



INSTRUCTIONS

APPLICANT:

1. **Read the Terms and Conditions.**
2. **Determine your authorized signatory.** Only an authorized signatory for your organization can sign the Terms and Conditions. An authorized signatory has the ability to contractually bind your organization.
3. **Sign the Terms and Conditions.** Once you have identified your authorized signatory, that person must sign the Terms and Conditions. By signing the Terms and Conditions, you are agreeing to the MF NCP's rules and requirements.
4. **Complete the W-9 form and the Electronic Funds Transfer (EFT) form.**
5. **Obtain Low to Moderate Income Housing Documentation and/or EPA Multifamily High Rise (MFHR) Partnership Agreement confirmation, if necessary.** Discuss with your Partner whether or not these documents are necessary for your project.
6. **Send the original copy of the signed complete Terms and Conditions, along with one copy of the W-9 form and the EFT form to your Partner. Additionally, send LMI Housing Documentation and/or EPA MFHR Partnership Agreement confirmation to your Partner, if necessary.**

PARTNER:

1. **Review the Applicant's documentation for completeness.** Check the Terms and Conditions and associated Application documents for completeness and accuracy.
2. **Upload the Complete Terms and Conditions and associated Application documents.** Submit the signed Terms and Conditions and completed Application documents with the electronic application. See Application Submittal Checklist for details.
3. **Maintain the original, signed Terms and Conditions** on behalf of the Owner for a minimum of seven (7) years.
4. **Refer to the Application Section of the MF NCP Guidelines** for more information on how to submit an electronic application.

TERMS AND CONDITIONS

1. The undersigned Applicant acknowledges that these Terms and Conditions are part of an Application being submitted by its chosen Multifamily New Construction Partner on behalf of the Applicant to participate in the Multifamily New Construction Program (MF NCP) administered by the New York State Energy Research and Development Authority (NYSERDA).

2. **Eligibility:**

The project identified below must be a multifamily, residential building(s) with ten (10) or more dwelling units and four (4) or more stories. To be eligible for MF NCP participation, an Applicant must be, or be capable of and intend to be, a New York State electricity distribution customer of a participating utility company that pays into the System Benefits Charge.

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

Submission of an Application does not entitle the Applicant to MF NCP participation or incentives.

4. **Glossary of Terms:**

Building Performance Plan Tool – Applicable only to Performance Path projects, the Building Performance Plan is a comprehensive tool detailing information about the project, the recommended scope of work and demonstrates achievement of the performance target.

Modified Prescriptive Path – This compliance path requires the project to meet the set of requirements specified in the Modified Prescriptive Path Requirements and the ENERGY STAR MFHR Testing & Verification Protocols. Inclusion of these requirements is considered to equal or exceed the performance target specified in the project's approved performance tier. The Modified Prescriptive Path offers some exceptions to its requirements for gut rehabs and historical buildings. This pathway does not result in an ENERGY STAR label, but may result in the New York Energy \$mart designation from NYSERDA.

Modified Prescriptive Path Calculator – This calculator includes a checklist where the Partner and the Applicant confirm that the Modified Prescriptive Path requirements are met. It also calculates estimated savings based on project-specific data.

Multifamily New Construction Partner – The Multifamily New Construction Partner (Partner) is the primary resource for the Applicant participating in the MF NCP. Partners have been approved by NYSERDA to provide technical support to Applicants. Partners provide a variety of services to the Applicant including, as applicable: explaining the requirements of MF NCP, completing and submitting the required MF NCP paperwork (including incentive requests), conducting a review of the project's design, creating a model of the project design, comparing it to a code-compliant baseline, evaluating the project's design for compliance with a prescriptive guideline, working in conjunction with the developer and design team to recommend a set of improvements to the project design to achieve the MF NCP performance target as identified in the Building Performance Plan, Passive Building Performance Plan, or Modified Prescriptive Path Calculator, and inspecting the installed work to ensure it meets MF NCP requirements and conforms with the assumptions made in the Building Performance Plan. The Partner is selected by the Applicant, who is expected to separately contract with and manage the performance of the Partner. Applicants must work with their Partner until the project is complete and has received all payments from NYSERDA; and notify NYSERDA if an alternative Partner firm is engaged.

