**2021-2023 IRP Procurement Track RFO Model Agreement**

**ENERGY EFFICIENCY RESOURCE PURCHASE AGREEMENT**

*between*

***[Name of SELLER]***

*and*

**San Diego Gas & Electric Company**

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**ENERGY EFFICIENCY RESOURCE PURCHASE AGREEMENT**

**BY AND BETWEEN**

***[SELLER]***

**AND**

**SAN DIEGO GAS & ELECTRIC COMPANY**

This Energy Efficiency Resource Purchase Agreement, together with its exhibits (the “Agreement”) is entered into by and between San Diego Gas & Electric Company, a California corporation (“SDG&E”), and *[Seller]*, a *[Seller’s business registration]* (“Seller”), as of *[Date]* (“Execution Date”). SDG&E and Seller are referred to herein individually as a “Party” and collectively as “Parties.”

Whereas, the Seller has agreed to deliver a Project (as defined below) by installing Measures at one or more End-Use Customer Sites over the Term (as defined herein) that will result in improved energy efficiency and energy and capacity reductions at each such Site.

Whereas, SDG&E has agreed to pay Seller for completing, installing, and operating the Project and ensuring that it remains in place.

NOW, THEREFORE, in consideration of these recitals and the agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, agree as follows.

# DEFINITIONS

**1.1 General**

As used in this Agreement, the following terms shall have the meanings set forth below:

“Acceptable Annual Inspection Report” means an Annual Inspection Report received by SDG&E of which SDG&E has provided Notice to Seller that it has accepted (or of which SDG&E is deemed to have accepted) pursuant to Section 2.5(c)(iii).

“Acceptable Pre-Delivery Period Inspection Report” means a Pre-Delivery Period Inspection Report received by SDG&E of which SDG&E has provided Notice to Seller that it has accepted (or of which SDG&E is deemed to have accepted) pursuant to Section 2.5(b)(iii).

“Affiliate” means, with respect to a Party, any entity that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with that Party. For this purpose, “control” of any entity or person means ownership of a majority of the voting power of the entity or person.

“Affordable Care Act” has the meaning set forth in Section 6.3(a).

“Annual Inspection” has the meaning set forth in Section 2.5(c)(i).

“Annual Inspection Report Deadline” has the meaning set forth in Section 2.5(c)(ii).

“Annual Energy Savings” means, in respect of a Contract Year, the annual reduction in energy of the Project during such Contract Year, as measured and calculated in accordance with Exhibit B.

“Annual Peak Capacity Savings” means, for each installed Measure, the expected annual reduction in peak electrical load capacity for such measure on the Inspection Date of the applicable Inspection Report, as measured and calculated in accordance with Exhibit B.

“Annual True-Up Payment” has the meaning set forth in Section 2.6.

“Arbitration” has the meaning set forth in Section 14.3.

“Bankrupt” means with respect to any entity, such entity (i) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is generally unable to pay its debts as they fall due.

“Billing Contract Year” means the subject Contract Year to which a Monthly Contract Price Payment refers.

“Billing Month” has the meaning set forth in Section 2.4(a).

“Business Day” means a day that is not a Saturday, Sunday, a Federal Reserve Bank holiday, or the Friday immediately following the U.S. Thanksgiving holiday. A Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant Party’s principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

“CAISO” means the California Independent System Operator, or any successor entity.

“Capacity Weighted Factor” has the meaning set forth in Section 2.4(a).

“Cash” means U.S. Dollars held by or on behalf of a Party as Performance Assurance hereunder.

“CEC” means the California Energy Commission, or any successor thereto.

“Claiming Party” has the meaning set forth in Article 12.

“Commission” or “CPUC” means the California Public Utilities Commission, and all divisions thereof, or any successor thereto.

“Contract Year” means each twelve (12)-month period starting with the Initial Delivery Date.

“Contracted Annual Energy Savings” has the meaning set forth in Section 2.1.

“Contracted Annual Peak Capacity Savings” has the meaning set forth in Section 2.1.

“Costs” means, with respect to the Non-Defaulting Party, brokerage fees, commissions, legal expenses and other similar third party transaction costs and expenses reasonably incurred by that Party in entering into any new arrangement which replaces this Agreement.

“CPUC Approval” means a decision of the CPUC that (i) is final and no longer subject to appeal, which approves (a) the relief requested in SDG&E’s approval filing and (b) the Agreement in full and in the form presented on terms and conditions acceptable to SDG&E in its sole discretion, including without limitation terms and conditions related to cost recovery and cost allocation of amounts paid to Seller under the Agreement; (ii) does not contain conditions or modifications unacceptable to either Party, in either Party’s sole discretion; and (iii) finds that any procurement pursuant to this Agreement satisfies the requirement to procure preferred resources under Commission Decision 14-13-004.

“Credit Rating” means, with respect to any entity, the rating then assigned to such entity’s unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating by the Ratings Agencies.

“Defaulting Party” has the meaning set forth in Section 8.1(a).

“Default Rate” means for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under “Money Rates” on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable Law.

“Deficiency Event” has the meaning set forth in Section 2.6.

“Delivery Period” has the meaning set forth in Section 2.3.

“Documentation” means all books, records, photographs, slides, materials, data, calculations, estimates, documents, communications, notes, proposals, reports, scopes of work or related responses, whether in written, electronic or any other tangible form, related to the Project or any Measure.

“Double Incentive” means Incentives from or paid for by any other energy efficiency program (whether an SDG&E energy efficiency program, an energy efficiency program of another utility, or otherwise) for the same Measure or Project installed at the End-User Customer’s Site, including the attribution of energy and demand savings or reductions for a single Measure or activity at multiple market intervention points (e.g., energy savings or reductions claimed upstream, midstream, and at the End-Use Customer) where such Measure was installed or such activity occurred.

“Early Termination Date” has the meaning set forth in Section 8.2(a).

“End-Use Customer” means a person or entity that is an SDG&E service customer and has an SDG&E customer service account number.

“Energy Savings Factor” has the meaning set forth in Section 2.4(a).

“Energy Weighted Factor” has the meaning set forth in Section 2.4(a).

“Evaluator” means an independent third-party who is not an Affiliate of the Party engaging such Evaluator and who has been engaged under this Agreement to perform an Inspection consistent with the M&V Plan, and issue a Pre-Delivery Period Inspection Report and/or Annual Inspection Report, as applicable. The Evaluator must (i) have demonstrated and significant experience performing evaluation, measurement and verification studies of energy efficiency projects of a size and type similar to the Project with demonstrated and significant experience using the guidelines and publications identified in Exhibit B, (ii) have sufficient depth and breadth in the skills required to perform the tasks identified in the M&V Plan, including study design, statistics, sample design, energy engineering, and econometric modeling, and (iii) adhere to ethical evaluation practices established by the American Evaluation Association.

“Event of Default” has the meaning set forth in Section 8.1(a).

“Execution Date” has the meaning set forth in the preamble.

“Executive(s)” has the meaning set forth in Section 14.2(a).

“Expected Initial Delivery Date” has the meaning set forth in Section 2.1.

“Fitch” means Fitch Ratings Ltd. or its successor.

“Force Majeure” means an event or circumstance (such as (a) acts of God, flooding, landslide, earthquake, fire, drought, explosion, epidemic, quarantine, hurricane, tornado, volcano, or other natural disaster or unusual or extreme adverse weather-related events, (b) war (declared or undeclared), riot or similar civil disturbance, acts of the public enemy (including acts of terrorism), sabotage, blockade, insurrection, revolution, expropriation, or confiscation, and (c) except as set forth in clause (vi) below, strikes, work stoppage or other labor disputes) which prevents one Party from performing its obligations under this Agreement, which event or circumstance was not anticipated as of the Execution Date, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided). Force Majeure shall not be based on (i) the loss of SDG&E’s markets; (ii) the loss or failure of Seller’s supply; (iii) a failure of performance of any other entity, except to the extent that such failure was caused by a Force Majeure event specifically described in clauses (a) through (c) above; (iv) breakage or malfunction of equipment, except to the extent that such failure was caused by a Force Majeure event specifically described in clauses (a) through (c) above; (v) strike, work stoppage or labor dispute limited only to any one or more of Seller, Seller’s Affiliates, End-Use Customer, contractors or subcontractors thereof or any other third party employed by Seller or an End-Use Customer to work on the Project; (vi) Seller’s failure to obtain financing or other funds, including funds authorized by a state or the federal government or agencies thereof; or (viii) Seller’s inability to obtain any Permits or other approvals of any type for the installation of any Measure, completion of the Project or performance under this Agreement.

“Forecasted Annual Energy Savings” has the meaning set forth in Section 2.4(a).

“Gains” means, with respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of this Agreement, determined in a commercially reasonable manner.

Factors used in determining the economic benefit to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., Intercontinental Exchange), all of which are calculated based on realized and future Annual Energy Savings and Annual Peak Capacity Savings. For purposes of determining Gain, SDG&E may also take into consideration that the Agreement satisfies the requirement to procure preferred resources from under Commission Decision 14-13-004 from Projects to meet the Local Capacity Requirements (LCR) within SDG&E’s Service Territory.

Only if the Non-Defaulting Party is unable, after using commercially reasonable efforts, to obtain third party information to determine the gain of economic benefits, *then* the Non-Defaulting Party may use information available to it internally suitable for this purpose in accordance with prudent industry practices.

“Governmental Body” means any federal, state, local, municipal or other government; any governmental, regulatory or administrative agency, commission or other authority lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; and any court or governmental tribunal.

“Incentive” means financial support or benefits, including Rebates, discounts and low-interest loans, to install Measures.

“Indemnified Party” has the meaning set forth in Section 6.3(a).

“Initial Delivery Date” has the meaning set forth in Section 2.2.

“Initial Delivery Deadline” has the meaning set forth in Section 2.1.

“Initial Negotiation End Date” has the meaning set forth in Section 14.2(a).

“Inspections” means, collectively, the Pre-Delivery Period Inspection and the Annual Inspections.

“Inspection Report” means the Pre-Delivery Period Inspection Report or an Annual Inspection Report, as applicable.

“Inspection Date” means, with respect to an Inspection Report, the date upon which the Evaluator certifies that the statements and calculations made within such Inspection Report are true and accurate.

“Interest Amount” means with respect to a Party and an Interest Period, the sum of the daily interest amounts for all days in such Interest Period; each daily interest amount to be determined by such Party as follows: (i) the amount of Cash held by such Party on that day; multiplied by (ii) the Interest Rate for that day, divided by (iii) 360.

“Interest Period” means the period from (and including) the last Business Day on which an Interest Amount was Transferred by a Party (or if no Interest Amount has yet been Transferred by such Party, the Business Day on which Cash was Transferred to such Party) to (but excluding) the Business Day on which the current Interest Amount is to be Transferred.

“Interest Rate” means for any date the rate per annum equal to the Commercial Paper (non-financial, 3 months) rate as published the prior month in the Federal Reserve Statistical Release, H.15. Should publication of the interest on Commercial Paper (non-financial, 3 months) be discontinued, then the interest rate on commercial paper, which most closely approximates the discontinued rate, published the prior month in the Federal Reserve Statistical Release, H.15., or its successor publication.

“Law” means any statute, law, treaty, rule, regulation, ordinance, code, Permit, enactment, injunction, order, writ, decision, authorization, judgment, decree or other legal or regulatory determination or restriction by a court or Governmental Body of competent jurisdiction, including any of the foregoing that are enacted, amended, or issued after the Execution Date, and which become effective prior to the end of the Delivery Period; or any binding interpretation of the foregoing by a Governmental Body.

“Letter of Credit” means an irrevocable, nontransferable standby letter of credit, substantially in the form of Exhibit A and acceptable to SDG&E, provided by Seller from an issuer acceptable to SDG&E that is either a U.S. financial institution or a U.S. commercial bank or a U.S. branch of a foreign bank with such financial institution or the bank (i) having a Credit Rating of at least (a) Credit Ratings of at least "A-" by S&P, “A-“ by Fitch and "A3" by Moody's, if such entity is rated by the Ratings Agencies; (b) if such entity is rated by only two of the three Ratings Agencies, a Credit Rating from two of the three Ratings Agencies of at least "A-" by S&P, if such entity is rated by S&P, “A-“ by Fitch, if such entity is rated by Fitch, and "A3" by Moody's, if such entity is rated by Moody’s; or (c) a Credit Rating of at least "A-" by S&P or "A3" by Moody's, or “A-” by Fitch if such entity is rated by only one Ratings Agency; and (ii) having shareholder equity (determined in accordance with generally accepted accounting principles) of at least $1,000,000,000.00 (ONE BILLION AND 00/100 DOLLARS). Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit.

