

# Multifamily Performance Program

## Terms and Conditions

### For Multifamily Building Owners

April 2024



## OWNER

- 1. Read the Terms and Conditions.**
- 2. Determine your authorized signatory.** Only an authorized signatory for your organization can sign the Terms and Conditions. An authorized signatory has the ability to contractually bind your organization.
- 3. Sign the Terms and Conditions.** Once you have identified your authorized signatory, that person must sign the Terms and Conditions. By signing the Terms and Conditions, you are agreeing to the Program's rules and requirements.
- 4. Complete the W-9 form.** If the Owner intends to assign incentive payments to another entity, then the Payment Assignee will need to complete and submit the W-9 form.
- 5. Send the original copy of the signed and completed Terms and Conditions,** along with the completed W-9 form, to your Provider.

## MULTIFAMILY BUILDING SERVICE PROVIDER

- 1. Review the Owner's documentation for completeness.** Check the Terms and Conditions and W-9 form for completeness and accuracy.
- 2. Upload the Completed Terms and Conditions and W-9 form.** Submit the signed Terms and Conditions and completed W-9 with the electronic application.
- 3. Maintain the original, signed Terms and Conditions** on behalf of the Owner for a minimum of seven (7) years.
- 4. Submit electronic application on behalf of the Owner.** Refer to the Application Instructions for more information on how to submit an electronic application.

# TERMS AND CONDITIONS

**1. The undersigned Participant acknowledges that these Terms and Conditions are part of an Application being submitted by their chosen Multifamily Building Solutions Provider on behalf of the Participant to participate in the Multifamily Performance Program administered by the New York State Energy Research and Development Authority (NYSERDA).**

**2. Eligibility:**

The project identified below is a multifamily, residential building(s) with five (5) or more units. The project is located within the service territory of one of New York State’s investor-owned utility companies and pays into the System Benefits Charge (SBC) or the Clean Energy Fund (CEF) charge upon receipt of an electric bill. Participants must certify their eligibility on their applications. Projects must be designated as “affordable housing” and must meet documentation requirements to certify affordability.

**3. Application Does Not Entitle Participant to Participate:**

Submission of a completed application does not entitle the Participant to Program participation or incentive payments.

**4. Glossary of Terms:**

**Program Guidelines:** The Multifamily Performance Program Guidelines outline the program process and detail the steps to operate within the program. Its primary purpose is a guidance document for the project’s Multifamily Building Solutions Provider.

**Multifamily Building Solutions Provider:** The Multifamily Building Solutions Provider (Provider) is the primary resource for the Participant while participating in the Program. Providers perform a variety of services to the Participant including but not limited to explaining the requirements of the Program, processing and submitting all of the paperwork for the Program (including incentive requests), conducting an energy assessment of the project and recommending a set of improvements to achieve the Program’s minimum reduction target as identified in the Program Guidelines, inspecting the installed work to ensure it conforms to the rules of the Program and with the assumptions made in the Savings Verification and Information Tool, and preparing documents to submit for the purpose of receiving the Performance Payment. The Provider is selected by the Participant who is expected to separately contract with and manage the performance of the Provider. The Participant must work with the Provider until the project is complete and Participant has received all payments from NYSERDA. If a Participant chooses to switch Provider Firms, notice must be submitted to NYSERDA.

**Energy Use Snapshot Program:** NYSERDA’s Energy Use Snapshot Program is used to determine a project’s energy use baseline. The baseline is used in conjunction with the Savings Verification and Information Tool (SAV-IT) to determine minimum reduction targets and post-construction performance payment eligibility.

**Savings Verification and Information Tool:** The SAV-IT is an Excel-based tool developed by the Program to summarize the project work and demonstrate compliance with the minimum reduction

target. The SAV-IT is prepared by the Provider as part of the energy assessment conducted on the project. The SAV-IT is developed in conjunction with the Participant. The submitted SAV-IT and the final NYSERDA-approved SAV-IT are assumed to have the Participant's approval and represent the improvements that the Participant intends to make as part of the Program. The SAV-IT is used to evaluate the project's energy efficiency measures and determine achievement of the minimum reduction target.

**5. Approval of Required Documentation:**

NYSERDA is not bound to pay any incentive unless NYSERDA approves the documentation required to be submitted as a condition of each trigger event. NYSERDA reserves complete discretion to approve or disapprove any documentation. Projects that proceed with the SAV-IT development prior to receipt of NYSERDA's approval or proceed with the installation of the Project Work prior to receipt of NYSERDA's approval do so at their own risk. Projects that fail to comply with these requirements may forfeit any program incentives and/or risk termination of this Agreement.

