

*ATTACHMENT A: PROJECT CONTRACT*

**RENEWABLE POWER PURCHASE AGREEMENT**

between

**Philadelphia Energy Authority**

as Purchaser and

[Seller]

as Seller

Dated as of \_\_\_\_\_, 2023

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## POWER PURCHASE AGREEMENT

This Power Purchase Agreement, dated as of the \_\_\_\_\_, 2024 (the **Effective Date**), is entered into by **[Seller]**, a [insert state] [Type of Entity] (the **Seller**) and the Philadelphia Energy Authority, a body politic and corporate existing under the laws of the Commonwealth of Pennsylvania (the **Purchaser**).

### Background

A. The Purchaser and the City of Philadelphia (the “City”) issued an RFP dated [insert date] seeking proposals for a distributed renewable energy resource, through a long-term power purchase agreement with commercial operation in [insert date], and Purchaser and the City have selected Seller to build a [approx. X MW] [renewable source] resource (the **System**) at [location] pursuant to the RFP.

B. Purchaser desires to purchase [all of] the [renewable source]-generated energy and RECs produced by the System for the benefit of the City’s operations and to help meet the City’s commitment to procure a renewable energy project that reduces greenhouse gas emissions and helps meet the City’s goal to utilize 100% renewable electricity by 2030. The City will enter into a power and REC purchase agreement (the **City Power Purchase Agreement**) under which it will acquire [all] the energy and RECs generated by the System and agree to perform Purchaser’s obligations under this Agreement.

C. The Seller desires to construct, own, operate and maintain the System to be located on [approximately X acres] located in [jurisdiction] (the **Site**) and to sell [all of] the Electrical Energy and [RECs] generated by the System to the Purchaser for use by the City.

D. Seller is a [state][Type of entity] with the full power and authority to enter into and perform this Agreement. Seller is an affiliate of [Seller Guarantor], which has agreed to guarantee Seller’s performance of this Agreement pursuant to a guarantee agreement (the “**Seller Guarantee**”) for the benefit of the Purchaser and the City.

E. Purchaser is a body politic and corporate, organized under the Municipality Authorities Act, 53 Pa. C. S., Ch. 56; and Purchaser is authorized to take actions concerning the purchase or facilitation of energy supply and energy services on behalf of the City under Ordinance No. 100163- AA, passed by the Philadelphia City Council on June 3, 2010 and signed by the Mayor on July 29, 2010.

F. The Philadelphia City Council enacted an ordinance, Bill Number \_\_\_\_\_, approved by the Mayor on \_\_\_\_\_ duly authorizing the City and Purchaser to enter into the City Power Purchase Agreement.

## Agreements

In consideration of the Background and the mutual representations and covenants set out below, the parties, intending to be legally bound, agree as follows:

### ARTICLE 1 DEFINITIONS; CONVENTIONS

#### 1.1 Definitions

Unless otherwise expressly defined herein (including with respect to sections 12.4 and 12.5), each of the following capitalized terms has the meaning given to it in this Section 1.1.

**Affiliate** means, with respect to any Party, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Party. For purposes of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, means (a) the direct or indirect right to cast at least twenty-five percent (25%) of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least twenty-five percent (25%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

**Agreement** has the meaning set forth in the preamble to this Agreement.

**Annual Delivery Guarantee** has the meaning set forth in Exhibit H.

**Annual Shortfall** has the meaning set forth in Section 8.3(b).

**Antidiscrimination Policy** has the meaning set forth in Section 12.2(a).

**Applicable Law** means all applicable present and future laws, ordinances, rules, regulations, orders, Permits and all requirements of Commonwealth and local governments courts, departments, commissions, boards or agencies, and or any board of fire underwriters having jurisdiction over either of the Parties, their Affiliates, the Site, the Project, the Interconnection Facilities, any other goods or services provided or to be provided by either Party under this Agreement.

**Applicable Standards** means: (a) Good Industry Practice, (b) Applicable Law and (c) the requirements of this Agreement, the Interconnection Agreement and all insurance policies that the Seller is required to maintain with respect to the System under this Agreement.

**Business Day** means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday. A Business Day shall open at 08:00 a.m. EPT and close at 05:00 p.m. EPT. Notwithstanding the foregoing, for scheduling purposes only, the term "Business Day" shall have the meaning given to that term from time to time by NERC on its website (<http://www.nerc.com>).

**Change of Control** has the meaning set forth in Section 15.1(d)

**City** means The City of Philadelphia, Pennsylvania, a Pennsylvania municipal corporation.

**City Power Purchase Agreement** has the meaning set forth in the Background.

**Claims** has the meaning set forth in Section 10.2(b).

**Commercial Operation** has the meaning set forth in Section 6.8(a).

**Commercial Operation Date** means the date on which Commercial Operation occurs.

**Confidential Information** has the meaning set forth in Section 10.5(b).

**Construction Documents** has the meaning set forth in Section 4.3(c).

**Contract Commitment(s)** has the meaning set forth in Section 12.2

**Credit Requirements** has the meaning set forth in Section 4.1(a).

**Curtailment Period** has the meaning set forth in Section 9.5.

**Damage Payment** has the meaning set forth in Section 10.3(b).

**Deemed Delivered Energy** has the meaning set forth in Exhibit G.

**Default Energy** means the amount of Metered Energy that would have been delivered by the System during the Defaulted Term if the System had produced its Expected Annual Production in each Operating Year (or portion thereof) following such Early Termination Date. Any partial Operating Year shall be prorated in accordance with expected monthly insolation during such partial Operating Year as compared to the Expected Annual Production.

**Defaulted Term** has the meaning set forth in Section 11.3(b).

**Delay Damages** has the meaning set forth in Section 6.7(b).

**Delivery Point** means [Seller's Pnode on the PJM system].

**Delivered Energy** means the amount of energy made available by Seller to Purchaser's Agent at the Settlement Point, which shall for any measured period equal the amount of Metered Output delivered by Seller at the Delivery Point for such measured period.

**Disclosing Party** has the meaning set forth in Section 10.5(a).

**DSBE** has the meaning set forth in Section 12.2(a).

**Early Termination Date** has the meaning set forth in Section 11.3.

**Economic Curtailment Make Whole Payment** has the meaning set forth in Section 9.5.

**Effective Date** has the meaning set forth in the preamble to this Agreement.

**Engineer** means a nationally recognized consulting engineer company, with demonstrated experience in [renewable energy source] that is designated in writing to Seller by purchaser.

**Environmental Attribute** means any and all claims, credits, benefits, emissions, aspects, characteristics, claims, benefits, reductions, offsets, or allowances created pursuant to Applicable Law or by an independent certification authority, howsoever entitled or designated, resulting from the avoidance of the emission of any gas, chemical, or other substance to the air, soil or water attributable to or associated with the production from Purchaser's Nameplate Capacity. Environmental Attributes include any avoided emissions of pollutants to the air, soil, or water such as sulfur oxides, nitrogen oxides, carbon monoxide, and other pollutants; and (b) any avoided emissions of carbon dioxide, methane and other greenhouse gases that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere. Environmental Attributes do not include (i) tax incentives, (ii) any environmental claim or other liability or (iii) adverse wildlife or environmental impacts, (iv) electricity and (v) capacity.

**Environmental Laws** means all current and future Federal, Commonwealth, and local environmental safety or health laws, statutes, rules, regulations, ordinances, orders, or common law including, but not limited to reported applicable decisions of any Commonwealth or Federal court and shall include, but not be limited to, the Occupational Safety and Health Act of 1970, as amended (29 U.S.C. § 651 et seq.); the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. § 9601 et seq.); the Resource Conservation and Recovery Act, as amended (42 U.S.C. § 6901 et seq.); the Toxic Substances Control Act, as amended, (15 U.S.C. § 2601 et seq.); the Hazardous Materials Transportation Act, as amended (49 U.S.C. § 5101 et seq.); the Clean Air Act, as amended, (42 U.S.C. § 7401 et seq.); the Clean Water Act, as amended (33 U.S.C. § 1251 et seq.); the Oil Pollution Act of 1990, as amended (33 U.S.C. § 2701 et seq.); the Safe Drinking Water Act, as amended (42 U.S.C. § 300 et seq.); the Pennsylvania Solid Waste Management Act, as amended (35 P.S. § 6018.101 et seq.); the Pennsylvania Hazardous Sites Cleanup Act, as amended (35 P.S. § 6020.101 et seq.); the Pennsylvania Clean Streams Law, as amended (35 P.S. § 691.1 et seq.); the Pennsylvania Underground Storage Tank and Spill Prevention Act 35 P.S. § 6021.10, et seq.; the Pennsylvania Hazardous Material Emergency Planning and Response Act, as amended (35 P.S. § 6022.101 et seq.); [and The Philadelphia Code], as any of the foregoing may hereinafter be amended; any rule or regulation promulgated pursuant thereto; and any other applicable present or future law, ordinance, rule, regulation, permit or permit condition, order or directive addressing environmental, health, or safety issues of or by the Federal government or the Commonwealth or other applicable political subdivision thereof, or any agency, court or body of the Federal government, or the Commonwealth or any political subdivision thereof, exercising executive, legislative, judicial, regulatory or administrative functions.

**EOP** has the meaning set forth in Section 12.2(a).



**EOP Damages** has the meaning set forth in Section 12.2(c).

**Event of Default** has the meaning set forth in Section 11.1.

**Expected Annual Production** for each Operating Year has the meaning set forth in Exhibit H.

**Expected Monthly Production** for each month has the meaning set forth in Exhibit H.

**Fair Market Value** or **Fair Market Price** means the amount that would be obtained in an arm's-length transaction between an informed and willing buyer and an informed and willing seller, each under no compulsion to buy or sell.

**Floor Price** means zero dollars per MWh.

**Force Majeure** means an event not anticipated as of the Effective Date, which materially adversely affects the ability of one party to timely perform and which is not within the reasonable control of the party affected thereby or attributable to such party's fault or negligence, and which by the exercise of due diligence the affected party is unable to overcome or obtain or cause a commercially reasonable substitute therefore to be obtained. Failure of the System will not constitute Force Majeure unless such failure is caused by a circumstance that would otherwise constitute Force Majeure. Force Majeure does not include (i) strikes or other labor actions arising from labor relations issues involving the employees of the Contractor or Subcontractors in connection with the Project or operation or maintenance of the System or (ii) any Hazardous Substance for which the Contractor is responsible under Section 10.7, (iii) the Seller's ability to sell the electrical output of the System or any component thereof at a more advantageous price; (iv) Seller's inability to obtain Facility Equipment, unless such failure is caused by an event that would otherwise constitute Force Majeure, or (v) Seller's failure to finance and/or construct the System. Increased cost of performance by Seller shall not constitute an event of Force Majeure. The failure to specifically exclude an event shall not be interpreted to indicate that it is a Force Majeure event.

**Forced Facility Outage** means a System Emergency or any other immediate reduction in output or capacity or removal from service, in whole or in part, of a generating unit by reason of an emergency or threatened emergency, unanticipated failure, or other cause beyond the control of the owner or operator of the Project.

**Good Industry Practice** means those practices, methods and standards that, in the exercise of reasonable and prudent judgment by a company designing, installing, constructing and operating a facility such as the System, in the United States, based on facts known or that reasonably should have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner that (a) is consistent with Applicable Law and all codes, manuals and engineering and safety standards generally applied in projects similar to the System, (b) gives due consideration to reliability, safety and protection of persons and equipment and (c) is consistent with manufacturers' recommendations and warranties.

**Governmental Authority** means any federal, state, local or municipal governmental, quasi-governmental, regulatory or administrative agency, commission, court, tribunal or other body or authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory, taxing or other binding jurisdiction, authority or power. Governmental Authority includes the Philadelphia City Council, and the Local Distribution Company acting pursuant to a tariff approved by the Public Utility Commission.

**Hazardous Substance** means: (1) asbestos, flammables, volatile hydrocarbons, industrial solvents, explosives, hazardous chemicals, radioactive material, oil, petroleum, petroleum products or by-products, crude oil, natural gas, natural gas liquids, hazardous chemical gases and liquids, volatile or highly volatile liquids, and/or synthetic gas, and shall include, without limitation, substances defined as “hazardous substances,” “hazardous materials,” “hazardous waste,” “toxic substances,” “pollutants,” or “contaminants,” as those terms are used in any Environmental Law or at common law; and (2) any and all other materials or substances that any governmental agency or unit having appropriate jurisdiction shall determine in generally applicable regulations from time to time are hazardous, harmful, toxic, dangerous or otherwise required to be removed, cleaned up or remediated.

**Indemnified Party** has the meaning set forth in Section 10.2(c).

**Indemnifying Party** has the meaning set forth in Section 10.2(c).

**Initial Term** has the meaning set forth in Section 3.1.

**Interconnection Agreement** means the interconnection agreement or agreements entered into by Seller pursuant to which the Project will be interconnected with the Local Distribution Company transmission system, and pursuant to which Seller's interconnection facilities and any other interconnection facilities will be constructed, operated and maintained during the Term.

**Internal Bilateral Transaction** means a type of energy schedule for generation and load for transactions that do not cross a PJM interface. Such schedules may be designated as day-ahead or real-time market.

**Lender Required Consents** has the meaning set forth in Section 14.1(c).

**Lien** means any mortgage, pledge, lien (including mechanic’s, labor, or materialman’s Lien), charge, security interest, encumbrance, or claim.

**Local Distribution Company** means [Utility], the electric utility responsible for electric energy transmission and distribution service to the Site.

**Locational Marginal Price** or **LMP** means the location specific real-time or day-ahead energy market price, as calculated and reported by PJM on its website, at the Delivery Point or Settlement Point, as applicable, for the period in question.

**Load Serving Entity** means a person or entity that (a) serves end-users within the PJM region, and (b) pursuant to state or local law, regulation, or franchise, has been granted authority or has an obligation to sell electric energy to end-users located within the Commonwealth of Pennsylvania.

**Metered Output** means the electrical output of the System attributable to Purchaser's Nameplate Capacity made available to Purchaser as measured by the Metering Equipment installed at the Delivery Point.

