

APPENDIX F: SAMPLE STANDARD PERFORMANCE CONTRACT AGREEMENT

**Renewable Portfolio Standard – Customer-Sited Tier
Anaerobic Digester (ADG)-to-Electricity Program (PON
2828)**

**STANDARD PERFORMANCE CONTRACT
AGREEMENT**

BETWEEN

**NEW YORK STATE RESEARCH AND DEVELOPMENT
AUTHORITY**

AND

**[CONTRACTOR]
Agreement #**

TABLE OF CONTENTS

| | |
|-------------|--|
| ARTICLE 1: | DEFINITIONS |
| ARTICLE 2: | PROJECT ORGANIZATION |
| ARTICLE 3: | MILESTONES TO PROCUREMENT AND INSTALLATION |
| ARTICLE 4: | QUALITY ASSURANCE/QUALITY CONTROL |
| ARTICLE 5: | PAYMENTS |
| ARTICLE 6: | FORCE MAJEURE |
| ARTICLE 7: | TERMINATION |
| ARTICLE 8: | RPS ATTRIBUTES |
| ARTICLE 9: | INDEMNIFICATION |
| ARTICLE 10: | INSURANCE |
| ARTICLE 11: | WARRANTIES AND GUARANTEES |
| ARTICLE 12: | COMPLIANCE WITH CERTAIN LAWS |
| ARTICLE 13: | PUBLICITY |
| ARTICLE 14: | MISCELLANEOUS |
| ARTICLE 15: | FREEDOM OF INFORMATION |

LIST OF ATTACHMENTS

- Exhibit A Total Contracted Project Incentive
- Exhibit B Standard Terms and Conditions for All NYSERDA Agreements
- Exhibit C Prompt Payment Policy Statement
- Exhibit D Final completed Application Form, Using the Incentive Calculation Tool
Quality Assurance/Quality Control and Reporting Requirements (Appendices B, C and F of
PON 2828)
- Exhibit E Metrics Reporting Guide – On-site Power Generation

AGREEMENT

This Standard Performance Contract Agreement (hereinafter referred to as the "Agreement"), dated and effective as of the ___ day of _____, 201_ ("Effective Date") by and between the New York State Energy Research and Development Authority (hereinafter referred to as "NYSERDA") with its principal office located at 17 Columbia Circle, Albany, New York, 12203-6399, and _____ [Contractor], (hereinafter "Contractor") with offices located at _____. NYSERDA and the Contractor may be individually referred herein as a "Party" and collectively as the "Parties."

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

ARTICLE 1: DEFINITIONS

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

ADG System: Anaerobic digester equipment and procedures used for the anaerobic digestion and production of ADG from Eligible Biomass Feedstocks(s). Installation of a gas tight cover over an existing waste storage structure for the purpose of producing and collection biogas is considered an ADG System for the purposes of this PON. Landfills are not ADG Systems for the purposes of this PON.

ADG-to-Electricity System ("the System"): The ADG System and ADG-fueled electric power generation equipment and procedures associated with using ADG to produce electricity for use at a Host Site. The ADG may be produced at the Host Site or delivered to the ADG-fueled electric power generation equipment by means of a dedicated ADG pipeline. For the purposes of this Agreement, ADG-to-Electricity System shall include brand new installations, as well as incremental upgrades to existing systems.

Agreement: This Standard Performance Contract Agreement, including Exhibits A (Total Contracted Project Incentive), B (Standard Terms and Conditions), C (Prompt Payment Policy Statement), D (Final completed Application Form and Quality Assurance/Quality Control Requirements), E (Metrics Reporting Guide – On-site Power Generation) and NYSERDA PON 2828, which is incorporated herein and made part hereof as though herein set forth in full.

Annual Contracted Generation: The number of kilowatt-hours (kWh) calculated by multiplying the Contracted Capacity by 8760 hours per year by a 75% Capacity Factor.

Anaerobic Digester Gas (ADG): Biogas produced by the anaerobic processing of manure, agricultural residues and biomass, industrial organic wastes (i.e., food wastes), and municipal wastewater.

Annual Performance Report: A report submitted annually to NYSERDA for a period of ten (10) years. The report provides data that should demonstrate clearly to NYSERDA whether or not an installed project is generating the amount of electricity projected in this Agreement.

Applicant: The Customer or third party who is submitting the Application Package.

Application Package: The Contractor's submission to NYSERDA containing the items listed in Appendix B Section A of PON 2828 requesting incentives through a Standard Performance Contract Agreement.

As-Built Diagrams: The final site plan, comprised of process flow and plan view diagrams, showing the installed and commissioned system. The As-Built Diagrams must be included in the Project Commissioning Report.

Capacity Factor: The ratio of the gross electricity generated, for the period of time considered, to the energy that could have been generated at continuous full-power operation at the Contracted Capacity. For the purpose of this PON a capacity factor of 75% shall be assumed.

Contracted Capacity: The real power production capacity of the new ADG power generation system as determined by the rated kW output of the generator at a power factor of 1.0, except as may be limited by (a) a lower power output of the engine at 100% load, with consideration of the generator efficiency, (b) equipment limiting generator output, (c) existing power generation associated with Project Enhancement incentives and (d) any other factors, all as determined in a manner satisfactory to NYSERDA.

