure by Seller to provide to NYSERDA, on or before November 30, 2019, additional Contract Security, in an amount equal to six dollars (\$6.00) per MWh multiplied by the Bid Quantity (See Section 15.01(b)).
- (m) Prevailing Wage Default. Failure by Seller to cure its failure to pay at least the Prevailing Wage in accordance with Sections 4.04 and 18.10 within 12 months from the date of written notification by NYSERDA.

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, if any information or document or statement furnished by the Seller in connection with this Agreement or the documents submitted to NYSERDA under RESRFP18-1 are found to contain any untrue statement of a material fact or have omitted a material fact;
- (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 Seller made material misrepresentations 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, in the case of a termination based on the default of Seller, irreparable damage would occur in the event that NYSERDA could not obtain Tier-1 Renewable Energy Certificates pursuant to this Agreement from the date of Event of Default in which Seller was the defaulting party, and accordingly, each Party hereby agrees that NYSERDA shall be entitled to elect to compel specific performance of this Agreement to compel the Transfer of all Tier-1 Renewable Energy Certificates associated with the Quantity Obligation that the [Bid Facility/Upgrade] produces following the date of any termination for such an Event of Default in accordance with the terms hereof, including Payment, together with any other remedy at law or equity available to NYSERDA in connection therewith, without the necessity of demonstrating the inadequacy of money damages. Notwithstanding the foregoing, for any termination by NYSERDA or Seller prior to the date of commencement of Commercial Operations, NYSERDA shall be entitled only to Stipulated Damages pursuant to Article XV.

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

Article XV

Contract Security

Section 15.01. Seller shall provide to NYSERDA Contract Security, in the form of cash, certified funds, or a Letter of Credit conforming to the requirements according to the following

schedule and conditions:

- (a) Within thirty (30) Business Days of the Award Notification Date, unless otherwise agreed to by NYSERDA, Seller must provide Contract Security in an amount equal to the product of (1) Bid Quantity and (2) nine dollars (\$9.00) [plus any amount pledged by Seller as a part of a RESRFP18-1 Step Two Bid Proposal]. **NYSERDA may rescind and cancel the award to Proposer/Seller under RESRFP18-1 should Seller fail to provide Contract Security within such 30-day period;**
- (b) On or before November 30, 2019, Seller must provide additional Contract Security in an amount equal to the product of (1) Bid Quantity and (2) six dollars (\$6.00). **Failure to provide the additional Contract Security by November 30, 2019 will constitute a default and may result in termination of this Agreement.**

Section 15.02. Extension of Commercial Operation Milestone Date. Seller may elect to extend the Commercial Operation Milestone Date as follows:

- (a) On or before October 30, 2020, Seller may elect to extend the Commercial Operation Milestone Date from November 30, 2020 to May 31, 2021 by providing to NYSERDA, in addition to the amounts provided under Section 15.01 (a) and (b), Contract Security in an amount equal to the product of (1) Bid Quantity and (2) two dollars (\$2.00);
- (b) On or before April 30, 2021, Seller may elect to extend the Commercial Operation Milestone Date from May 31, 2021 to November 30, 2021 by providing to NYSERDA, in addition to the amounts provided under Section 15.01 (a) and (b) and 15.02 (a), Contract Security in an amount equal to the product of (1) Bid Quantity and (2) two dollars (\$2.00);
- (c) On or before October 29, 2021, Seller may elect to extend the Commercial Operation Milestone Date from November 30, 2021 to May 31, 2022 by providing to NYSERDA, in addition to the amounts provided under Section 15.01 (a) and (b) and 15.02 (a) and (b), Contract Security in an amount equal to the product of (1) Bid Quantity and (2) two dollars (\$2.00);
- (d) On or before April 29, 2022, Seller may elect to extend the Commercial Operation Milestone Date from May 31, 2022 to November 30, 2022 by providing to NYSERDA, in addition to the amounts provided under Section 15.01 (a) and (b) and 15.02 (a), (b) and (c), Contract Security in an amount equal to the product of (1) Bid Quantity and (2) two dollars (\$2.00).

Section 15.03. Executed Interconnection Agreement. In lieu of Contract Security Seller may provide under Section 15.02(c) and/or (d), Seller may extend the Commercial Operation Milestone Date from November 30, 2021 to November 30, 2022 by providing to NYSERDA proof that an interconnection agreement has been entered into by the NYISO or its counterpart in an adjacent control area, the Connecting Transmission Owner, and the Seller or a legal representative of the Seller. Bid Facilities seeking to satisfy the electricity delivery requirement through options 2 or 3 of Section 3.01 may provide proof that 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 15.04. 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 B (“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 15.05. 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 15.06. Refund of Security. Amounts provided by Seller as Contract Security will be refunded to Seller by NYSERDA as follows:

- (a) In their entirety, upon the achievement by the Bid Facility of an SoQ (Operational Certification) if the Installed Bid Capacity is equal to or greater than the Bid Capacity.
- (b) At a prorated amount, upon the achievement by the Bid Facility of an SoQ (Operational Certification), if the Installed Bid Capacity is less than the Bid Capacity. Such amount that will be refunded, expressed as a percentage of the total Contract Security, will be equal to the Installed Bid Capacity divided by the Bid Capacity.