**Metering Equipment** has the meaning set forth in Section 7.2(a)

**MBE** has the meaning set forth in Section 12.2(a).

**Monthly Shortfall** has the meaning set forth in Section 8.5(a)(ii).

**Monthly Shortfall Makeup Amount** has the meaning set forth in Section 8.5(a).

**Monthly Delivery Guarantee** has the meaning set forth in Exhibit H.

**M/W/DSBE** has the meaning set forth in Section 12.2(a).

**Nameplate Capacity** means the is the Maximum Facility Output specified in the Interconnection Service Agreement or Wholesale Market Participation Agreement.” of the System as measured at the Metering Equipment.

**Notice to Proceed** has the meaning set forth in Section 2.3(c).

**Notice to Proceed Date** means the date of the Notice to Proceed.

**OEO** has the meaning set forth in Section 12.2(a).

**Operating Procedures** has the meaning set forth in Section 7.1(b)

**Operating Year** means each City fiscal year (July 1 to June 30) commencing on the Commercial Operation Date; provided that if the first and last Operating Years are not full calendar years, the first Operating Year begins on the Commercial Operation Date and ends on to the next-following June 30, and the last Operating Year will begin on July 1 of the calendar year in which this Agreement terminates and end on the date of termination.

**Party** means each of the Seller and the Purchaser, and their permitted successors and assigns.

**Permits** has the meaning set forth in Section 4.5.

**Person** means any individual, corporation, partnership, joint venture, association, joint stock company, trust, trustee, estate, limited liability company, unincorporated organization, real estate investment trust, government or any agency or political subdivision thereof, or any other form of entity.

**PJM** means PJM Interconnection, Inc., the Regional Transmission Organization serving all or portions of 13 states in the mid-Atlantic and Midwest regions, including Pennsylvania, and the District of Columbia.

**PJM GATS** means the PJM Generation Attributes Tracking System.

**Planned Outage** has the meaning set forth in Section 7.1(d).

**Products** mean (i) Delivered Energy settled in the PECO Transmission Zone and scheduled to the Purchaser Subaccount; (ii) RECs transferred to the Purchaser in Purchaser's PJM GATS Account in accordance with Section 8.2.

**Project** means the development and installation of the System and all related activities undertaken pursuant to this Agreement prior to the Commercial Operation Date including the satisfaction by Seller of all conditions precedent.

**Public Utility Commission** means the Pennsylvania Public Utility Commission.

**Purchase Date** means: (a) at the end of the calendar year in which the ( ) anniversary of the Commercial Operation Date occurs or (b) at the end of each calendar year thereafter or (c) at the expiration of the initial term.

**Purchase Price** has the meaning set forth in Section 8.3.

**Purchaser** has the meaning set forth in the preamble to this Agreement.

**Purchaser Indemnified Persons** means the Purchaser, the City, and each of their respective officers, employees, boards, members, councilmembers, commissions, representatives and agents.

**Purchaser Make-Up Amount** has the meaning set forth in Section 8.3(a).

**Purchaser Subaccount** means a PJM Subaccount managed by Purchaser's Agent as designated by Purchaser.

**Purchaser's Agent** means a Load Serving Entity that is City's Licensed Retail Electricity Service Provider.

**Purchaser's Nameplate Capacity** means \_\_\_\_\_MW of installed design electric generation capacity as measured at the Metering Equipment.

**REC** means a renewable energy credit or alternative energy credit produced by a [renewable] generation facility that (i) is a [Tri-Qual REC], and (ii) meets the registration requirements for Green-e certification under the Green-e Renewable Energy Standard for Canada and the United States Version 3.3 as of the Effective Date.

**Receiving Party** has the meaning set forth in Section 10.5(a).

**Renewal Term** has the meaning set forth in Section 3.1.

**Representative** has the meaning set forth in Section 10.8.

**RTKL** has the meaning set forth in Section 10.5(b).

**Scheduled Commercial Operation Date** has the meaning set forth in Section 6.6(b).

**Seller** has the meaning set forth in the preamble to this Agreement.

**Seller Guarantee** means the Guarantee by [Seller Parent] of the obligations of Seller under this Agreement in the form attached as Exhibit C.

**Seller's Credit Support** has the meaning set forth in Section 4.1.

**Seller's Work** has the meaning set forth in Section 6.1(a).

**Seller's Makeup Amount** has the meaning set forth in Section 8.4.

**Settlement Point** means for Delivered Energy, the PECO Transmission Zone, as that term is defined by PJM. In PJM's Locational Marginal Price bus model, the current Price Node ID for the PECO Transmission Zone is 51297, as it may be revised by PJM from time to time.

**Site** means the real property described in Exhibit A.

**"Subcontractor"** means a Person performing at any tier under a subcontract with the Seller or another Subcontractor one or more portions of the Work which the Seller has agreed to perform under the Contract. Subcontractors shall include, without limitation, vendors or other Persons contracting with a Subcontractor or the Seller for part of the Work under the Contract.

**System** means: (a) the integrated assembly of renewable electric generating equipment, foundations or mounting, assemblies, inverters, converters, metering, lighting, fixtures, transformers, disconnections, combiners, switchgear, wiring and protective equipment to be installed at the Site, all as more specifically described in Exhibit B and (b) all alterations, additions, or improvements made thereto.

**Taxes** means all foreign and domestic taxes, and levies, whether currently in effect or adopted during the Term, including but not limited to, ad valorem, consumption, distribution, excise, franchise, gross receipts, import, export, license, property, sales, stamp, storage, transfer, turnover, use or value-added taxes and any and all items of penalty, addition to tax, interest or assessment related thereto.

**Term** has the meaning set forth in Section 3.1

**Tri-Qual RECs** means physically delivered Class I Renewable Energy Certificates, Tier 1 Renewable Energy Credits and Tier I Alternative Energy Credits (“**Class I REC**”) where a Class I REC is an electronic certificate issued by the PJM GATS for generation simultaneously qualifying for the respective portions of the Pennsylvania alternative energy portfolio standard program, and the New Jersey and Maryland renewable portfolio standard programs.

**Undelivered Electricity** means, during any period in which a circumstance exists that prevents electricity to be delivered to the Delivery Point, the amount of electricity that would have been delivered had such circumstance not existed as reasonably estimated by the Seller.

**Wage Damages** has the meaning set forth in Section 12.2(b).

**WBE** has the meaning set forth in Section 12.2(a).

## **1.2 Conventions**

Unless otherwise specifically provided in this Agreement:

(a) terms defined in the singular shall have the corresponding plural meaning when used in the plural, and terms defined in the plural shall have the corresponding singular meaning when used in the singular;

(b) references to agreements, certificates and other legal instruments shall include all subsequent amendments thereto, and changes to, and restatements or replacements of, such agreements, certificates or instruments that are duly entered into and effective against the parties thereto or their permitted successors and assigns;

(c) references to Persons shall include their permitted successors and assigns;

(d) the term “include”, “includes” or “including” means, include, includes or including without limitation (as the case may be);

(e) references to Articles, Sections and Exhibits means the articles and sections of, and exhibits to, this Agreement;

(f) references to this Agreement means this Agreement, including all schedules and exhibits;

(g) the term “day” means a calendar day and includes Saturdays, Sundays and holidays, except that, if any financial or administrative obligation to be performed under this Agreement falls due on a Saturday, Sunday or a holiday on which State banks are not open for business, the obligation shall be due on the next business day thereafter;

(h) a reference to a statute or to a regulation issued by a governmental authority includes the statute or regulation in force as of the date hereof, together with all amendments and supplements thereto and any statute or regulation substituted for such statute or regulations; and

(i) a reference to a Governmental Authority or to a public officer includes an entity or officer that or who succeeds to substantially the same functions as those performed by such Governmental Authority or officer as of the date of this Agreement.

## **ARTICLE 2 CONDITIONS PRECEDENT; REPRESENTATIONS AND WARRANTIES**

### **2.1 Conditions Precedent to the Obligations and Liabilities of Seller**

The obligations and liabilities of the Seller under this Agreement (except Section 2.3) are subject to the satisfaction or waiver by the Seller of each of the following conditions precedent:

(a) all Permits required for installation, operation and maintenance of the System and the sale and delivery of electricity to the Purchaser that can be obtained in the ordinary course before commencement of construction have been obtained;

(b) the Seller has entered into arrangements, on terms acceptable to it, under which funds, sufficient to procure and install the System, will be available to the Seller and the conditions to the first draw on such funds have been met;

(c) the Seller has entered into an engineering, procurement and construction agreements for the System;

(d) the City and the Purchaser have entered into the City Power Purchase Agreement in substantially the form attached as Exhibit D;

(e) the Seller and the Local Distribution Company [and PJM] have executed and delivered an Interconnection Agreement in form and substance reasonably acceptable to the Seller; and

(f) the Purchaser has delivered any Lender Required Consents in form and substance satisfactory to any lender or lessor.

### **2.2 Conditions Precedent to the Obligations and Liabilities of Purchaser**

The obligations and liabilities of the Purchaser under this Agreement (except Sections 2.3 and Article 4) shall be subject to the satisfaction or waiver by the Purchaser of each of the following conditions precedent.

(a) The representations and warranties of the Seller are true and correct as of the Notice to Proceed Date;

(b) the Seller shall have completed the requirements of Article 4 except obtaining Permits that by their nature cannot be obtained prior to construction;

(c) the Seller shall have obtained all Permits required by Applicable Law to commence construction, specifically including but not limited to preliminary interconnection approval by the Local Distribution Company and PJM, approval by PJM GATs for REC generation and registration, and local construction permits, with conditions reasonably acceptable to the Seller and shall have provided copies to Purchaser;

(d) Seller has caused to be delivered the Seller Guarantee and Seller Credit Support in accordance with Section 4.1(b);

(e) the City and the Purchaser have entered into the City Power Purchase Agreement in substantially the form attached as Exhibit D;



(f) the Seller, PJM, and the Local Distribution Company have executed and delivered an Interconnection Agreement in form and substance reasonably acceptable to the Seller;

(g) any Lender Required Consents are in form and substance acceptable to the Purchaser and the City; and

(h) the Seller has delivered to the Purchaser certificates of insurance evidencing that the insurance required to be maintained by the Seller under this Agreement is in effect.

### **2.3 Satisfaction of Conditions Precedent**

(a) Each party shall exercise good faith and due diligence in satisfying the foregoing conditions precedent and giving prompt notice to the other party when such conditions precedent have been satisfied or waived in writing by the party whose obligation is conditioned thereon.

(b) Either party shall promptly notify the other party if any condition precedent is incapable of being satisfied.

(c) When both parties agree that all conditions precedent are satisfied or that they are prepared to waive any conditions not so satisfied the Seller and the Purchaser shall execute an instrument in the form of Exhibit E attached hereto (the “**Notice to Proceed**”) in which (i) each of them states that all of the conditions precedent to its obligations set forth in this Article 2 have been satisfied or waived and (ii) the Purchaser directs the Seller to begin the installation of the System.

(d) If either party delivers a notice that one or more conditions precedent cannot be satisfied pursuant to Section 2.3(b) above, or if any condition precedent is not satisfied or waived by six months from the execution date of this Agreement, in either case for reasons not due to the terminating party’s failure to comply with its obligations under Section 2.3(a), then (i) either party may at any time thereafter until such conditions have been satisfied or waived, by notice to the other party, terminate this Agreement, (ii) neither party will be liable to the other for any such termination and (iii) each party will bear its own expenses attributable to the transactions contemplated by this Agreement; provided that if such termination is due to the failure of Seller to comply with its obligations under Section 2.3(a), such failure will be treated as an Event of Default, and without limiting Purchaser’s remedies hereunder, Purchaser may draw on Seller’s Credit Support to satisfy any claims or damages it may have.

### **2.4 Representations and Warranties**

Seller represents and warrants that:

(a) it is duly formed and validly existing under the laws of \_\_\_\_\_ and authorized to do business in the Commonwealth of Pennsylvania and has the full power, authority and legal right to enter into and perform this Agreement, and its execution, delivery and performance thereof (i) will not violate any judgment, order, law or regulation applicable to Seller, including any provisions of its formation documents and (ii) do not (A) conflict with, (B) constitute a default under or (C) result in the creation of any Lien on any assets of Seller under any agreement or instrument to which it is a party or by which it or its assets may be bound or affected;

(b) this Agreement has been duly authorized, executed and delivered by the Seller and constitutes its legal, valid and binding obligation, enforceable in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, reorganizations, moratorium or similar laws affecting the enforcement of creditors' rights generally, or by general equitable principles concerning remedies;

(c) no approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Authority is required for the valid execution and delivery of this Agreement by Seller except those that have been duly obtained or made;

(d) there is no litigation or proceeding pending or, to its knowledge, threatened against or affecting Seller (i) challenging the validity of this Agreement or the transactions contemplated thereby, (ii) seeking to enjoin such Seller's performance hereunder or (iii) that, if adversely determined, would materially adversely affect Seller's ability to perform its obligations hereunder;

(e) to its knowledge, there are no facts, circumstances or other matters that may interfere with or delay the installation or operation of the System;

(f) it has no unpaid debt due and owing Purchaser or City and is not delinquent in the payment of any Taxes or other assessments due to Purchaser or City, except such debts or obligations for which Seller has executed an agreement with The City of Philadelphia through its Department of Revenue to eliminate such delinquencies; and

(g) neither Seller nor any of Seller's directors, officers, members, partners or employees, shall have any interest nor shall they acquire any interest, directly or indirectly, that would or may conflict in any manner or degree with Seller's performance under this Agreement.

### **ARTICLE 3 TERM; RENEWAL**

#### **3.1 Term; Renewal**

This Agreement will begin on the date hereof and, unless terminated earlier pursuant to the terms hereof, end on the twentieth anniversary of the Commercial Operation Date (the "**Initial Term**"). Purchaser shall have the option to renew this Agreement for five years; provided that the Purchase Price for electricity shall be adjusted to the Fair Market Value of electricity and RECs at the time of renewal. Such five-year extension shall be referred to as the "**Renewal Term**", and together with the Initial Term, the "**Term**."

### **ARTICLE 4 PRECONSTRUCTION PROVISIONS**

#### **4.1 Credit Support**

Seller will be required to provide a Letter of Credit (**LoC**) in a form reasonably satisfactory to Purchaser (the "**Seller Credit Support**") in the amount of \$100,000 per MW of Purchaser's Nameplate Capacity within five days of the date of execution of this Agreement. The amount of Sellers' Credit Support may be reduced to \$75,000 per MW of Purchaser's Nameplate Capacity

following achievement of Commercial Operation. Seller's Credit Support shall be supplied from entities rated A-/A3 or better by S&P, Moody's or AM Best, as applicable. [Seller will also be required to provide the Seller Guarantee on or prior to the Notice to Proceed Date.]