**6. Under these Terms and Conditions, the Participant agrees to:**

- (a) hire an approved and current Multifamily Building Solutions Provider to provide services necessary to meet all Program requirements as indicated in the Program Guidelines; and provide access to the project's building staff, tenants and/or shareholders, and others as necessary to develop a set of improvements that would achieve the Program's minimum reduction target and pass validation with the SAV-IT.
- (b) provide the project's Multifamily Building Solutions Provider with the information needed to baseline the project's energy performance using NYSERDA's Energy Use Snapshot Program in accordance with the guidelines as indicated in the Energy Use Snapshot application. Such information may include access to tenants and data release forms or similar authorization to the project's utility(ies). Any discrepancies, intentional or otherwise, between the project's actual consumption and that submitted to the Energy Use Snapshot Program may be subject to immediate cancellation of this Agreement and/or repayment of any NYSERDA incentives.
- (c) work with the project's Multifamily Building Solutions Provider to finalize a set of recommended measures and/or strategies that are intended to achieve the minimum performance target in accordance with the various policies and guidelines as described in the Program Guidelines that pass the Program's SAV-IT. The SAV-IT must be submitted to NYSERDA by the Provider no later than 90 calendar days from the application approval notification from NYSERDA. Failure to submit the SAV-IT within this time frame may result in termination of this Agreement and/or loss of any or all NYSERDA incentives. Extensions will only be considered if the Provider requests an extension from NYSERDA in writing or by email. NYSERDA may grant extensions at its discretion. The extension is only effective when NYSERDA has approved it through writing or email. Upon NYSERDA approval of the SAV-IT, the SAV-IT shall be deemed to be incorporated into these Terms and Conditions.
- (d) substantially complete the improvements detailed in the approved SAV-IT within two (2) years from the application approval notification from NYSERDA. Failure to substantially complete the

improvements detailed in the SAV-IT within this time frame may result in termination of this Agreement and/or loss of any or all NYSERDA incentives. Extensions will only be considered if the Provider requests an extension from NYSERDA in writing or by email. NYSERDA may grant extensions at its discretion. The extension is only effective when NYSERDA has approved it through writing or email.

- (e) refrain from increasing or seeking an increase in rent for Project Work to the extent that such Project Work is performed with NYSERDA Funds.
- (f) ensure that the project complies with Affordable Housing eligibility requirements contained in the Program Guidelines.
- (g) acquire and maintain, at its own cost, any and all permits, licenses, easements, waivers and permissions of every nature necessary to perform the work.

**7. Incentive Payments:** NYSERDA will arrange to provide incentives as set forth in the fully executed incentive award letter in accordance with the attached Prompt Payment Policy (Exhibit A). Information about the current available incentives is available on NYSERDA's website. The fully executed incentive award letter will establish the Incentive Payment Schedule that the project is eligible for.

In 2022 NYSERDA granted active MPP projects that either had a pre-construction baseline analysis or a post-construction baseline analysis completed or expected to be completed after March 15, 2020 eligibility to receive a COVID waiver for the energy use requirement of their performance payment. This means that projects that were granted the COVID waiver will receive full performance payment based on their initial projected performance tier regardless of actual performance. However, as explained below NYSERDA, will still be collecting the utility bill analysis request package and performance payment worksheet so that NYSERDA can continue to track actual performance where possible.

- (a) **Base Incentive** - The project's incentives shall be calculated according to the Incentive Payment Schedule in effect when the completed application is submitted.

Upon approval of the completed application, including these Terms and Conditions, NYSERDA will issue a fully executed incentive award letter specifying the Incentive Payment Schedule for which the Project is eligible and identifying the Base Incentive and Performance Payment, discussed below. Note that the Incentive Payment Schedule that is assigned to the Project is not based on the timing of the Participant's signing of these Terms and Conditions. A completed application, which includes these signed Terms and Conditions, must be submitted by the Provider before NYSERDA can assign the appropriate Incentive Payment Schedule. The fully executed award letter is the final determination of the Project's Incentive Payment Schedule.

- (b) **Performance Payment** – Projects that project and achieve the minimum required energy reduction listed in the Program Guidelines as indicated by the Post Construction Utility Bill analysis performed by NYSERDA and the NYSERDA-approved SAV-IT are eligible to receive a Performance Payment in addition to the Base Incentive mentioned above. The projected energy reduction from the NYSERDA-approved SAV-IT shall determine the project's Performance

Payment tier in accordance with the Incentive Payment Schedule included on the executed incentive award letter. If a project's one-year post-construction analysis demonstrates an actual energy reduction within the project's original tier, the project will receive a Performance Payment equal to that tier's amount. If the analysis demonstrates actual savings greater than the project's original tier, the Performance Payment will be at the original tier's amount. If the analysis demonstrates actual savings less than the project's original tier, but within a lower tier the Performance Payment will be updated to be paid at the lower tier's amount. If the analysis demonstrates actual savings less than the required minimum, the project will not be eligible to receive a Performance Payment.

The one-year post-construction analysis period begins when the Provider submits the 100% Site Inspection Report, even if NYSERDA's inspection of the Project Work indicates deficiencies that must be corrected and ends 12 months later. The consumption analysis must include the first full month of metered consumption following submittal of the 100% Site Inspection Report and include 12 consecutive months of consumption data. Providers will be required to submit a Post-Construction Billing Analysis Request to NYSERDA. NYSERDA will return a one-year post construction performance analysis. Should the one-year performance analysis indicate that the project did not achieve at least the minimum required savings, the Provider may request a six-month extension. The new one-year post-construction analysis period will then include the first full month of metered consumption starting six months from the submittal of the 100% Site Inspection Report extending 12 months. If the initial consumption analysis demonstrates savings of at least the minimum required target, even if less than the projected savings, the project will not be eligible to request a second analysis period and the Participant will receive the Performance Payment appropriate for the demonstrated savings.

