

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

**Building Owner Participation Agreement**

**Future Housing Initiative**

**January 2024**

**BUILDING OWNER INSTRUCTIONS:**

- 1. Read the terms and conditions of this Participation Agreement**
- 2. Determine your authorized signatory.** Only an authorized signatory for your organization can sign the Agreement. An authorized signatory is an individual who has the ability to contractually bind your organization.
- 3. Sign the Participation Agreement.** Once you have identified your organization's authorized signatory, that person must sign the Participation Agreement. Signature on the Agreement creates a legally binding agreement with New York State Energy Research and Development Authority ("NYSERDA") and the signatory's organization, agreeing to all requirements stated within the Agreement.

**Complete the W-9 form.**

- 4. Send the original copy of the signed and completed Participation Agreement along with the completed W-9 form to NYSERDA attention: James Mannarino [james.mannarino@nyserda.ny.gov](mailto:james.mannarino@nyserda.ny.gov) or such other recipient designated by NYSERDA in writing, with a copy to New York City Department of Housing Preservation and Development ("HPD") attention: [futurehousing@hpd.nyc.gov](mailto:futurehousing@hpd.nyc.gov)**

## TERMS AND CONDITIONS

This signed Participation Agreement (“Agreement”) serves as the binding agreement between the undersigned (hereinafter referred to as “Owner”) and the New York State Energy Research and Development Authority (“NYSERDA”) for participation in the NYSERDA/New York City Department of Housing Preservation and Development (“HPD”) Future Housing Initiative (“Initiative”), in accordance with the terms in this document and the <https://www1.nyc.gov/site/hpd/services-and-information/hpd-nyserda-retrofit-electrification-pilot.page> **Program Description**. Under the Initiative, NYSERDA provides funding and technical assistance to high-performance all-electric multifamily buildings that will achieve Passive House Certification that are financed through HPD’s New Construction Programs.

All members of the project team (Owner, architects, engineers, consultants, etc.; together, the “Project Team”) will work with a Technical Assistance Provider (“TAP”) who will assist participants with adapting their scope of work to meet the standards required by the Initiative. This will include technical support and oversight during the design, and during construction to ensure quality control and cost-effectiveness. The Project Team will be expected to participate in several meetings with the TAP, starting with a kickoff meeting in Fall 2023.

Upon acceptance of a project into the Initiative, NYSERDA will issue an Incentive Eligibility Letter which will indicate the funding amount for the project and encumber funds for such project. Upon Applicant’s submission, and NYSERDA acceptance, of all requirements set forth in this Agreement, NYSERDA will issue an incentive award letter (“Incentive Award Letter”) containing the final incentive amount for this Project (as defined below) and will confirm the encumbered funds to be distributed during construction.

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

Block(s): \_\_\_\_\_, Lot(s): \_\_\_\_\_ (“Project”)

1. The Owner certifies that the Project is a new construction multifamily, residential building(s) with five (5) or more units that will enter into a regulatory agreement with HPD, and that 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 upon receipt of an electric bill.
2. The Owner certifies that it
  - (a) owns the building(s) comprising the Project, or
  - (b) is controlled by or under common control with an entity that has entered into a binding agreement to acquire the building(s) comprising the Project, or
  - (c) has entered into a binding agreement to acquire the building(s) comprising the Project from its current owner.

In the event that the Owner, or an entity controlled by or under common control with the Owner, fails to acquire the Project, NYSERDA may, in its sole discretion, terminate this agreement.

### 3. Incentive Amounts:

- (a) Incentive Amount and Incentive Eligibility Letter:

If the Project is selected for the Initiative, Owner shall receive an Incentive Eligibility Letter from NYSERDA, noting the anticipated **incentive amount** based on the Owner’s Initiative application and the approved NYSERDA scope. The Incentive Eligibility Letter shall confirm the availability of funds, pursuant to the terms in such Incentive Eligibility Letter and this Agreement.