#### **4.2 Permits**

Seller, at its cost, shall be responsible for completing, preparing and submitting and obtaining all applications, plans, permits, licenses, consents waivers, variances, registrations and approvals, including building and stormwater management permits/approvals, and all other documentation required from all applicable Governmental Authorities, needed to construct and operate the System (collectively, the “Permits”). Seller shall be responsible for the payment of any applicable Permit and impact fees or other similar costs.

#### **4.3 Additional Preconstruction Obligations**

Prior to the Notice to Proceed Date Seller shall:

- (a) Participate in regular pre-construction conferences with the City and Seller’s project manager, as requested by the City, and discuss the project scheduling; and
- (b) provide to Purchaser monthly reports that describe, in a standardized format, the status of Seller's efforts to meet all of the conditions set forth in Article 2.

### **ARTICLE 5 OWNERSHIP OF THE SYSTEM**

#### **5.1 Ownership of the System**

The System is, and will remain, the personal property of the Seller.

#### **5.2 Taxes**

During the Term of this Agreement, Seller shall pay or cause to be paid to the applicable taxing authority, no later than thirty calendar days before each installment is due, any and all Taxes assessed or imposed upon the Site, including the System, or any portion thereof associated with the Site.

### **ARTICLE 6 INSTALLATION OF THE SYSTEM**

#### **6.1 Seller’s Work**

(a) The Seller shall provide, in a good and thorough manner, all services, supervision, labor, materials and equipment, supplies, miscellaneous materials, and machinery necessary to design, engineer, procure, construct, install and commission the System (the Seller’s Work). The Seller’s Work includes the following activities:

- (1) the preparation and completion of a detailed design of the System;
- (2) the acquisition, delivery, construction, assembly and installation of the System at the Site, including the procurement, expediting, inspection, installation,

construction, assembly and erection of all required structures System components in accordance with Exhibit B (Description of the System);

- (3) the interconnection of the System in accordance with the requirements of the Local Distribution Company and PJM;
- (4) commissioning and testing the System; and
- (5) the performance of each of the Contractor's other obligations under this Agreement, to be completed as a condition to Final Completion.

(b) Upon execution of the Notice to Proceed, the Contractor shall promptly begin and diligently prosecute to completion the Seller's Work.

## **6.2 Subcontractors**

(a) The Seller will be as fully responsible to the Purchaser for the acts and omissions of subcontractors or persons directly or indirectly employed by them as it is for the acts or omissions of persons employed by the Seller. Nothing in this Agreement will create any contractual relationship between any subcontractor and the Purchaser. The Purchaser will have no obligation to pay directly, or cause the payment of, any subcontractor. The employment of any subcontractor will not relieve the Seller of any of its obligations under this Agreement.

(b) The Seller shall require each subcontractor of Seller to execute a Certificate of Non-Indebtedness (as provided herein), and, to the best of Seller's information and belief after investigating, the representations made in such Certificate(s) of Non-Indebtedness are or will be, upon execution, true and correct.

## **6.3 Right to Inspect**

The Purchaser, the City and the Engineer shall have the right upon prior oral or written notice to Seller (or without any notice whatsoever in case of emergency), to visit the Site for the purpose of (i) inspecting the System, (ii) ensuring that Seller's Work complies with the terms and conditions herein, (iii) observing all tests of the Facility and/or (iv) bringing PEA or City accredited visitors to the site.

## **6.4 Progress Reports**

The Seller shall deliver to the Purchaser within 5 days after the 15th and final day of each month prior to the Commercial Operation Date a progress report containing, at a minimum, a summary of activities undertaken during such month and activities to be undertaken during the following month.

## **6.5 Performance Tests**

Following the completion of construction and installation of the System, the Seller shall conduct a thorough and systematic performance test of each element of the System in accordance with Exhibit F. Testing must be designed to determine if the System is functioning in accordance with both its published specifications and the requirements of this Agreement including all

required testing of System switchgear with the Local Distribution Company present, and testing of the interconnection to System switchgear to the satisfaction of the Purchaser. The Seller shall notify the Purchaser and the City at least seven days prior to the date scheduled for each scheduled test and the Purchaser and the City and their invitees will have the right to be present at any or all such tests. The Seller shall correct and adjust all deficiencies in the Seller's Work that are observed during System commissioning procedures.

## 6.6 Commercial Operation

(a) **"Commercial Operation"** means that all of the following conditions have been met:

- (1) the construction and installation of the System has been completed in accordance with the terms of this Agreement;
- (2) all requirements of the Interconnection Agreement have been met;
- (3) the performance tests have been completed in accordance with Exhibit F and have demonstrated that the performance criteria set forth in Exhibit F have been achieved; and
- (4) the Seller has delivered to the Purchaser a certificate executed by a duly authorized representative of the Seller certifying that the foregoing conditions have been met.

(b) The Seller shall cause Commercial Operation to occur on or before the date that is \_\_\_ days following the Notice to Proceed Date. Such date will be extended to the extent that the Seller has demonstrated to the reasonable satisfaction of the Purchaser that a Force Majeure event has delayed construction or testing. If Commercial Operation has not been achieved by such date (as it may have been so extended), (**"Scheduled Commercial Operation Date"**), the Seller shall pay damages (**"Delay Damages"**) to the Purchaser for the period of delay in an amount equal to \$150 per MW per day plus an amount [to be specified in the final completed contract] to compensate purchaser for any increase in the aggregate purchase price over the life of the contract due to the delay of Commercial Operation. Seller's failure to achieve Commercial Operation within 120 days of the Scheduled Commercial Operation Date constitutes an Event of Default under this Agreement.

## 6.7 Capacity Shortfall

If, on or before the Guaranteed Commercial Operation Date, Seller has not caused the Nameplate Capacity to equal 100% of the Purchaser's Nameplate Capacity, Seller shall pay to Purchaser liquidated damages (**"Capacity Shortfall Damages"**) in an amount for such day equal to (a) \$100,000 per MW<sub>ac</sub> multiplied by (b) the Purchaser's Nameplate Capacity minus the Nameplate Capacity as of the Guaranteed Commercial Operation Date. If Capacity Shortfall

Damages are owed by Seller to Purchaser, Seller shall (i) include the amount of such Capacity Shortfall Damages (including the supporting data and calculations) on the first invoice issued pursuant to Section 8.6 following the Guaranteed Commercial Operation Date and (ii) pay such Capacity Shortfall Damages to Purchaser in accordance with Section 8.6. The payment of such Capacity Shortfall Damages shall be Purchaser's sole remedy for shortfall of the Purchaser's Nameplate Capacity with relation to the failure of the Project to achieve the Purchaser's Nameplate Capacity by the Guaranteed Commercial Operation Date.

## ARTICLE 7 SYSTEM OPERATIONS

### 7.1 General Responsibilities

(a) The Seller shall be solely responsible for the operation, repair, monitoring and maintenance of the Project and the costs incurred in connection therewith.

(b) Before the Commercial Operation Date, Purchaser and Seller, acting reasonably and in good faith, shall develop written operating procedures ("**Operating Procedures**") for the Project that will set forth the protocol under which the Parties shall perform their respective obligations under this Agreement. Such Operating Procedures shall include, without limitation, procedures concerning the following: (i) the method of day-to-day communications; (ii) key personnel lists for Seller and Purchaser, including an appointed authorized representative for each Party; and (iii) Outage reporting requirements.

(c) After the Commercial Operation Date, Seller will operate and maintain the Project in accordance with all Applicable Standards.

(d) Seller shall use Commercially Reasonable Efforts to furnish Purchaser with as much advance notice as practicable of any proposed or necessary maintenance outages ("**Planned Outages**"). The Parties shall work to schedule such Planned Outages to mutually accommodate, as practicable, the reasonable requirements of Seller and the reasonable requests of Purchaser. Seller shall promptly provide written notice to Purchaser, to the extent information is available, of the reason, timing, expected duration and the impact of any Forced Facility Outages on Metered Output. For any month in which there is a Forced Facility Outage, Seller also shall provide to Purchaser, in a form reasonably acceptable to Purchaser, a monthly report of Forced Facility Outages.

### 7.2 Metering

(a) Seller shall install metering equipment and any related data processing equipment (the "**Metering Equipment**") at the Delivery Point, which is designated as the settlement meter by PJM, to be used for the registration, recording and transmission of information regarding Metered Output. Seller shall provide Purchaser and the City read-only access to Seller's PJM Power Meter account and Market Settlements Reporting System as well as a remote dashboard to permit Purchaser and the City to monitor System operations.

(b) The Seller shall inspect and test the Metering Equipment upon its initial installation and annually thereafter and provide the Purchaser with the results thereof. The Seller shall give the Purchaser and the City at least five days' notice of any inspection and testing of the Metering Equipment. The Purchaser and the City may have a representative present at any time that the Seller reads or inspects and tests the Metering Equipment. At the Purchaser's request, the Seller shall inspect and test the Metering Equipment more frequently. If such additional inspection and test determines that the Metering Equipment is accurate and in good working order, the Purchaser shall reimburse the Seller for the costs of performing such inspection and test. If such additional inspection and test determines that the Metering Equipment is inaccurate or defective, the Seller will not be entitled to reimbursement and shall adjust, repair, or replace, and retest the Metering Equipment at its sole expense.

(c) If, on testing, the measurement made by the Metering Equipment varies by more than two percent from the measurement made by the standard measuring equipment used in the test, (i) an adjustment will be made correcting all measurements made by the Metering Equipment for (A) the actual period during which inaccurate measurements were made, if such period can be determined or, if not, (B) the period immediately preceding the test equal to one-half the time from the date of the previous test; and (ii) the Purchaser or the Seller, as appropriate, shall refund or pay to the other party the amount by which actual payment made hereunder represents an overpayment or underpayment based on corrected measurements.

(d) If, during any period, a reading cannot be obtained from the Metering Equipment, settlement shall be made in accordance with PJM procedures then in effect.

### **7.3 Alterations to the System**

After the Commercial Operation Date, the Seller may repair or replace damaged or inoperable parts of the system or make other improvements or changes to the System so long as the System as repaired or modified is capable of meeting Seller's obligations to Purchaser under this Agreement without limiting its ability to meet its obligations or resulting in a default under other agreements with respect to the operation, sales of output or financing of the System.

### **7.4 Damage to the System**

If the System is materially damaged or destroyed, or suffers any other material loss, the Seller shall, unless otherwise agreed by the Purchaser, as soon as practicable, either replace the System with an equivalent system or restore the System to the condition that it was in prior to such damage, destruction or loss; provided that any alteration of the system shall meet the requirements of Section 7.3.

## **ARTICLE 8 PURCHASE OF ELECTRICITY AND RECS**

### **8.1 Purchase and Sale of Delivered Energy**

(a) In accordance with and subject to the terms and conditions of this Agreement, commencing on the Commercial Operation Date, but subject to Section 2.4, and continuing through the end of the Term, Seller shall deliver to Purchaser's Agent, and Purchaser's Agent shall acquire from Seller, all right, title and interest in and to Delivered Energy made available by Seller at the Settlement Point.

(b) Seller shall sell, or cause to be made available, and Purchaser shall purchase and receive, or cause to be received, the quantity of Delivered Energy at the Settlement Point, and Purchaser's Agent, or Purchaser if Purchaser's Agent fails to do so, shall pay Seller the Purchase Price. Seller shall be responsible for any costs or charges imposed on or associated with making available the Delivered Energy up to the Settlement Point.

(c) All electricity delivered by the Seller must meet all requirements of the Interconnection Agreement.

## **8.2 Purchase of RECS**

(a) The Seller agrees to sell, and the Purchaser agrees to purchase all RECs associated with the Delivered Energy. RECs shall be delivered and registered in accordance with Section 8.8.

(b) During the Term of this Agreement, Purchaser shall be entitled, with no additional payment, to the Environmental Attributes associated with RECs delivered to the Purchaser PJM ATS Account under this Agreement. Purchaser's right to receive the Environmental Attributes associated with such RECs shall arise immediately upon the generation of the electric energy by the Project that gives rise to Seller's obligation to transfer such RECs, and title to the RECs will pass to Purchaser upon delivery to the Purchaser's PJM GATS Account. Seller agrees that it will not alienate the Environmental Attributes related to any RECs delivered under this Agreement, take any other action, or enter into any transaction that would prevent the sale of the Environmental Attributes associated with the transferred RECs.

## **8.3 Purchase Price**

Purchaser shall pay Seller \_\_\_\_\_ dollars (\$\_\_\_\_\_) per MWh (the "**Purchase Price**") for the Delivered Energy and all RECs associated with Delivered Energy that is made available by Seller at the Delivery Point. For clarity and in no way affecting the obligations of Purchaser to pay for such Delivered Energy if so made available, the Purchase Price is composed of \_\_\_\_\_ (\$\_\_\_\_\_) per MWh for the Delivered Energy, and \_\_\_\_\_ dollars (\$\_\_\_\_\_) per MWh for the RECs and related Environmental Attributes.

## **8.4 Certain Restrictions on Purchaser's Agent**

Purchaser's Agent may be an Affiliate of Purchaser so long as Seller is not required to satisfy or be subject to the requirements of the Commonwealth of Pennsylvania applicable to retail sales by public utilities or Electric Generation Suppliers or Electricity Suppliers, as such terms are defined or used in 66 Pa. C. S. Sections 2803 and 2809, 52 Pa. Code §§54.1 - 54.10, 52 Pa. Code §§



54.31 -54.43 and 52 Pa. Code Ch. 56.

## **8.5 Failure to Deliver**

If, in any Operating Year, the Seller fails to deliver at least 90 percent of the Expected Annual Production for such year set forth in Exhibit H less any amount not produced as a result of a Force Majeure event (as further defined in Exhibit H, the “**Annual Delivery Guarantee**”):

(a) The Seller shall pay to the Purchaser within 30 days after the end of such Operating Year an amount (the “**Purchaser Make-Up Amount**”) equal to the sum, if positive, for all months in the Operating Year of the amounts (the “**Monthly Shortfall Make-up Amounts**”) calculated for each month as follows:

(i) the difference, whether positive or negative, between (i) the generation weighted average of day-ahead prices at PJM pricing node ID 51297 (PECO Transmission Zone) for electricity delivered between the hours of 8 a.m. and 4 p.m. during such month minus (ii) the Purchase Price in effect for such month; *multiplied by*

(ii) the amount calculated in Accordance with Exhibit H as the Monthly Delivery Guarantee for such month *minus* the number of MWhs delivered during such month (the “**Monthly Shortfall**”).