Projects that qualify for a Performance Payment will receive a supplemental fully executed incentive award letter from NYSERDA specifying the maximum performance payment for which the project is eligible based on the approved SAV-IT and Program Guidelines.

- (c) **Maximum Incentive** - A project's maximum incentive (Base Incentive plus Performance Payment) may not exceed the amounts set forth in the executed incentive award letter or fifty percent of the project cost, whichever is less. Eligible project costs include the cost of the recommended improvements as delineated in the SAV-IT and defined in the Guidelines.
- (d) **Utility and Other NYSERDA Incentive Programs** – Incentives received from measures installed and functional as a part of any investor-owned utility program, the MPP Targeted Option, or any NYSERDA incentive program, including renewables, within one year (12 months) prior to NYSERDA's Application approval may be included in the project's MPP scope of work. The energy savings and cost of the measures may contribute to the performance target and the total project costs. The incentive received for any claimed measure from the other program(s) will be deducted from the total eligible MPP incentive.
- (e) **Incentive Amounts** – The fully executed incentive award letter states the base incentive amount and possible performance payment that Projects are eligible to receive. The basis for determining the Incentive Payment Schedule assigned to a Project is set forth on NYSERDA's

website and may be subject to change. NYSERDA's determination of total incentive amounts is final.

- (f) **Assignment of Incentive** – The Participant can assign all incentive payment to another entity. By signing this form, the Participant (Payment Assignor) directs that all incentive amounts be paid directly to the Payment Assignee indicated on this form, and permanently relinquishes any right to the payment of incentives that may become payable by NYSERDA associated with this project.

#### **8. Program Changes**

NYSERDA reserves the right to change, modify, or terminate this Program at any time without advance notice or any liability except as expressly stated herein.

#### **9. Post-Construction Analysis and Follow-up Visits:**

- (a) The Participant agrees to provide NYSERDA copies of all utility bills showing consumption and cost for electricity, fuel, and water, and provide access to such information using the Program's Data Release Authorization Form (DRAF). Such bills shall cover all common areas of the building and a sample of apartments. In addition, a list of all the apartments and their type (e.g. studio, large 1 bedroom) shall be provided. The apartment sample shall consist of at least 10% of the apartments with no fewer than seven (7) apartments. Of the 10% sample, each line of apartments must be represented. The DRAF authorizes NYSERDA to receive data for ten (10) years following execution of the DRAF.
- (b) The Participant agrees to provide access to NYSERDA and/or its contractors the ability to make a reasonable number of pre- and post-installation follow-up visits to the project during the implementation of the SAV-IT and up to 36 months following the date of its completion. Such visit(s) will be scheduled with the owner with at least one (1) week advance notice to the Participant by NYSERDA.
- (c) The purpose of the follow-up visit(s) is to provide NYSERDA with an opportunity to evaluate the installed Project Work in order to determine the actual demand reduction and energy savings for Program evaluation purposes.

#### **10. Time is of the Essence:**

Participant's failure to act within the time required constitutes a breach of the contract. Time is of the essence with respect to all provisions of this Agreement and any and all exhibits and attachments hereto that specify a time for performance.

#### **11. Proprietary Information:**

It is anticipated that NYSERDA will retain a copy of all materials or reports completed in accordance with these Terms and Conditions. The NYS Freedom of Information Law, Public Officers law, Article 6, provides for public access to information NYSERDA possesses. Public Officers Law, Section 87(2)(d) provides for exceptions to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Information submitted to NYSERDA that the

Participant wishes to have treated as proprietary and confidential trade secret information, should be identified and labeled "Confidential" or "Proprietary" on each page at the time of disclosure. This information should include a written request to exclude it from disclosure, including a written statement of the reasons why the information should be excluded. See Public Officers Law, Section 89(5) and the procedures set forth in 21 NYCRR Part 501. However, NYSERDA cannot guarantee the confidentiality of any information submitted.

Unless identified as confidential or proprietary by the Participant, information contained in these materials or reports may be used for the purpose of promoting awareness and adoption of energy efficiency strategies, practices, and technologies. NYSERDA does not provide any endorsement of any Multifamily Building Solutions Provider's capabilities to provide services outside of the Scope of Work to be conducted pursuant to this Program.

**12. Tax Liability:**

NYSERDA is not responsible for the payment of any taxes assessed by federal, state, or local governments on benefits conferred on the Participant by NYSERDA.

**13. Indemnification:**

The Participant 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, attorney's fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to the performance of this Agreement. The obligations of the Participant under this section shall survive any expiration or termination of this Agreement.