- (b) Final Incentive Amount and Incentive Award Letter:

Prior to issuing the Incentive Award Letter, NYSERDA, in consultation with the TAP, shall calculate the final incentive amount ("Final Incentive Amount") based on the Owner's Initiative application and review of projects' Construction Documents, as defined in section 5(f) of this agreement. Construction Documents shall be subject to review and approval by NYSERDA and the TAP to establish the final scope ("Approved NYSERDA Scope"). Prior to the closing of the HPD financing, NYSERDA will issue an Incentive Award Letter noting the Final Incentive Amount.

NYSERDA reserves the right to revise the Final Incentive Amount if elements of the Approved NYSERDA Scope are revised or deleted prior to the closing of the HPD financing for the Project. Such changes must be approved by HPD, the TAP and NYSERDA. If NYSERDA revises the Final Incentive Amount, NYSERDA will issue a revised Incentive Award Letter with the new incentive amount.

#### **4. Incentive Payment Structure:**

NYSERDA funds shall be allocated towards construction and completion of the Approved NYSERDA Scope, as approved by NYSERDA, the TAP and HPD, and outlined in the Incentive Award Letter and the Rider between the owner and the contractor, which together describe the process for submitting requisitions as well as other program requirements.

Owner acknowledges that payment of the NYSERDA incentive will be made upon the TAP's approval of the Approved NYSERDA Scope items in accordance with the terms of this Agreement and the HPD loan documents.

1. Funding will be paid out in the milestones described below; provided that the milestones or the percentage of funds being disbursed may be modified, subject to the prior approval of HPD, NYSERDA and the Senior Lender:
  - a. After Closing: For projects where funding includes soft costs, the amount of soft costs shall be released to the owner after the closing of the HPD loan. Soft costs may not constitute more than 5% of the total incentive amount.
  - b. At completion of "rough ins": 40% of funds will be released
  - c. At Substantial Completion: 40% of funds will be released
  - d. At Final Completion: All remaining funds will be disbursed at proof of Final Completion.

Note that the portion of the retainage associated with the incentive will be released upon satisfaction and TAP approval of all commissioning requirements.

Owner shall comply with the requirements regarding disbursements in the HPD financing documents in order to requisition for HPD loan proceeds for the HPD portion of the Approved NYSERDA Scope items.

Owner acknowledges that any change order requests to the Approved NYSERDA Scope must be reviewed and approved by HPD, NYSERDA and Senior Lender, if any, and if so approved, NYSERDA may revise the Final Incentive Amount if a portion of the Approved NYSERDA Scope is removed or changed. Any relevant documentation should be included in a request. (AIA G701, similar)

5. Prior to NYSERDA disbursement of the NYSERDA incentive, the Owner shall submit to NYSERDA and TAP the following documents:
  - (a) All application documents as described in the Future Housing Framework, "Document Checklist – Applicant", "Application" Column.
  - (b) A total final project budget ("Budget") for the Future Housing Initiative Project that is true and accurate, and that shows NYSERDA incentives in addition to financing/funding sources offered by HPD and private lenders. This must include a detailed cost

breakdown of the NYSERDA Scope that can be used to determine the portion of the work that will be covered by the NYSERDA incentive.

- (c) A written commitment (e.g., an HPD commitment letter) to abide by a construction schedule that demonstrates that the NYSERDA Scope will be completed within 24 months of construction loan closing, or by the completion date set forth in such commitment, as may be extended by HPD and Senior Lender, if any.
- (d) A completed Rider that names the TAP and describes the process for submitting requisitions, as applicable, as well as other program requirements including the Future Housing Initiative Technical Requirements and a cost breakdown of the Approved NYSERDA scope that can be used to determine the portion of the work that will be covered by the NYSERDA incentive and which will be used in the requisition.
- (e) For projects with tenant or shareholder paid heating, prior to closing of the HPD loan, Owner shall have submitted to NYSERDA a certification that at least two-thirds of tenants or shareholders, as applicable, have signed Data Release Authorization Forms (DRAFTs) permitting NYSERDA to collect utility data from such tenants or shareholders, applicable, for a period of occupancy up to 10 years. In the event Owner fails to collect DRAFTs from two-thirds of tenants or shareholders, as applicable, upon request from HPD, NYSERDA may reduce the minimum number of DRAFTs required for closing.
- (f) Final construction documents that incorporate the Approved NYSERDA Scope with detailed line-item costs and all associated bids and contracts, and a construction schedule detailing dates for the procurement, production, and installation of the Approved NYSERDA Scope and an executed construction contract (together, the "Construction Documents").