If the sum of the Monthly Shortfall Make-up Amounts is negative The Purchaser Makeup amount shall be zero.

(b) The Seller shall deliver substitute RECs of the same vintage in an amount equal to the sum of the Monthly Shortfalls for such Operating Year (the “**Annual Shortfall**”), or in the event that such substitute RECs are not available for purchase, Seller shall credit Purchaser in an amount equal to the midpoint of the then-current over-the-counter [Tri-Qual or Pennsylvania solar] REC market, multiplied by the Annual Shortfall.

## **8.6 Statements; Payment**

Following the Commercial Operation Date, the Seller shall submit a statement to the Purchaser on or before the 15th day of each month showing the Metered Output delivered to the Purchaser at the Delivery Point in the prior month, the total amount due for electricity and RECs pursuant to Sections 8.1 and 8.2, and, in the statement for the last month of an Operating Year, any Purchaser Make-Up Amount payable with respect to such Operating Year. If any Purchaser Make-Up Amount is payable with respect to such prior month, such amount will be netted against the amount payable to the Seller. Each statement shall be accompanied by supporting documentation and calculations reasonably acceptable to the Purchaser. The Purchaser shall pay all undisputed amounts within 30 days after receipt of the related statement.

### **8.7 Costs and Charges**

The Seller will be responsible for all costs and charges imposed by third parties, if any, in connection with the production and delivery of the Metered Output, until electricity is delivered at the Delivery Point.

### **8.8 Registration of Renewable Energy Credits**

With respect to the RECs associated with the Metered Output, Seller shall register the System and the Metered Output to the City's account in the PJM GATS. The City will provide assistance reasonably requested by Seller.

### **8.9 Records; Audits**

(a) Seller shall keep and maintain at all times during the Term accurate books of account and records in accordance with generally accepted accounting principles, including such books as may be necessary or useful in performing or verifying any calculations made pursuant to this Agreement, or in verifying Seller's performance hereunder. All such records shall be retained by Seller for at least seven calendar years following the calendar year in which such records were created.

(b) Purchaser and its agents will have the right during normal business hours, to examine and copy the records maintained by the Seller to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made hereunder or to verify Seller's performance of its obligations hereunder. Such examination will be made at Purchaser's sole expense unless a material discrepancy is discovered, in which event the examination shall be at Seller's expense.

### **8.10 Additional Revenue**

If the Project qualifies for recovery of revenue requirements pursuant to PJM's schedule named "Reactive Supply and Voltage Control from Generation or Other Sources Service" in PJM's tariff, then any revenues received in respect of such PJM schedule, net of any costs and expenses incurred by Seller in connection therewith, shall be shared on an equal basis between the Parties.

### **8.11 Project Nameplate Capacity**

(a) If the Nameplate Capacity of the Project is greater than Purchaser's Nameplate Capacity, Seller may market and sell the energy, Environmental Attributes, RECs, and any other attributes generated by such increased capacity to any other Person free and clear of any obligations in this Agreement as long as in doing so, Seller's arrangements do not affect its ability to perform its obligations under this Agreement.

(b) At any time during the Term of this Agreement, Purchaser and Seller may agree, by written instrument executed by both Parties each in their sole discretion, on any additional terms upon which Seller may agree to install a battery storage system as part of the Project.

## **ARTICLE 9 TITLE; RISK OF LOSS; DELIVERY**

### **9.1 Title and Risk of Loss; Liens**

(a) Title to and risk of loss related to the Delivered Energy shall pass and transfer from Seller to Purchaser's Agent at the Settlement Point; provided that, for any energy Seller delivers to Purchaser's Agent prior to Commercial Operation pursuant to Section 2.4, title to and risk of loss of such energy shall pass from Seller to Purchaser's Agent at the Delivery Point.

(b) Seller shall make available to Purchaser's Agent the Delivered Energy free and clear of all liens, security interests, claims and encumbrances or any other interest therein or thereto by any Person arising prior to the Settlement Point; provided that, for any energy Seller delivers to Purchaser's Agent prior to Commercial Operation pursuant to Section 2.4, Seller shall make such energy available free and clear of all liens, security interests, claims and encumbrances or any other interest therein or thereto by any Person arising prior to the Delivery Point.

### **9.2 Delivery and Scheduling of Delivered Energy**

Seller shall initiate, and Purchaser or Purchaser's Agent shall confirm, an Internal Bilateral Transaction contract that designates the Source as \_\_\_\_\_ and the Sink as PECO Zone and the term of the transaction. For each day of the Term, Seller shall initiate Internal Bilateral Transaction schedules on a day-behind basis pursuant to PJM rules and manuals. Such schedules will contain the hourly amounts of electric energy produced by the Project on the previous day. Such Internal Bilateral Transaction will be designated as DAY-AHEAD in the pricing field and SELLER\_UNILATERAL in the confirmation field, unless Purchaser has provided Seller reasonable advance notice in writing of Purchaser's preferred designation, in which case Seller shall apply such Purchaser designations until otherwise notified by Purchaser in writing. Seller shall be responsible for annual renewals of bilateral transaction contracts as needed.

### **9.3 Reductions in Delivery**

The obligation of Seller to make available to Purchaser's Agent the Delivered Energy pursuant to this Agreement is on an as-generated, instantaneous basis and is contingent on the availability of and the amount of Metered Output generated and delivered to the Delivery Point by the Project. For the avoidance of doubt, and without limiting the foregoing, Seller shall be permitted to reduce deliveries of Delivered Energy and Metered Output during each period where any of the following is occurring:

- (a) any Planned Outage;
- (b) any Forced Facility Outage;
- (c) any Force Majeure Event that affects Seller's ability to provide Delivered Energy;
- (d) any failure by Purchaser's Agent to take Delivered Energy at the Settlement Point or a breach by Purchaser of this Agreement;
- (e) delivery is prevented by the terms of the Interconnection Agreement or applicable tariff; and
- (f) the occurrence of an Economic Curtailment event as provided in Section 9.5.

#### **9.4 Seller's Responsibility for Downstream Costs**

Seller shall be responsible for all interconnection, electric losses and transmission arrangements and costs required to make available Metered Output from the Project to the Delivery Point. Seller shall be responsible for the costs of scheduling Delivered Energy at the Settlement Point. Seller shall be responsible for all costs of interconnection of the Project and any associated network upgrades required by PJM or the Local Distribution Company.

#### **9.5 Economic Curtailment**

In order to mitigate the impact of a zero or negative LMP on the Purchaser with respect to hourly settlements between and among PJM, Seller and Purchaser, the Parties agree that in the event that the day-ahead LMP is negative at the Delivery Point, the Settlement Point or both (an “**Economic Curtailment**”) that ordinary deliveries of energy will be suspended, and the Parties will follow the procedures and make the payments specified in Exhibit G. The hours of such Economic Curtailment will constitute an “**Economic Curtailment Period,**” and any applicable payments calculated in accordance with Exhibit G will constitute the “**Economic Curtailment Make-Whole Payment.**”

#### **9.6 Market Disruption Event**

If the PJM LMP becomes unavailable, the Parties agree to good faith negotiation on a replacement formula for any calculations based on such LMP and an additional alternative process that reflects the benefits and burdens of this Agreement as closely as commercially practicable. If after 30 days of negotiating in good faith, the Parties are unable to determine a replacement PJM LMP, the Parties may pursue other means of dispute resolution in accordance with Section 10.8.

### **ARTICLE 10 FURTHER AGREEMENTS**

#### **10.1 Insurance**

The Seller shall maintain the insurance set forth in Exhibit I. Seller shall, at the request of Purchaser, deliver to Purchaser certificates of insurance evidencing that such insurance is in effect.

## 10.2 Indemnification

(a) The Seller agrees that it will protect, indemnify, and hold harmless the Purchaser Indemnified Persons from and against all liabilities, causes of action, damages, claims, demands, judgments, losses, penalties, costs (including, but not limited to, litigation and settlement costs and counsel and expert fees and expenses), expenses, suits, and actions (collectively, “**Claims**”), and will defend the Purchaser Indemnified Persons in any suit, including appeals:

- (1) brought by third parties to the extent occasioned wholly or in part by the act or omission or negligence or willful misconduct of the Seller or Seller’s agents, subcontractors, independent contractors, suppliers, employees or servants in connection with this Agreement;
- (2) arising from the construction or operation of the Project including liability from or based on the presence of any Hazardous Substances on the Site or any resulting contamination or adverse effects on the environment;
- (3) arising from any breach, violation or nonperformance of any covenant, term or condition of this Agreement to be performed or observed by Seller;
- (4) arising from any loss of data, data security breach, or any infringement or violation of any proprietary right (including, but not limited to, patent, copyright, trademark, service mark and trade secret); or
- (5) arising from or based on the Seller’s failure to comply with Applicable Standards.

(b) If a Purchaser Indemnified Person entitled to indemnification under this Agreement (an “**Indemnified Party**”) receives notice or has knowledge of any Claim that may result in a claim for indemnification hereunder, it shall promptly give notice of such Claim to the Seller (the “**Indemnifying Party**”) which notice must include a reasonably detailed description of the facts and circumstances relating to such Claim. Failure promptly to give such notice or to provide such information and documents will not relieve an Indemnifying Party of any obligation of indemnification it may have hereunder unless such failure materially diminishes the Indemnifying Party’s ability to respond to such Claim. The parties shall consult with each other regarding and cooperate in respect of the response to and the defense of any such Claim and the Indemnifying Party, upon its acknowledgment in writing of its obligation to indemnify the Indemnified Party, will be entitled to assume and control the defense or to represent the interests of Indemnified Party, which will include the right to select and direct legal counsel and other consultants, appear in proceedings on behalf of the Indemnified Party and to propose, accept or reject offers of settlement; provided, however, that the Indemnified Party will have the right to retain separate counsel in respect of such Claim at its own expense unless the retention of such counsel has been specifically

authorized by the Indemnifying Party.

### **10.3 Liquidated Damages Not a Penalty; Limitation of Liability**

(a) The definitions of the Purchaser Make-Up Amount and the Seller Make-Up Amount are each intended to provide a methodology for the calculation of actual damages to the party to which such amounts are owing and do not constitute a penalty. The parties acknowledge that a party's actual damages under the circumstances giving rise to the obligation to pay the Early Termination Fee or Delay Damages may be impractical and difficult to accurately ascertain and that the amount of such Early Termination Fee or Delay Damages constitutes fair and reasonable liquidated damages to be borne by such party in lieu of its actual damages.

(b) The payment by a party of an Early Termination Fee, Delay Damages, EOP Damages, Wage Damages, the Purchaser Make-Up Amount or the Seller Make-Up Amount (each, a "**Damage Payment**") will be such party's sole liability, and the receiving party's sole remedy, with respect to the circumstances giving rise to the obligation to make such payment.

(c) Notwithstanding any other provision of this Agreement, except for specified Damage Payments, neither party will be liable under this Agreement to the other party for any indirect, special, punitive, incidental or consequential damages, including loss of anticipated profits, whether in contract or tort (including the negligence or strict liability of the party whose liability has been so limited) or otherwise, except as specifically provided with respect to Damage Payments.

### **10.4 Force Majeure**

(a) If, as a result of a Force Majeure Event, either party is prevented from performing or is delayed in the performance of any of its obligations under this Agreement (other than an obligation to pay money), such prevention of or delay in performance will, subject to such party's satisfaction of the conditions precedent in subsection (b) below, be excused during any period in which such performance is prevented or delayed by an Force Majeure event, and for such period thereafter as necessary to correct the adverse effect of such Force Majeure event; provided that the failure to pay any amounts owed hereunder (whether accruing prior to or during the Force Majeure event) in a timely manner will not be excused by an Force Majeure event. Whenever either Party is required to commence or complete any action within a specified period, such period shall be extended by an amount equal to the duration of any event of Force Majeure occurring or continuing during such period; provided, however, that in no event will any Force Majeure event extend this Agreement beyond its Term.

(b) A party will be excused from performance hereunder as a result of Force Majeure event subject to the following conditions: the affected party shall (i) give the other party written notice within 48 hours of the commencement of the Force Majeure event, with details to be supplied within three (3) Business Days after the commencement of the Force Majeure event further describing the particulars of the occurrence of the Force Majeure event, and (ii) uses its commercially reasonable efforts to (A) mitigate the impact of the Force Majeure event on its performance, (B) pursue insurance and any other third-party reimbursement that may reasonably be expected to be obtained with respect to the Force Majeure event and (C) overcome the prevention of or delay in performance, and performance is resumed at the earliest practicable time after cessation of the Force Majeure event.

(c) If an affected party fails to substantially perform its obligations under this Agreement on account of a Force Majeure event for a period exceeding 180 days after the occurrence of such Force Majeure event, then the non-affected party shall have the right to terminate the Agreement after thirty (30) days written notice to the affected party; provided that such 180 day period may be extended, by the written agreement of both parties, for an additional 180 days if (i) such Force Majeure event is not remedied within the original 180-day period with reasonable due diligence; (ii) such Force Majeure event may reasonably be expected to be remedied within such additional 180-day period, and (ii) the affected party promptly undertakes to remedy such Force Majeure event and continues with reasonable diligence to effect such remedy within the additional 180-day period.

## **10.5 Release of Information**

(a) Public Announcements. Seller may not issue or make any public announcement, press release or statement relating to this Agreement or the System unless such public announcement, press release or statement is issued jointly by the Parties or, prior to the release of the public announcement, press release or statement, Seller furnishes Purchaser with a copy of such announcement, press release or statement, and obtains the approval of the Purchaser, such approval not to be unreasonably withheld, conditioned or delayed; provided that, notwithstanding any failure to obtain such approval, Seller shall be prohibited from issuing or making any such public announcement, press release or statement relating to this Agreement if it is necessary to do so in order to comply with Applicable Laws, legal proceedings or rules and regulations of any stock exchange having jurisdiction over Seller or its Affiliates. The Parties hereby agree to draft a joint public statement that can be used and issued by both Parties within 30 days of the Effective Date.

(b) Right to Know Law. The Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104, applies to this Agreement.