Section 15.07. Retention of 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, within thirty (30) days of the Award Notification Date, Contract Security in the amount required under Section 15.01(b), above.

- (b) At a prorated amount if the Installed Bid Capacity is less than the Bid Capacity. Such amount that will be retained, expressed as a percentage of the total Contract Security, will be equal to the Bid Capacity minus the Installed Bid Capacity divided by the Bid Capacity.

Section 15.08. Site Character Security. Where Seller has attested as part of the Site Character section of its Bid Proposal to avoid the encroachment by its Permanent Physical Footprint, in a Defined Percentage(s), on land with agricultural importance to New York State:

- (a) NYSERDA will retain twenty-five percent (25%) of the Bid Facility's Contract Security. Such amount shall be refunded to Seller should NYSERDA determine, through Operational Certification (which will review the final site plan and the Site Character Map provided to Seller), that the percentage of encroachment of the Permanent Physical Footprint of the Bid Facility is equal to or less than the Defined Percentage(s). Such amount shall be forfeited to NYSERDA by Seller should NYSERDA determine, through Operational Certification (which will review the final site plan and the Site Character Map provided to Seller), that the percentage of encroachment of the Permanent Physical Footprint of the Bid Facility is greater than the Defined Percentage(s).
- (b) [For wind and solar Bid Facilities where Site Character points were awarded, NYSERDA will retain twenty percent (20%) of the Bid Facility's Contract Security for a period of 365 days following the date upon which the project achieves Commercial Operation. Upon such date, NYSERDA will: (1) refund the retained Contract Security; or (2) if the New York State Department of Agriculture & Markets (DAM) has notified NYSERDA that the Bid Facility was not constructed in accordance with the DAM Construction Standards (incorporated herein and made part hereof at Exhibit E), NYSERDA will provide written notice to Seller of DAM's claim and NYSERDA will retain such 20% of the Contract Security until (a) DAM notifies NYSERDA that suitable corrective action has been taken, at which point such amount shall be refunded to the Proposer, or (b) 180 days from the date upon which NYSERDA provided notice to Seller, in which case such amount shall be forfeited to NYSERDA by Seller.]

Section 15.09. 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 RES Program nor selection under RESRFP18-1 in any way replaces or modifies the necessity or applicability of any permit or approval process including SEQRA or Public Service Law Article 10 by any jurisdiction. NYSERDA's obligations to make payments to Seller are conditional on the acquisition by Seller of all such permits and approvals. Upon request by NYSERDA Seller must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Seller shall provide prompt Notice to NYSERDA of the initiation of any criminal or regulatory investigation, hearing, proceeding, or review process ("Process") by any federal or State entity regarding any actual or alleged violation of any permit or approval obtained or applied for with respect to the Bid Facility, as well as of any modification, penalty and/or fine that may be imposed or occur as a result of such a Process or violation. Upon the filing by Seller of an Article 10 Application, Seller shall promptly notify NYSERDA and shall comply with any restrictions NYSERDA may impose regarding communication with NYSERDA staff.

Section 17.05. Other Legal Requirements. The references to particular laws of the State of New York in this Article and elsewhere in this Agreement are not intended to be exclusive and nothing contained in such Article, Exhibit and Agreement shall be deemed to modify the obligations of 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/Costs. Seller shall be responsible for and obligated to pay all present and future taxes, fees, levies and costs that may be assessed by any entity including but not limited to NYGATS with respect to Seller's provision of Tier-1 Renewable Energy Certificates to NYSERDA, or with respect to the measurement, tracking, and verification and participation in NYGATS necessary for the creation and Transfer of the Tier-1 Renewable Energy Certificates and/or the energy with which they are associated, into the NYSERDA NYGATS account.

Section 18.03. Term. Unless terminated earlier under this Article, this Agreement shall expire upon the expiration of the Contract Delivery Term. Upon such date or upon earlier Termination of this Agreement under Article XIV, neither Party shall have any further obligation to the other, except that Sections 5.02(a), 7.01, 11.01, 15.08, 17.01, 18.04, 19.02, 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. Nothing in this Agreement shall be construed as creating a partnership, joint venture or other relationship between NYSERDA and Seller for any reason.