**14. No Warranties:**

- (a) NYSERDA does not endorse, guarantee, or warrant any particular manufacturer or product, and NYSERDA provides no warranties, expressed or implied, for any product or services. The Participant's reliance on warranties is limited to any warranties that may arise from, or be provided by, contractors, vendors, etc.
- (b) The Participant acknowledges that neither NYSERDA nor any of its consultants are responsible for assuring that the design, engineering, and construction of the building or installation of the recommendations made by the Multifamily Building Solutions Provider is proper or complies with any particular laws (including patent laws), codes, or industry standards. NYSERDA does not make any representations of any kind regarding the results to be achieved by the recommendations made by the Multifamily Building Solutions Provider or the adequacy or safety of such measures.
- (c) NYSERDA and the State of New York make no warranties or representations, expressed or implied, as to the fitness for particular purpose or merchantability of any product, apparatus, or service, or the usefulness, completeness, or accuracy of any processes, methods, or other information contained, described, disclosed, or referred to in this report. NYSERDA and the State of New York make no representation that the use of any product, apparatus, process, method, or other information will not infringe privately owned rights and will assume no liability for any loss,



injury, or damage resulting from, or occurring in connection with, the use of information contained, described, disclosed, or referred to in this report.

**15. Limit of Incentive Payments:**

NYSERDA reserves the right, for any reason, to stop approving incentive applications at any time without notice.

**16. Release by the Participant:**

The acceptance by the Participant of final payment shall release NYSERDA from all claims and liability the Participant, its representatives, and assigns might otherwise have relating to this award.

**17. Termination:**

This Agreement may be terminated by either party at any time with or without cause, upon 10 days prior written notice.

**18. 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 by any of the following:

- via certified or registered United States mail, return receipt requested
- by facsimile transmission
- by personal delivery
- by expedited delivery service
- by e-mail

Such notices shall be addressed to NYSERDA at:

New York State Energy Research and Development Authority  
Attn: Multifamily Performance Program  
1359 Broadway, 19<sup>th</sup> Floor  
New York, NY 10018

Fax: 212-971-5349

Email: MultifamilyPrograms@nyserda.ny.gov

Notices addressed to Participant shall be addressed to Participant at the address supplied by the Provider in the electronic application.

(b) Notices shall be deemed given on the date delivered or date of attempted delivery, if service is refused. The addresses provided by the Participant are subject to change at any time during the term of this Agreement provided that the party changing the address furnishes written notification of the new address in accordance with this section.

**19. Modification; Waiver:**

This Agreement cannot be amended or waived except by an agreement in writing signed by authorized representatives of both parties and specifically referring to this Agreement. The failure of either party to object to or to take affirmative action with respect to any conduct of the other

party which is in violation of the terms hereof shall not be construed as a waiver thereof, nor of any subsequent breach or wrongful conduct. The rights and remedies set forth herein are intended to be cumulative, and the exercise of any right or remedy by either party shall not preclude or waive its exercise of any other rights or remedies hereunder or pursuant to law or equity.

**20. Section Headings; Counterparts:**

The section headings set forth herein are for convenience only and do not constitute a substantive part of this Agreement. This Agreement may be executed in counterparts and by facsimile signature, all of which together shall be considered one and the same original document.

**21. Severability; Survival:**

If any provision of this Agreement is deemed to be invalid or unenforceable by any court of competent jurisdiction, then the balance of this Agreement shall remain enforceable, and such invalid or unenforceable provision shall be enforced by such court to the maximum possible extent, unless the ineffectiveness of such provision would result in such a material change as to cause completion of the transactions contemplated hereby to be unreasonable. The provisions of Sections 12, 24-32 shall survive the expiration or earlier termination of this Agreement.

**22. Independent Contractors:**

Relationship of the Parties. It is understood and agreed that the personnel furnished by Provider to perform the services stipulated in this Agreement, including personnel who may perform such services at NYSERDA's offices, shall be Provider's employee(s) or agent(s), and under no circumstances are such employee(s) to be considered NYSERDA's employee(s) or agent(s), and shall remain the employees of Provider, except to the extent required by Section 414(n) of the Internal Revenue Code.

The relationship of the parties to this Agreement is that of independent contractors. Nothing in this Agreement shall be construed as creating a partnership, joint venture, employment, agency, legal representation or other relationship between NYSERDA and Provider for any reason, including but not limited to unemployment, workers' compensation, employee benefits, vicarious liability, professional liability coverage or indemnification. Neither party shall have the right, power or authority to obligate or bind the other in any manner not specified in this Agreement.

No Benefits: Provider agrees that if the personnel furnished by Provider are determined to be "leased employees" within the meaning of Section 414(n) of the Internal Revenue Code, Provider acknowledges that leased employees are excluded from participation in the employee benefit plans, funds and programs provided by NYSERDA to its employees including, but not limited to, any group health plan, sickness or accident plan, retirement plan, retirement plan or similar benefit plan provided to employees by NYSERDA, by the terms of such benefit plans, funds or programs. Provider agrees to notify NYSERDA if it maintains (or ceases to maintain) a plan described in Section 414(n)(5)(B) of the Internal Revenue Code.