(1) The City or the Purchaser shall notify the Seller using the legal contact information

provided in this Agreement if the City or Purchaser needs the Seller's assistance in any matter arising out of the Right to Know Law (“**RTKL**”). The Seller shall notify the City and Purchaser in writing of any change in the name or the contact information within a reasonable time of the change.

- (2) Upon notification from the City or the Purchaser that the City or the Purchaser requires the Seller's assistance in responding to the RTKL request ("**Requested Information**"), Seller shall have five Business Days from receipt of notification from the City or the Purchaser to provide input on the release of the requested information as the City may request in order to comply with the RTKL.
- (3) The City's or the Purchaser's determination as to whether the Requested Information is a public record is dispositive of the question as between the Parties. The Seller agrees not to challenge the City's or the Purchaser's decision to deem the Requested Information a public record. If, upon review of the input provided by the Seller, the City or the Purchaser decides to release the Requested Information in response to the RTKL request, the Seller will not challenge or in any way hold the City or the Purchaser liable for such a decision.
- (4) The Seller agrees to abide by any decision to release a record of the City or the Purchaser to the public made by the Office of Open Records, or by the Pennsylvania courts. The Seller agrees to waive all rights or remedies that may be available to it as a result of the City's disclosure of Requested Information pursuant to the RTKL. The Seller's duties relating to the RTKL are continuing duties that survive the expiration of this Agreement and shall continue as long as the Seller has the Requested Information in its possession.

#### **10.6 Compliance With Standards**

The Seller shall conduct, or cause to be conducted, all Seller's Work and all other activities and obligations to be conducted by the Seller hereunder in accordance with Applicable Standards.

#### **10.7 Hazardous Substances**

As between the Purchaser and the Seller, the Seller will have the exclusive responsibility for the detection, monitoring, handling, removal, transport, storage and disposal of Hazardous Substances, and remediation of the Site.

#### **10.8 Dispute Resolution**

(a) Each of Seller or Purchaser shall appoint a representative to coordinate with the other Party the implementation of this Agreement (each a "**Representative**" and collectively the "**Representatives**"). If any dispute arises with respect to any Party's performance hereunder the Representatives shall meet to attempt to resolve such dispute, either in person or by telephone, within five (5) Business Days after the written request of either Representative. If the Representatives are unable to resolve such dispute within thirty (30) Days after their initial meeting (in person or by telephone), senior officers or executives of Purchaser and senior officers or executives of Seller shall meet, either in person or by telephone, within ten (10) Business Days



after either Representative provides written notice that the Representatives have been unable to resolve such dispute. If such senior officers or executives are unable to resolve such dispute within thirty (30) Days after their initial meeting (in person or by telephone) either Party may refer the dispute to a court pursuant to Section 18.2, which shall be the sole legally binding forum available to the Parties for resolution of a dispute hereunder.

(b) Each Party waives, to the fullest extent permitted by Applicable Law, any right it may have to a trial by jury in respect of any dispute, suit, action, claim or proceeding arising out of or relating to this Agreement. Each Party certifies that it has been induced to enter into this Agreement or instrument by, among other things, the mutual waivers and certifications set forth above in this Section 10.9.

(c) While any dispute is pending, the Parties shall continue to perform their obligations under this Agreement notwithstanding such dispute.

## **10.9 Engineer**

(a) The Engineer shall review and monitor construction progress; review proposed material changes, if any, to the specifications set forth in Exhibit B; review and ascertain for the Purchaser the validity of the Seller's written notice that a Force Majeure has occurred; attend and review the Performance Tests contained in Exhibit F to assure that they have been successfully completed or the extent to which they have not been satisfied. The fees of the Engineer shall be the sole expense of the Purchaser.

(b) The Engineer shall have reasonable access to the Facility Site during the construction period and the Seller shall review the design and construction of the Facility with the Engineer.

## **ARTICLE 11 DEFAULT AND REMEDIES; TERMINATION**

### **11.1 Events of Default**

Each of the following will be an "Event of Default" with respect to a party:

(a) such party fails to pay any amount due under this Agreement within five days of the date on which such amount was due and such failure continues for more than five days after receipt of notice from the other party;

(b) such party fails in any respect in the observance or performance of any covenant, condition or agreement of such party under this Agreement and such default continues for 30 days after written notice from the other party or such longer period (not to exceed an additional 60 days) as may be reasonably necessary to cure such failure; provided that, in the latter case, such party proceeds with all due diligence to cure such failure curable within such period of time;

(c) any representation or warranty made by such party in this Agreement was false or misleading in any respect when made;

(d) such party (i) commences a voluntary case under any bankruptcy law or any other law relating to bankruptcy, insolvency, reorganization, winding up, or composition or readjustment of debts; (ii) fails to controvert in a timely and appropriate manner, or acquiesces in writing to, any petition filed against the other party in an involuntary case under any bankruptcy law; (iii) applies for or consents to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property; (iv) admits in writing its inability, or is generally unable, to pay its debts as such debts become due; (v) makes a general assignment for the benefit of its creditors; (vi) takes any corporate or other action for the purpose of affecting any of the foregoing; or (vii) any involuntary bankruptcy proceeding is commenced against such party and is not dismissed or discharged for 60 days;

(e) such party fails to provide or maintain in full force and effect any insurance required by this Agreement;

(f) if Seller and/or any Affiliate and/or any assignee shall be in default under any lease or agreement with Purchaser or the City or any Department thereof, or hereinafter enters into with the City or any Department thereof;

(g) if Seller fails to comply with the Credit Support requirements of Section 4.1; and

(h) if Seller achieves Metered Output of less than 50 percent of the Annual Production Guarantee in any Operating Year.

As to Seller, the events specified in Sections 2.3(d), 6.6(b), and 14.1(e) and in Exhibit J under Prohibited Gifts – Subsection (c) and Certificate of Non-Indebtedness – Subsection (c) shall also be Events of Default.

## **11.2 Termination for an Event of Default**

If an Event of Default has occurred and is not cured within any applicable cure period set forth in Section 11.1, the party who is not in default (the “**Non-Defaulting Party**”) shall have the right, at any time when such Event of Default is continuing, to (a) designate by notice to the Defaulting Party a day, no earlier than the day such notice becomes effective and no later than twenty days after the day such notice becomes effective, on which this Agreement shall terminate (the “**Early Termination Date**”); (b) recover in connection with such termination a Termination Payment; and (c) subject to the express limitations set forth in Section 10.3, pursue any other right or remedy available under this Agreement or Applicable Law.

## **11.3 Termination Payment**

(a) Upon termination of this Agreement as a result of an Event of Default, the Non-Defaulting Party shall calculate an amount (the “**Termination Payment**”) equal to the aggregate of (i) the Market Value (as defined below) of this Agreement to the Non-Defaulting Party *plus* (ii) any costs incurred by the Non-Defaulting Party as a result of the termination of

this Agreement due to the Defaulting Party's default *plus* (iii) any unpaid amounts owing under this Agreement from the Defaulting Party to the Non-Defaulting Party which arose prior to the Early Termination Date, including with respect to a Seller Default any Purchaser Makeup Amount for the final Operating Year *minus* (iv) any unpaid amounts owing under this Agreement from the Non-Defaulting Party to the Defaulting Party *minus* (v) any amounts that the Non-Defaulting Party is able to recover pursuant to mitigation under Section 9.9. If the Termination Payment is a positive amount, the Defaulting Party shall pay the Termination Payment to the Non-Defaulting Party. If the Termination Payment is a negative amount, the amount of the Termination Payment shall be deemed to be zero and no payment shall be made to either Party except that all unpaid amounts (if any) shall be paid by the owing Party for any payments that are due but not yet made on the Early Termination Date.

(b) "Market Value" means:

- (1) where Seller is the Non-Defaulting Party, the product of (A) the excess, if any, of (1) the monthly weighted average of the Purchase Price, stated in \$/MWh, for the period from the Early Termination date to the Date that is 20 years from the Commercial Operation Date (the "**Defaulted Term**"), over (2) the monthly average of the Fair Market Price of electrical energy, for the Defaulted Term, determined in a commercially reasonable manner by the Seller, taking into account, among other valuations, a reasonable number of quotations from leading dealers in energy contracts, settlement prices on established, actively traded power exchanges and other bona fide third party offers, and other relevant market information, and (B) the amount of Default Energy; and
- (2) where Purchaser is the Non-Defaulting Party, the product of (A) the excess, if any, of (1) the monthly average of the Fair Market Price of electrical energy for the Defaulted Term, determined in a commercially reasonable manner by the Purchaser, taking into account, among other valuations, a reasonable number of quotations from leading dealers in energy contracts, settlement price on established, actively traded power exchanges and other bona fide third party offers, and other relevant market information, over (2) the monthly weighted average of the Purchase Price, stated in \$/MWh, for the Defaulted Term, and (B) the amount of Default Energy.

(c) For purposes of this Section 11.3, (i) if the Purchase Price cannot be reasonably calculated for the entire Defaulted Term, the Purchase Price for the Month immediately preceding the month in which the Early Termination Date occurs shall be used for purposes of calculating Market Value; and (ii) if the market price cannot be reasonably calculated in clause (b)(i)(A)(2) or clause (b)(ii)(A)(1) above for the Defaulted Term, the market prices that are determined by the Non-Defaulting Party shall be averaged, and such market price shall be used for purposes of calculating Market Value.

#### **11.4 Duty/Right to Mitigate**

(a) Each Party agrees that it has a duty to mitigate damages, and that it shall use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement, including taking such mitigation into account pursuant to Section 11.3(a)(v); *provided* that in no event shall the mitigating Party be required to pay any amounts to the Non-Defaulting Party in connection with such mitigation. The Parties shall exercise commercially reasonable efforts when purchasing or selling, as the case may be, Metered Output, RECs and related Environmental Attributes, and replacement energy at the Settlement Point in order to mitigate damages pursuant to this Section 11.4.

(b) Seller shall be entitled to reduce the amount of monetary damages payable by Seller pursuant to Section 11.3 as and to the extent Seller provides Purchaser's Agent with replacement energy at the Settlement Point, and replacement RECs delivered to the City's PJM GATS account.

(c) If the Non-Defaulting Party elects to terminate this Agreement following an Event of Default, the Non-Defaulting Party shall make Commercially Reasonable Efforts to purchase or sell replacement energy or Metered Output as the case may be, *provided* that such duty to mitigate (i) shall not be a condition to collecting the Termination Payment, and (ii) shall terminate on the Early Termination Date.

#### **11.5 Effect of Termination**

Upon termination of this Agreement, the obligations of the parties will cease; provided that any obligation for the payment of money, arising from the conduct of the parties pursuant to this Agreement prior to such termination and the parties' obligations will not be affected by such termination and will remain in full force and effect and the parties' rights and obligations under the following sections will remain in full force and effect:

- (a) Section 10.2 (relating to indemnification);
- (b) Section 10.3 (relating to limitation of liability);
- (c) Section 10.5 (relating to release of information);
- (d) Article 1 (relating to definitions);
- (e) this Article 11; and
- (f) Article 14 (miscellaneous provisions).

## ARTICLE 12 STANDARD CITY PROVISIONS

### 12.1 Standard City Provisions

Seller shall comply with the City's Standard Provisions set forth in Exhibit J.

### 12.2 Economic Opportunity Plan (EOP)

(a) Equal Opportunity Plan. Chapter 17-1600 of The Philadelphia Code requires the development and implementation of the EOP for certain classes of contracts and covered projects as defined in Section 17-1601. The EOP memorializes "Best and Good Faith Effort" commitments made by the Seller and agreed to by the City, acting through its Office of Economic Opportunity ("OEO"). Exhibit K includes the entire EOP completed for this project.

(b) Criminal Liability for Fraudulent or False Statements. Seller hereby verifies that all information submitted to the City in connection with the EOP is true and correct and is notified that the submission of false information is subject to the penalties of 18 Pa. C. S. §4904 relating to unsworn falsification to authorities, which may include payment of a fine of at least \$1,000 and a term of imprisonment of not more than two (2) years.

## ARTICLE 13 REGULATORY REQUIREMENTS AND INTERPRETATION

### 13.1 Nature of Agreement

This Agreement is entered into by the parties to document the terms and conditions upon which the Purchaser will purchase from Seller, and Seller will sell to Purchaser, energy output of the System and as such constitutes an agreement relating to the purchase and sale of electrical energy. This Agreement is not intended by the parties to constitute an agreement the characterization of which is governed by Section 7701(e) of the Internal Revenue Code. But if contrary to the parties' intentions, it is held to be so governed, the parties intend that this Agreement be treated as a "service agreement" rather than as a "lease" as provided in Sections 7701(e)(3)(A) of the Internal Revenue Code. Neither party shall take any position on any original or amended tax return filed with any taxing authority or take any position in any administrative or judicial proceeding relating thereto that is inconsistent with the intention of the parties that this agreement is not characterized as a lease of the equipment for income tax purposes or for any other purposes.

### 13.2 Forward Contract

The Parties acknowledge and agree that this Agreement and the transactions contemplated by this Agreement constitute a "forward contract" within the meaning of the United States Bankruptcy Code.

### 13.3 Seller is not a Utility

The Purchaser hereby acknowledges and agrees that for the purposes of this Agreement, the Seller is not a "utility" as such term is used in United States Bankruptcy Code Section 366 and agrees to waive and not to assert the applicability of the provision of United States Bankruptcy Code Section 366 in any legal or bankruptcy proceeding where the Purchaser is a debtor.

## ARTICLE 14 MISCELLANEOUS PROVISIONS

### 14.1 Assignment

(a) No Assignment Without Consent. Except as permitted in this Article 15, neither party shall assign this Agreement or any portion thereof, without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed; provided (i) at least thirty (30) days prior notice of any such assignment shall be given to the other party; (ii) any assignee shall expressly assume the assignor's obligations hereunder, unless otherwise agreed to by the other party, and no assignment, whether or not consented to, shall relieve the assignor of its obligations hereunder in the event the assignee fails to perform, unless the other party agrees in writing in advance to waive the assignor's continuing obligations pursuant to this Agreement; (iii) no such assignment shall impair any security given by Seller hereunder; (iv) before the Agreement is assigned by Seller, the assignee must first obtain such approvals, if any, as may be required by all applicable Governmental Authorities.

(b) Transfer to City or City Authorities. Seller's consent shall not be required for the Purchaser to assign this Agreement to the City or a municipal authority of the City.