Contractor: The Customer or third party who is submitting the Application Package and a party to this Agreement.

Customer: The owner or tenant of a Host Site and who, generally, pays the RPS Program Surcharge.

Effective Date: The date appearing in the first paragraph of this Agreement.

Engine: For purposes of this Agreement, a device that converts fuel energy to mechanical work (e.g., internal combustion engine, microturbine).

Host Site: The site at which the ADG-to-Electricity System is located, ADG-fueled electricity is generated and used, and where the utility meter, which is generally interconnected with the grid, is located.

Installation and Commissioning: The completion of construction of the ADG-to-Electricity System, interconnection of the System with the utility grid, if applicable, at least one month of satisfactory operation of the system according to its design intent with a minimum 75% Capacity Factor, and demonstration of the ability to upload information to NYSERDA's CHP Website.

Installation Phase: The phase of the Standard Performance Contract that includes Procurement, developing the QA/QC Plan, Installation and Commissioning, and preparation and approval of the Project Installation Report.

kW: One kilowatt of electrical power.

kWh: One kilowatt-hour of electrical energy (or electricity).

Performance Phase: The final phase of this Agreement that commences on the date upon which NYSERDA approves the Project Installation Report and includes and continues through completion of the QA/QC activities required by the approved QA/QC Plan.

Post-installation Site Inspection: NYSERDA or its designated technical consultant will conduct a Post-Installation Site Inspection to verify that the New Equipment specified in the approved Application Package has been installed properly and is operating according to its design intent.

Procurement: Ordering and securing delivery of all major equipment associated with the ADG-to-Electricity System.

Project Commissioning Report: The detailed description of the installed and commissioned ADG-to-Electricity System. The Project Commissioning Report includes updates to the information provided in the Application Package, which subsequently were used to develop the Standard Performance Contract Agreement, to reflect the installed System, including As-built Diagrams of the ADG-fueled Electric Power Generation Equipment.

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

Quality Assurance/Quality Control (QA/QC): The process of monitoring, measuring, and verifying the electrical energy generated by the New Equipment of the ADG-to-Electricity System.

Renewable Portfolio Standard (RPS) Program: A program established by the New York State Public Service Commission to increase the proportion of renewable electricity used by New York consumers to at least 30% by 2015.

RPS Surcharge: One of the delivery charges levied by National Grid, NYSEG, Rochester Gas and Electric, Orange and Rockland, Central Hudson Gas and Electric, and Consolidated Edison. The RPS Surcharge permits these companies to recover costs associated with providing financial incentives for the development of renewable resources in New York State. NYSERDA is the administrator of the RPS program.

Total Contracted Project Incentive: The dollar amount listed in Exhibit A of this Agreement, representing the maximum amount payable under this Agreement.

Total Production Performance Period: The ten (10) consecutive years during which the annual kWh production is compiled for use in determining the amounts of the annual performance payments.

ARTICLE 2: PROJECT ORGANIZATION

§2.1. Project Organization. The Project contemplated herein shall be implemented in accordance with the Agreement and in two phases: Installation and Performance. The Installation Phase shall begin with the Effective Date and will include the Procurement, Installation and Commissioning of the ADG-to-Electricity System set forth in the approved Application Package, and preparation and approval of the Project Commissioning Report. The Performance Phase shall begin upon approval by NYSERDA of the Project Installation Report and will include and continue through completion of the QA/QC activities required by the approved QA/QC Plan and provision of the metrics reports described in Exhibit E.

§2.2. Project Term. The Project term of this Agreement shall begin on the Effective Date and continue until the end of the Performance Phase, unless extended or terminated under the terms hereof.

§2.3. Extensions of Time. The Project Term or other milestones or deadlines for submittal of documentation to NYSERDA included in this Agreement may be extended for good cause at NYSERDA's discretion. As used herein, "good cause" means an unanticipated circumstance or event, which despite the due diligence of the Contractor, renders compliance with project term or other deadline impracticable. A request for an extension should be submitted in writing to NYSERDA no less than 30 calendar days prior to the expiration of the applicable deadline. The request for extension must describe the reasons for the

delay and the expected timeframe to meet all the milestones in the Agreement. Extensions may be granted or denied at NYSERDA's sole discretion. Any such extension shall be communicated in writing by NYSERDA's Contract Administrator. NYSERDA may terminate this Agreement upon the failure of the Contractor to conform to these requirements or to complete any milestone by the listed milestone time limit.

§2.4. Modification. This Agreement may be modified to effect changes in Contracted Capacity and associated incentive amounts or in any other parts of the Agreement, when such modifications are determined to be warranted by both NYSERDA and the Contractor and are incorporated in a written modification duly executed by both parties. Any request for a modification should be submitted in writing to NYSERDA no less than 30 days prior to any deadlines proposed to be affected by such modification. Approval or denial of any modifications by NYSERDA shall be at NYSERDA's sole discretion.