Notification of Claims/Events: Provider expressly acknowledges NYSERDA's need to be advised, on an immediate basis, of the existence of any claim or event that might result in a claim or claims against NYSERDA, Provider and/or Provider's personnel by virtue of any act or omission on the part

of NYSERDA or its employees. Accordingly, Provider expressly covenants and agrees to notify NYSERDA of any such claim or event, including but not limited to, requests for accommodation and allegations of harassment and/or discrimination, immediately upon Provider's discovery of the same, and to fully and honestly cooperate with NYSERDA in its efforts to investigate and/or address such claims or events, including but not limited to, complying with any reasonable request by NYSERDA for disclosure of information concerning such claim or event even in the event that this Agreement should terminate for any reason.

**23. Assignment:**

A Party shall not assign its rights and/or obligations or delegate its duties under this Agreement without the prior written approval of the other Party (Parties) and any attempted assignment or delegation without such approval shall be void and constitute a material breach. This Agreement and all of the terms and provisions hereof will be binding upon, and will inure to the benefit of, the Parties hereto, and their respective successors and approved assigns.

Projects participating eligible federal, state and local programs, such as the New York State Weatherization Assistance Program (WAP), may elect to execute an Assignment Addendum to this Agreement for the purpose of providing an advance of the NYSERDA incentives directly to the eligible Agency's escrow account established for the project under their participation.

**24. Audit:**

NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and for three (3) years thereafter to inspect and audit any and all books, accounts and records at the office or offices of the Participant where they are then being kept, maintained and preserved. Any payment made under the Agreement shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Participant by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

**25. Audit Adjustment:**

Any payment made hereunder shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Participant by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

**26. Executory Clause:**

It is understood by and between the parties hereto that this agreement shall be deemed executory only to the extent of the monies available to NYSERDA for the purpose of paying incentives under this Agreement, and no liability on account thereof shall be incurred by NYSERDA beyond monies available for the such purpose.

**27. Governing Law:**

This Agreement shall be governed by, and be construed in accordance with, the laws of the State of New York, without regard to its choice of law principles.

**28. Laws of the State of New York:**

The Participant shall comply with the Standard Clauses for New York State Contracts set forth below:

- (a) **Non-Discrimination Requirements.** In accordance with Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Participant will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status.
- (b) **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 NYSERDA's written consent, but must, instead, be heard in a court of competent jurisdiction of the State of New York.
- (c) **Service of Process.** In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), Participant hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Participant's actual receipt of process or upon NYSERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Participant 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. Participant will have thirty (30) calendar days after service hereunder is complete in which to respond.
- (d) **Criminal Activity.** If subsequent to the effectiveness of this Agreement, NYSERDA comes to know of any allegation previously unknown to it that the Participant or any of its principals is under indictment for a felony, or has been, within five (5) years prior to submission of the Participant'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 Participant 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 Participant knowingly withheld information about such an indictment or conviction, NYSERDA may declare the Agreement null and void and may seek legal remedies against the Participant and its principals. The Participant or its principals may also be subject to penalties for any violation of law which may apply in the particular circumstances. For a Participant 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, Providers, or directors or members of any similar governing body, as applicable.

**29. Entire Agreement:**

These Terms and Conditions, including Exhibits, constitutes the final, complete and exclusive understanding between the Parties with respect to its subject matter and supersedes all prior or contemporaneous agreements, letters of intent, understandings, negotiations, and discussions of the parties, whether oral or in writing. The Parties have not relied upon any promises, warranties or undertakings other than those expressly set forth in this Agreement.

**30. All Legal Provisions Deemed Included:**

It is the intent and understanding of the Participant 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 Participant, 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.

**31. Other Legal Requirements:**

The references to particular laws of the State of New York in these Terms and Conditions are not intended to be exclusive and nothing contained in such Article, Exhibit and Agreement shall be deemed to modify the obligations of the Participant to comply with all legal requirements

**32. Participant Agreement to Terms and Conditions:**

Participant acknowledges that this application may not be approved if the requirements of the Program are not met and that incentive payments will be contingent upon meeting all terms and conditions of the Program. The undersigned certifies that he or she is authorized to act on behalf of the Participant, and that all information provided in this application, including any attachments, is true and correct to the best of his or her knowledge. The undersigned has read and understands the above Terms and Conditions, which are part of this application, and agrees on behalf of the Participant to abide by them.

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**Project Name**

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**Participant Company Name (as listed on W-9 form; must be owner of the subject property)**

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**Signature of Authorized Representative of the Participant** **Date**

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**PRINT Name of Authorized Representative** **Title of Authorized Representative (in reference to company listed above)**

**For Assignment of Incentive Payments (optional)**

I understand that by signing this form I, as Participant (Payment Assignor), am directing that all incentive payments be paid directly to the Payment Assignee indicated on this form.

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Signature of Authorized Representative of the Participant

Date

If the Participant is assigning all incentives to another entity, the Payment Assignee must sign below. The Participant acknowledges and confirms that the execution of this assignment does not relieve Participant from performance of its duties and obligations under the signed Terms and Conditions.