(c) Collateral Assignment by Seller. Without the consent of the Purchaser Seller may, in its discretion, make a collateral assignment of this Agreement to any and all financing parties or grant any or all financing parties a lien or security interest in any right, title or interest in part or all of the System or any or all of Seller's rights under this Agreement for the purpose of the financing or refinancing of the System; provided, however, that Seller shall provide notice of each such assignment (including the identity of the assignee) no less than thirty (30) days prior to assignment and such assignment shall recognize the Purchaser's rights under this Agreement. In order to facilitate the obtaining of financing or refinancing of the System, the Purchaser shall cooperate with Seller and execute consents, agreements or similar documents with respect to a collateral assignment hereof ("**Lender Required Consents**") to any financing party as such financing party may reasonably request in connection with the financing or refinancing of the System, including an agreement to give notice to such financing parties of any default by Seller under this Agreement and to allow such financing parties to cure any such default during periods which are equal to and consistent with the cure periods Seller has under this Agreement, provided that the Purchaser shall be reasonably satisfied that any such consents, agreements or similar documents do not in any manner adversely affect its rights under this Agreement or impose material obligations on the Purchaser except with respect to providing any additional notice of default and opportunity to cure consistent with this Agreement. Seller shall reimburse the Purchaser for the expenses (including, without limitation, the reasonable fees and expenses of counsel) incurred by the Purchaser in the preparation, negotiation, execution and/or delivery of any documents requested by Seller, and provided by the Purchaser, pursuant to this Section 14.1(c).

(1) Seller Change of Control. Any direct or indirect Change of Control of Seller

(whether voluntary or by operation of law) shall require the prior written consent of the Purchaser, which shall not be unreasonably withheld. **Change of Control** means a change in either (1) fifty percent or more of the economic interests in Seller or (2) the ability to vote fifty percent or more of the controlling interests in Seller; provided that a Change of Control shall not occur with respect to any change in interests in a publicly traded company.

(d) Transfer Without Consent is Null and Void. Any sale, transfer, or assignment of any interest in the System or in this Agreement made without fulfilling the requirements of the Agreement shall be null and void and shall constitute an Event of Default.

**14.2 Notices**

(a) Unless otherwise provided herein, any notice, consent or waiver required or permitted hereunder must be in writing under this Agreement and mailed by certified mail, postage prepaid, returned receipt requested, or sent by overnight air courier service, or personally delivered to a representative of the receiving party, or sent by email to the following addresses:

<p>If to the Purchaser:</p> <p>Philadelphia Energy Authority  City Hall, Room 566  1400 JFK Boulevard  Philadelphia, PA 19107  Attn: President  Phone: (215) 686-4483  Email: <a href="mailto:eschapira@philaenergy.org">eschapira@philaenergy.org</a> and <a href="mailto:info@philaenergy.org">info@philaenergy.org</a></p> <p>With copies to:</p> <p>Office of Sustainability  One Parkway Building  1515 Arch Street, 13th Floor  Philadelphia, PA 19102  Attention: City Energy Manager  Email: <a href="mailto:Madeline.Schuh@phila.gov">Madeline.Schuh@phila.gov</a> and <a href="mailto:energy@phila.gov">energy@phila.gov</a></p> <p>City of Philadelphia Law Department  One Parkway Building  1515 Arch Street, 16th Floor  Philadelphia, PA 19102</p>	<p>If to the Seller:</p>
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Attention: Chief Deputy City Solicitor- Regulatory Law Unit Email: <a href="mailto:brendan.orourke@phila.gov">brendan.orourke@phila.gov</a> and <a href="mailto:james.kellett@phila.gov">james.kellett@phila.gov</a>	
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(b) Any notice shall be deemed to have been delivered to a party upon such party's receipt or refusal to accept.

**14.3 Binding Effect**

This Agreement will be binding upon, and inure to the benefit of, the parties and their respective successors and permitted assigns.

**14.4 Waivers**

No failure or delay by either party in exercising any right, power, privilege, or remedy hereunder will operate as a waiver thereof. No consent by either party to, or waiver of a breach by either party, whether express or implied, may be construed to operate as or constitute a consent to waiver of, or excuse of, any other or subsequent or succeeding breach by either party.

**14.5 Amendment**

No modification of this Agreement will be effective except by written amendment executed by the parties.

**14.6 Counterparts**

This Agreement may be executed in counterparts, which will together constitute one and the same agreement.

**14.7 Entire Agreement**

This Agreement shall constitute the entire agreement between the parties relating to the subject matter hereof and supersedes any other prior agreements, written or oral, between the parties concerning such subject matter.

**14.8 Third-Party Beneficiaries**

(a) The Parties acknowledge that the City is an intended third-party beneficiary of the Agreement; provided, however, that the City shall have no rights or remedies available to it to a greater extent than those available to Purchaser under this Agreement, and any exercise of such rights and remedies is subject to all limitations applicable to Purchaser as set forth in this Agreement. Notwithstanding the foregoing, nothing else in this Agreement shall provide any benefit to any Person, other than the Parties and the City, or entitle any third Person to any claim, cause of action, remedy or right of any kind, it being the intent of the Parties that this Agreement shall not be construed as a third-party beneficiary contract.



(b) The City's status as a third-party beneficiary, does not confer on Seller any rights under this Agreement against the City. Specifically, while the Agreement sets forth certain actions expected to be performed by the City, and failure to take such actions may constitute a default under the Agreement, Seller's sole recourse for any failure by the City is against PEA, which is responsible hereunder for the complete performance of (or compliance with, as applicable) any terms and conditions which it is required to cause the City to perform or comply with hereunder.

#### **14.9 Severability**

If any provision of this Agreement is, for any reason, determined to be invalid, illegal, or unenforceable in any respect, the parties shall negotiate in good faith and agree to such amendments, modifications, or supplements of or to this Agreement or such other appropriate actions as will, to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the parties as reflected herein, and the other provisions of this Agreement will, as so amended, modified, or supplemented, or otherwise affected by such action, remain in full force and effect.

#### **14.10 Governing Law; Venue**

This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the Commonwealth of Pennsylvania, without regard to its principles of conflicts of law. Any suit, action, claim, or legal proceeding involving, directly or indirectly, any matter arising out of or related to this Agreement, or the relationship created or evidenced thereby shall be brought exclusively in the United States District Court for the Eastern District of Pennsylvania or the Court of Common Pleas of Philadelphia County. It is the express intent of the Parties that jurisdiction over any lawsuit, action, claim, or legal proceeding shall lie exclusively in either of these two forums. The Parties further irrevocably consent and agree not to raise any objection to any lawsuit, action, claim, or legal proceeding which is brought in either of these two forums on grounds of venue or *forum non conveniens*, and the Parties expressly consent to the jurisdiction and venue of these two forums. Each party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement.

#### **14.11 Relationship of the Parties**

The Parties shall not be deemed to be in a relationship of partners or joint venturers by virtue of this Agreement, nor shall any party be an agent, representative, trustee or fiduciary of any other party. Neither Seller nor Purchaser shall have any authority to bind the other to any agreement. This Agreement is intended to secure and provide for the services of each party as an independent contractor. Neither the Seller nor its employees or subcontractors shall in any way represent that they are acting as employees, officials or agents of the Purchaser or the City.

#### **14.12 Counterparts**

This Agreement may be executed in one or more identical counterparts, each of which will be deemed an original, and all of which, together, will comprise a single agreement.

#### **14.13 Electronic Signatures**

The parties acknowledge and agree that notwithstanding any law or presumption to the contrary, a telefaxed, electronic signature or signature that is transmitted electronically of either party whether upon this Agreement or any related document shall be deemed valid and binding and admissible by either party against the other as if same were an original ink signature.

### Signatures

As evidence of their intent to be legally bound, the parties have signed this Agreement as of the Effective Date.

[Seller]

By:

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Name:

Title:

PHILADELPHIA ENERGY AUTHORITY

By:

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Name: Emily Schapira

Title: President and CEO

**EXHIBIT A: DESCRIPTION OF THE SITE**

## **EXHIBIT B: DESCRIPTION OF THE SYSTEM**

**EXHIBIT C: FORM OF SELLER GUARANTEE**  
**[If required]**

THIS GUARANTEE is made as of [Date] by [Seller Parent], a [insert company type] ("**Parent**") to and for the benefit of the Philadelphia Energy Authority (the "**Purchaser**"), and the City of Philadelphia (the "**City**").

**Background**

- A. [Seller], a [State] limited liability company ("**Seller**") and a wholly owned subsidiary of Parent, and the Purchaser have entered into a Power Purchase Agreement dated [date] (the "**Agreement**") and the City is a beneficiary of the Agreement.
- B. Parent is willing to guarantee, as set forth below, the performance of the Seller under the Agreement.
- C. The Purchaser would not enter into the Agreement unless Parent provided this Guarantee.
- D. Any term used herein defined in the Agreement shall have the meaning attributed to it in the Agreement.

NOW, THEREFORE, as an inducement to the Purchaser to enter into the Agreement, Parent agrees as follows:

- 1. Parent hereby unconditionally, irrevocably and absolutely guarantees to the Purchaser the performance by the Seller, and by any successor assign of the Seller, including any Affiliate, of all the Seller's obligations under the Agreement in accordance with the terms and conditions contained therein, and each and every other obligation or liability (both those now in existence and those that shall hereafter arise, including, without limitation, all reasonable costs and expenses of enforcement, including reasonable attorneys' fees) of Seller to the Purchaser arising pursuant to the Agreement, whether or not Seller shall hereafter be released or discharged from such obligations or liabilities (collectively, the "Obligations").
- 2. Under this Guarantee, Parent shall perform (or cause the Seller to perform) all Obligations in accordance with the terms and conditions of the Agreement.
- 3. Parent agrees that this Guarantee is an unconditional and continuing guaranty and will remain in full force and effect until all Obligations under the Agreement have been performed as set forth in the Agreement.
- 4. Parent waives protest and notice of dishonor or default. This is a guaranty of performance only, and not of collection.
- 5. Parent agrees that its Obligations under this Guarantee shall not be terminated, reduced, or affected in any way by reason of the assertion by Purchaser against Seller of any right or remedy

for the enforcement of the Obligations of Seller under the Agreement, or by reason of the waiver by Purchaser of, or its failure to enforce, any of the terms, covenants, or conditions of the Agreement, or the granting of any indulgence or extension of time to the Seller; and Parent waives notice of any of the foregoing and of default by the Seller in the performance of the Obligations. Parent further agrees that its Obligations hereunder shall apply with full force and effect to any amendment, renewal, or extension of the Agreement, even though made without notice thereof to Parent.

6. The respective Obligations of Parent to the Purchaser set forth in this Guarantee shall be absolute and unconditional, shall not be subject to any requirement that the Purchaser first enforce any remedies it may have against the Seller or any other person, or any requirement to seek to recover from Seller hereunder before proceeding against Parent hereunder, and shall not be subject to any claim of Parent against any other person including the Purchaser, other than a claim that the matter giving rise to the Purchaser claim is the subject of dispute resolution in good faith under the Agreement or in the courts of the United States or the State.

7. Parent agrees that its liability under this Guarantee shall be primary, direct and immediate, and that with respect to any right of action which shall accrue to the Purchaser under the Agreement, Purchaser may at its option proceed against Parent without having commenced any action or having obtained any judgment against the Seller.

8. Parent waives any and all defenses available to it in connection with the enforcement of the Guarantee, including, but not limited to, the right to require pursuit of any remedies against the Seller or any other person.

9. This Guarantee shall remain in full force and effect notwithstanding the institution by or against the Seller of any bankruptcy, reorganization, readjustment, receivership, insolvency or similar proceedings of any nature whatsoever, or the disaffirmance of the Agreement, in connection therewith.

10. Parent agrees to pay all costs and expenses, including reasonable attorneys' fees, incurred by Beneficiary in enforcing this Guarantee against Parent.

11. No failure or delay by the Purchaser in exercising any right, power or privilege hereunder or under the Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other right, power or privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided in the Agreement or by law or equity. No waiver, amendment, release or modification of this Guarantee shall be established by conduct, custom or course of dealing, but solely by an instrument in writing duly executed by the party against whom such waiver, amendment, release or modification is sought to be enforced.

12. Parent may not assign its Obligations hereunder, except to a successor by merger or consolidation or any transferee of all or substantially all of the properties of Parent.

13. Parent represents that as of the date hereof:

(a) Parent is a limited liability company duly organized and existing in good standing under the laws of Texas and has the corporate power and authority to enter into and perform its Obligations under this Guarantee.

(b) Parent has the power, authority, and legal right to enter into and perform this guarantee and the execution, delivery and performance hereof (i) have been duly authorized, (ii) have the requisite approval of all governmental bodies, (iii) will not violate any judgment, order, law or regulation applicable to Parent or any provisions of Parent's Articles of Organization or operating agreement, and (iv) do not (A) conflict with, (B) constitute a default under or (C) result in the creation of any lien, charge, encumbrance or security interest upon any assets of Parent under any agreement or instrument to which Parent is a party or by which Parent or its assets may be bound or affected.

(c) There are no pending or threatened actions or proceedings before any court or administrative agency which would materially adversely affect Parent's ability to perform its Obligations under this Guarantee.

14. This Guarantee shall be governed by the laws of the Commonwealth of Pennsylvania (the "State") and Parent hereby agrees to the service of process in the State for any claim or controversy arising out of this guarantee or relating to any breach and to submit to the exclusive jurisdiction of any court of competent jurisdiction of the Philadelphia County Court of Common Pleas over any suit, action or proceeding arising out of or relating to this Guaranty.

15. This Guarantee will be binding upon and enforceable against Parent, its successors, assigns, and legal representatives, and is for the benefit of the Purchaser, the City and their respective successors and assigns.

IN WITNESS WHEREOF, Parent has executed this instrument the day and year first above written

[Seller Parent]

By: \_\_\_\_\_  
Title:

**EXHIBIT D: FORM OF CITY POWER PURCHASE AGREEMENT**



**EXHIBIT E: FORM OF NOTICE TO PROCEED**

This Notice to Proceed is issued effective as of [Date] pursuant to that certain Power Purchase Agreement dated [Date] (the **Agreement**) between [Seller] (**Seller**) and the Philadelphia Energy Authority (**Purchaser**).