§2.5. Manner of Performance. The Contractor shall perform its responsibilities under this Agreement in an efficient and expeditious manner and in accordance with all of the terms and provisions of this Agreement. The Contractor shall perform all responsibilities in accordance with the current professional standards and with the diligence and skill expected for the performance of work of the type described in this Agreement. The Contractor shall furnish such personnel and shall procure such materials, machinery, supplies, tools, equipment and other items as may reasonably be necessary or appropriate to perform its responsibilities in accordance with this Agreement. Operation of the ADG System must conform to the eligibility requirements imposed by the RPS Program with regard to the Customer-Sited Tier.

ARTICLE 3: MILESTONES TO PROCUREMENT AND INSTALLATION

This Article defines milestones leading to procurement and successful installation of the New Equipment. NYSERDA may terminate this Agreement for failure to complete the milestones by the listed milestone time limits. If the Contractor finds it necessary to seek an extension to any of the milestone time limits listed in this Article, a request for an extension should be submitted in writing to NYSERDA no less than 30 calendar days prior to the expiration of the applicable deadline. The provisions of Section 2.3 of Article 2 shall govern the granting or denial of extension requests.

The Contractor shall schedule project progress meetings with NYSERDA at approximately 4 months and 8 months from the Effective Date.

§3.1. Interconnection with the Utility Grid. The Contractor shall provide adequate documentation of steps completed to interconnect the New System with the utility grid. Such documentation shall include, within two (2) months of the Effective Date, evidence that a complete detailed interconnection design package has been submitted to the utility as defined in the New York State Standardized Interconnection Requirements and Application Process for New Distributed Generators 2 MW or Less Connected in Parallel with Utility Distribution Systems (SIR) "Step 5: Applicant Commits to the Completing of the CESIR" (a copy of the SIR is included in Appendix G of PON 2828).

§3.2. Documentation of Adequacy of Biogas Supply. The Contractor shall provide adequate documentation of steps taken to secure sufficient digester feedstock for the ADG-to-Electricity System to generate adequate biogas for annual power production at least at a 75% capacity factor; such documentation shall include:

(a) Within 3 months of the Effective Date (1) written documentation from sufficient sources of such feedstock(s) of the quantity and availability of such feedstock(s) throughout the year and the characteristics of the feedstock(s) affecting both biogas potential (e.g. volatile solids content) and disposition of digester effluent (e.g. Nitrogen and Phosphorus content) and (2) assumptions and calculations using the

characteristics and quantities of sufficient feedstock streams planned for digestion to show that adequate biogas will be produced;

(b) (For Concentrated Animal Feeding Operations) Within 4 months of the Effective Date written documentation from a Certified Agricultural Environmental Management Planner of the ability of the Host site and Contractor to provide for acceptable disposition of the effluent from the digester with the digestion of such feedstock(s); and

(c) Within 5 months of the Effective Date, copies of required regulatory approvals or permits for accepting the feedstock(s).

§3.3. System Financing. Within four (4) months of the Effective Date, the Contractor shall provide adequate documentation of steps taken to secure the financing necessary to successfully install and commission the New Equipment; such documentation shall include:

(a) Written documentation from funding sources of the amounts of funding available;

(b) A statement of the Contractor that there are no substantial financial changes to the project (such as dramatically increased costs) since the original Economic Evaluation provided in the proposal. If there have been substantial changes the Contractor must demonstrate that the project still shows adequate net benefits for successful installation, operation and at least 10 years of continued operation of the new ADG installation.

§3.4. Procurement. Procurement of major equipment must be completed, and sufficient documentation of Procurement must be provided to NYSERDA, within eight (9) months of the Effective Date. Major equipment includes the ADG-fueled engine, generator, engine/generator controls, biogas clean-up system, as well as major components of the anaerobic digester, if applicable. Sufficient documentation of Procurement may include but may not be limited to invoices, Bills of Lading, etc.

§3.5. System Installation. Within eleven (11) months of the Effective Date, the Contractor shall be responsible for the installation of the New System including the interconnection with the utility grid and production of electricity by the power generation equipment in accordance with the approved QA/QC Plan.

§3.6. System Commissioning. Within twelve (12) months of the Effective Date, the Contractor shall be responsible for Commissioning of the New System, which shall include documentation of satisfactory operation of the New Equipment, which is defined as operating with a minimum average 75% Capacity Factor of the Total Contracted Capacity for at least 7 consecutive days, and demonstration of the ability to upload information to NYSERDA's CHP Data Integration Website ("CHP Website").

§3.7. Project Commissioning Report. A Project Installation Report must be completed and submitted to NYSERDA within 14 months of the Effective Date; such Report must be prepared in accordance with the requirements of Exhibit D, and must sufficiently document that Installation and Commissioning has been completed. The Project Commissioning Report must include As-Built Diagrams of the commissioned ADG system. NYSERDA's approval of the Project Commissioning Report will depend on the results of a Post-Installation Site Inspection, which will verify the information provided in the Project Commissioning Report. NYSERDA will provide notice of approval of the Project Commissioning Report or will request additional information within 60 days of receipt. NYSERDA will review the Project Commissioning Report, inspect the system and either approve the Project Installation Report as submitted, approve it with minor revisions, or reject it. If the Project Commissioning Report is rejected, the Contractor will be provided with a period of 60 calendar days from the date of rejection to provide necessary information and resolve all outstanding issues with NYSERDA.