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Payment Assignee Company Name (as listed on W-9 form)

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Signature of Authorized Representative of the Payment Assignee Company

Date

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PRINT Name of Authorized Representative

Title of  
Authorized  
Representative  
(in reference to  
company listed  
above)

# Exhibit A: Prompt Payment Policy Statement

## Section 504.1 Purpose and Applicability.

- (a) The purpose of this Part is to implement section 2880 of the Public Authorities Law by detailing the authority's policy for making payment promptly on amounts properly due and owing by the authority under contracts. This Part constitutes the authority's prompt payment policy statement as required by that section.
- (b) This Part generally applies to payments due and owing by the authority to a person or business in the private sector under a contract it has entered into with the authority on or after May 1, 1988. This Part does not apply to payments due and owing:
  - 1. Under the Eminent Domain Procedure Law;
  - 2. As interest allowed on judgments rendered by a court pursuant to any provision of law except Section 2880 of the Public Authorities Law;
  - 3. To the Federal government; to any state agency or its instrumentalities; to any duly constituted unit of local government, including but not limited to counties, cities, towns, villages, school districts, special districts or any of their related instrumentalities; to any other public authority or public benefit corporation; or to its employees when acting in, or incidental to, their public employment capacity;
  - 4. If the Authority is exercising a legally authorized set-off against all or part of the payment; or
  - 5. If other State or Federal law or rule or regulation specifically requires otherwise.

## Section 504.2 Definitions.

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

- (a) "Authority" means the New York State Energy Research and Development Authority.
- (b) "Contract" means an enforceable agreement entered into between the Authority and a contractor.
- (c) "Contractor" means any person, Providership, private corporation, or association:
  - 1. selling materials, equipment or supplies or leasing property or equipment to the Authority pursuant to a contract;
  - 2. constructing, reconstructing, rehabilitating or repairing buildings, highways or other improvements for, or on behalf of, the Authority pursuant to a contract; or
  - 3. rendering or providing services to the Authority pursuant to a contract.
- (d) "Date of payment" means the date on which the Authority requisitions a check from its statutory fiscal agent, the Department of Taxation and Finance, to make a payment.
- (e) "Designated payment office" means the Office of the Authority's Controller, located at 17 Columbia Circle, Albany, New York 12203.
- (f) "Payment" means provision by the Authority of funds in an amount sufficient to satisfy a debt properly due and owing to a contractor and payable under all applicable provisions of a contract to which this Part applies and of law, including but not limited to provisions for retained amounts or

provisions which may limit the Authority's power to pay, such as claims, liens, attachments or judgments against the contractor which have not been properly discharged, waived or released.

- (g) "Prompt payment" means a payment within the time periods applicable pursuant to Sections 504.3 through 504.5 of this Part in order for the Authority not to be liable for interest pursuant to Section 504.6.
- (h) "Payment due date" means the date by which the date of payment must occur, in accordance with the provisions of Sections 504.3 through 504.5 of this Part, in order for the Authority not to be liable for interest pursuant to Section 5.06.
- (i) "Proper invoice" means a written request for a contract payment that is submitted by a contractor setting forth the description, price or cost, and quantity of goods, property or services delivered or rendered, in such form, and supported by such other substantiating documentation, as the Authority may reasonably require, including but not limited to any requirements set forth in the contract; and addressed to the Authority's Controller, marked "Attention: Accounts Payable," at the designated payment office.
- (j) "Receipt of an invoice" means:
1. If the payment is one for which an invoice is required, the later of:
    - The date on which a proper invoice is actually received in the designated payment office during normal business hours; or
    - The date by which, during normal business hours, the Authority has actually received all the purchased goods, property or services covered by a proper invoice previously received in the designated payment office.
  2. If a contract provides that a payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice the 30th calendar day, excluding legal holidays, before the date so specified or predetermined.

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

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

### **Section 504.3 Prompt payment schedule.**

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



#### **Section 504.4 Payment Procedures.**

- (a) Unless otherwise specified by a contract provision, a proper invoice submitted by the contractor to the designated payment office shall be required to initiate payment for goods, property or services. As soon as any invoice is received in the designated payment office during normal business hours, such invoice shall be date stamped. The invoice shall then promptly be reviewed by the Authority.
- (b) The Authority shall notify the contractor within 15 calendar days after receipt of an invoice of:
  - 1. Any defects in the delivered goods, property or services;
  - 2. Any defects in the invoice; and
  - 3. Suspected improprieties of any kind.
- (c) The existence of any defects or suspected improprieties shall prevent the commencement of the time period specified in Section 504.3 until any such defects or improprieties are corrected or otherwise resolved.
- (d) If the Authority fails to notify a contractor of a defect or impropriety within the fifteen-calendar day period specified in subdivision (b) of this section, the sole effect shall be that the number of days allowed for payment shall be reduced by the number of days between the 15th day and the day that notification was transmitted to the contractor. If the Authority fails to provide reasonable grounds for its contention that a defect or impropriety exists, the sole effect shall be that the payment due date shall be calculated using the original date of receipt of an invoice.
- (e) In the absence of any defect or suspected impropriety, or upon satisfactory correction or resolution of a defect or suspected impropriety, the Authority shall make payment, consistent with any such correction or resolution and the provisions of this Part.