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

Section 18.07. Seller Expense. Seller shall, at its own expense, make all arrangements necessary to: (1) register the Bid Facility and Transfer Tier-1 Renewable Energy Certificates to the NYSERDA NYGATS Account, and (2) interconnect the Bid Facility with a transmission or distribution system and to comply with the Bid Facility Electricity Delivery Requirements. This requirement encompasses Seller's purchasing or arranging for all services including without limitation transmission, ancillary services, any control area services, line losses and transaction fees necessary to deliver energy to the New York Control Area, in accordance with all rules and protocols of the NYISO, throughout the Contract Delivery Term.

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

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

Section 18.10. Prevailing Wage. All laborers, workmen and mechanics, within the meaning of NYS Labor Law Article 8, performing construction activities with respect to the Bid Facility and Energy Storage, if applicable, including, but not limited to, the staging, installation, erection and placement of Bid Facility and its electrical interconnection as well as start-up and commissioning of the Bid Facility, whether through long-term or short-term employment, must be paid at least the applicable Prevailing Wage applicable in the area where the Bid Facility will be situated, erected and used, as published by the [NYS Department of Labor](https://www.dol.ny.gov/) (DOL)³ or at least

³ For NYS DOL Prevailing Wage Schedules, please visit:

<https://applications.labor.ny.gov/wpp/publicViewPWChanges.do?method=showIt> and
<https://applications.labor.ny.gov/wpp/showSearchWageSchedulePublic.do?method=showIt>

the equivalent Prevailing Wage requirements of the jurisdiction where the Bid Facility is located. This requirement applies: (1) to all laborers, workmen and mechanics performing construction activities, whether they be direct employees of the Seller or of Seller's subcontractor(s), and (2) regardless of whether or not Seller claimed such employment as an Incremental Economic Benefit in its Bid Proposal.

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 personal delivery;
 - (3) by expedited delivery service; or
 - (4) 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 email Address:
To NYSERDA:	NYSERDA Attn: Office of the General Counsel 17 Columbia Circle Albany, New York 12203-6399 email address: pete.keane@nyserda.ny.gov
With a copy to:	NYSERDA Attn: Large-Scale Renewables 17 Columbia Circle Albany, New York 12203-6399 email address: res@nyserda.ny.gov

- (b) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States [or Canadian] mail, as of the date of first attempted delivery at the address and in

the manner provided herein, or in the case of facsimile transmission or email, upon receipt of an email acknowledgement of receipt.

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

Section 19.02. Entire Agreement; Amendment. This Agreement, including the Exhibits hereto, embodies the entire agreement and understanding between NYSERDA and 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 RES program staff, with regard to the preparation of any press release, public announcement, publication or media interview with respect to the Parties' entry into this Agreement or the subject matter thereof or which concerns NYSERDA or the RES Program. Staff can be contacted by calling 518-862-1090. In any such press release, public announcement publication, or media interview Seller and/or the Owner of the Bid Facility and/or its employees shall credit NYSERDA and the funding participation of the Renewable Energy Standard in the activities of the Bid Facility. Seller will not represent that positions taken or advanced by Seller represent the opinion or position of NYSERDA, the PSC or the State of New York.

Article XXI

Confidentiality

Section 21.01. Seller may be required to waive confidentiality, as to NYSERDA, for the direct transfer to NYSERDA by an energy market administrator or the operator of the transmission and/or distribution system into which the energy from the Bid Facility is delivered of transactional and/or delivery information and data pertinent to the verification of attribute creation and electricity delivery.

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

Section 21.03. Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” If NYSERDA receives a request from a third party for information or a document received from Seller and which has been marked “Confidential” or “Proprietary,” NYSERDA will process such request under the procedures provided by NYSERDA’s FOIL regulations.

Section 21.04. Claim of Confidentiality. Information of any tangible form including any document that Seller wishes to be protected from disclosure to third parties, including any information provided as a part of a Bid Proposal Package submitted in response to RESRFP18-1, must be marked “Confidential” or “Proprietary” at the time such information is provided to NYSERDA. NYSERDA reserves the right to make public, after the fifth anniversary of the Award Notification Date, this RES Standard Form Agreement, in its entirety or in part.

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:

Name:

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 5/12

STANDARD TERMS AND CONDITIONS
FOR ALL NYSERDA AGREEMENTS⁴

(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 Agreement. 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

⁴ NYSERDA's Standard Forms and Agreements can be found on NYSERDA's website:
<https://www.nyserda.ny.gov/Funding-Opportunities/Standard-Forms-and-Agreements>

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 (<https://openfoil.ny.gov/newfoilrequest?agencyCode=DOS>) and NYSERDA's Regulations, Part 501 (<https://www.nyserda.ny.gov/About/New-York-State-Regulations>).