Contractor shall be responsible for the acquisition and maintenance, at its own cost, of any and all permits, approvals, licenses, easements, waivers and permissions of every nature necessary to perform the Project.

ARTICLE 4: QUALITY ASSURANCE/QUALITY CONTROL

§4.1. Quality Assurance/Quality Control Plan. The Contractor must develop a Quality Assurance/Quality Control (QA/QC) Plan (in accordance with Exhibit D) in conjunction with NYSERDA's designated technical consultant. The QA/QC Plan must be received and approved by NYSERDA prior to submittal (or payment) of any invoices Capacity or Performance Incentives beyond the 1st Capacity payment. The Contractor shall be responsible to provide the instrumentation (sensors and meters) and communications capability specified within the approved QA/QC Plan; all QA/QC activities shall be conducted in accordance with the approved QA/QC Plan.

§4.2. Annual Performance Reports. The total production performance period of the Standard Performance Contract Agreement shall be ten (10) years. The first year's (consecutive 12-month) performance period must begin no later than the 30th day after NYSERDA's approval of the Project Commissioning Report. If NYSERDA determines that data collected prior to approval of the Project Commissioning Report is satisfactory, the first year's performance period may begin at an earlier date approved by NYSERDA.

Within 60 days from the end of the first year's performance period, the Contractor must submit an Annual Performance Report to NYSERDA, which will become the basis for the first Performance Incentive payment. Annual performance reporting shall be in accordance with Exhibit D. Annual Performance Reports must also be submitted to NYSERDA within 60 days from the end of the second and third performance periods. The Contractor shall be responsible for ensuring that data provided in the Annual Performance Reports accurately represents the operation of the ADG-to-Electricity System.

§4.3. Prior Notice. NYSERDA or its designated technical consultant may choose to visit a project site to verify that the information provided in the Annual Performance Report is accurate with regard to project equipment, site conditions, and monitoring configurations. These inspections may occur at any time after project installation. Should NYSERDA decide to inspect a site, NYSERDA, or its designated technical consultant may or may not contact the Contractor to schedule the inspection. In other words, an inspection may occur without advance notice given to the Contractor. If the QA/QC activities are found to be different from those represented in either the QA/QC plan or the Annual Performance Report, NYSERDA may refuse any further incentive payments. If NYSERDA deems an inspection necessary, an Annual Performance Report that is under review will not be approved until the inspection has been completed.

ARTICLE 5: PAYMENTS

§5.1. Invoicing. Payments may be requested by the Contractor by submitting an invoice to NYSERDA. Invoices must be accompanied by all additional required information and documentation. NYSERDA shall make payments to the Contractor in accordance with terms of this Agreement and subject to its Prompt Payment Policy Statement, which is attached hereto as Exhibit C. No invoice may be submitted and no payment will become payable unless and until NYSERDA has approved Contractor's QA/QC Plan. NYSERDA will not be liable for payment of any invoices if received more than 90 days after the expiration of the Project Term.

§5.2. Interconnection Incentive Payment Distribution.
1st Interconnection payment - 100% of the Interconnection Review Incentive is payable once the Contractor provides documentation to NYSERDA that CESIR costs have been paid in full to the utility.

2nd Interconnection payment - 75% of the Interconnection Implementation Incentive is payable once the Contractor provides documentation to NYSERDA that the full estimated costs of interconnection implementation have been paid to the utility.

3rd Interconnection payment – The remaining 25% of the Interconnection Implementation Incentive is payable once the Contractor provides documentation to NYSERDA that the interconnection has been completed by the utility and the costs estimated in the CESIR have been reconciled with the actual costs of interconnection implementation. The total incentive payable is limited to 50% of the reconciled costs of interconnection implementation. If 50% of the reconciled costs are less than the initial Interconnection Implementation Incentive payment, no additional payments will be made. Additionally, any overpaid funds will be subtracted from the Total Capacity Incentive.

§5.3. Capacity Incentive Payment Distribution.

1st Capacity payment - Up to 15% of the Total Capacity Incentive is payable once the Contractor provides evidence sufficient to demonstrate payments for major equipment (e.g., power generation system, anaerobic digester system, biogas clean-up and handling systems etc.) and/or engineering design.

2nd Capacity payment* - Up to 45% of the Anaerobic Digester component of Total Capacity Incentive, is payable once NYSERDA's designated technical consultant has verified that construction/installation/upgrade of the anaerobic digestion system has been completed.

3rd Capacity payment* - Up to 45% of the Power Generation component of Total Capacity Incentive is payable once the Contractor has provided sufficient documentation to NYSERDA verifying that the power generation system has been delivered to the site (e.g., delivery receipt).