#### **Section 504.5 Exceptions and Extension of Payment Due Date.**

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

- (a) If the case of a payment which a contract provides will be made on a specific date or at a predetermined interval, without having to submit a written invoice, if any documentation, supporting data, performance verification, or notice specifically required by the contract or other State or Federal mandate has not been submitted to the Authority on a timely basis, then the payment due date shall be extended by the number of calendar days from the date by which all such matter was to be submitted to the Authority and the date when the Authority has actually received such matter.
- (b) If an inspection or testing period, performance verification, audit or other review or documentation independent of the contractor is specifically required by the contract or by other State or Federal mandate, whether to be performed by or on behalf of the Authority or another entity, or is specifically permitted by the contract or by other State or Federal provision and the Authority or other entity with the right to do so elects to have such activity or documentation undertaken, then the payment due date shall be extended by the number of calendar days from the date of receipt of an invoice to the date when any such activity or documentation has been completed, the Authority

has actually received the results of such activity or documentation conducted by another entity, and any deficiencies identified or issues raised as a result of such activity or documentation have been corrected or otherwise resolved.

- (c) If an invoice must be examined by a State or Federal agency, or by another party contributing to the funding of the contract, prior to payment, then the payment due date shall be extended by the number of calendar days from the date of receipt of an invoice to the date when the State or Federal agency, or other contributing party to the contract, has completed the inspection, advised the Authority of the results of the inspection, and any deficiencies identified or issues raised as a result of such inspection have been corrected or otherwise resolved.
- (d) If appropriated funds from which payment is to be made have not yet been appropriated or, if appropriated, not yet been made available to the Authority, then the payment due date shall be extended by the number of calendar days from the date of receipt of an invoice to the date when such funds are made available to the Authority.

#### **Section 504.6 Interest Eligibility and Computation.**

If the Authority fails to make prompt payment, the Authority shall pay interest to a contractor on the payment when such interest computed as provided herein is equal to or more than ten dollars. Interest shall be computed and accrue at the daily rate in effect on the date of payment, as set by the New York State Tax Commission for corporate taxes pursuant to Section 1096(e)(1) of the Tax Law. Interest on such a payment shall be computed for the period beginning on the day after the payment due date and ending on the date of payment.

#### **Section 504.7 Sources of Funds to Pay Interest.**

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

#### **Section 504.8 Incorporation of Prompt Payment Policy Statement into Contracts.**

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

#### **Section 504.9 Notice of Objection.**

Unless a different procedure is specifically prescribed in a contract, a contractor may object to any action taken by the Authority pursuant to this Part which prevents the commencement of the time in which interest will be paid by submitting a written notice of objection to the Authority. Such notice shall be signed and dated and concisely and clearly set forth the basis for the objection and be addressed to the Vice President, New York State Energy Research and Development Authority, at the address set forth in Section 504.2(e). The Vice President of the Authority, or his or her designee, shall review the objection for purposes of affirming or modifying the Authority's action. Within 15 working days of the receipt of the objection, the Vice President, or his or her designee, shall notify the contractor either that

the Authority's action is affirmed or that it is modified or that, due to the complexity of the issue, additional time is needed to conduct the review; provided, however, in no event shall the extended review period exceed 30 working days.

**Section 504.10 Judicial Review.**

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

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

- (a) Notwithstanding any other law to the contrary, the liability of the Authority to make an interest payment to a contractor pursuant to this Part shall not extend beyond the date of a notice of intention to file a claim, the date of a notice of a claim, or the date commencing a legal action for the payment of such interest, whichever occurs first.
- (b) With respect to the court action or other legal processes referred to in subdivision (a) of this section, any interest obligation incurred by the Authority after the date specified therein pursuant to any provision of law other than Public Authorities Law Section 2880 shall be determined as prescribed by such separate provision of law, shall be paid as directed by the court, and shall be paid from any source of funds available for that purpose.

**Section 504.12 Amendments.**

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

**ADDENDUM ONE. (5/26/20)**

**ADDITIONAL COVID-19 TERMS AND CONDITIONS  
FOR ALL NYSERDA AGREEMENTS**

In response to the ongoing COVID-19 pandemic, beginning in March 2020, Governor Cuomo issued a series of Executive Orders addressing various categories of business activities, including, but not limited to, construction, manufacturing, administrative, and professional services. In addition, Empire State Development (ESD) was authorized to develop *Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders*. Although much of NYSERDA’s clean energy efforts involve construction activity, NYSERDA engages in many other activities that are affected by State COVID-19 directives and requirements.

The State has also established a series of metrics required to begin a phased reopening plan. The phase-in plan prioritizes businesses considered to have a greater economic impact and inherently low risks of infection for the workers and customers, followed by other businesses considered to have less economic impact, and those that present a higher risk of infection spread.<sup>1</sup> Pursuant to Executive Order 202.31 and “NY Forward,” New York will reopen on a regional basis as each region meets the criteria necessary to protect public health.