Passive Building Performance Plan Tool – Applicable only to the Passive House Institute (PHI) and the Passive House Institute US (PHIUS) compliance paths, the Passive Building Performance Plan is a comprehensive reporting tool that provides details regarding the project's scope of work and achievement of the performance thresholds. In addition, the *Passive BPP* collects general information about the project, cost information about the project, and verification that either a PHIUS Certified Passive House Consultant (CPHC[®]) and a PHIUS+ Verifier, or a PHI certified Consultant or Designer and an accredited PHI Certifier, have been hired by the Applicant.

Passive House Institute (PHI) – Projects following this compliance path must comply with the Passive House Standard developed by the Passive House Institute (PHI). The project must contract with a PHI Consultant or Designer and a PHI Certifier, and must pursue, and obtain, certification by PHI. In addition

to meeting the PHI requirements, projects following the PHI path are required to submit the ENERGY STAR MFHR Photo Template and meet applicable Testing and Verification requirements, as identified in the MF NCP Guidelines.

Passive House Institute US (PHIUS) – Projects following this compliance path must comply with the PHIUS+ Multifamily Certification Standard developed by the Passive House Institute US (PHIUS). The project must contract with a Certified Passive House Consultant (CPHC) and a PHIUS+ Verifier, and must pursue, and obtain, certification by PHIUS. In addition to meeting the PHIUS requirements, PHIUS path projects are required to submit the ENERGY STAR MFHR Photo Template.

Performance Path – This compliance path follows the standards developed by the US Environmental Protection Agency (EPA) for the ENERGY STAR Multifamily High Rise (MFHR) program. This pathway requires the Partner to create a model of the proposed building design based on ASHRAE standards and compare it to a baseline model. The difference in the utility cost savings of the two models must equal or exceed the performance target specified in the project’s approved performance tier. Projects following the Performance Path with ENERGY STAR are required to adhere to all ENERGY STAR MFHR Performance Path Prerequisites and Testing & Verification Protocols.

Performance Target – Applicable only to Performance Path projects, the performance target is a utility cost savings metric defined in the MF NCP Guidelines. The performance target determines which of the three performance tiers the project is eligible to receive.

MF NCP Guidelines – The Multifamily New Construction Program (MF NCP) Guidelines detail the processes associated with the MF NCP, serving as a guidance document for Partners and Applicants.

Simulation Guidelines – The Simulation Guidelines was developed by the EPA and is a companion document to ASHRAE 90.1 Appendix G that contains guidance intended to assist Partners in developing the Baseline Building Design, Proposed Building Design, and As-Built models for each project. This document applies to the Performance Path with ENERGY STAR projects only.

5. Approval of Required Documentation:

NYSERDA is not bound to pay any incentive unless NYSERDA approves the documentation required to be submitted as a condition of each submittal stage. NYSERDA reserves complete discretion to approve or disapprove any documentation. Projects that proceed with the Building Performance Plan development prior to receipt of NYSERDA’s “Notice to Proceed to the Building Performance Plan” or proceed with the installation of the Project Work prior to receipt of NYSERDA’s “Notice to Proceed to Construction” do so at their own risk. Projects that fail to comply with these requirements may forfeit any MF NCP incentives and/or risk termination of this Agreement.

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

- (a) hire a Partner that is an approved Technical Assistance Provider under Request for Proposal (RFP) 3036, has executed a Partnership Agreement with NYSERDA and has been integrated into the Applicant’s design team to ensure that the design of the project conforms to MF NCP requirements and, based on the compliance path indicated in this Application, will follow one of the four pathways described in the MF NCP Guidelines: the Performance Path, the Modified Prescriptive Path, the Passive House Institute (PHI) path, or the Passive House Institute US (PHIUS) path.
- (b) work with the project’s Partner to finalize a set of designs that conforms to the MF NCP’s compliance path requirements and, based on the compliance path indicated in this Application, will incorporate the recommended measures outlined in the documentation submitted to, and approved by, NYSERDA, for this specific project.
- (c) within 30 days of the project’s Buildings Department final approval of New Building Architectural, Mechanical, and Plumbing plans, submit the applicable Stage 1 deliverables to NYSERDA for projects following the Performance Path, the Passive House Institute (PHI) path, or the Passive House Institute US (PHIUS) path.
- (d) construct its project as described by the Proposed Building Performance Plan for Performance Path projects, the Modified Prescriptive Path Calculator for Modified Prescriptive Path projects, or the Passive Building Performance Plan for Passive House Institute (PHI) and Passive House Institute US (PHIUS) path projects, and commit to make no changes during construction that would cause

the As-Built project to fail to meet MF NCP's compliance path requirements.