1. Seller and Purchaser each acknowledge that the conditions precedent to their respective obligations set forth in Article 2 of the Agreement have been satisfied or that they hereby waive any conditions not so satisfied [; provided (*Insert any further conditions agreed to as a condition of a party's waiver*)].

2. The Purchaser hereby directs the Seller to begin the installation of the System in accordance with the terms of the Agreement.

<b>Seller</b> [Seller] <hr/>	<b>Purchaser</b> Philadelphia Energy Authority By: _____ Title:
------------------------------------	--

## **EXHIBIT F: PERFORMANCE TESTS**

This exhibit is a placeholder for all testing and commissioning documents or results with respect to the System. This shall include tests and commissioning of:

1. The System;
2. System interconnection and metering to Local Distribution Utility [transmission/distribution] system and related Local Distribution Utility infrastructure; and
3. Any other required tests of the System to ensure that it can operate as designed and as permitted or regulated.

## EXHIBIT G: CURTAILMENT MAKE WHOLE PAYMENT

With respect to each Economic Curtailment Period, Seller will not deliver energy to Purchaser in accordance with Section 8.1, will not schedule internal bilateral transactions with Purchaser, and will pay Seller the amount the Economic Curtailment Make-Whole Payment (“ECMWP”), if any, determined as follows:

**A. Settlement Point LMP Less Than or Equal to Zero.**

For each hour in an Economic Curtailment Period when the Delivery Point LMP is greater than zero dollars, *and* the Settlement Point LMP is equal to or less than zero dollars: Purchaser will pay Seller an ECMWP equal to (a) Metered Output *multiplied* by (b) the positive difference between (i) the Contract Price *minus* (ii) the Delivery Point LMP during each such hour, *multiplied* by (c) the hours in the Economic Curtailment Period that meet the condition specified in this Section A; *provided that* if the amount calculated in clause (b) is less than zero dollars, then the ECMWP shall be zero.

$$\text{ECMWP} = ((a) \times ((b)(i) - (b)(ii))) \times (c)$$

**B. Delivery Point LMP Less Than or Equal to Zero.**

For each hour in an Economic Curtailment Period when the Delivery Point LMP is equal to or less than zero dollars and the Settlement Point LMP is greater than zero dollars: Purchaser will pay Seller an ECMWP equal to (a) Deemed Delivered Energy during each such hour, *multiplied* by (b) the Contract Price, *multiplied* by (c) the hours in the Curtailment Period that meet the condition specified in this Section B.

$$\text{ECMWP} = (((a)(i) + (a)(ii)) \times (b)) \times (c)$$

**C. Deemed Delivered Energy** for any hour in which production would not have otherwise been prevented by a Force Majeure event, means the expected hourly production set forth for such hour and month in Table 1 of Exhibit H [*multiplied* by the annual degradation factor for the Operating Year in which the hour occurs set forth in Table 2 of Exhibit H.] [For Solar]. If a Force Majeure event would have prevented production for such hour, the Deemed Generated Energy is zero.

**D. Delivery Point LMP and Settlement Point LMP each Less Than or Equal to Zero.**

For each hour in an Economic Curtailment Period when the Delivery Point LMP and the Settlement Point LMP are each equal to or less than zero dollars, there will be no Economic Curtailment Make-Whole Payment.

## EXHIBIT H: EXPECTED PRODUCTION AND PRODUCTION GUARANTEE

The following terms have the meanings set forth below:

**Expected Monthly Production** for any month means the amount set forth in Table 1 below as the total production for hours in such month.

**Monthly Delivery Guarantee** for any month in any Operating year means (a) (i) the Expected Monthly Production for such month minus (ii) the number of hours of production excused by Force Majeure events in such month, [multiplied by (b) [for solar] the annual degradation factor for such Operating Year set forth in Table 2 below], multiplied by (c) 0.9.

$$((a)(i) + (a)(ii)) \times (b) \times (c)$$

**Expected Annual Production** for an Operating Year means (a) the sum of the Expected Monthly Production amounts for such Operating Year [multiplied by (b) the annual degradation factor for such Operating Year set forth in Table 2 below.] [For Solar]

**Annual Delivery Guarantee** for an operating year means the sum of the Monthly Delivery Guarantees for such Operating Year.

**TABLE 1 MONTHLY PRODUCTION**

Average MW/Hour of [Solar/Wind] Production												
Hour	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1												
2												
3												
4												
5												
6												
7												
8												
9												
10												
11												
12												
13												
14												
15												
16												
17												
18												
19												
20												
21												
22												
23												
24												
<b>Total</b>												

**TABLE 2 ANNUAL DEGRADATION FACTOR**

<b>Operating Year</b>	<b>Degradation Factor</b>
Year 1	
Year 2	
Year 3	
Year 4	
Year 5	
Year 6	
Year 7	
Year 8	
Year 9	
Year 10	
Year 11	
Year 12	
Year 13	
Year 14	
Year 15	
Year 16	
Year 17	
Year 18	
Year 19	
Year 20	
Year 21	
Year 22	
Year 23	
Year 24	
Year 25	

## **EXHIBIT I: SELLER'S INSURANCE**

Insurance. Unless otherwise approved by the City's Risk Management Division in writing, the successful respondent (hereinafter "Provider") shall, at its sole cost and expense, procure and maintain, or cause to be procured and maintained, in full force and effect, the types and minimum limits of insurance specified below, covering Provider's performance of the Services and the delivery of the Materials. Provider shall procure, or cause to be procured, all insurance from reputable insurers admitted to do business on a direct basis in the Commonwealth of Pennsylvania or otherwise acceptable to the City. All insurance herein, except Professional Liability insurance, shall be written on an "occurrence" basis and not a "claims-made" basis. In no event shall Provider perform any Services or other work until Provider has delivered or caused to be delivered to the City's Risk Management Division the required evidence of insurance coverages. All insurance coverages shall provide for at least thirty (30) days prior written notice to be given to the Purchaser and the City in the event coverage is materially changed, canceled, or non-renewed. The Purchaser and the City, their officers, employees, and agents, shall be named as additional insureds on the General Liability and Umbrella Liability Insurance policies. Provider shall also deliver or cause to be delivered to the Purchaser and the City an endorsement stating that the coverage afforded the Purchaser and the City and their officers, employees, and agents, as additional insureds, will be primary to any other coverage available to them and that no act or omission of the Purchaser or City, its officers, employees or agents shall invalidate the coverage.

(a) Workers' Compensation and Employers' Liability.

(1) Workers' Compensation: Statutory Limits

(2) Employers' Liability:

Bodily Injury by Accident - \$100,000 Each Accident;

Bodily Injury by Disease - \$500,000 Policy Limit

Bodily Injury by Disease - \$100,000 Each Employee

(b) General Liability Insurance.

(1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability; \$1,000,000 advertising injury; \$2,000,000 general aggregate and \$1,000,000 aggregate for products and completed operations. The City may require higher limits of liability if, in the City's sole discretion, the potential risk warrants.

(2) Coverage: Premises operations; blanket contractual liability; personal injury liability; products and completed operations; independent contractors, employees and volunteers as additional insureds; cross liability; and broad form property damage (including completed operations).

(c) Automobile Liability Insurance.

(1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.

(2) Such requirement shall be \$5,000,000 per occurrence for vehicles with access to the airfield.

(3) Coverage: Owned, non-owned, and hired vehicles.

(d) Umbrella Liability Insurance.

(1) Limit of Liability totaling \$5,000,000 per occurrence when combined with insurance required under (a), (b) and (c) above for the period of construction and installation of the PV system.

(2) Limit of Liability totaling \$3,000,000 per occurrence when combined with insurance required under (a), (b), and (c) above after the system Commercial Operation Date.

(e) Professional Liability Insurance.

(1) Limit of Liability: \$2,000,000 with a deductible not to exceed \$100,000.

(2) Coverage: Errors and omissions.

(3) Professional Liability Insurance may be written on a claims-made basis provided that coverage for occurrences happening during the performance of the Services required under this Contract shall be maintained in full force and effect under the policy or "tail" coverage for a period of at least two (2) years after completion of the Services.

(f) All Risk Property Insurance.

(1) Subcontractor is responsible for any damage to their work, materials, equipment, tools, etc. It is the responsibility of the Subcontractor to insure at Subcontractor's sole expense. In the event that a crane will be required to be supplied by Subcontractor on this project, Subcontractor shall maintain Contractors Equipment Coverage in connection with that crane including insurance coverage for expenses to re-erect the crane and Rental Reimbursement and Expediting Expense Coverages.

(2) In addition, the Subcontractor waives all rights of recovery and shall cause its Insurers to waive their rights of subrogation against City of Philadelphia, Department of Aviation and [General Contractor, Construction Manager, Prime Contractor, Owner, all the Additional Insureds] and any of their agents and employees for damages caused by fire or other causes of loss to the extent covered by property insurance applicable to the work or any other type



of property insurance (such as Contractor's Equipment, Installation Floater) maintained by Subcontractor.

(g) Self-Insurance. Provider may not self-insure any of the coverages required under the Contract without the prior written approval of the Responsible Official and the City's Risk Manager. In the event that Provider wants to self-insure any of the coverages listed above, it shall submit to the Responsible Official Purchaser and the City's Risk Management Division, prior to Provider's commencement of Services or delivery of any Material hereunder, a certified copy of Provider's most recent audited financial statement, and such other evidence of its qualifications to act as self-insurer (e.g. state approval) as may be requested by the Purchaser or the City's Risk Manager. In the event the City grants such approval, Provider understands and agrees that the Purchaser and the City, their officers, employees and agents shall be entitled to receive the same coverages and benefits under Provider's self-insurance program that they would have received had the insurance requirements set forth above been satisfied by a reputable insurer admitted and duly authorized to do business in the Commonwealth of Pennsylvania or otherwise acceptable to the City. If at the time of commencement of the Term of the Contract, Provider self-insures its professional liability or workers' compensation and employers' liability coverage, Provider may, in lieu of the foregoing, furnish to the City a current copy of the state certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate. The insurance (including self-insurance) requirements set forth herein are not intended and shall not be construed to modify, limit or reduce the indemnifications made in the Contract by Provider to the Purchaser and the City, or to limit Provider's liability under the Contract to the limits of the policies of insurance (or self-insurance) required to be maintained by Provider hereunder.

(h) Evidence of Insurance Coverage. Certificates of insurance evidencing the required coverages must specifically reference the Agreement for which they are being submitted. The original certificate of insurance must be submitted to the City's Risk Manager at the following address:

City of Philadelphia  
Finance Department  
Division of Risk Management  
1515 Arch Street, 14<sup>th</sup> Floor  
Philadelphia, PA 19102-1579

risk.management@phila.gov  
(215) 683-1719

## EXHIBIT J: CITY STANDARD PROVISIONS

### Defined Terms

Capitalized terms used in this Exhibit and not defined herein shall have the meanings ascribed to them in the Agreement. Reference in this Exhibit to the “City” means the City of Philadelphia, in its municipal capacity.

### Prohibited Gifts

(a) Pursuant to Executive Order 10-16, no City officer or employee may accept or receive payment, subscription, advance, forbearance, rendering or deposit of money, services, entertainment, invitation, food, drink, travel, lodging or anything of value, unless consideration of equal or greater value is conveyed in return, from any person who, at time or within twelve (12) months preceding the time a gift is received:

1. is seeking, or has sought, official action from the officer or employee;
2. has operations or activities regulated by the officer’s or employee’s agency, department, office, board or commission, or, in the case of gifts to members of the Mayor’s Cabinet, has operations or activities that are regulated by any agency, department, office, board or commission within the Executive and Administrative branch; or
3. has a financial or other substantial interest in acts or omissions taken by the officer or employee, which the officer or employee is able to substantially affect by his or her official action.

(b) Additionally, no City officer or employee shall accept or receive a gift of any value from any person that engages in lobbying on behalf of a principal for economic consideration, and is registered as such, pursuant to the requirements of Section 20-1202 of The Philadelphia Code, including any attorney at law while engaged in lobbying.

(c) Seller understands and agrees that if it offers anything of value to a City official or employee under circumstances where the receipt of such item would violate the provisions of this Executive Order, Seller shall be subject to sanctions with respect to future City contracts. Such sanctions may range from disqualification from participation in a particular contract to debarment, depending on the nature of the violation. Furthermore, if Seller offers or gives, directly or indirectly, anything of value to any City official or employee in violation of Executive Order 10-16, it will constitute a default by Seller and entitle the City to exercise any rights or remedies available to it under the Agreement, at law and in equity.

(d) All City employees presented with gifts or gratuities as indicated in Executive Order 10-16 have been instructed to report these actions to the appropriate authorities. If Seller is solicited for gifts or gratuities by City employees, Seller is urged to report these incidents to the appropriate authorities, including but not limited to, the City’s Office of the Inspector General.

**Executive Order 7-14: Office of the Inspector General and Duties of Those Involved in Transactions with the City**

Seller shall:

1. report to the City's Office of Inspector General (the "OIG") knowledge of violations subject to investigation by the OIG pursuant to Philadelphia Mayoral Executive Order 7- 14;
2. cooperate fully with representatives of the OIG by providing complete and accurate information as well as the necessary assistance in matters under investigation;
3. keep conversations and contact with the OIG confidential, except and to the extent the OIG may authorize disclosure; and
4. instruct its employees that under no circumstances shall any employee or official take or threaten to take any action of any sort in an attempt to prevent anyone from providing to a City official information regarding conduct that is the subject of Section 3 of Executive Order 7- 14, or providing any information to, or cooperating with, the OIG, or retaliate against anyone for doing so or against anyone who is about to do so.

**Certification of Non-Indebtedness**

(a) Seller hereby certifies and represents to the City that Seller and Seller's direct organizational affiliate(s) and/or subsidiaries, if any, are not currently indebted to the City, and will not during the Term of the Agreement and any extension or renewal thereof be indebted to the City, for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District of Philadelphia), liens, judgments, fees or other debts for which no payment plan satisfactory to the City has been established. In addition to any other rights or remedies available to the Purchaser or the City at law or in equity, Seller acknowledges that any breach or failure to conform to this certification may, at the option and direction of the City, result in the withholding of payments otherwise due to Seller in connection with the Agreement and, if such breach or failure is not resolved to the City's satisfaction within a reasonable time frame specified by the City in writing, may result in the offset of any such indebtedness against said payments otherwise due to Seller and/or the termination of the Agreement for default (in which case Seller will be liable for all excess costs and other damages resulting from the termination).