4th Capacity payment* - Up to 45% of the Project Enhancement component of Total Capacity Incentive is payable once NYSERDA's designated technical consultant has verified that construction/installation of the Project Enhancement has been completed or the required documentation for the Project Enhancement(s), according to applicable sections of *Using the Incentive Calculation Tool* of Exhibit D has been submitted to NYSERDA. The Contractor may request payment at this time for any Project Enhancements that have been completed and verified. Payment for Project Enhancements completed and verified after the 4th Capacity payment request has been made may be requested with the 6th Capacity payment.

5th Capacity payment - 20% of the Total Capacity Incentive is payable once documentation has been provided to NYSERDA that sufficiently verifies successful operation of the newly installed system and completion of interconnection, if applicable (e.g., interconnection acceptance test documentation from the utility).

6th Capacity payment - Up to 100% of the Total Capacity Incentive is payable once the newly installed system is successfully commissioned. Commissioning includes operating the ADG - fueled energy generation system at a minimum of 75% average capacity factor over seven (7) consecutive days, and demonstrating the ability to upload data generated by the system to NYSERDA's CHP website, if applicable. A Project Commissioning Report must also be completed detailing the installation and commissioning activities and include design updates and as-built diagrams. Any Project Enhancements payments that were not made with the 4th Capacity payment may be requested with this payment.

* The QA/QC Plan must also be completed before requesting these payments.

The 2nd, 3rd, and 4th Capacity payments need not be requested in the order presented above.

§5.4. Performance Incentive Payment Distribution.

There are normally 10 Performance Incentive payments. Each payment shall be based on the verified electricity generated and verified H₂S levels that satisfy requirements for the particular H₂S removal process as specified in Exhibit D (Appendix C of PON 2828) during each of the 10 consecutive years during which Performance Incentives are offered, known as the Performance Period.

The first year's (consecutive 12-month) Performance Period must begin after commissioning no later than the 30th day after NYSERDA's approval of the Project Commissioning Report. If NYSERDA determines that data collected prior to approval of the Project Commissioning Report is satisfactory, the first year's performance period may begin at an earlier date if approved by NYSERDA.

Performance Incentive payments shall be made after the following:

- The Annual Performance Report, prepared by the designated technical consultant, has been approved by NYSERDA. The Contractor is responsible for ensuring that data provided in the Annual Performance Reports accurately represent the operation of the ADG-to-Electricity System in accordance with the QA/QC plan.
- An invoice has been submitted to NYSERDA for the previous year's Performance Incentives.
- A statement has been submitted to NYSERDA stating whether or not a Federal Grant via 1603 Treasury Grant, USDA REAP and/or NRCS/EQIP digester funding has been received for one or more components of the project. Contractor may be required and hereby agrees to provide NYSERDA with any necessary authority for NYSERDA to independently verify the existence and amount of any federal grant and to execute any documents necessary for NYSERDA to do so.

In general, 10% of the Power Generation component of the Total Performance Incentive (based on the kWh production times \$.025) will be paid by NYSERDA in each year, not to exceed a cumulative total of 100% of the Power Generation component of the Total Performance Incentive. The percentage paid in a given year will be calculated based on the ratio of the actual verified electricity produced compared to the total electrical generation stipulated in the contract agreement. If, in a given year, the Contractor is unable to produce 10% of the total electrical generation expected over the 10 year period, that production deficit can be made up in subsequent years provided the cumulative percentage of the total Performance Incentives paid by that year does not exceed the cumulative percentage of years that the system had been in production. For example, a maximum of only 80% of the total Performance Incentives can be paid for production at the end of the 8th year of the Performance Period.

Additionally, the H₂S Reduction Processes component of the annual Performance Incentives payments is based on the hourly outlet H₂S readings (up to a max. of 90% of the hours in a year) that are below the minimum H₂S threshold of 800 ppm (for Iron Chloride, Ferric Hydroxide or Other H₂S reduction processes) or 400 ppm (for Biological Scrubber, Carbon Filter or Iron sponge). Therefore the H₂S Reduction component of annual Performance Incentive payment is determined by multiplying the Contract Capacity, times the factor .83, times the verified hourly samples below the min. H₂S threshold, times the H₂S Performance Incentive variable (shown for each respective H₂S additive or technology on page 2 of this Appendix). NYSERDA may direct its designated technical consultant to sample the biogas, determine H₂S removal efficiency, and compare the actual efficiency to the data originally provided by the operator.

The first year's (consecutive 12-month) Performance Period must begin after commissioning no later than the 30th day after NYSERDA's approval of the Project Commissioning Report. If NYSERDA determines that data collected prior to approval of the Project Commissioning Report is satisfactory, the first year's performance period may begin at an earlier date approved by NYSERDA.

Performance Incentive payments shall be made after the following:

- The Annual Performance Report, prepared by the NYSERDA's designated technical consultant, has been approved by NYSERDA. The Contractor is responsible for ensuring that data provided in the Annual Performance Reports accurately represent the operation of the ADG-to-Electricity System in accordance with the QA/QC plan.
- An invoice has been submitted to NYSERDA for the previous year's Performance Incentives.
- A statement has been submitted to NYSERDA stating whether or not a Federal Grant via 1603 Treasury Grant, USDA REAP and/or NRCS/EQIP digester funding has been received for one or more components of the project.