“Letter of Credit Default” means with respect to a Letter of Credit, the occurrence of any of the following events: (i) the issuer of such Letter of Credit shall fail to maintain a Credit Rating of at least (a) "A-" by S&P, “A-“ by Fitch, and "A3" by Moody’s, if such issuer is rated by the Ratings Agencies, (b) “A-“ by S&P, , “A-“ by Fitch or “A3” by Moody’s if such issuer is rated by only two of the Ratings Agencies, or (c) “A-“ by S&P, “A-“ by Fitch, or "A3" by Moody’s, if such issuer is rated by only one Ratings Agency; (ii) the issuer of the Letter of Credit shall fail to comply with or perform its obligations under such Letter of Credit; (iii) the issuer of such Letter of Credit shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such Letter of Credit; (iv) such Letter of Credit shall expire or terminate, or shall fail or cease to be in full force and effect at any time during the Term of the Agreement, in any such case without replacement; or (v) the issuer of such Letter of Credit shall become Bankrupt; provided, however, that no Letter of Credit Default shall occur or be continuing in any event with respect to a Letter of Credit after the time such Letter of Credit is required to be canceled or returned to a Party in accordance with the terms of this Agreement.

“Losses” means, with respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of this Agreement, determined in a commercially reasonable manner.

Factors used in determining economic loss to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., Intercontinental Exchange), all of which are calculated based on realized and future Annual Energy Savings and Annual Peak Capacity Savings. For purposes of determining Losses, SDG&E may also take into consideration that the Agreement satisfies the requirement to procure preferred resources from under Commission Decision 14-13-004 from Projects to meet the LCR within SDG&E’s Service Territory.

Only if the Non-Defaulting Party is unable, after using commercially reasonable efforts, to obtain third party information to determine the loss of economic benefits, then the Non-Defaulting Party may use information available to it internally suitable for these purposes in accordance with prudent industry practices.

“Manager” has the meaning set forth in Section 14.2(a).

“M&V Plan” means the detailed plan to measure and verify the Annual Energy Savings and Annual Peak Capacity Savings for the Project, as further described in Exhibit B.

“Measure” a service or product (or aggregated group of services or products) described in Exhibit B whose installation and operation at an End-Use Customer’s premises is expected to result in a reduction in the End-Use Customer’s on-site energy and capacity use, compared to what would have happened without the service or product installation and for which Seller has delivered a Measure Installation Certificate.

“Minimum Annual Energy Savings” means, for each Contract Year, an amount equal to eighty percent (80%) of the Contracted Energy Savings for such Contract Year.

“Minimum Annual Peak Capacity Savings” means, for each Contract Year, an amount equal to eighty percent (80%) of the Contracted Annual Peak Capacity Savings for such Contract Year.

“Monthly Contract Price” has the meaning set forth in Section 2.1.

“Monthly Contract Price Payment” has the meaning set forth in Section 2.4(a).

“Moody’s” means Moody’s Investor Services, Inc. or its successor.

“Non-Defaulting Party” has the meaning set forth in Section 8.2.

“Notice” means notices, requests, statements or payments provided in accordance with Article 7.

“Peak Capacity Savings Factor” has the meaning set forth in Section 2.4(a).

“Performance Assurance” has the meaning set forth in Section 5.1(a).

“Permits” means all applications, approvals, authorizations, consents, filings, licenses, orders, permits or similar requirements imposed by any Governmental Body in order to develop, construct, maintain, improve, and/or refurbish the Project or any Measure.

“Pre-Delivery Period Inspection” has the meaning set forth in Section 2.5(b)(i).

“Pre-Delivery Period Inspection Report” means the report prepared by an Evaluator in accordance with the requirements of Section 2.5(b)(ii), setting forth the Evaluator’s findings from the Pre-Delivery Period Inspection.

“Project” means the aggregate of the Measures installed (or to be installed) at multiple End-Use Customer(s) Sites during the Term, as more fully described in Section 2.1 and Exhibit B.

“Project Requirements” means, on the Inspection Date of the applicable Inspection Report, all of the following: (a) all of the Measures comprising the Project on such date have been installed in accordance with the requirements of this Agreement, including Section 6.2(a) and Exhibit B, and (b) the Seller has installed Measures that has (i) an aggregate Annual Peak Capacity Savings amount for the Project that is no less than the Minimum Annual Peak Capacity Savings amount for the relevant Contract Year, and (ii) a forecasted aggregate Annual Energy Savings amount for the Project for the relevant Contract Year that is no less than the Minimum Annual Energy Savings amount for such Contract Year.

“Proprietary Rights” has the meaning set forth in Section 2.12.

“Qualified Assignee” has the meaning set forth in Section 15.3.

“Ratings Agency” means any of S&P, Moody’s, and Fitch (collectively the ‘Ratings Agencies’).

“Rebate” means an identified and pre-specified amount of money to be paid to an End-Use Customer for the installation of one or more identified Measure at the End-Use Customer’s facility.

“Referral Date” has the meaning set forth in Section 14.2(a).

“Reported Annual Peak Capacity Savings” has the meaning set forth in Section 2.4(a).

“Reported Annual Savings True-Up” has the meaning set forth in Section 2.4(b).

“S&P” means Standard & Poor’s Financial Services LLC, or its successor.

“SDG&E” has the meaning set forth in the preamble.

“Seller” has the meaning set forth in the preamble.

“Settlement Amount” means:

(a) where Seller is the Defaulting Party and the applicable Early Termination Date is effective before the Initial Delivery Date has occurred, the full amount of the Performance Assurance required to be posted by Seller at such Early Termination Date; or

(b) in all cases other than as set forth in clause (a) above, the Non-Defaulting Party’s Costs and Losses, on the one hand, netted against its Gains, on the other, such that if the Non-Defaulting Party’s Costs and Losses exceed its Gains (i.e. a positive Settlement Amount), then the Settlement Amount shall be an amount owing to the Non-Defaulting Party; provided, however, if the Non-Defaulting Party’s Gains exceed its Costs and Losses (i.e. a negative Settlement Amount), then the Settlement Amount shall be Zero dollars ($0). Under no circumstance under this clause (b) shall the Settlement Amount include consequential, incidental, punitive, exemplary or indirect or business interruption damages.

“Site” means the physical location(s) of the Measures comprising the Project and the End-Use Customer(s)’ account as more fully described in Exhibit B.

“Term” has the meaning set forth in Section 2.3.

“Termination Payment” means the sum of all amounts owed by the Defaulting Party to the Non-Defaulting Party under this Agreement, less any amounts owed by the Non-Defaulting Party to the Defaulting Party determined as of the Early Termination Date. For clarity, the Settlement Amount is part of and included in the Termination Payment.

“Total Savings Factor” has the meaning set forth in Section 2.4(a).

“Transfer” means, with respect to any Performance Assurance or Interest Amount, and in accordance with the instructions of the Party entitled thereto: (i) in the case of Cash, payment or transfer by wire transfer into one or more bank accounts specified by the recipient; (ii) in the case of Letters of Credit, delivery of the Letter of Credit or an amendment thereto to the recipient.

“WMDVBE” means women, minority, and disabled veteran business enterprise, as more particularly set forth in CPUC General Order 156.

**1.2 Interpretation**

 The following rules of interpretation shall apply:

1. This Agreement shall be considered for all purposes as prepared through the joint efforts of the parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.
2. Unless otherwise specified herein, all references herein to any agreement or other document of any description shall be construed to give effect to amendments, supplements, modifications or any superseding agreement or document as then exist at the applicable time to which such construction applies.
3. Capitalized terms used in this Agreement, including the appendices hereto, shall have the meaning set forth in Article 1, unless otherwise specified.
4. Unless otherwise specified herein, references in the singular shall include references in the plural and vice versa, pronouns having masculine or feminine gender will be deemed to include the other, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organizations or other entities (whether or not having a separate legal personality). Other grammatical forms of defined words or phrases have corresponding meanings.
5. The term “including” when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation.
6. References to a particular article, section, subsection, paragraph, subparagraph, appendix or attachment shall, unless specified otherwise, be a reference to that article, section, subsection, paragraph, subparagraph, appendix or attachment in or to this Agreement.
7. Any reference in this Agreement to any natural person, Governmental Body, corporation, partnership or other legal entity includes its permitted successors and assigns or to any natural person, Governmental Body, corporation, partnership or other legal entity succeeding to its functions.
8. Any reference in this Agreement to any statute shall include all regulations promulgated thereunder, and any reference in this Agreement to statutes or regulations shall be construed as including all statutory and regulatory provisions consolidating, amending or replacing such statutes or regulations.
9. All references to dollars are to U.S. dollars.
10. The headings used herein are for convenience and reference purposes only.
11. Each Party agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement.
12. Words having well-known technical or industry meanings have these meanings unless otherwise specifically defined in this Agreement.
13. Nothing in this Agreement relieves either Party from, or modifies, any obligation or requirement that exists in any Law.

# TRANSACTION

## 2.1 Project

 Seller shall design, construct and install the Project, and SDG&E shall pay Seller a Monthly Contract Price Payment for the installation of the Project in accordance with the terms and conditions of this Agreement. Seller shall be responsible for all costs, expenses, taxes, fees, labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary to install and complete the Project.

|  |  |
| --- | --- |
| **Monthly Contract Price** | [*Insert Monthly Payment Amount*] |
| **Contracted Annual Energy Savings (MWh)** | See Exhibit C |
| **Contracted Annual Peak Capacity Savings (MW)** | See Exhibit D |
| **Expected Initial Delivery Date** | [*Expected first day of the Delivery Period to be inserted*] |
| **Initial Delivery Deadline** | [TBD, Based on Seller’s Bid] |

## 2.2 Initial Delivery Date; Initial Delivery Deadline

Notwithstanding any other provision in this Agreement, Seller shall cause the Initial Delivery Date to occur no later than the Initial Delivery Deadline. The Initial Delivery Deadline shall be extended on a day for day basis, for up to six (6) months in the aggregate, ***[NOTE: bids with Initial Delivery Dates in 2021 shall have only three (3) months extension]*** to the extent Seller is actually and demonstrably delayed in achieving the Initial Delivery Date as a result of Force Majeure.

The “Initial Delivery Date” shall be the later of (a) the first day of the calendar month following the date that Seller provides SDG&E with an Acceptable Pre-Delivery Period Inspection Report (which report has an Inspection Date no earlier than three (3) months prior to the Initial Delivery Date) that finds that the Project Requirements for the first (1st) Contract Year have been met, or (b) the Expected Initial Delivery Date. ***[NOTE: may be modified for bids with starting dates in 2021]***

## 2.3 Delivery Period; Term

The “Delivery Period” of this Agreement shall commence upon the Initial Delivery Date and shall continue until the end of the [*Insert Length of Delivery Period*] Contract Year after the Initial Delivery Date or the earlier termination of this Agreement.

The “Term” of this Agreement shall commence upon the Execution Date and shall continue until the expiration of the Delivery Period or the earlier termination of this Agreement.

## 2.4 Monthly Contract Price Payment

(a) Generally. Subject to Section 2.4(b) and Section 2.4(c) below, for each calendar month (“Billing Month”) of a Contract Year (i.e., the Billing Contract Year) during the Delivery Period, SDG&E shall pay Seller an amount (“Monthly Contract Price Payment”) calculated as follows:

MCCP = MCP x TSF

Where:

MCCP = The Monthly Contract Price Payment for each Billing Month of such Billing Contract Year;

MCP = The Monthly Contract Price for such Billing Contract Year; and

TSF = The Total Savings Factor (as defined below) for such Billing Contract Year.