(b) Seller shall require all contractors and subcontractors performing repairs and/or alterations on the Site or in connection with the Agreement to sign a certification of non-indebtedness in favor of the City, which certification shall include the following provisions and Seller shall cooperate with the City in exercising the rights and remedies described below or otherwise available at law or in equity:

"\_\_\_\_\_(“Subcontractor”) hereby certifies and represents that Subcontractor and Subcontractor's parent company(ies) and their subsidiary(ies), are not currently indebted to The City of Philadelphia (“City”), and will not at any time during the term of this Agreement, be indebted to the City, for or on account of any delinquent taxes (including, but not limited to, taxes

collected by the City on behalf of the School District of Philadelphia), liens, judgments, fees or other debts for which no written payment plan satisfactory to the City has been established. In addition to any other rights or remedies available at law or in equity, Subcontractor acknowledges that any breach or failure to conform to this certification may, at the option and direction of the City, result in the withholding of payments otherwise due to Subcontractor for services rendered in connection with the Agreement and, if such breach or failure is not resolved to the City's satisfaction within a reasonable time frame specified by the City in writing, may result in the offset of any such indebtedness against said payments otherwise due to Subcontractor and/or the termination of the Agreement for default (in which case Subcontractor will be liable for all excess costs and other damages resulting from the termination).

(c) Any breach or failure to conform to the aforesaid certifications shall constitute a default by Seller and entitle the City to exercise any rights or remedies available to it under the Agreement, and at law and in equity.

### **Fair Practices**

Seller agrees to comply with the provisions of the Fair Practices Ordinance, Chapter 9-1100 of The Philadelphia Code (as it may be amended from time to time, the "Code"), which prohibits, inter alia, denial of or interference with the employment opportunities of an individual based upon the individual's race, ethnicity, color, sex (including pregnancy, childbirth, or a related medical condition), sexual orientation, gender identity, religion, national origin, ancestry, age, disability, marital status, familial status, genetic information, or domestic or sexual violence victim status.

### **Application of Prevailing Wage Rates and Rules to Project Work**

The contract will require that employees of contractors and their subcontractors performing project building or construction work, including repair, alteration and remodeling, and all offsite fabrication of sheet metal ducts or similar sheet metal products for heating, ventilating, and air-conditioning systems produced as non-standard items for such work be paid at least the applicable prevailing wages for the respective occupational classifications designated in Section 17-107 of the Philadelphia Code, Contractors: Labor-Management Relationships. All requirements of Sections 17-107(2),(3),(4),(5),(6),(7),(8) and (9) shall be deemed applicable pursuant to the contract to the contractors and their subcontractors. Contractors and their subcontractors are required to submit weekly certified payroll records to the City's Labor Standards Unit ("LSU") through an electronic system, LCP Tracker, or as directed by the Labor Standards Unit. Failure to pay prevailing wage, as applicable, or to submit certified payroll records is a substantial breach of the contract and may be subject to fines and penalties as prescribed by Sections 17-107(8) and (9) of The Philadelphia Code. Those provisions may include withholding from any sums due to the Contractor under the Contract so much as may be necessary to pay the employees the difference between the wages required to be paid hereunder and the wages actually paid to such employees, and the City may make such payments directly to the appropriate employees.

### **No Alcohol Advertisements**

Seller shall not place (or permit placement) on the Site any advertisements for alcohol.

### **Nondiscrimination**

(a) In accordance with Chapter 17-400 of the Code, Seller agrees that its payment or reimbursement of membership fees or other expenses associated with participation by its employees in an exclusionary private organization, insofar as such participation confers an employment advantage or constitutes or results in discrimination with regard to hiring, tenure of employment, promotions, terms, or privileges or conditions of employment on the basis of race, color, sex, sexual orientation, religion, national origin or ancestry, constitutes a substantial breach of the Agreement entitling the City to all rights and remedies provided in the Agreement or otherwise available at law or in equity.

(b) Seller agrees to include subparagraph (a) of this Section, with appropriate adjustments for the identity of the parties, in all subcontracts which are entered into for work to be performed pursuant to the Agreement.

(c) Seller further agrees to cooperate with the Commission on Human Relations (the "Commission") in any manner which said Commission deems reasonable and necessary for the Commission to carry out its responsibilities under Chapter 17-400 of the Code, and failure to do so constitutes a substantial breach of the Agreement entitling the City to all rights and remedies provided in the Agreement or otherwise available at law or in equity.

(d) Seller covenants and agrees that in order to confirm the assurance required by the City by Federal non-discrimination laws, statutes and regulations, including, but not limited to, Title VI of the Civil Rights Act of 1964, as amended, (a) no person on the grounds of race, religion, color, national origin, sex, age or disability shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of any space leased to it hereunder and (b) Seller shall use the Site in compliance with all other requirements imposed by or pursuant to 49 C.F.R. Part 21 and Title VI of the Civil Rights Act of 1964, and as said regulations may be amended. Noncompliance with this clause will constitute a material breach of the Agreement; therefore, in the event of such noncompliance, Seller hereby authorizes the City to take such action as the Federal government may direct to enforce this covenant, and Seller also authorizes the Federal government to take appropriate action to enforce compliance, including the right to seek judicial enforcement.

(e) To the extent required by law, Seller will undertake any affirmative action program required by 14 C.F.R. Part 152, Subpart E, as amended from time to time to ensure that no person is excluded from participating in any employment, contracting, or leasing activity on the grounds of race, religion, color, national origin or sex. Seller agrees that no person may be excluded on these grounds from participating in or receiving the services or benefits of any program or activity covered by the regulation. Seller will require its covered sub-organizations to provide assurance that they will also undertake affirmative action programs and require assurance from their sub-organizations, as required by 14 C.F.R. Part 152.

### **Compliance with the Philadelphia 21<sup>st</sup> Century Minimum Wage and Benefits Ordinance**

A. If Seller, any sub-tenant, or any subcontractor is an Employer subject to the requirements of Chapter 17-1300, as that term is defined in Section 17-1302 and described in Section 17-1303 of the Code, then, absent a waiver, during the term of the Agreement and any extension thereto, in addition to any applicable Commonwealth and Federal requirements, it shall provide its respective covered Employees with at least the minimum wage standard and minimum benefits standard and notice thereof, as required under applicable law. A summary of the current requirement is as follows:

1. Term of Agreement and Effective Date of Minimum Wage Rates.

(a) For agreements with a term of one year or less, the rate applicable on the effective date of the agreement is the rate for the entire term of the agreement.

(b) For renewals and amendments with a term of one year or less, the rate applicable on the effective date of the renewal or amendment is the rate for work performed during the term of the renewal or amendment and remains the rate throughout the term of the renewal or amendment.

(c) For leases, renewals, and amendments with a term longer than one year, the applicable rate on the effective date of the agreement shall apply until the next June 30. On the next July 1, the new rate effective on that July 1 date shall apply during the period from July 1 through the following June 30. Each July 1, the rate may increase.

2. Minimum Wage Rates. Absent a waiver, an Employer subject to Chapter 17-1300 shall pay each Employee an hourly wage, excluding benefits, equal to:

Effective Date between July 1, 2020, and June 30, 2021, \$13.75;

Effective Date between July 1, 2021, and June 30, 2022, \$14.25;

Effective Date between July 1, 2022, and June 30, 2023, \$15.00; and

Starting July 1, 2023, and thereafter, \$15.00 multiplied by the CPI Multiplier, provided that the minimum wage shall not be less than the previous year's minimum wage. The CPI Multiplier is calculated annually by the City's Director of Finance by dividing the most recently published Consumer Price Index for all Urban Consumers All Items Index for Philadelphia, Pennsylvania, by the most recently published Consumer Price Index for all Urban Consumers (CPI-U) of each calendar year. The then-current minimum hourly wage applicable will be posted on the City's website.

3. Minimum Benefits. Absent a waiver, if Employer is subject to Chapter 17- 1300, to the extent the employer provides health benefits to any of its employees, the Employer shall provide each full-time, non-temporary, non-seasonal covered Employee with health benefits at least as valuable as the least valuable health benefits that are provided to any other full-time employees of the Employer. The Employer shall also provide to each covered Employee at least the minimum number of earned sick leave days required by Section 17-1305(2) of the Code.

B. Absent a waiver, if Seller is subject to Chapter 17-1300, Seller shall promptly provide to the City all documents and information as the City may require verifying its compliance and that of all sub-tenants and subcontractors who are also Employers with the requirements of Chapter 17-1300. Each covered Employer shall notify each affected Employee what wages and benefits are required to be paid pursuant to Chapter 17-1300.

C. Absent a waiver, if Seller is subject to Chapter 17-1300, Seller shall take such steps as are necessary to notify its covered sub-tenants and subcontractors of the requirements of this section and to cause such covered sub-tenants and subcontractors to notify lower-tier covered sub-tenants and subcontractors of these requirements, including, without limitation, by incorporating this section, with appropriate adjustments for the identity of the parties, in its sub-leases and subcontracts with such covered sub-tenants and subcontractors, respectively. A Seller, sub-tenant, or subcontractor at any tier subject to Chapter 17-1300 that fails to comply with these provisions may, after notice and a hearing before the Director of Finance or such other officer or agency designated by the Mayor, be suspended from receiving financial assistance from the City or from bidding on and/or participating in future City contracts for up to three (3) years. City Council may also initiate a similar suspension or debarment process. Such suspension or debarment shall be in addition to any of the other sanctions or remedies set forth in Chapter 17-1300 or the Agreement.

D. The failure of a Seller, sub-tenant, or subcontractor at any tier subject to Chapter 17-1300 to comply with these provisions shall constitute a substantial breach of the Agreement entitling the City to all rights and remedies provided in the Agreement or otherwise available at law or in equity.

E. Seller's covered Employees shall be deemed third-party beneficiaries of Seller's representation, warranty, and covenant to the City under this section only, and the covered Employees of a sub-tenant or subcontractor at any tier that is also a covered Employer shall be deemed third-party beneficiaries of their Employer's representation, warranty, and covenant to Seller or such sub-tenant or subcontractor at any tier, as the case may be, under this section.

F. The City may grant a partial or total waiver of Chapter 17-1300 based on specific stipulated reasons elaborated in Section 17-1304 of the Code.

**EXHIBIT K: ECONOMIC OPPORTUNITY PLAN**



## EXHIBIT L-1: PREVAILING WAGE SCHEDULE

### Prevailing Wages

- a. All employees performing project building or construction work, including repair, alteration and remodeling, and all offsite fabrication of sheet metal ducts or similar sheet metal products for heating, ventilating, and air-conditioning systems produced as non-standard items for such work under the Agreement shall be paid at least the applicable prevailing wages for the respective occupational classifications designated, as set forth in the minimum wage schedule attached as Attachment 1, and shall be given at least the applicable presently prevailing working conditions during the entire period of work under the Agreement. Such working conditions are those which are given to employees pursuant to a bona fide collective bargaining agreement for the applicable craft, trade or industry in the Philadelphia area on the date the Agreement is entered into. The occupational classifications for all employees under the Agreement shall be only the specific categories of jobs within a given craft, trade or industry for which a separate hourly wage rate for the Philadelphia area is determined by the Secretary of Labor of the United States, in accordance with the provisions of the Davis-Bacon Act, and which are set forth in the applicable schedule attached as Attachment 1. In the event that the Seller believes that work under the Agreement should be performed by employees in occupational classifications omitted from the schedule attached as Attachment 1, it shall so advise the Managing Director's Office (the "MDO"), Labor Standards Division, which shall remedy the omission if it agrees.
- b. The Purchaser may withhold from any sums due to the Seller under the Agreement so much as may be necessary to pay the employees the difference between the wages required to be paid under this section and the wages actually paid to such employees, and the Purchaser or the City may make such payments directly to the appropriate employees.
- c. The Seller shall require all contractors to comply with and be bound by all of the provisions of this section and of Section 17-107 of The Philadelphia Code, and the Seller shall insert the requirements of Section 17-107 in all subcontracts.
- d. The Seller, and the Seller's contractors and subcontractors, shall keep an accurate record preserved on employee time sheets or time cards showing the name, address, social security number, occupational classification, wages and other benefits paid or provided and number of hours worked for each employee assigned to city-work (as "city work" is defined in Section 17-107(1)(b) of The Philadelphia Code), and such record shall be preserved at the current place of business of the employer for two (2) years from the date of creation. The Seller shall maintain and make his or her accounting and employment records and records relating thereto available for inspection by authorized representatives of the City, at all reasonable hours, and shall permit such representatives to interview employees during the hours on the job, all without prior notice. Neither the Seller nor any contractor shall allow any employee or other person to interfere with any such inspection or interview.
- e. The Seller and all contractors and subcontractors performing work shall, upon request of the City, file with the MDO, Labor Standards Division a certified statement setting forth the name,

address, occupational classification, wages and other benefits paid or provided and number of hours worked with respect to each employee performing work. Such statement shall be made weekly for each preceding weekly period. The certification shall affirm that the statement is correct and complete, that the wages set forth therein are not less than those required by the Agreement for work and that the occupational classification set forth for each employee conforms with the work performed.

f. Nothing herein shall preclude the payment by the Seller of wages at rates higher than those specified as the minimum in the Attachment 1. However, no increase in any Purchase Price shall be allowed or authorized on account of the payment of wages in excess of those so specified, or on account of wage increases granted hereafter.

g. The minimum wages required hereby shall be paid unconditionally without any subsequent deduction or rebate of any kind except in accordance with Applicable Law governing payroll deductions for taxes, benefits and collective bargaining charges. Any assignment of wages by an employee for the direct or indirect benefit of the Seller shall constitute a violation of this paragraph; and any purported release of rights under Section 17-107 of The Philadelphia Code by an employee shall be void and of no effect.

h. The parties shall refer to Section 17-107 of The Philadelphia Code, and to the regulations to be issued from time to time by the MDO, Labor Standards Division, for further information concerning the administration of the foregoing requirements. In addition, it shall be the responsibility of the Seller and its contractors to inform themselves as to all prevailing working conditions, including, without limitation, length of work day and work week, overtime compensation, and holiday and vacation rights.

**ATTACHMENT 1 TO EXHIBIT L: PREVAILING WAGES**

**EXHIBIT L-2: WAGE SCHEDULE FOR PROJECTS OUTSIDE OF THE CITY OF  
PHILADELPHIA**