- (e) either i) provide NYSERDA or its designees the electricity, fuel, and water consumption data for the entire common area and a representative 10% sample of the dwelling units as outlined in the Data Release Authorization Form (DRAF) following the building(s)' receipt of a Certificate of Occupancy, or ii) follow the Addendum 1 process outlined in the MF NCP Guidelines.
 - (f) for a project pursuing the LMI incentive, the Applicant will ensure that the project complies with LMI eligibility requirements contained in the MF NCP Guidelines; and,
 - (g) acquire and maintain, at its own cost, any and all permits, licenses, easements, and permissions of every nature necessary to perform the work.
- 7. Incentive Payments:** NYSERDA will arrange to provide incentives as set forth in the fully executed incentive award letter in accordance with the attached Prompt Payment Policy (Exhibit D). Information about the current available incentives is available on NYSERDA's website. The fully executed incentive award letter will establish the incentive payment schedule that the project is eligible for.

- (a) **Incentive Schedule** The project's incentives shall be calculated according to the phases of the incentive payment schedule when the completed application is submitted. The Applicant must state in its MF NCP application which compliance path and performance tier it is pursuing. Projects that have already initiated construction at the time of application must be able to comply with all requirements of the Open Wall Inspection once its Building Performance Plan, Passive Building Performance Plan, or Modified Prescriptive Path Calculator has been prepared by the Partner and reviewed and approved by NYSERDA. The technical requirements of each option are described in the MF NCP Guidelines. If an Applicant elects to change the compliance path or performance tier it is pursuing prior to the submittal of the Stage 1 deliverables, the Applicant shall cause its Partner to notify NYSERDA in writing or via email. In order to change to a higher performance tier, the project must receive explicit approval from NYSERDA.

Upon approval of the completed application, including these Terms and Conditions, NYSERDA will issue a fully executed incentive award letter specifying the incentive payment schedule for which the project is eligible. Note that the incentive payment schedule that is assigned to the project is not based on the timing of the Applicant's signing of these Terms and Conditions. A completed application, which includes these signed Terms and Conditions, must be submitted by the Partner before NYSERDA can assign the appropriate incentive payment schedule. The fully executed award letter is the final determination of the project's incentive payment schedule.

- (b) **Maximum Incentives** – A project's maximum incentive may not exceed the amount set forth in the executed incentive award letter. The total per project incentives have been capped as outlined in the MF NCP Guidelines. In order to receive the full incentive amount, projects must verify that they have achieved the performance targets specified in their approved performance tier and each submittal must be approved by NYSERDA. If the project does not meet the performance target, the Partner must contact the Case Manager prior to submittal.

In order to receive the LMI incentives, a project must qualify as "Low to Moderate Income housing" by meeting the documentation requirements, and the Applicant must certify that the project meets the requirements for an LMI project in accordance with the MF NCP Guidelines.

- (c) **Incentive Amounts** – The fully executed incentive award letter states the incentive amount that projects are eligible to receive. The basis for determining the incentive payment schedule assigned to a project is set forth on NYSERDA's website and may be subject to change. NYSERDA's determination on total incentive amounts is final.

While the fully executed incentive award letter represents the incentive payment schedule that is assigned to a project, Applicants may reference the NYSERDA website for the incentive schedule

for informational purposes. The information provided on the NYSERDA website does not necessarily represent the most current incentive schedule or the incentives that will be applied to a particular project.

8. MF NCP Changes

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

9. Post-Construction Analysis and Follow-Up Visits:

- (a) The Applicant agrees to provide NYSERDA copies of all utility bills showing consumption and cost for electricity, fuel, and water, or provide access to such information using the MF NCP's Data Release Authorization Form (DRAF) as described in the MF NCP Guidelines. As an alternative to providing information on a 10 percent sample of dwelling units, the Applicant may use the Addendum 1 process described in the MF NCP Guidelines.
- (b) The Applicant 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 implementation of the Project Work 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 Applicant by NYSERDA.
- (c) The purpose of the follow-up visit(s) is to provide NYSERDA with an opportunity to evaluate the installed Project Work in order to determine the actual demand reduction and energy savings for MF NCP evaluation purposes.