ARTICLE 6: FORCE MAJEURE

§6.1. Neither party hereto shall be liable for any failure or delay in the performance of its respective obligations hereunder if and to the extent that such delay or failure is due to a cause or circumstance beyond the reasonable control of such party, including, without limitation, acts of God or the public enemy, expropriation or confiscation of land or facilities, compliance with any law, order or request of any Federal, State, municipal or local governmental authority, acts of war, rebellion or sabotage or damage resulting therefrom, fires, floods, storms, explosions, accidents, riots, or strikes or the delay or failure to perform by any subcontractor by reason of any cause or circumstance beyond the reasonable control of such subcontractor. Failure by Contractor to obtain or secure any permit or approval or delay in obtaining any permit or approval of any sort with regard to Contractor's performance under the Agreement shall not constitute a force majeure event.

ARTICLE 7: TERMINATION

§7.1. This Agreement shall remain in effect for the Project Term defined in Section 2.2, unless there is an event of default and the Agreement is terminated in accordance with this Article. Events of default include either Party's breach of any provision of this Agreement, including provisions incorporated by reference, and including, but not limited to, the following:

- a. failure of the Contractor to perform its responsibilities in a timely manner, including, but not limited to, failure to provide the required submittals within the required time frames, including responses to requests for clarification or additional information, or failure complete the required inspections within the time limits and manner set forth in PON 2828;
- b. failure of the Contractor to provide NYSERDA or its contractors sufficient access to the Host Site's facility for inspection and/or observation of the Contractor's field QA/QC activities;
- c. failure of the Contractor to cure any deficiency in a material term or cure any material breach of this Agreement within 30 calendar days after written notice;
- d. failure of the Contractor to acquire or maintain any necessary permit, license or failure to maintain Insurance as required under this Agreement;
- e. assignment or subcontracting of all or part of the Contractor's obligations required under this Agreement without NYSERDA's prior written permission, except that the Contractor shall not be required to obtain NYSERDA approval to subcontract all or part of the work;
- f. submittal by the Contractor of false, misleading or incorrect information; and

- g. failure by NYSERDA to make payments due pursuant to the terms of this Agreement to the Contractor within the time limits set forth in this Agreement.

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

§7.3. Notwithstanding the provisions of this Article, NYSERDA may terminate this Agreement on notice, and without providing an opportunity for cure, for Contractor's failure to fulfill, adhere to, or comply with the provisions of Article 3.

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

ARTICLE 8: RPS ATTRIBUTES

§8.1. Renewable Portfolio Standard (RPS) Attributes: Orders issued by the NYS Public Service Commission provide that the RPS Program will support and promote an increase, to 30%, of the percentage of the energy consumed in NYS that comes from renewable sources. When assessing and reporting on progress towards that goal, or on the composition of the energy generated and/or consumed in NYS, NYSERDA and the NYS Department of Public Service will include all electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program, for the life of such projects, and the environmental attributes associated with the production of such electrical energy, whether metered or projected, as a part of any report, evaluation, or review of the RPS Program, whenever any such report, evaluation, or review may be conducted or issued, as renewable energy consumed in NYS. No party, including but not limited to owners, lessees/lessors, operators, and/or associated contractors shall agree to or enter any transaction that would or may be intended to result in the exportation or transmittal of any electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program to any party or system outside of New York State.

ARTICLE 9: INDEMNIFICATION

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

ARTICLE 10: INSURANCE.

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

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

§10.2. Types of Insurance. The types and amounts of insurance required to be maintained under this Article are as follows:

- a. Commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of \$1,000,000 in respect of claims arising out of personal injury or sickness or death of any one person, \$1,000,000 in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$1,000,000 in respect of claims arising out of property damage in any one accident or disaster.
- b. Workers Compensation, Employers Liability, and Disability Benefits as required by New York State.

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

ARTICLE 11: WARRANTIES AND GUARANTEES

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

- a. it has all requisite power, authority, licenses, permits and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
- b. its execution, delivery and performance of this Agreement have been duly authorized by, or is in accordance with, its organizing instrument, and this Agreement has been duly executed and delivered for it by the signatories authorized, and it constitutes its legal, valid and binding obligation;

- c. its execution, delivery and performance of this Agreement shall not result in a breach or violation of, or constitute a default under, any agreement, lease, or instrument to which it is a party or by which it or its properties may be bound or affected; and
- d. it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

§11.2. The Contractor also warrants and guarantees that:

- a. it is financially and technically qualified to perform the Project;
- b. it is familiar with and will comply with all general and special federal, State, municipal and local laws, ordinances and regulations, if any, that may in any way affect the performance of this Agreement;
- c. the design, supervision and workmanship furnished with respect to performance of the Project shall be in accordance with sound and currently accepted engineering practices;
- d. neither the Contractor nor any of its employees, agents, representatives or servants has actual knowledge of any patent, copyright or trademark issued under the laws of the United States or any other matter which could constitute a basis for any claim that the performance of the Project or any part thereof infringes any patent, copyright, or trademark or otherwise interferes with any other right of any individual, corporation, association or partnership, organization, business or a government or political subdivision thereof, or any governmental agency or instrumentality;
- e. it has no actual knowledge that there are existing undisclosed or threatened legal actions, claims, or encumbrances, or liabilities that may adversely affect the Project or NYSERDA's rights hereunder;
- f. it has no actual knowledge that any information or document or statement furnished by the Contractor in connection with this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make the statement not misleading, and that all facts have been disclosed that would materially adversely affect the Project;
- g. it has no, and shall not obtain during the course of this Agreement any, interest, financial or otherwise, direct or indirect, nor is it engaged in any business or transaction or professional activity, nor has it incurred any obligation of any nature, which is in substantial conflict with the rendering of services under this Agreement; and
- h. it shall exercise reasonable care to achieve commercial standards of fitness for the Customer's use of the equipment that is installed in connection with the Project.

ARTICLE 12: COMPLIANCE WITH CERTAIN LAWS

§12.1. Governing Law/Venue. This Agreement shall be interpreted according to the laws of the State of New York without regard to its conflicts of laws principles. The Contractor, its subcontractors and consultants will comply with all laws, rules, orders, regulations and requirements of federal, state and municipal governments applicable thereto, including provisions set forth in Exhibit C hereto. 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 the 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.

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

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

§12.4. Equipment Requirements. All Equipment required for the ADG-to-Electricity system described in the Project Application and subsequent As-built Diagrams shall be consistent with the New York State Uniform Fire Prevention and Building Code, or the applicable local, State or Federal codes.

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

§12.6. Permits and Approvals. The Contractor shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Project during the Project Term. Neither the RPS Program nor entry into this Agreement in any way replaces or modifies the necessity or applicability of any permit or approval process by any jurisdiction. NYSERDA's obligations to make payments to Contractor will be conditional on the acquisition of all such permits and approvals. Upon request by NYSERDA Contractor must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Contractor 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 Project, 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.

ARTICLE 13: PUBLICITY

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

§13.2. It is recognized that during the course of the Project under this Agreement, the Contractor or its employees may from time to time desire to publish information regarding scientific or technical developments made or conceived in the course of or under this Agreement. In any such information, the Contractor shall credit funding participation in the Project to the **New York State Renewable Portfolio**

Standard Customer-Sited Tier program, and shall state that "NYSERDA has not reviewed the information contained herein, and the opinions expressed in this report do not necessarily reflect those of NYSEDA or the State of New York."

§13.3. The Contractor shall not use NYSEDA's corporate name, logo, identity, or any affiliation, without NYSEDA's prior written consent.

ARTICLE 14: MISCELLANEOUS

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

§14.2. Record Retention. The Contractor and subcontractors shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of five (5) years after the expiration or early termination of this Agreement, accurate records of the Project work which is performed hereunder. NYSEDA or its designated representative shall at reasonable times have access to inspect such records.

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

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

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

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

§14.7. Assignment. The assignment, transfer, conveyance, or other disposal of this Agreement or any of the Contractor's rights, obligations, interests or responsibilities hereunder, in whole or in part, without the express consent in writing of NYSEDA shall be void and of no effect as to NYSEDA.

§14.8. Notices. All notices, requests, consents, approvals and other communications which may or are required to be given by either party to the other under this Agreement shall be deemed to have been sufficiently given for all purposes hereunder when delivered or mailed by registered or certified mail, postage prepaid, return receipt requested, (i) if to NYSEDA, at 17 Columbia Circle, Albany, New York 12203-6399, or at such other address as NYSEDA shall have furnished to the Contractor in writing, and (ii) if to the Contractor, at the address noted in the first paragraph of Page 1 of this Agreement, or such other address as the Contractor shall have furnished to it in writing.

§14.9. Executory Clause. NYSERDA shall have no liability under this Agreement to the Contractor or to anyone else beyond RPS Surcharge funds actually paid to NYSERDA by third parties which would fund this Agreement.

§14.10. Independent Contractor. (a) The status of the Contractor under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, the Contractor, the Subcontractors, and their respective officers, agents, employees, representatives and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives or servants of NYSERDA nor make any claim, demand or application for any right or privilege applicable to NYSERDA, including, without limitation, vicarious liability, professional liability coverage or indemnification, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage and retirement membership or credit. It is understood and agreed that the personnel furnished by Contractor to perform the Work shall be Contractor'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 Contractor, except to the extent required by section 414(n) of the Internal Revenue Code.

(b) Contractor 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, Contractor and/or Contractor's personnel by virtue of any act or omission on the part of NYSERDA or its employees. Accordingly, Contractor 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 contractor'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.

§14.11. 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 Contractor's performance under this Agreement, at the office or offices of the Contractor 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, Contractor 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 Contractor by an agency of the United States, the State of New York or NYSERDA not to constitute a properly invoiced amount.