The “Total Savings Factor” for a Billing Contract Year shall be calculated as follows:

TSF = (CWF x PCSF) + (EWF x ESF)

Where:

TSF = The Total Savings Factor for such Billing Contract Year;

CWF = The Capacity Weighted Factor, which shall be 0.30; [*Note to Sellers: SDG&E assumes a typical 70%/30% weighted allocation of the contract’s value to SDG&E between energy and capacity. The allocation may be subject to revision if the bid Project’s value materially differs from this allocation.*]

PCSF = The Peak Capacity Savings Factor, which is equal to the Reported Annual Peak Capacity Savings amount (as defined below) for such Billing Contract Year divided by the Contracted Annual Peak Capacity Savings for such Billing Contract Year, provided that if the calculation of the Peak Capacity Savings Factor for a Billing Contract Year results in a number greater than one (1), then such Peak Capacity Savings Factor for such Billing Contract Year shall be one (1);

EWF = The Energy Weighted Factor, which shall be 0.70; and

ESF = The Energy Savings Factor, which is equal to the Forecasted Annual Energy Savings amount (as defined below) for such Billing Contract Year divided by the Contracted Annual Energy Savings for such Billing Contract Year, provided that if the calculation of the Energy Savings Factor for a Billing Contract Year results in a number greater than one (1), then such Energy Savings Factor for such Billing Contract Year shall be one (1).

The “Reported Annual Peak Capacity Savings” amount for a Billing Contract Year shall be the aggregate Annual Peak Capacity Savings amount for all Measures comprising the Project as set forth in the Acceptable Annual Inspection Report delivered in respect of the Contract Year immediately before the Billing Contract Year (unless such Billing Contract Year is the first (1st) Contract Year, in which case, the Reported Annual Peak Capacity Savings amount for such Billing Contract Year shall be the aggregate Annual Peak Capacity Savings amount reported in the Acceptable Pre-Delivery Period Inspection Report).

The “Forecasted Annual Energy Savings” amount for a Billing Contract Year shall be the forecasted aggregate Annual Energy Savings amount for such Billing Contract Year for all Measures comprising the Project as set forth in the Acceptable Annual Inspection Report delivered in respect of the Contract Year immediately before the Billing Contract Year (unless such Billing Contract Year is the first (1st) Contract Year, in which case, the Forecasted Annual Energy Savings amount for such Billing Contract Year shall be the forecasted aggregate Annual Energy Savings amount reported in the Acceptable Pre-Delivery Period Inspection Report).

For the avoidance of doubt and notwithstanding anything contained in this Agreement to the contrary, in the calculation of a Monthly Contract Price Payment, under no circumstance shall Seller be credited or otherwise receive any benefit for Annual Energy Savings or Annual Peak Capacity Savings that were not procured or reported due to a Force Majeure event.

(b) Temporary Withholding. Starting with the Billing Contract Year that is the second (2nd) Contract Year, if an Acceptable Annual Inspection Report for the Contract Year immediately before the Billing Contract Year has not been provided to SDG&E before the beginning of such Billing Contract Year, then until such Acceptable Annual Inspection Report has been delivered to SDG&E, SDG&E shall be entitled to withhold the payment of any Monthly Contract Price Payments in respect of such Billing Contract Year until such Acceptable Annual Inspection has been delivered to SDG&E; provided that if such Acceptable Annual Inspection has not been provided to SDG&E by the end of such Billing Contract Year, then SDG&E shall be entitled to retain all such withheld amounts without any further obligation to release such withheld amounts. Following the receipt of such Acceptable Annual Inspection Report before the end of such Billing Contract Year, SDG&E shall release all such withheld Monthly Contract Price Payments in respect of such Billing Contract Year (but only to the extent based on the Reported Annual Peak Capacity Savings amount and Forecasted Annual Energy Savings amount set forth in such Acceptable Annual Inspection Report) in accordance with the invoicing and payment provisions of Article 4. If, following the expiration or earlier termination of this Agreement, SDG&E continues to retain any withheld amounts of Monthly Contract Price Payments for which SDG&E was required to release under this Section 2.4(b), then such amount shall be released by SDG&E within sixty (60) days following the receipt by SDG&E of an invoice for such amount from Seller.

(c) No Waiver of Remedies. Nothing in this Section 2.4 shall be deemed to limit or waive either Party’s rights and remedies under Article 8 as a result of an Event of Default of the other Party, and each Party’s rights under this Section 2.4 shall be subject to such other Party’s rights and remedies under Article 8.

## 2.5 Inspections

1. Generally.
2. Seller shall, and shall cause all End-Use Customer(s) of the Project to, provide all Evaluators access to the Sites and Project to examine, test, measure, and inspect the Project and to perform all Inspections. Seller shall also provide all Evaluators access to, and the ability to review, any records or documents needed to examine, test, measure, or inspect the Project, and properly perform all Inspections. Access shall be granted for the number of days needed to complete any such Inspections. The obligation to provide access described in this paragraph shall apply regardless of whether the End-Use Customer associated with the Project, a Site, or Measure changes during the Term of the Agreement.

(ii) With respect to an Evaluator engaged by Seller, Seller shall make the Evaluator available to SDG&E to discuss any Inspection and any of the information contained in an Inspection Report upon SDG&E’s request. SDG&E shall also have the right to review all records and Documentation related to an Inspection or Inspection Report. SDG&E may, in its sole discretion, request access to any Site and the Project to examine, test, measure, and inspect the Project. Seller shall, and shall cause all End-Use Customer(s) of the Project to, provide access to the Site and Project to SDG&E and/or an Evaluator engaged by SDG&E pursuant to this Agreement.

 (iii) All Inspection Reports provided by Seller’s Evaluator shall be issued for the benefit of SDG&E and shall expressly allow SDG&E to rely on such reports.

1. Pre-Delivery Period Inspection.
2. Prior to the occurrence of the Initial Delivery Date, Seller, at Seller’s expense, shall have caused an Evaluator to conduct an on-site inspection (“Pre-Delivery Period Inspection”) that is consistent with the M&V Plan and to issue a Pre-Delivery Period Inspection Report in accordance with this Section 2.5(b) that demonstrates that Seller has met the Project Requirements for the first (1st) Contract Year. The selection of any Evaluator under this subsection (i) shall be subject to SDG&E’s consent, which shall not be unreasonably withheld or delayed.
3. Seller shall cause the Evaluator to issue a Pre-Delivery Period Inspection Report within thirty (30)days after the completion of the Pre-Delivery Period Inspection. The Pre-Delivery Period Inspection Report shall include the following information:
4. The Inspection Date of the Pre-Delivery Period Inspection Report;
5. A description of each Measure installed on such Inspection Date, which description shall include the type of Measure, the Site of the Measure, and the End-Use Customer at whose Site such Measure was installed;
6. The Annual Peak Capacity Savings for each Measure and the Project in aggregate on such Inspection Date, calculated in accordance with Exhibit B;
7. The forecasted Annual Energy Savings during the first (1st) Contract Year for each Measure and the Project in aggregate as of such Inspection Date, calculated in accordance with Exhibit B;
8. A certification from the Evaluator that the statements and calculations made in such Pre-Delivery Period Inspection Report is true and accurate as of such Inspection Date; and
9. Any other information reasonably requested by SDG&E to determine (i) the Project’s compliance with the Project Requirements for the first (1st) Contract Year, (ii) the Annual Peak Capacity Savings for each Measure and the Project in the aggregate on such Inspection Date, and (iii) the forecasted Annual Energy Savings during the first (1st) Contract Year for each measure and the Project in the aggregate as of such Inspection Date.
10. Within thirty (30) days after receipt of the Pre-Delivery Period Inspection Report, SDG&E shall either (A) provide Notice to Seller that it has accepted the Pre-Delivery Period Inspection Report, or (B) provide Notice to Seller that it is not accepting the Pre-Delivery Period Inspection Report to its reasonable satisfaction, which reasons may include, but is not limited to: the Annual Inspection Report being materially inaccurate or incomplete; not properly determining or providing enough information in support of finding whether the Project meets the Project Requirements for the first (1st) Contract Year, the amount of Annual Peak Capacity Savings, or the amount of forecasted Annual Energy Savings; indicating that the Annual Inspection was not conducted consistent with the M&V Plan; or being materially deficient in any manner whatsoever. If SDG&E provides the Notice under subsection (B), then Seller shall cause the Evaluator (or another Evaluator) to re-submit a Pre-Delivery Period Inspection Report that is not deficient for the reasons cited by SDG&E (in which case the procedure set forth in this clause (iii) shall re-apply). If SDG&E fails to provide Notice under subsection (A) or (B) above within the prescribed thirty (30)-day period, then SDG&E shall be deemed to have accepted Seller’s Pre-Delivery Period Inspection Report.
11. Annual Inspections.
12. No later than the last day of each Contract Year, Seller, at Seller’s expense, shall cause an Evaluator to conduct an on-site inspection (“Annual Inspection”) that is consistent with the M&V Plan and to issue an Annual Inspection Report for such Contract Year in accordance with this Section 2.5(c). The selection of any Evaluator under this subsection (i) shall be subject to SDG&E’s consent, which shall not be unreasonably withheld or delayed. An Annual Inspection Report shall have an Inspection Date that is both no earlier than the date that is thirty (30) days prior to the last day of such Contract Year and no later than the last day of such Contract Year.
13. Seller shall cause the Evaluator to issue an Annual Inspection Report no later than thirty (30) days following the end of each Contract Year (the “Annual Inspection Report Deadline”). The Annual Inspection Report shall include the following information:
14. The Inspection Date of the Annual Inspection Report;
15. A description of each Measure installed on such Inspection Date, which description shall include the type of Measure, the Site of the Measure, and the End-Use Customer at whose Site such Measure was installed;
16. The Annual Peak Capacity Savings for each Measure and the Project in the aggregate on such Inspection Date, calculated in accordance with Exhibit B;
17. The actual aggregate Annual Energy Savings for the Project during such Contract Year, calculated in accordance with Exhibit B;
18. The forecasted Annual Energy Savings during the following Contract Year for each Measure and the Project in the aggregate as of such Inspection Date, calculated in accordance with Exhibit B;
19. A certification from the Evaluator that the statements and calculations made in such Annual Inspection Report is true and accurate as of such Inspection Date; and
20. Any other information reasonably requested by SDG&E to determine (i) the Project’s compliance with the Project Requirements for the following Contract Year, (ii) the Annual Peak Capacity Savings and for each Measure and the Project in the aggregate on the Inspection Date, (iii) the actual aggregate Annual Energy Savings for the Project during such Contract Year, (iii) the actual aggregate Annual Energy Savings for the Project during such Contract Year, and (iv) the forecasted Annual Energy Savings during the following Contract Year for each measure and the Project in the aggregate as of such Inspection Date.
21. Within thirty (30) days of receipt of an Annual Inspection Report, SDG&E shall either (A) provide Notice to Seller that it has accepted the Annual Inspection Report, or (B) provide Notice to Seller that it is not accepting the Annual Inspection Report to its reasonable satisfaction, which reasons may include, but is not limited to: the Annual Inspection Report being materially inaccurate or incomplete; not properly determining or providing enough information in support of finding whether the Project meets the Project Requirements for the following Contract Year, the amount of Annual Peak Capacity Savings, or the amount of actual or forecasted Annual Energy Savings; indicating that the Annual Inspection was not conducted consistent with the M&V Plan; or being materially deficient in any manner whatsoever. If SDG&E provides the Notice under subsection (B), then Seller cause the Evaluator (or another Evaluator) to re-submit an Annual Inspection Report that is not deficient for the reasons cited by SDG&E (in which case the procedure set forth in this clause (iii) shall re-apply). If SDG&E fails to provide Notice under subsection (A) or (B) above within the prescribed thirty (30)-day period, then SDG&E shall be deemed to have accepted Seller’s Annual Inspection Report.
22. For the avoidance of doubt, even if an Acceptable Annual Inspection Report for a Contract Year is delivered after the end of a Contract Year, such Acceptable Annual Inspection Report shall be deemed an Acceptable Inspection Report in respect of the such Contract Year for purposes of this Agreement.

## 2.6 Annual True-Up

If the results of an Acceptable Annual Inspection Report delivered by Seller in respect of a Contract Year demonstrates the occurrence of a Deficiency Event (as defined below), then Seller shall pay SDG&E an Annual True-Up Payment in respect of such Contract Year calculated in accordance with this Section 2.6. A “Deficiency Event” shall have occurred if such Acceptable Annual Inspection Report for such Contract Year shows either (a) that the aggregate Annual Peak Capacity Savings amount set forth in such Acceptable Inspection Report is less than the Reported Annual Peak Capacity Savings amount used to calculate the Monthly Contract Price Payments during such Contract Year, and/or (b) that the actual aggregate Annual Energy Savings for such Contract Year set forth in such Acceptable Inspection Report is less than the Forecasted Annual Energy Savings amount used to calculate the Monthly Contract Price Payments during such Contract Year.