For New York State regions and approved activities that have been deemed reopened pursuant to the State’s Regional Monitoring Dashboard, and in light of the paramount importance placed on health and safety at this time, NYSERDA hereby directs and requires that NYSERDA contractors performing clean energy activity pursuant to a NYSERDA contract or program to comply with all Executive Orders addressing the COVID-19 pandemic, and in all events, NYSERDA contractors are expected to continue to comply with all relevant State, federal and local rules. All contractors are also accountable for staying current with any updates to these requirements. COVID-19 related guidance and references can be found on NYSERDA’s website at: <https://www.nyserda.ny.gov/ny/COVID-19-Response>, and is hereby deemed incorporated herein, as may be updated from time to time.

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<sup>1</sup> In accordance with ESD’s current Essential Business Guidance and subject to all relevant health and safety requirements, NYSERDA is hereby allowing its contractors performing program work pursuant to a NYSERDA contract or program to undertake the following activities on a Statewide basis:

- electric power generation and storage-related development, construction, operation or maintenance, except with respect to new solar projects on residential sites (which residential projects must continue to follow the regional reopening);
- electric vehicle (EV) charging station installation, operation and maintenance at commercial and government sites; and
- activity by a single worker who is the sole worker on a project site.

Phase I of reopening does include all construction activity. All NYSERDA contractors specifically engaging in construction activity are required to, without limitation, adhere to and attest to the New York State Department of Health (NYS DOH) *Interim Guidance for Construction Activities During the COVID-19 Public Health Emergency* prior to commencing work on NYSERDA clean energy construction projects. The attestation is embedded within the Guidance Document and NYSERDA advises that contractors maintain a copy of such attestation for their records. Also, as included in the NYS DOH Construction Guidance, for all contractors performing construction activities, completed safety plans must be conspicuously posted on a project site. The State has provided a template to assist in developing Business Safety Plans, which is available through the NY Forward website as well as NYSERDA's COVID-19 webpage. While these plans are not required to be submitted to NYSERDA or a State agency for approval, they must be retained on the premises of the business or construction site and must be made available to the NYS DOH or local health or safety authorities in the event of an inspection.

In accordance with Executive Order 202.31, business activities may only commence for New York State regions that have been deemed reopened and is limited to only those activities approved for reopening. For state regions and activities that remain on PAUSE, or for reopened areas that revert back to PAUSE, NYSERDA continues to direct a pause in work until that region is re-opened for all NYSERDA contractors performing program activity pursuant to a NYSERDA contract or program, requiring in-person presence at a project site, that is not explicitly permitted under State directives or guidance.

During this time of uncertainty, NYSERDA is committed to working collaboratively with its Contractors to address contractual obligations when performance under the contract may be suspended or delayed due to COVID-19-related limitations in business activity that are beyond the reasonable control of either NYSERDA or the Contractor.

NYSERDA takes health and safety issues of its contractors and program participants very seriously and will strictly enforce compliance with Executive Order 202.31, and any relevant subsequent Executive Orders, and this guidance, as well as existing contractual obligations that require NYSERDA's contractors to comply with all general and special Federal, State, municipal and local laws, ordinances and regulations that may in any way affect the performance of agreements executed with NYSERDA. Accordingly, non-compliance may give rise to disciplinary action, which may include, without limitation:

- orders to stop work;
- immediate termination of the Agreement;
- a determination of ineligibility to participate in one or more NYSERDA program efforts, on either a temporary or permanent basis;
- reporting of non-compliant activity to enforcement authorities, including but not limited to the NY Forward online complaint submission form, which will result in investigation and, if credible, enforcement.

*This guidance supersedes all previously issued guidance and shall be deemed to modify any applicable provisions in any NYSERDA contract, program rule, guideline, manual, solicitation or other applicable document or agreement.*

## **ADDENDUM TWO.**

### **STOP WORK ORDER**

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

(i) by written notice to the Participant, cancel the Stop Work Order, which shall be effective as provided in such cancellation notice, or if not specified therein, upon receipt by the Participant, or

(ii) terminate the Work covered by such order as provided in the Termination Section of this Agreement.

(b) If a Stop Work Order issued under this Section is cancelled or the period of the Order or any extension thereof expires, the Participant shall resume Work. An equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, if any, or a combination thereof, and in any other provisions of the Agreement that may be affected, and the Agreement shall be modified in writing accordingly, if:

(i) the Stop Work Order results in an increase in the time required for, or in the Participant's cost properly allocable to, the performance of any part of this Agreement, and

(ii) the Participant asserts a claim for such adjustments within 30 days after the end of the period of Work stoppage; provided that, if NYSERDA decides the facts justify such action, NYSERDA may receive and act upon any such claim asserted at any time prior to final payment under this Agreement.

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

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





**NYSERDA**

**State of New York**

Kathy Hochul, Governor

**New York State Energy Research and Development Authority**

Richard L. Kauffman, Chair | Doreen M. Harris, President and CEO