10. Time of the Essence:

Applicant'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. NYSERDA may, at its discretion, terminate a project for failing to progress with the development of its Building Performance Plan, Passive Building Performance Plan or Modified Prescriptive Path Calculator or the construction of the project as required in Section 11 of this document. Such termination does not necessarily preclude the building from reapplying to the MF NCP once the issues preventing progress have been resolved, but approval of such reapplication shall be at NYSERDA's discretion.

11. Building Performance Plan Development and Construction Requirements:

- (a) For Performance Path projects and Passive House Path projects, if the Applicant has not caused the Partner to submit a completed Building Performance Plan, or Passive Building Performance Plan within 30 days of the project's Buildings Department final approval of New Building Architectural, Mechanical, and Plumbing plans to the project's Case Manager, this Agreement may be terminated in accordance with Section 18.
- (b) The project's As-Built submittal must be completed and submitted to the project's Case Manager for review within 6 months of receipt of the Temporary Certificate of Occupancy. Extensions will only be considered if the Partner requests an extension from NYSERDA in writing or by email to the project's Case Manager. NYSERDA may grant extensions at its discretion. The extension is only effective when NYSERDA has approved it through writing or email.

12. 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 Applicant 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.

If the dwelling units in the building(s) earn the EPA ENERGY STAR label, project specific information may be shared with the EPA for the purposes of complying with its program requirements. Unless identified as confidential or proprietary by the Applicant, information contained in these materials or reports may be used for the purpose of promoting awareness and adoption of energy efficiency strategies, practices, and technologies. NYSERDA does not provide any endorsement of any Partner's capabilities to provide services outside of the Scope of Work to be conducted pursuant to this Program.

13. Tax Liability:

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

14. Indemnification:

The Applicant shall protect, indemnify, and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, attorney's fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to the performance of this Agreement. The obligations of the Applicant under this section shall survive any expiration or termination of this Agreement.

15. 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 Applicant's reliance on warranties is limited to any warranties that may arise from, or be provided by, contractors, vendors, etc.

(b) The Applicant acknowledges that neither NYSERDA nor any of its consultants are responsible for assuring that the design, engineering, and construction of the Building or installation of the recommendations made by the Partner is proper or complies with any particular laws (including patent laws), codes, or industry standards. NYSERDA does not make any representations of any kind regarding the results to be achieved by the recommendations made by the Partner or the adequacy or safety of such measures.

16. Limit of Incentive Payments:

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

17. Release by the Applicant:

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

18. Termination:

This Agreement may be terminated by either party at any time with or without cause, upon 30 days prior written notice.

19. Notices:

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

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

Such notices shall be addressed to NYSERDA at:

New York State Energy Research and Development Authority
Attn: Multifamily New Construction Program
17 Columbia Circle
Albany, NY 12203

Fax: 518-862-1091

Email: MFNCP@trcsolutions.com

Notices addressed to Applicant shall be addressed to Applicant at the address supplied by the Partner in the electronic application.

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

20. 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.

21. 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.

22. Severability; Survival:

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

23. Independent Contractors:

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

24. 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.

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

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

27. 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.

28. 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.

29. Laws of the State of New York:

The Applicant 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 Applicant will not discriminate against any employee or participant 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 the 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"), Applicant hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Applicant's actual receipt of process or upon NYSERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Applicant 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. Applicant 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 Applicant or any of its principals is under indictment for a felony, or has been, within five (5) years prior to submission of the Applicant'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 Applicant 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 Applicant knowingly withheld information about such an indictment or conviction, NYSERDA may declare the Agreement null and void and may seek legal remedies against the Applicant and its principals. The Applicant or its principals may also be subject to penalties for any violation of law which may apply in the particular circumstances. For an Applicant 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.

30. 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.

31. All Legal Provisions Deemed Included:

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

32. 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 Applicant to comply with all legal requirements

33. Applicant Agreement to Terms and Conditions:

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

Project Name:

Applicant Company Name (as listed on W-9; must be the owner of the subject property):

Signature of Authorized Representative of the Applicant

Date

PRINT Name of Authorized Representative

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

Exhibit D

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.
- (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.
- (g)(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.

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>

- (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.