Such “Annual True-Up Payment” amount for a Contract Year shall be calculated as follows:

ATP = {[CWF x 6 months x (RAPCS – APCS) / CAPCS] + [EWF x 12 months x (FAES – AAES) / CAES]} x MCCP

Where:

ATP = The Annual True-Up Payment for such Contract Year;

CWF = The Capacity Weighted Factor;

RAPCS = The Reported Annual Peak Capacity Savings amount used to calculate the Monthly Contract Price Payments during such Contract Year;

APCS = The aggregate Annual Peak Capacity Savings amount for such Contract Year set forth in such Acceptable Annual Inspection Report;

CAPCS = The Contracted Annual Peak Capacity Savings amount for such Contract Year;

EWF = The Energy Weighted Factor;

FAES = The Forecasted Annual Energy Savings amount used to calculate the Monthly Contract Price Payments during such Contract Year;

AAES = The actual aggregate Annual Energy Savings for such Contract Year set forth in such Acceptable Annual Inspection Report;

CAES = The Contracted Annual Energy Savings amount for such Contract Year; and

MCCP = The Monthly Contract Price Payment for such Contract Year;

provided, however, for clarity, if the value of (RAPCS – APCS) or the value of (FAES – AAES) results in an amount less than zero (0), then such value shall be zero (0). For the avoidance of doubt and notwithstanding anything contained in this Agreement to the contrary, in the calculation of an Annual True-Up Payment, under no circumstance shall Seller be credited or otherwise receive any benefit for Annual Energy Savings or Annual Peak Capacity Savings that were not procured or reported due to a Force Majeure event.

Annual True-Up Payment amounts shall be credited against the next successive Monthly Contract Price Payments, provided that if any Annual True-Up Payment amounts remains unpaid following the expiration or earlier termination of this Agreement, then such amount shall be paid by Seller within thirty (30) days following the receipt by Seller of an invoice for such amount from SDG&E, which payment shall be made by check or wire transfer as set forth in such invoice.

The Parties acknowledge that an Acceptable Annual Inspection Report in respect of a Contract Year might not be available until after the start of the next Contract Year (or if such Contract Year is the last Contract Year of the Delivery Period, after the expiration or earlier termination of the Agreement) and that such delay shall not in any way abrogate or diminish each Party’s obligations under this Section 2.6.

The Parties acknowledge and agree that the actual damages that SDG&E would incur due to a Deficiency Event would be difficult or impossible to predict with certainty, and that the Annual True-Up Payment is a reasonable and appropriate approximation of such damages, and is SDG&E’s exclusive remedy for such Deficiency Event (but shall not otherwise act to limit any of SDG&E’s rights or remedies arising from any other Event of Default by Seller).

## 2.7 Permits and Licenses

Seller, at its own expense, shall obtain and maintain, or shall cause the End-Use Customer to obtain and maintain, as applicable, any and all Permits needed to install the Project and to maintain and operate the Project at the Site(s).

## 2.8 Advertising and Marketing

(a) No Use of Marks. Seller shall not use SDG&E’s or any of its Affiliates’ corporate names, trademarks, service marks, trade names, logos, identities or any affiliations for any reason, without SDG&E’s prior written consent.

(b) No Endorsement. Seller shall not state or represent to third parties, End-Use Customers (prospective or otherwise) or Project participants that SDG&E has endorsed or approved Seller or its contractors or subcontractors of their work.

(c) Funding Source Disclosure. Seller shall disclose its source of funding for the Project by stating prominently on all advertising, promotion or marketing materials that the Project is “funded, in whole or in part, by California ratepayers under the auspices of the California Public Utilities Commission.”

(d) No Obligation to Purchase. As appropriate and directed by SDG&E, Seller shall prominently disclose to prospective End-Use Customers, in writing, that customers are not obligated to purchase any service or product offered by Seller.

## 2.9 Records

1. Information Production. Upon request from SDG&E, Seller shall, within ten (10) Business Days of such request, produce any and all documents, information, or records related to the Project or a Measure that is part of the Project, including any documents, information, or records needed to measure the energy or capacity reductions of the Project or Measure. For purposes of this Section 2.9(a), Seller shall be obligated to provide any documents, information, or records of an Evaluator engaged by Seller related to the subject matter of this Section 2.9(a).
2. WMDVBE Reporting. During the Term, no later than twenty (20) days after each semi-annual period ending on June 30th or December 31st, or more frequently if requested by SDG&E, a report listing all WMDVBEs that supplied goods or services to Seller during such period, including any certifications or other Documentation of such WMDVBEs’ status as such and the aggregate amount paid to WMDVBEs during such period.
3. SDG&E has the right to disclose to the CPUC all such information provided by Seller pursuant to this Section 2.9(b).
4. Seller shall make reasonable efforts to accommodate requests by the CPUC (or by SDG&E in response to a request by the CPUC) to audit Seller in order to verify data provided by Seller pursuant to this Section 2.9(b).

## 2.10 Subcontractors

Seller shall obtain SDG&E’s written consent prior to retaining contractors or subcontractors to perform any portion of the work related to the Project, provided that any such consent may be revoked by SDG&E with no less than thirty (30) days prior written notice for just and reasonable cause. Seller shall at all times be responsible for the acts and omissions of such contractors and subcontractors, and any persons performing such work on their behalf, employed directly or indirectly by Seller and shall contractually require each such contractor and subcontractor to be bound by the same terms and conditions as binding Seller under this Agreement. Seller shall be responsible for performance of all work related to the Project as set forth in this Agreement, whether performed by Seller or any contractor or subcontractor of Seller or any other person performing such work on their behalf. This Agreement shall not give rise to any contractual relationship between SDG&E and any contractor or subcontractor of Seller. SDG&E does not undertake any obligation to pay or to be responsible for the payment of any sums to any contractor or subcontractor or agent of Seller. Upon request of SDG&E, Seller shall furnish to SDG&E copies of any executed contracts or subcontracts entered into between Seller and any such contractor or subcontractor.

## 2.11 Customer Complaint and Dispute Resolution Procedures

Seller shall be responsible, to the complete satisfaction of SDG&E, for developing and implementing a process for the management of customer complaints. Seller shall undertake activities to resolve customer complaints in an expedited manner including, but not limited to, (a) ensuring adequate levels of professional customer service staff, (b) direct access of customer complaints to supervisory and/or management personnel, and (c) ensuring sufficient levels of delivery personnel expected during times of high volume. Seller shall implement a Customer Comment Tracking System for recording customer inquiries, complaints, and positive feedback for SDG&E. The Customer Comment Tracking System shall include, but is not limited to, dates of customer complaints, information on the number, characterization, and resolution of customer complaints, date of each complaint resolution and tracking of the total number of telephone calls, duration of calls, number of calls placed on hold, duration of time calls are on hold, and number of cancelled calls (hang-ups). Seller shall provide SDG&E with a monthly status report on such customer comments and status of customer complaints (on a cumulative basis).

## 2.12 Documentation

Title to all Documentation, including any and all inspection reports, including copyright ownership in the Documentation, shall pass to SDG&E when prepared (whether prepared by Seller, its contractor or subcontractor or its Evaluator). To the extent any invention, discovery, trade secret, patent, copyright, or other intellectual property (collectively, “Proprietary Rights”) conceived, developed or reduced to practice by Seller is used in and have become integral with the Documentation, or are necessary for SDG&E to have complete enjoyment of the Documentation, Seller shall grant to SDG&E a non-exclusive, irrevocable, royalty-free license, as may be required by SDG&E for complete enjoyment of the Documentation, including the right to reproduce, correct, repair, replace, maintain, translate, publish, use, modify, copy or dispose of any or all of the Documentation and grant sublicenses to others with respect to such Documentation. If the Documentation includes the Proprietary Rights of others, Seller shall procure, at no additional cost to SDG&E, all necessary licenses regarding such Proprietary Rights of others so as to allow SDG&E the complete enjoyment of the Documentation, including the right to reproduce, correct, repair, replace, maintain, translate, publish, use, modify, copy or dispose of any or all of the Documentation and grant sublicenses to others with respect to such Documentation.

# CPUC APPROVAL

Unless otherwise specified herein, notwithstanding SDG&E’s execution and delivery of this Agreement, SDG&E’s obligations under this Agreement (including, without limitation, the obligation to pay the Monthly Contract Price Payment) shall only become effective upon CPUC Approval. Seller shall use commercially reasonable efforts to support SDG&E in obtaining CPUC Approval. SDG&E has no obligation to seek rehearing or to appeal a Commission decision which fails to approve this Agreement or which contains findings required for CPUC Approval with conditions or modifications unacceptable to either Party.

Either Party has the right to terminate this Agreement on Notice, which will be effective on the date such Notice is given, if CPUC Approval has not been obtained or waived by SDG&E in its sole discretion within 365 days after SDG&E files its request for CPUC Approval and such Notice of termination is given on or before the 395th day after SDG&E files the request for CPUC Approval.

Failure to obtain CPUC Approval in accordance with this Article 3 will not be deemed to be a failure of Seller to install the Project or a failure of SDG&E to make payment for such installation, and will not be or cause an Event of Default by either Party. No Settlement Amount with respect to this Agreement will be due or owing by either Party upon termination of this Agreement due solely to failure to obtain CPUC Approval.

# PAYMENT AND BILLING

## 4.1 Invoicing and Payment

(a) Invoicing. For any Billing Month in which payment from Buyer to Seller is due, Seller shall send an invoice to SDG&E for such Billing Month’s Monthly Contract Price Payment no later than the tenth (10th) day of such Billing Month. Invoices shall be submitted to:

[*SDG&E to provide*]

As a condition to SDG&E’s payment of an invoice, all invoices submitted must reference the Agreement number and the invoice contact and have complete support documentation of all charges incurred.

(b) Payment. So long as no Event of Default with respect to the Seller has occurred and is continuing, and without limiting the provisions of Section 2.6(b) above and subject to Sections 4.2 and 4.3 below, SDG&E shall pay such Monthly Contract Price Payment no later than sixty (60) days after receipt of an invoice. Payment may be made through check, credit card or wire transfer protocol to the following address:

[*Seller to provide*]

If either the invoice deadline or payment deadline is not a Business Day, then such invoice or payment shall be provided on the next following Business Day. Any undisputed amounts not paid by the due date will be deemed delinquent and will accrue interest at the Default Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

## 4.2 Disputes and Adjustments of Invoices

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within two (2) Business Days of such resolution along with interest accrued at the Default Rate from and including the original due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived if the other Party is not notified in accordance with this Section 4.2 within twelve (12) months after the invoice is rendered or subsequently adjusted, except to the extent any misinformation was from a third party not Affiliated with the Party claiming the error and such third party corrects its information after the twelve-month period. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

## 4.3 Netting

SDG&E may offset any payments that are due and owing by any amount(s) that were previously overpaid through netting, such that only the excess amount remaining due shall be paid by SDG&E.

# PERFORMANCE ASSURANCE

## 5.1 Performance Assurance Amount.

Seller shall post and thereafter maintain security (“Performance Assurance”) equal to [*To be Inserted*] Dollars ($[\_\_\_\_\_\_\_\_\_\_]), in accordance with the following terms and conditions:

1. Seller shall post [*Insert*] ($[\_\_\_\_\_\_\_\_\_\_]) of Performance Assurance on or before the Execution Date and the remaining amount of [*To be Inserted*] Dollars ($[\_\_\_\_\_\_\_\_\_\_]) within ten (10) Business Days after CPUC Approval;
2. Performance Assurance shall be held by SDG&E as security for Seller’s obligations under the Agreement;
3. The Performance Assurance must be in the form of either Cash or a Letter of Credit;
4. If Seller posts any Performance Assurance in Cash, Seller will receive Interest Amounts in accordance with the procedure specified in Section 5.4(a)(ii); and
5. If Seller establishes the Performance Assurance by means of a Letter of Credit, such Letter of Credit must be provided substantially in the form of Exhibit A.