**6. Owner Commitments:**

- (a) Owner acknowledges that the general contractor is subject to approval by NYSERDA and HPD.
- (b) Owner shall cause any lender to the Project to invite NYSERDA to any construction progress meetings and shall send to NYSERDA copies of any reports related to project status, allocation of funds, change orders (adds or deducts), cost or time overruns or underruns consistent with those provided to the project's other lenders.
- (c) Owner shall provide notice to NYSERDA of any extension to the completion date granted by HPD or a Senior Lender, if any.
- (d) Prior to closing, Owner shall submit to NYSERDA and the TAP a comprehensive maintenance plan to ensure successful operation and maintenance of all systems long term, which plan shall be subject to review and approval by NYSERDA and the TAP. The plan will include initial and ongoing training of maintenance personnel in systems' operation and best practices, along with available maintenance agreements, warranties and commitments by systems' manufacturers.
- (e) Owner shall adhere to all requirements and directives described in the Future Housing Initiative Framework
- (f) Owner commits to utilizing NYS Clean Heat Contractors, as applicable, and securing all relevant utility incentives for applicable technologies installed as part of this scope, including New York State Clean Heat incentives, and those incentives shall be incorporated into project budget and Construction Documents.
- (g) Prior to closing, NYSERDA and/or the TAP must approve the full NYSERDA Scope(s) of work, in a format ready for publication as open-source documents. The Owner hereby agrees to the release of all materials submitted to NYSERDA and/or the TAP for open-source publication, e.g. in case studies.
- (h) Owner acknowledges that the NYSERDA incentive will only be released after the financial closing with those additional parties providing project financing.
- (i) Owner acknowledges that the buildings that receive funding under this Agreement will not be eligible for additional funding from HCR's Clean Energy Initiatives (CEI) or other NYSERDA

programs including Buildings of Excellence (BOE) or New Construction – Housing Program. Projects can and must seek other incentives including Clean Heat (where available), NY-Sun, and other federal incentives where available.

- (j) Owner acknowledges that NYSERDA has permission to study, promote, publish, and generally distribute information, with the exception of any Personal Identifiable Information relating to tenants, about the project publicly for at least ten years and will make it a requirement of any sale agreement` transferring control of ownership that new owner abides by this agreement.
- (k) Signed Data Release Authorization Form(s) (DRAFs) permitting NYSERDA to access and utilize your past, current, and 120-month future energy/resource billing and consumption information/data so that it can effectively track the performance of your building's energy utilization systems to maximize their potential.

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

- (a) The Owner agrees, upon NYSERDA request, to provide NYSERDA copies of all utility bills showing consumption and cost for electricity, fuels, and water, or 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 five (5) 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 Owner agrees to provide access to NYSERDA and/or its contractors to make a reasonable number of pre- and post-installation follow-up visits to the Project during the construction phase 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 Owner by NYSERDA. 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 Initiative evaluation purposes.
- (c) The Owner agrees to provide all residents with a HPD Resident Resource Packet that provides residents with resources for operating equipment, tips for saving energy, and links to tenant protection and utility assistance programs.

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

Owner'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.

#### **9. 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 Owner 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.

**10. Tax Liability:**

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

**11. Indemnification:**

The Owner shall protect, indemnify, and hold harmless HPD, 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 HPD, NYSERDA or the State of New York resulting from, arising out of or relating to the performance of this Agreement. The obligations of the Owner under this section shall survive any expiration or termination of this Agreement.

**12. 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 Owner acknowledges that neither NYSERDA nor any of its consultants are responsible for assuring that the design, engineering, and construction of the NYSERDA Scope components are proper or comply 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 NYSERDA Scope 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.