§14.12. Review and Disclaimer. NYSERDA's execution of this Agreement with the Contractor and any NYSERDA review of the design, construction, operation, or maintenance of the Project shall not constitute any representation as to the economic or technical feasibility, operational capability, or reliability of the Project or Facility. The Contractor shall in no way represent to any third party that NYSERDA's execution of this Agreement or any reviews by NYSERDA, including, but not limited to, NYSERDA's review of the design, construction, operation, or maintenance of the Project is a representation by NYSERDA as to the economic or technical feasibility, operational capability, or reliability of the Facility or Project.

§14.13. Requirement to Pay the RPS. The Host Site must be paying the RPS Surcharge at the time of application submittal to NYSERDA

§14.14. Annual Metrics Reports. In addition to the data required by the QA/QC Plan, on an annual basis, the Contractor shall submit, to NYSERDA's Project Manager, a prepared analysis and summary of metrics addressing the anticipated energy, environmental and economic benefits that are realized by the project. All estimates shall reference credible sources and estimating procedures, and all assumptions shall be documented. Reporting shall commence the first calendar year after the contract was executed. Reports shall be submitted by January 31st for the previous calendar years activities (i.e. metrics reporting period). Please see the Metrics Reporting Guide in Exhibit E for the metrics to be provided and the reporting duration.

ARTICLE 15: FREEDOM OF INFORMATION

§15.1. Freedom of Information Law. Contractor 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).

§15.2. Claim of Confidentiality. Information of any tangible form including any document that Contractor wishes to be protected from disclosure to third parties must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA.

§15.3. 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 Contractor and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations (see www.nyserda.org/About/NYSERDA.Regulations.pdf).

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

[Contractor]

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

By _____

By

Jeffrey J. Pitkin
Treasurer

Name _____

Title _____

STATE OF)
) SS.:
COUNTY OF)

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

Notary Public

EXHIBIT A
TOTAL CONTRACTED PROJECT INCENTIVE

Contractor Name:
Agreement Number:
Project Name:

| Contracted Capacity (kW) | Annual Contracted Generation (kWh/year) | Total Performance Incentive (\$) | Total Interconnection Incentive (\$) | Total Capacity Incentive (\$) | Total Contracted Project Incentive (\$) |
|--------------------------|---|----------------------------------|--------------------------------------|-------------------------------|---|
| - | - | \$ | \$ | \$ | \$ |

EXHIBIT C

REVISED 5/12

STANDARD TERMS AND CONDITIONS FOR ALL NYSERDA AGREEMENTS

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

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

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

2. WAGE AND HOURS PROVISIONS. If this is a public work Agreement covered by Article 8 of the Labor Law or a building service Agreement covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article

8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by NYSERDA of any NYSERDA-approved sums due and owing for work done upon the project.

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

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

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

6. PROPRIETARY INFORMATION. Notwithstanding any provisions to the contrary in the Agreement, Contractor and NYSERDA acknowledge and agree that all information, in any format, submitted to NYSERDA shall be subject to and treated in accordance with the NYS Freedom of Information Law ("FOIL," Public Officers Law, Article 6). Pursuant to FOIL, NYSERDA is required to make available to the public, upon request, records or portions thereof which it possesses, unless that information is statutorily exempt from disclosure. Therefore, unless the Agreement specifically requires otherwise, Contractor should submit information to NYSERDA in a non-confidential, non-proprietary format. FOIL does provide that NYSERDA may deny access to records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." [See Public Officers Law, § 87(2)(d)]. Accordingly, if the Agreement specifically requires submission of information in a format Contractor considers a proprietary

and/or confidential trade secret, Contractor shall fully identify and plainly label the information “confidential” or “proprietary” at the time of disclosure. By so marking such information, Contractor represents that the information has actual or potential specific commercial or competitive value to the competitors of Contractor. Without limitation, information will not be considered confidential or proprietary if it is or has been (i) generally known or available from other sources without obligation concerning its confidentiality; (ii) made available by the owner to others without obligation concerning its confidentiality; or (iii) already available to NYSERDA without obligation concerning its confidentiality. In the event of a FOIL request, it is NYSERDA’s policy to consider records as marked above pursuant to the trade secret exemption procedure set forth in 21 New York Codes Rules & Regulations § 501.6 and any other applicable law or regulation. However, NYSERDA cannot guarantee the confidentiality of any information submitted. More information on FOIL, and the relevant statutory law and regulations, can be found at the website for the Committee on Open Government (<http://www.dos.state.ny.us/coog/foil2.html>) and NYSERDA’s Regulations, Part 501 (<http://www.nyserda.ny.gov/en/About/~media/Files/About/Contact/NYSERDAREgulations.aspx>).

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

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

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

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

10. **NO ARBITRATION.** Disputes involving this Agreement, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily

required) without the NYSERDA's written consent, but must, instead, be heard in a court of competent jurisdiction of the State of New York.

11. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon NYSERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify NYSERDA, in writing, of each and every change of address to which service of process can be made. Service by NYSERDA to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

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

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

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

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

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

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

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

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

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

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

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

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

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

16. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of

discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

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

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

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

EXHIBIT D

NYSERDA PROMPT PAYMENT POLICY STATEMENT

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

(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.

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

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

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

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

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

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

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

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

504.11. Court Action or Other Legal Processes.

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

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