## 5.2 Return of Performance Assurance

So long as no Event of Default or Potential Event of Default with respect to the Seller has occurred and is continuing, and no Early Termination Date has occurred or been designated as the result of an Event of Default with respect to the Seller, SDG&E shall return all unused Performance Assurance to Seller within fifteen (15) Business Days after the date that all of Seller’s obligations have been indefeasibly paid in full after the end of the Term of the Agreement.

## 5.3 Grant of Security Interest/Remedies

To secure its obligations under this Agreement, and until released as provided herein, Seller hereby grants to SDG&E a present and continuing security interest in, and lien on (and right of setoff against), and collateral assignment of, the Performance Assurance and all cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, such SDG&E, and each Party agrees to take such action as the other Party reasonably requires in order to perfect SDG&E’s first-priority security interest in, and lien on (and right of setoff against), such Performance Assurance and collateral and any and all proceeds resulting therefrom or from the liquidation thereof. Upon or any time after the occurrence or deemed occurrence and during the continuation of an Event of Default or an Early Termination Date, SDG&E, if it is the Non-Defaulting Party, may do any one or more of the following: (i) exercise any of the rights and remedies of SDG&E with respect to the Performance Assurance, including any such rights and remedies under law then in effect; (ii) exercise its rights of setoff against any and all property of the Seller in the possession of SDG&E or its agent; (iii) draw on any outstanding Letter of Credit issued for its benefit; and (iv) liquidate all Performance Assurance then held by or for the benefit of SDG&E free from any claim or right of any nature whatsoever of the Seller, including any equity or right of purchase or redemption by the Seller. In such an event SDG&E shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce the Seller’s obligations under the Agreement (the Seller remaining liable for any amounts owing to SDG&E after such application), subject to SDG&E’s obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

## 5.4 Administration of Performance Assurance

1. Cash. Performance Assurance provided in the form of Cash to SDG&E shall be subject to the following provisions:
2. Notwithstanding the provisions of applicable Law, if no Event of Default has occurred and is continuing with respect to SDG&E and no Early Termination Date has occurred or been designated as a result of an Event of Default with respect to SDG&E for which there exist any unsatisfied payment obligations, then SDG&E shall have the right to sell, pledge, re-hypothecate, assign, invest, use, commingle or otherwise use in its business any Cash that it holds as Performance Assurance hereunder, free from any claim or right of any nature whatsoever of the Seller, including any equity or right of redemption by the Seller.
3. So long as no Event of Default or Potential Event of Default with respect to the Seller has occurred and is continuing, and no Early Termination Date for which any unsatisfied payment obligations of the Seller exist has occurred or been designated as the result of an Event of Default with respect to the Seller, and to the extent that an obligation to Transfer Performance Assurance would not be created or increased by the Transfer, in the event that SDG&E is holding Cash, SDG&E will Transfer (or caused to be Transferred) to the Seller, in lieu of any interest or other amounts paid or deemed to have been paid with respect to such Cash (all of which may be retained by SDG&E), the Interest Amount. The Seller shall invoice SDG&E annually setting forth the calculation of the Interest Amount due, and SDG&E shall make payment thereof by the later of (A) the tenth (10th) Business Day of the first month after the last month to which such invoice relates or (B) the tenth (10th) Business Day after the day on which such invoice is received. On or after the occurrence of a Potential Event of Default or an Event of Default with respect to the Seller or an Early Termination Date as a result of an Event of Default with respect to the Seller, SDG&E shall retain any such Interest Amount as additional Performance Assurance hereunder until the obligations of the Seller under the Agreement have been satisfied in the case of an Early Termination Date or for so long as such Event of Default is continuing in the case of an Event of Default.
4. Letters of Credit. Performance Assurance provided in the form of a Letter of Credit shall be subject to the following provisions.
5. Each Letter of Credit shall be maintained for the benefit of SDG&E. The Seller shall (A) renew or cause the renewal of each outstanding Letter of Credit on a timely basis as provided in the relevant Letter of Credit, (B) if the bank or financial institution that issued an outstanding Letter of Credit has indicated its intent not to renew such Letter of Credit, provide either a substitute Letter of Credit or Cash, in each case at least sixty (60) Calendar Days prior to the expiration of the outstanding Letter of Credit, and (C) if a bank or financial institution issuing a Letter of Credit shall fail to honor SDG&E’s properly documented request to draw on an outstanding Letter of Credit, provide for the benefit of SDG&E either a substitute Letter of Credit that is issued by a bank or financial institution acceptable to SDG&E or Cash, in each case within one (1) Business Day after such refusal.
6. As one method of providing Performance Assurance, the Seller may increase the amount of an outstanding Letter of Credit or establish one or more additional Letters of Credit.
7. Upon the occurrence of a Letter of Credit Default, the Seller agrees to Transfer to SDG&E either a substitute Letter of Credit or Cash, in each case on or before the first (1st) Business Day after the occurrence thereof (or the fifth (5th) Business Day after the occurrence thereof if only clause (i) under the definition of Letter of Credit Default applies).
8. Upon or at any time after the occurrence and continuation of an Event of Default or Letter of Credit Default with respect to the Seller, or if an Early Termination Date has occurred or been designated as a result of an Event of Default with respect to the Seller for which there exist any unsatisfied payment obligations, then SDG&E may draw on the entire, undrawn portion of any outstanding Letter of Credit upon submission to the bank or financial institution issuing such Letter of Credit of one or more certificates specifying that such Event of Default, Letter of Credit Default or Early Termination Date has occurred and is continuing. Cash proceeds received from drawing upon the Letter of Credit shall be deemed Performance Assurance as security for the Seller’s obligations to SDG&E, and SDG&E shall have the rights and remedies set forth in Section 5.5 with respect to such Cash proceeds. Notwithstanding SDG&E’s receipt of Cash proceeds of a drawing under the Letter of Credit, the Seller shall remain liable (A) for any failure to Transfer sufficient Performance Assurance and (B) for any amounts owing to SDG&E and remaining unpaid after the application of the amounts so drawn by SDG&E.
9. In all cases, the costs and expenses of establishing, renewing, substituting, canceling, and increasing the amount of a Letter of Credit shall be borne by the Seller.
10. Care of Performance Assurance. Except as otherwise provided in Section 5.4(a)(i) and in the exercise of reasonable care in the custody thereof, SDG&E shall have no duty as to any Performance Assurance in its possession or control or any income thereon or as to the preservation of rights against prior parties or any other rights pertaining thereto. SDG&E shall be deemed to have exercised reasonable care in the custody and preservation of the Performance Assurance in its possession if the Performance Assurance is accorded treatment substantially equal to that which it accords its own property, and shall not be liable or responsible for any loss or damage to any of the Performance Assurance, or for any diminution in the value thereof, except to the extent such loss or damage is the result of SDG&E’s willful misconduct or gross negligence. SDG&E shall at all times retain possession or control of any Performance Assurance Transferred to it.

## 5.5 Exercise of Rights Against Performance Assurance

1. In the event that an Event of Default with respect to the Seller has occurred and is continuing or an Early Termination Date has occurred or been designated as a result of an Event of Default with respect to the Seller, SDG&E may exercise any one or more of the rights and remedies provided under this Agreement, or as otherwise available under applicable Law. Without limiting the foregoing, if at any time an Event of Default with respect to the Seller has occurred and is continuing, or an Early Termination Date occurs or is deemed to occur as a result of an Event of Default with respect to the Seller, then SDG&E may, in its sole discretion, exercise any one or more of the following rights and remedies:
2. all rights and remedies available to SDG&E under the Uniform Commercial Code and any other applicable jurisdiction and other applicable Laws with respect to the Performance Assurance held by or for the benefit of SDG&E;
3. the right to set off any Performance Assurance held by or for the benefit of SDG&E against and in satisfaction of any amount payable by the Seller in respect of any of its obligations; and
4. the right to draw on any outstanding Letter of Credit issued for its benefit.
5. SDG&E shall be under no obligation to prioritize the order with respect to which it exercises any one or more rights and remedies available hereunder. The Seller shall in all events remain liable to SDG&E for any amount payable by the Seller in respect of any of its obligations remaining unpaid after any such liquidation, application and set off.
6. Subject to Section 5.2 above, in the event that SDG&E draws or otherwise sets off any portion of the Performance Assurance, Seller shall replenish such drawn or set off amount so as to maintain the full amount of the Performance Assurance as required under Section 5.1 above.

## 5.6 Financial Information

If requested by a Party, the other Party shall deliver (a) within one hundred and twenty (120) days following the end of each fiscal year, a copy of the annual report containing audited consolidated financial statements (income statement, balance sheet, statement of cash flows and statement of retained earnings and all accompanying notes) for such fiscal year setting forth in each case in comparative form the figures for the previous year for the Party, and (b) within sixty (60) days after the end of each of its first three fiscal quarters of each fiscal year, a copy of a quarterly report containing unaudited consolidated financial statements for such fiscal quarter and the portion of the fiscal year through the end of such quarter, setting forth in each case in comparative form the figures for the previous year, and if the Party files reports with the Securities and Exchange Commission, certified in accordance with all applicable laws and regulations, including without limitation all applicable Securities and Exchange Commission rules and regulations. If the Party does not file reports with the Securities and Exchange Commission, the reports must be certified by a Chief Financial Officer, Treasurer or any Assistant Treasurer as being fairly stated in all material respects (subject to normal year-end audit adjustments); provided however, for the purposes of this subsection (a) and (b), if a Party’s financial statements are publicly available electronically on the Securities and Exchange Commission’s website, then this requirement shall be deemed satisfied. In all cases the statements shall be for the most recent accounting period and shall be prepared in accordance with generally accepted accounting principles; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not be an Event of Default so long as the relevant entity diligently pursues the preparation, certification and delivery of the statements. Without limiting anything contained in this Section 5.6, Seller shall promptly provide any and all financial information as may be requested by the CPUC from time to time.

## 5.7 Uniform Commercial Code Waiver

This Agreement sets forth the entirety of the agreement of the Parties regarding credit, collateral, financial assurances and adequate assurances. Except as expressly set forth in this Agreement, including, but not limited to, those provisions set forth in Article 5 and Article 8, neither Party:

1. has or will have any obligation to post margin, provide letters of credit, pay deposits, make any other prepayments or provide any other financial assurances, in any form whatsoever, or
2. will have reasonable grounds for insecurity with respect to the creditworthiness of a Party that is complying with the relevant provisions of Article 5 and Article 8 of this Agreement; and all implied rights relating to financial assurances arising from Section 2-609 of the Uniform Commercial Code or case law applying similar doctrines, are hereby waived.

# REPRESENTATIONS, WARRANTIES AND COVENANTS

## 6.1 Representations and Warranties of Both Parties

On the Execution Date, each Party represents and warrants to the other Party that:

1. It is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
2. Except for CPUC Approval in the case of SDG&E, it has or will timely acquire all regulatory authorizations necessary for it to legally perform its obligations under this Agreement;
3. The execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Law, rule, regulation, order or the like applicable to it;
4. This Agreement constitutes its legally valid and binding obligation, enforceable against it in accordance with its terms;
5. It is not Bankrupt and there are not proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or become Bankrupt;
6. Except for proceedings related to obtaining CPUC Approval in the case of SDG&E, there is not pending or, to its knowledge, threatened against it, any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement; and
7. It (i) is acting for its own account, (ii) has made its own independent decision to enter into this Agreement and as to whether this Agreement is appropriate or proper for it based upon its own judgment, (iii) is not relying upon the advice or recommendations of the other Party in so doing, and (iv) is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions, and risks of this Agreement.