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

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

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

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

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

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

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

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

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

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

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

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

NYS Department of Economic Development
Division for Small Business
625 Broadway
Albany, New York 12207
Telephone: 518-292-5200
Fax: 518-292-5884
<http://www.esd.ny.gov>

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

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

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 Agreement 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 Agreement, 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).

**EXHIBIT B
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.

DRAWINGS PRESENTED BY FACSIMILE TO FACSIMILE NUMBER _____ ARE ACCEPTABLE; PROVIDED THAT SUCH FAX PRESENTATION IS RECEIVED ON OR BEFORE THE EXPIRY DATE ON THIS INSTRUMENT IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THIS LETTER OF CREDIT, IT BEING UNDERSTOOD THAT ANY SUCH FAX PRESENTATION SHALL BE CONSIDERED THE SOLE OPERATIVE INSTRUMENT OF DRAWING. IN THE EVENT OF PRESENTATION BY FAX, THE ORIGINAL DOCUMENTS SHOULD NOT BE PRESENTED.

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].

THIS LETTER OF CREDIT IS NOT TRANSFERABLE. 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 _____ DATE _____."

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 (2007 REVISION), INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION 600 (PROVIDED, HOWEVER, THAT DRAWINGS PERMITTED HEREUNDER SHALL NOT BE DEEMED TO BE DRAWINGS BY INSTALLMENTS WITHIN ARTICLE 32 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, INCLUDING THE LETTER OF CREDIT REFERENCE NUMBER AS IT APPEARS ABOVE.

[NAME AND ADDRESS OF ISSUING BANK]

AUTHORIZED SIGNATURE
OF OFFICER OF ISSUING BANK

Annex A to Exhibit B - 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. _____.

Payment by the bank pursuant to this drawing shall be made to _____, ABA Number _____, Account Number _____, Attention: _____, Re: _____.

To: [Issuing Bank]
[Address]
Attention: _____

As Beneficiary

By: _____
[Name and Title]

Annex B to Exhibit B - 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 the first Effective Date of the Agreement, 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 a Statement of Qualification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of November 30, 2020; 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 a Statement of Qualification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of May 31, 2021; 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 a Statement of Qualification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of November 30, 2021; 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 a Statement of Qualification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of May 31, 2022; 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 a Statement of Qualification and/or to commence Commercial Operation on or before the Commercial Operation Milestone Date of November 30, 2022; 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 Installed Bid Capacity is less than the Bid Capacity; 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 minus the Installed Bid Capacity divided by the Bid Capacity.

_____NYSEDA has determined, through Operational Certification, that the percentage of encroachment of the Permanent Physical Footprint of the Bid Facility is greater than the Defined Percentage(s), under which circumstance, NYSEDA is authorized to draw an amount equal to twenty-five (25) percent of the Letter of Credit Amount.

_____New York State Department of Agriculture and Markets has not notified NYSEDA that suitable corrective action has been taken, with regard to a failure to comply with the Construction Standards (Exhibit E),

within 180 days of written notification by NYSERDA to Seller, under which circumstance, NYSERDA is authorized to draw an amount equal to twenty (20) percent of the Letter of Credit Amount.

_____ 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, referenced above.

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

As Beneficiary

By: _____
[Name and Title]

EXHIBIT C

NYSERDA PROMPT PAYMENT POLICY STATEMENT

504.1. Purpose and Applicability. (a) The purpose of this Exhibit is to provide a description of Part 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.⁵

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

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

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

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

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

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

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

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

⁵ This is only a summary; the full text of Part 504 can be accessed at: <https://www.nyserda.ny.gov/About/New-York-State-Regulations>

(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.

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

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

504.4. Payment Procedures.

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

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

(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 Article XIX of this Agreement. The Vice President of NYSERDA, or his or her designee, shall review the objection for purposes of affirming or modifying NYSERDA's action. Within fifteen (15) working days of the receipt of the objection, the Vice President, or his or her designee, shall notify the Contractor either that NYSERDA's action is affirmed or that it is modified or that, due to the complexity of the issue, additional time is needed to conduct the review; provided, however, in no event shall the extended review period exceed thirty (30) working days.

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

504.11. Court Action or Other Legal Processes.

(a) Notwithstanding any other law to the contrary, the liability of NYSERDA to make an

interest payment to a Contractor pursuant to this Exhibit shall not extend beyond the date of a notice of intention to file a claim, the date of a notice of a claim, or the date commencing a legal action for the payment of such interest, whichever occurs first.

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