**13. Reservation of Rights to Recapture Funds**

The Owner acknowledges that if NYSERDA determines that an Owner has not adhered to the terms and conditions of the Initiative for a Project, any NYSERDA incentives paid to the Owner for that Project shall be repaid to, or recaptured by, NYSERDA upon prior approval by HPD and the Senior Lender, if any. Subject to the foregoing, upon notice from NYSERDA, the Owner shall provide NYSERDA direct payment within 30 days for the identified outstanding value of any NYSERDA incentive paid on Projects that do not comply with the Initiative's terms and conditions as identified in this Agreement or in the [-Program Requirements](#). Subject to the foregoing, failure to repay funds owed to NYSERDA may result in referral of the matter to the Attorney General's Office. NYSERDA shall have the right to seek any other relief that may be appropriate or desirable at law or in equity. The obligations of the Owner under this section shall survive any expiration or termination of this Agreement.

**14. Release by the Participant:**

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

**15. Termination:**

This Agreement may be terminated by NYSERDA at any time during the term of this Agreement with or without cause, upon 10 days written notice to the Owner. In such event, payment shall be paid to

the Owner for approved NYSERDA scope performed and expenses incurred prior to the effective date of termination in accordance with the terms of the Initiative.

**16. 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:
- i. via certified or registered United States mail, return receipt requested
  - ii. by personal delivery
  - iii. by expedited delivery service
  - iv. 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

Email: MultifamilyPrograms@nyserda.ny.gov

Notices addressed to Owner shall be addressed to Owner at the address accompanying its signature below.

- (b) Notices shall be deemed given on the date delivered or date of attempted delivery, if service is refused. The address provided by the Owner is 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.

**17. 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.

**18. 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.

**19. 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 16, 18, 19, 20, 29, 31, 34 and 35 shall survive the expiration or earlier termination of this Agreement.

**20. Independent Contractors:**

Relationship of the Parties. It is understood and agreed that the personnel furnished by Owner to perform the services stipulated in this Agreement, including personnel who may perform such services at NYSERDA's offices, shall be Owner'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 Owner, 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 Owner 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: Owner agrees that if the personnel furnished by Owner are determined to be "leased employees" within the meaning of Section 414(n) of the Internal Revenue Code, Owner 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. Owner 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: Owner 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, Owner and/or Owner's personnel by virtue of any act or omission on the part of NYSERDA or its employees. Accordingly, Owner 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 Owner'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.

**21. 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.

**22. 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 Owner 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 Owner by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

**23. 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 Owner by an agency of the United States, State of New York or NYSERDA not to constitute an allowable charge or cost hereunder.

**24. 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 such purpose.

**25. 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.

**26. 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 Owner 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 Owner or any of its principals is under indictment for a felony, or has been, within five (5) years prior to submission of the Owner'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 Owner 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 Owner knowingly withheld information about such an indictment or conviction, NYSERDA may declare the Agreement null and void and may seek legal remedies against the Owner and its principals. The Owner or its principals may also be subject to penalties for any violation of law which may apply in the particular circumstances. For an Owner 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, Owner, or directors or members of any similar governing body, as applicable.

**27. 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.

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

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

**29. 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

**30. Owner Agreement to Terms and Conditions:**

The undersigned certifies that he or she is authorized to act on behalf of the Owner, and that all information provided in this document, 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 Agreement and agrees on behalf of the Owner to abide by them.

**31. NYSERDA Customer Consent Form:**

Participant agrees and authorizes the sharing of the participant-customer's information and/or project level information with New York State Department of Public Service Staff and appropriate local utility, including its agents or authorized representatives, in carrying out its responsibilities under New York State Public Service Commission orders. (For clarity, the term project level includes the information based on the scope of the project, including, but not limited to, whole building, building or subsets of the project.)

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**Project Name**

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**Owner 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 Owner**

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

- (a) the date on which a proper invoice is actually received in the designated payment office during normal business hours; or
  - (b) the date by which, during normal business hours, the Authority has actually received all the purchased goods, property or services covered by a proper invoice previously received in the designated payment office.
- (ii) if a contract provides that a payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice the 30th calendar day, excluding legal holidays, before the date so specified or predetermined.

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.

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.