## 6.2 Additional Seller Representations, Warranties and Covenants

1. Eligibility. Seller hereby represents, warrants and covenants to SDG&E throughout the Term that:
	1. The Project, and every Measure in the Project, is within SDG&E’s Service Territory;
	2. Seller will not use, submit, claim, or receive a Double Incentive for the Project, or any Measure in the Project;
	3. Seller will not knowingly provide an Incentive to an End-Use Customer for any Measure in the Project who would receive a Double Incentive as a result of receiving such Incentive; and
	4. Prior to providing an Incentive to an End-Use Customer, Seller shall obtain a signed form from such End-Use Customer whereby such End-Use Customer certifies that (A) such End-Use Customer has not received any rebate, incentive or discount for the same service or measure from any other SDG&E program or from another utility, state or local program, and (B) such End-Use Customer will not apply for any rebate, incentive or discount for the same service or measure from any other SDG&E program or from another utility, state or local program. Seller shall keep such End-Use Customer-signed forms for at least four (4) years after the end of the Term of this Agreement.
2. Measures. Seller hereby represents and warrants that, to the best of Seller’s knowledge, at all times during the Term, all of the Measures comprising the Project have been installed in accordance with this Agreement, including Exhibit B.
3. Performance Assurance. On each day on which Performance Assurance is held by SDG&E under this Agreement, the Seller hereby represents and warrants that:
4. the Seller has good title to and is the sole owner of such Performance Assurance, and the execution, delivery and performance of the covenants and agreements of this Agreement, do not result in the creation or imposition of any lien or security interest upon any of its assets or properties, including, without limitation, the Performance Assurance, other than the security interests and liens created under this Agreement;
5. upon the Transfer of Performance Assurance by the Seller to SDG&E, SDG&E shall have a valid and perfected first priority continuing security interest therein, free of any liens, claims or encumbrances, except those liens, security interests, claims or encumbrances arising by operation of law that are given priority over a perfected security interest; and
6. it is not and will not become a party to or otherwise be bound by any agreement, other than this Agreement, which restricts in any manner the rights of any present or future holder of any of the Performance Assurance with respect hereto.

## 6.3 Taxes

(a) Seller Liability. Seller assumes exclusive liability for and shall pay before delinquency, all federal, state, regional, municipal or local sales, use, excise and other taxes, charges or contributions imposed on, or with respect to, or measured by (i) the equipment, materials, supplies or labor furnished hereunder, (ii) the wages, salaries or other remunerations paid to individuals employed in connection with the performance of the work under this Agreement, or (iii) any failure to comply with the Patient Protection and Affordable Care Act of 2010, as amended (the “Affordable Care Act”) with respect to individuals performing the work under this Agreement. Seller shall assume sole risk, responsibility and liability for, and shall indemnify, reimburse, defend, and hold harmless SDG&E and SDG&E’s directors, officers, employees, agents, assigns, and successors in interest (each, an “Indemnified Party”) for, from and against, any and all loss, liability, damage, claim, cost, charge, demand, penalty, fine or expense of any kind or nature (including any direct, damage, claim, cost, charge, demand, or expense, and attorneys’ fees (including cost of in-house counsel) and other costs of litigation, arbitration or mediation, and in the case of third-party claims only, indirect or consequential loss or damage of such third-party) arising from, caused by, or in connection with, Seller’s failure to pay such taxes, charges or contributions.

(b) Tax Minimization. Each Party shall make commercially reasonable efforts to cooperate with each other to minimize the tax liability of both Parties to the extent legally permissible (and with no duty to increase either parties tax liability), including separately stating taxable charges on Seller’s invoices and supplying resale and exemption certificates, if applicable, and any other information as reasonably requested.

# NOTICES

## 7.1 Notice

All Notices, requests, statements or payments from one Party to the other Party shall be made to the addresses and persons specified in Section 7.2. All Notices, requests, statements or payments from one Party to the other Party shall be made in writing except where this Agreement expressly provides otherwise. Notices required to be in writing shall be delivered by hand delivery, overnight delivery, or facsimile. Notice from one Party to the other Party by facsimile (where confirmation of successful transmission is received) shall be deemed to have been received on the day on which it was transmitted (unless transmitted after 5:00 p.m. at the place of receipt or on a day that is not a Business Day, in which case it shall be deemed received on the next Business Day). Notice from one Party to the other Party by hand delivery or overnight delivery shall be deemed to have been received when delivered. A Party may change its contact information by providing Notice of the same in accordance herewith.

## 7.2 Contact Information

For SDG&E:

Billing Representative Contract Representative

*[Name] [Name]*

Phone: Phone:

Facsimile: Facsimile:

Settlements

*[Name]*

Phone:

Facsimile:

Accounts Payable :

Attn:

*[address]*

Phone:

Facsimile:

Invoice Payment Department:

Attn:

*[address]*

Phone:

Facsimile:

Credit and Collections

Attn: Manager of Credit for SDG&E

555 W. 5th St. ML18A3

Los Angeles, CA 90013

Phone: (866) 313-6622 Facsimile: (213) 244-8316

Notices of Event of Default or Potential Event of Default to:

SDG&E Law Department, General Counsel

Phone:

Facsimile:

For Seller:

Billing Representative Contract Representative

*[Name] [Name]*

Phone: Phone:

Facsimile: Facsimile:

Settlements

*[Name]*

Phone:

Facsimile:

Other Seller Contact Information:

*[Name, if any]*

Credit and Collections

Attn:

Phone:

Facsimile:

Notices of Event of Default or Potential Event of Default to:

*[Name]*

Phone:

Facsimile:

The Parties acknowledge and agree that those persons set forth in this Section 7.2 are designated by each Party as their respective authorized representatives to act on their behalf for the purposes described therein.

# EVENTS OF DEFAULT; TERMINATION

## 8.1 Events of Default

(a) Generally. An “Event of Default” shall mean, with respect to a Party (“Defaulting Party”), the occurrence of any of the following:

(i) the failure to make, when due, any payment required to be made to the other Party pursuant to this Agreement, if such failure is not remedied within three (3) Business Days after written Notice of such failure is given by the Non-Defaulting Party;

(ii) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated if the representation or warranty is continuing in nature;

(iii) the failure to perform any material covenant, obligation, term or condition of this Agreement (except to the extent constituting a separate Event of Default), where such breach is not remedied within five (5) Business Days of Notice of such breach by the Non-Defaulting Party;

(iv) such Party becomes Bankrupt;

(v) such Party disaffirms, disclaims, or rejects, in whole or in part, or challenges the validity of this Agreement; or

(vi) such Party assigns this Agreement tor any of its rights hereunder other than in compliance with Section 15.3.

(b) Seller Events of Default. In addition to the Events of Default set forth in Section 8.1(a) above, the following shall be an Event of Default of Seller:

* 1. the failure of Seller to satisfy the collateral requirements set forth in Article 5, including failure to post and maintain Performance Assurance;
	2. the failure of Seller to achieve the Initial Delivery Date by the Initial Delivery Deadline (as such Initial Delivery Deadline shall have been extended pursuant to Section 2.2);
	3. Seller abandons the Project;
	4. the failure to maintain the necessary Permits under Section 2.7;
	5. a breach by Seller of any representation, warranty, covenant or obligations under Section 6.2;
	6. For two (2) consecutive Contract Years, the Acceptable Annual Inspection Report for each such Contract Year shows that the Project does not meet the Project Requirements for the following Contract Year. ***[NOTE: SDG&E has a minimum capacity requirement of 70% of the bid capacity over any consecutive 12-month period.]***

## 8.2 Remedies

If an Event of Default shall have occurred with respect to a Defaulting Party, the other Party (the “Non-Defaulting Party”) has the right:

1. To designate by Notice, which will be effective five (5) Business Days after the Notice is given, a day, no later than twenty (20) calendar days after the Notice is effective, for the early termination of this Agreement (an “Early Termination Date”) and the concurrent payment of the Termination Payment determined in accordance with Section 8.3 below;
2. Suspend performance of this Agreement (including making payments due to the Defaulting Party under this Agreement), but excluding the obligation to post and maintain Performance Assurance in accordance with Article 5; and
3. To pursue all other remedies available at law or in equity against the Defaulting Party (including monetary damages), except to the extent that such remedies are limited by the terms of this Agreement.

## 8.3 Termination Payment

As soon as practicable after an Early Termination Date is declared, the Non-Defaulting Party shall provide Notice to the Defaulting Party of the Termination Payment.

The Notice must include a written statement setting forth, in reasonable detail, the calculation of such Termination Payment including the Settlement Amount, together with appropriate supporting Documentation.

If the Termination Payment is positive, the Defaulting Party shall pay such amount to the Non-Defaulting Party within two (2) Business Days after the Notice is provided. If the Termination Payment is negative (i.e., the Non-Defaulting Party owes the Defaulting Party more than the Defaulting Party owes the Non-Defaulting Party), then the Non-Defaulting Party shall pay such amount to the Defaulting Party within thirty (30) days after the Notice is provided.

Each Party acknowledges and agrees that (a) the actual damages that the Non-Defaulting Party would incur in connection with a termination of this Agreement by the Non-Defaulting Party as a result of an Event of Default of the Defaulting Party would be difficult or impossible to predict with certainty, (b) the Termination Payment described in this Section 8.3 is a reasonable and appropriate approximation of such damages, and (c) the Termination Payment is the exclusive remedy of the Non-Defaulting Party in connection with such termination but shall not otherwise act to limit any of the Non-Defaulting Party’s rights or remedies if the Non-Defaulting Party does not elect such termination as its remedy for an Event of Default by the Defaulting Party.

# INDEMNIFICATION

## 9.1 Seller’s Indemnification Obligations

1. General Indemnity. In addition to any other indemnification obligations Seller may have elsewhere in this Agreement, which are hereby incorporated in this Section 9.1, Seller releases, and shall indemnify, defend and hold harmless SDG&E and each other Indemnified Party, from and against any and all loss, liability, damage, claim, cost, charge, demand, penalty, fine or expense of any kind or nature (including any direct, damage, claim, cost, charge, demand, or expense, and attorneys’ fees (including cost of in-house counsel) and other costs of litigation, arbitration or mediation, and in the case of third-party claims only, indirect or consequential loss or damage of such third-party) incurred by such Indemnified Party, arising out of or in connection with:
2. The performance of work under this Agreement (whether such performance is by Seller, Seller’s contractor or subcontractor, any other person performing on behalf of Seller or Seller’s contractor or subcontractor or otherwise);
3. any violation of a Law arising out of or in connection with Seller’s performance of, or failure to perform, this Agreement, including any strict liability imposed by any Law; or
4. Any violation by Seller or any of Seller’s contractors or subcontractors of any third party license to use intellectual property in connection with work performed under this Agreement;

except to the extent any of the foregoing is caused by such Indemnified Party’s negligence or willful misconduct.

1. Hazardous Materials. Seller acknowledges that any claims, demands, losses, damages, costs, expenses, and legal liability that arise out of, result from, or are in any way connected with the release or spill of any legally designated hazardous material or waste as a result of the work performed under or in connection with this Agreement are expressly within the scope of this indemnity, and that the costs, expenses, and legal liability for environmental investigations, monitoring, containment, abatement, removal, repair, cleanup, restoration, remedial work, penalties, and fines arising from strict liability, or violation of any Law, attorney's fees, disbursements, and other response costs incurred as a result of such releases or spills are expressly within the scope of the indemnity set forth in this Section 9.1.
2. Intellectual Property Infringement. Seller shall indemnify, defend and hold harmless SDG&E and each Indemnified Party from and against any actual or alleged infringement or misappropriation by Seller or any of Seller’s contractors or subcontractors of any patent, copyright, trade secret, trademark, service mark, trade name, or other intellectual property right in connection with work performed under this Agreement.
3. Liens. Seller shall indemnify, defend and hold harmless SDG&E and each Indemnified Party from and against any mechanics lien or stop notice claim against such Indemnified Party by Seller or any of its contractors, subcontractors, employees, suppliers or agents pertaining the work under this Agreement. If Seller fails to remove or discharge by bond, payment or otherwise any lien or claim within five (5) Business Days after an Indemnified Party’s written demand to do so, SDG&E may offset the compensation otherwise payable to SDG&E under this Agreement in order to pay such lienors directly.

## 9.2 Indemnification Claims.

All claims for indemnification by an Indemnified Party under this Agreement will be asserted and resolved as follows:

1. If a claim or demand for which SDG&E may claim indemnity is asserted against or sought to be collected from Seller by a third party, SDG&E shall as promptly as practicable give Notice to the Seller; provided, failure to provide this Notice will relieve Seller only to the extent that the failure actually prejudices Seller;
2. Seller will have the right to control the defense and settlement of any claims in a manner not adverse to SDG&E but cannot admit any liability or enter into any settlement without SDG&E’s approval; and
3. SDG&E may employ counsel at its own expense with respect to any claims or demands asserted or sought to be collected against it; provided, if counsel is employed due to a conflict of interest or because Seller does not assume control of the defense, Seller will bear the expense of this counsel.

# LIMITATION OF REMEDIES, LIABILITY, AND DAMAGES

EXCEPT AS SET FORTH HEREIN, THERE ARE NO WARRANTIES BY EITHER PARTY UNDER THIS AGREEMENT, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF.

FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES WILL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR’S LIABILITY WILL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED, UNLESS THE PROVISION IN QUESTION PROVIDES THAT THE EXPRESS REMEDIES ARE IN ADDITION TO OTHER REMEDIES THAT MAY BE AVAILABLE.

IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR’S LIABILITY WILL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES WILL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED.

UNLESS EXPRESSLY PROVIDED IN THIS AGREEMENT, INCLUDING WITHOUT LIMITATION THE PROVISIONS OF ARTICLE NINE (INDEMNITY), NEITHER PARTY WILL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE.

IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

NOTHING IN THIS ARTICLE PREVENTS, OR IS INTENDED TO PREVENT SDG&E FROM PROCEEDING AGAINST OR EXERCISING ITS RIGHTS WITH RESPECT TO ANY PERFORMANCE ASSURANCE.

SDG&E’S AND/OR ITS CONSULTANTS’ REVIEW OF THE DESIGN, CONSTRUCTION, OPERATION OR MAINTENANCE OF THE PROJECT SHALL NOT CONSTITUTE ANY REPRESENTATION AS TO THE ECONOMIC OR TECHNICAL FEASIBILITY, OPERATIONAL CAPABILITY, OR RELIABILITY OF THE PROJECT OR OF THE PROJECT’S ABILITY TO PROVIDE ANY ENERGY OR CAPACITY SAVINGS, REDUCTIONS OR EFFICIENCY. SELLER SHALL IN NO WAY REPRESENT TO ANY THIRD PARTY THAT SDG&E’S REVIEW OF THE PROJECT, INCLUDING, BUT NOT LIMITED TO, SDG&E’S AND/OR ITS CONSULTANTS’ REVIEW OR ANALYSIS OF THE DESIGN, CONSTRUCTION, OPERATION OR MAINTENANCE OF THE PROJECT, IS A REPRESENTATION BY SDG&E AS TO THE ECONOMIC OR TECHNICAL FEASIBILITY, OPERATIONAL CAPABILITY, AND RELIABILITY OF SUCH PROJECT OR AS TO THE PROJECT’S ABILITY TO PROVIDE ANY ENERGY OR CAPACITY SAVINGS, REDUCTIONS OR EFFICIENCY. SELLER IS SOLELY RESPONSIBLE FOR THE ECONOMIC AND TECHNICAL FEASIBILITY, OPERATIONAL CAPABILITY AND RELIABILITY OF SELLER’S PROJECT AND THE ENERGY AND CAPACITY SAVINGS OR REDUCTIONS ASSOCIATED THEREWITH.

# CONFIDENTIALITY

**11.1 Agreement Terms.**

Neither Party shall disclose the non-public terms or conditions of this Agreement or any transaction hereunder to a third party, other than (a) the Party’s Affiliates and its and their officers, directors, employees, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential, (b) for disclosure to the Buyer’s Procurement Review Group, as defined in CPUC Decision (D) 02-08-071, subject to a confidentiality agreement, (c) to the CPUC under seal for purposes of review, (d) in order to comply with any applicable Law, regulation, or any exchange, control area or CAISO rule, or order issued by a court or entity with competent jurisdiction over the Party seeking to disclose such non-public terms or conditions or transaction hereunder (“Disclosing Party”), other than to those entities set forth in subsection (f); or (e) to a Qualified Assignee; or (f) in order to comply with any applicable regulation, rule, or order of the CPUC, CEC, or the Federal Energy Regulatory Commission. In connection with requests made pursuant to clause (iv) of this Section 11.1 (“Disclosure Order”) each Party shall, to the extent practicable, use reasonable efforts to prevent or limit such disclosure. After using such reasonable efforts, the Disclosing Party shall not be: (i) prohibited from complying with a Disclosure Order or (ii) liable to the other Party for monetary or other damages incurred in connection with the disclosure of the confidential information. Except as provided in the preceding sentence, the Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

**11.2 Publicity.**

No announcement, publicity, advertising, press release, promotional or marketing materials regarding the arrangement contemplated under this Agreement, including the existence hereof, shall be made by either Party without the prior written approval of the other Party which approval shall not be unreasonably withheld or delayed.

**11.3 End-Use Customer Information.**

Notwithstanding anything contained in this Agreement to the contrary (including without limitation the terms of Sections 11.1 and 11.2), Seller shall keep confidential and shall not disclose to any third party (other than to its contractors and subcontractors for the sole purpose of performing the work under this Agreement and only if such contractors and subcontractors have agreed in writing to confidentiality obligations at least as stringent as set forth in this Section 11.3 as if they were the “Seller” hereunder) any information related an End-Use Customer, including but not limited to names, addresses, billing information and energy usage data, except in the event, and only to the extent, that Seller is required to do so by the disclosure of requirements of any Law applicable to Seller, provided that Seller has provided SDG&E with prompt written notice of any such requirement prior to making or permitting any such disclosure so that SDG&E (with Seller’s assistance if requested by SDG&E) may have a reasonable opportunity to seek a protective order or other appropriate remedy. Seller shall cause its contractors and subcontractors to comply with the requirements of this Section 11.3 as if they were the “Seller” hereunder.

# FORCE MAJEURE

If, because of a Force Majeure, either Party is unable to perform an obligation under this Agreement, such Party (the “Claiming Party”) shall not be in default under this Agreement as a result of such failure of performance is affected or would have been required by or but for the Force Majeure only to the extent and for the duration so affected, provided:

1. the Claiming Party promptly, but no more than one (1) Business Day after the initial occurrence of the claimed Force Majeure, gives the other Party Notice describing the particulars of the occurrence;
2. the Claiming Party, within five (5) Business Days of providing Notice of occurrence of the Force Majeure, provides evidence reasonably sufficient to establish that the occurrence constitutes a Force Majeure as defined in this Agreement;
3. the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure; and
4. as soon as Claiming Party is able to resume performance of its obligations under this Agreement, it shall do so and shall promptly give the other Party Notice of this resumption.

Notwithstanding anything contained in this Article 12 to the contrary, a Force Majeure shall not excuse:

(i) the Claiming Party’s obligation to make payments then due or becoming due with respect to performance prior to such Force Majeure;

(ii) the Claiming Party’s indemnification, hold harmless or defense obligations under this Agreement;

 (iii) an Event of Default by Seller under Section 8.1(b)(ii) (with the understanding that the Initial Delivery Deadline may be extended as a result of a Force Majeure pursuant to Section 2.2);

(iv) an Event of Default by Seller under Section 8.1(b)(v); or

(v) an Event of Default by Seller under Section 8.1(b)(vi).

This Agreement may be terminated upon Notice by the non-Claiming Party with no further obligation to the Claiming Party if the total number of Force Majeure extension days claimed by such Claiming Party (which may be from one or more Force Majeure events) during the Term of the Agreement exceeds 365 days.

# INSURANCE

## 13.1 Insurance

Throughout the Term and for such additional periods as may be specified below, Seller shall, at its own expense, provide and maintain in effect the insurance policies and minimum limits of coverage specified below, and such additional coverage as may be required by applicable law, with insurance companies which are authorized to do business in the state in which the services are to be performed and which have an A.M. Best’s Insurance Rating of not less than A-;VII. The minimum insurance requirements specified herein do not in any way limit or relieve Seller of any obligation assumed elsewhere in this Agreement, including, but not limited to, Seller’s defense and indemnity obligations.

1. Workers’ Compensation Insurance with the statutory limits required by the state having jurisdiction over Seller’s employees;
2. Employer’s Liability Insurance with limits of not less than:
3. Bodily injury by accident – One Million dollars ($1,000,000) each accident
4. Bodily injury by disease – One Million dollars ($1,000,000) policy limit
5. Bodily injury by disease – One Million dollars ($1,000,000) each employee
6. Commercial General Liability Insurance (which, except with the prior written consent of SDG&E and subject to subsections 13.1(c)(i) and 13.1(c)(ii) below, shall be written on an “occurrence,” not a “claims-made” basis), covering all operations by or on behalf of Seller arising out of or connected with this Agreement, including coverage for bodily injury, broad form property damage, personal and advertising injury, products/completed operations, and contractual liability. Such insurance shall bear a combined single limit per occurrence and annual aggregate of not less than [*TBD (or) $3,000,000* *per occurrence* *and $6,000,000 general aggregate*], exclusive of defense costs, for all coverages. Such insurance shall contain standard cross-liability and severability of interest provisions and no explosion, collapse, or underground exclusions.

If Seller elects, with SDG&E’s written concurrence, to use a “claims made” form of Commercial General Liability Insurance, then the following additional requirements apply:

1. The retroactive date of the policy must be prior to the Execution Date; and
2. Either the coverage must be maintained for a period of not less than three (3) years after the Agreement terminates, or the policy must provide for a supplemental extended reporting period of not less than three (3) years after the Agreement terminates.
3. Commercial Automobile Liability Insurance covering bodily injury and property damage with a combined single limit of not less than One Million dollars ($1,000,000) per occurrence. Such insurance shall cover liability arising out of Seller’s use of all owned (if any), non-owned and hired automobiles in the performance of the Agreement.
4. Pollution Liability Insurance, (which, except with the prior written consent of SDG&E and subject to subsections 13.1(e)(i) and 13.1(e)(ii) below, shall be written on an “occurrence,” not a “claims-made” basis) with limits of not less than [*TBD (or) $5,000,000 per occurrence or each claim and in the annual aggregate*], covering losses involving hazardous material(s) and caused by pollution incidents or conditions that arise from the Project, including but not limited to, coverage for bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death, property damage including the resulting loss of use thereof, clean-up costs, and the loss of use of tangible property that has not been physically damaged or destroyed, and defense costs.

If Seller elects, with SDG&E’s written concurrence, to use a “claims made” form of Pollution Liability Insurance, then the following additional requirements apply:

1. The retroactive date of the policy must be prior to the Execution Date; and
2. Either the coverage must be maintained for a period of not less than three (3) years after the Agreement terminates, or the policy must provide for a supplemental extended reporting period of not less than three (3) years after the Agreement terminates.
3. Umbrella/Excess Liability Insurance, written on an “occurrence,” not a “claims-made” basis, providing coverage excess of the underlying Employer’s Liability, Commercial General Liability, and Commercial Automobile Liability insurance, on terms at least as broad as the underlying coverage, with limits of not less than [*TBD (or) $10,000,000 per occurrence and in the annual aggregate*]per occurrence and in the aggregate. The insurance requirements of this Article 13 can be provided by any combination of Seller’s primary and excess liability policies.

## 13.2 SDG&E as Insured

The insurance required in Section 13.1 shall apply as primary insurance to, without a right of contribution from, any other insurance maintained by or afforded to SDG&E, its subsidiaries and affiliates, and their respective officers, directors, shareholders, agents, and employees, regardless of any conflicting provision in Seller's policies to the contrary. To the extent permitted by law, Seller and its insurers shall be required to waive all rights of recovery from or subrogation against SDG&E, its subsidiaries and affiliates, and their respective officers, directors, shareholders, agents, employees and insurers. The Commercial General Liability, Pollution Liability and Umbrella/Excess Liability insurance required above shall name SDG&E, its subsidiaries and affiliates, and their respective officers, directors, shareholders, agents and employees, as additional insureds for liability arising out of Seller’s obligations under this Agreement.

## 13.3 Certificates of Insurance

At the time this Agreement is executed, or within a reasonable time thereafter, and within a reasonable time after coverage is renewed or replaced, Seller shall furnish to SDG&E certificates of insurance evidencing the coverage required above, written on forms and with deductibles reasonably acceptable to SDG&E. All deductibles, co-insurance and self-insured retentions applicable to the insurance above shall be paid by Seller. All certificates of insurance shall note that the insurers issuing coverage shall endeavor to provide SDG&E with at least thirty (30) days’ prior written notice in the event of cancellation of coverage. SDG&E’s receipt of certificates that do not comply with the requirements stated herein, or Seller’s failure to provide certificates, shall not limit or relieve Seller of the duties and responsibility of maintaining insurance in compliance with the requirements in this Article 13 and shall not constitute a waiver of any of the requirements in this Article 13.

## 13.4 Failure to Comply

If Seller fails to comply with any of the provisions of this Article 13, Seller, among other things and without restricting SDG&E’s remedies under the law or otherwise, shall, at its own cost and expense, act as an insurer and provide insurance in accordance with the terms and conditions above. With respect to the required Commercial General Liability, Pollution Liability, Umbrella/Excess Liability and Commercial Automobile Liability insurance, Seller shall provide a current, full and complete defense to SDG&E, its subsidiaries and affiliates, and their respective officers, directors, shareholders, agents, employees, assigns, and successors in interest, in response to a third party claim in the same manner that an insurer would have, had the insurance been maintained in accordance with the terms and conditions set forth above.

# DISPUTE RESOLUTION

## 14.1 Intent of the Parties

Except as provided in the next sentence, the sole procedure to resolve any claim arising out of or relating to this Agreement or any related agreement is the dispute resolution procedure set forth in this Article 14. Either Party may seek a preliminary injunction or other provisional judicial remedy if such action is necessary to prevent irreparable harm or preserve the status quo, in which case both Parties nonetheless will continue to pursue resolution of the dispute by means of the dispute resolution procedure set forth in this Article 14.

## 14.2 Management Negotiations

(a) The Parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement or any related agreements by prompt negotiations between each Party’s authorized representative designated in writing as a representative of the Party (each a “Manager”). Either Manager may, by Notice to the other Party, request a meeting to initiate negotiations to be held within ten (10) Business Days of the other Party’s receipt of such request, at a mutually agreed time and place (either in person or telephonically). If the matter is not resolved within fifteen (15) Business Days of their first meeting (“Initial Negotiation End Date”), the Managers shall refer the matter to the designated senior officers of their respective companies that have authority to settle the dispute (“Executive(s)”). Within five (5) Business Days of the Initial Negotiation End Date (“Referral Date”), each Party shall provide one another Notice confirming the referral and identifying the name and title of the Executive who will represent the Party.

(b) Within five (5) Business Days of the Referral Date, the Executives shall establish a mutually acceptable location and date, which date shall not be greater than thirty (30) days from the Referral Date, to meet. After the initial meeting date, the Executives shall meet, as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute.

(c) All communication and writing exchanged between the Parties in connection with these negotiations shall be confidential and shall not be used or referred to in any subsequent binding adjudicatory process between the Parties.

(d) If the matter is not resolved within forty-five (45) days of the Referral Date, or if the Party receiving the Notice to meet, pursuant to Section 14.2(a) above, refuses or does not meet within the ten (10) Business Day period specified in Section 14.2(a) above, either Party may initiate arbitration of the controversy or claim by providing Notice of a demand for binding arbitration at any time thereafter.

## 14.3 Arbitration

Any dispute that cannot be resolved by management negotiations as set forth in Section 14.2 above shall be resolved through binding arbitration by a retired judge or justice from the JAMS panel conducted in San Diego, California, administered by and in accordance with JAMS Comprehensive Arbitration Rules and Procedures (“Arbitration”).

1. Any arbitrator shall have no affiliation with, financial or other interest in, or prior employment with either Party and shall be knowledgeable in the field of the dispute. The Parties shall cooperate with one another in selecting the arbitrator within sixty (60) days after Notice of the demand for arbitration. If, notwithstanding their good faith efforts, the Parties are unable to agree upon a mutually-acceptable arbitrator, the arbitrator shall be appointed as provided for in JAMS Comprehensive Arbitration Rules and Procedures.
2. At the request of a Party, the arbitrator shall have the discretion to order depositions of witnesses to the extent the arbitrator deems such discovery relevant and appropriate. Depositions shall be limited to a maximum of three (3) per Party and shall be held within thirty (30) days of the making of a request. Additional depositions may be scheduled only with the permission of the arbitrator, and for good cause shown. Each deposition shall be limited to a maximum of six (6) hours duration unless otherwise permitted by the arbitrator for good cause shown. All objections are reserved for the Arbitration hearing except for objections based on privilege and proprietary and confidential information. The arbitrator shall also have discretion to order the Parties to exchange relevant documents. The arbitrator shall also have discretion to order the Parties to answer interrogatories, upon good cause shown.
3. The arbitrator shall have no authority to award punitive or exemplary damages or any other damages other than direct and actual damages and the other remedies contemplated by this Agreement.
4. The arbitrator shall prepare in writing and provide to the Parties an award including factual findings and the reasons on which their decision is based.
5. The arbitrator’s award shall be made within nine (9) months of the filing of the notice of intention to arbitrate (demand) and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the Parties or by the arbitrator, if necessary.
6. Judgment on the award may be entered in any court having jurisdiction.
7. Each Party shall bear its own costs, expenses and attorneys’ fees associated with the dispute resolution process, and the arbitrator shall not have authority to allocate the costs or expenses of the Arbitration, including the arbitrator’s fees, to either Party.
8. The arbitrator shall have the authority to grant dispositive motions prior to the commencement of or following the completion of discovery if the arbitrator concludes that there is no material issue of fact pending before the arbitrator.
9. The existence, content, and results of any Arbitration hereunder is confidential information that is subject to the provisions of Article 11.

# MISCELLANEOUS

## 15.1 Governing Law and 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 STATE OF CALIFORNIA, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS. ANY ACTION OR LITIGATION BROUGHT TO ENFORCE OR INTERPRET THIS AGREEMENT SHALL BE BROUGHT IN A SUPERIOR COURT OF CALIFORNIA LOCATED IN SAN DIEGO COUNTY, CALIFORNIA (OR, IF THE FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER THE SUBJECT MATTER OF THE DISPUTE, IN THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA), AND THE PARTIES HEREBY SUBMIT TO THE EXCLUSIVE JURISDICTION OF SUCH COURT.

## 15.2 Amendment

This Agreement can only be amended by a writing signed by both Parties.

## 15.3 Assignment

Neither Party shall assign this Agreement or its rights hereunder, as the case may be, without the prior written consent of the other Party, which consent may be withheld in the exercise of its sole discretion; provided, however, either Party may, without the consent of the other Party (and without relieving itself from liability hereunder), (i) assign this Agreement or the accounts, revenues or proceeds hereof or thereof, as the case may be, in connection with any financing or other financial arrangements to its financing providers as collateral, (ii) transfer or assign this Agreement to an Affiliate of such Party which Affiliate’s creditworthiness is equal to or higher than that of such Party (and, where Seller is the assignor, demonstrates, to SDG&E’s reasonable satisfaction, that such assignee Affiliate has the experience and expertise to perform all of Seller’s obligations under this Agreement), or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets of such Party and whose creditworthiness is equal to or higher than that of such Party (and, where Seller is the assignor, demonstrates, to SDG&E’s reasonable satisfaction, that such assignee Affiliate has the experience and expertise to perform all of Seller’s obligations under this Agreement); provided, however, that in each such case, any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request. Notwithstanding the foregoing, SDG&E may, without the consent of the Seller (and therefor relieving itself from liability hereunder), assign this Agreement to a Qualified Assignee. Qualified Assignee shall mean: any community choice aggregation entity or joint powers authority formed in the State of California or any legal entity that is established by statute or by the CPUC to serve load as a central procurement entity.

## 15.4 Successors and Assigns

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

## 15.5 Waiver

None of the provisions of this Agreement shall be considered waived by either Party unless the Party against whom such waiver is claimed gives the waiver in writing. The failure of either Party to insist in any one instance upon strict performance of any the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishments of such rights for the future but the same shall continue and remain in full force and effect. Waiver by either Party of any default of the other Party shall not be deemed a waiver of any other default.

## 15.6 Obligations Surviving Termination

Except as may be provided or limited by this Agreement, the obligations which by their nature are intended to survive termination of this Agreement, including representations, warranties, covenants and rights and obligations with respect to indemnification, payment, settlement, and confidentiality, shall so survive.

## 15.7 No Agency

Except as otherwise provided explicitly herein, in performing their respective obligations under this Agreement, neither Party is acting, or is authorized to act, as the other Party’s agent.

## 15.8 No Third Party Beneficiaries

This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound by this Agreement), except where such third party is an Indemnified Party under this Agreement.

## 15.9 Entire Agreement

This Agreement, when fully executed, constitutes the entire agreement by and between the Parties as to the subject matter hereof, and supersedes all prior understandings, agreements or representations by or between the Parties, written or oral, to the extent they have related in any way to the subject matter hereof. Each Party represents that, in entering into this Agreement, it has not relied upon any promise, inducement, representation, warranty, agreement or other statement not set forth in this Agreement.

## 15.10 Severability

If any term, section, provision or other part of this Agreement, or the application of any term, section, provision or other part of this Agreement, is held to be invalid, illegal or void by a court or regulatory agency of proper jurisdiction, all other terms, sections, provisions or other parts of this Agreement shall not be affected thereby but shall remain in force and effect unless a court or regulatory agency holds that the provisions are not separable from all other provisions of this Agreement.

## 15.11 Multiple Originals

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any of the signatures thereon, and may be attached to another counterpart of this Agreement identical in form hereto by having attached to it one or more signature pages.

## 15.12 Audit Rights

SDG&E, or its designee, shall have the right, at its sole expense and during normal working hours, to audit the documents, records or data of Seller to the extent reasonably necessary to verify the accuracy of any statement, claim, charge or calculation made pursuant to this Agreement. Seller shall promptly comply with any reasonable request by SDG&E under this Section and provide copies of documents, records or data to SDG&E. The rights and obligations under this Section shall survive the termination of this Agreement for a period of five (5) years. Seller shall include a similar clause in its arrangements with its contractors and subcontractors reserving the right to designate Seller’s own designee and/or representative of SDG&E, who shall have the right to verify the accuracy of any statement, claim, charge or calculation made in connection with the work performed under this Agreement.

## 15.13 Performance Under this Agreement

Each Party and its representatives shall maintain records and supporting Documentation relating to this Agreement, and the performance of the Parties hereunder in accordance with, and for the applicable time periods required by, all applicable Laws.

## 15.14 Independent Contractor

(a) Seller’s Relationship with SDG&E. The Parties agree that Seller is performing all work under this Agreement as an independent contractor and no principal-agent or employer-employee relationship or joint-venture or partnership shall be created with SDG&E. Seller represents to SDG&E that Seller and its contractors and subcontractors and agents are properly licensed, fully experienced and qualified (including having all necessary authorizations) to perform the class and type of the work as specified in this Agreement, in addition to being properly insured, equipped, organized, staffed and financed to handle such work. Seller shall perform the work under this Agreement in an orderly and professional manner in accordance with industry standards. Seller shall not employ for the work any personnel or contractor or subcontractor unskilled in the work assigned. Seller shall use prudent business practices in its relationships with subcontractors, suppliers and agents.

(b) Individuals Performing the Work; Benefits and Affordable Care Act. Regardless of the nature or duration of any assignment with SDG&E, neither Seller, its contractor or subcontractor nor any individuals performing work under this Agreement shall be eligible for or entitled to participate in any of SDG&E’s employee benefit plans, programs, policies or practices which may now or in the future be in effect, including, without limitation, any pension, retirement, or 401(k) plan; any profit sharing, stock option, bonus or incentive compensation plan; any life or health insurance plan; any vacation or holiday pay plan; or any separation payment plan. Seller shall, or shall require that the appropriate contractor and subcontractor is contractually obligated to, treat individuals performing the work under this Agreement as its employees for the purposes of satisfying the requirements of the Affordable Care Act, including but not limited to the requirements of Internal Revenue Code Section 4980H, the associated reporting requirements of Internal Revenue Code Section 6056, and the requirements of Sections 18A and 18B of the Fair Labor Standards Act. Furthermore, Seller shall, or shall require that the appropriate contractor and subcontractor is contractually obligated to, offer minimum essential coverage that is both affordable and minimum value to all individuals performing work under this Agreement who are full-time employees (and their dependents) in accordance with Internal Revenue Code section 4980H and the regulations issued thereunder, provided that the Seller or applicable subcontractor is a “large employer” subject to section 4980H.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the Parties have read this Agreement, understand it, and agree to be bound by its terms as of the Execution Date.

|  |  |
| --- | --- |
| **SAN DIEGO GAS & ELECTRIC****COMPANY** | **[SELLER]** |
| By: Name: Title: Date  | By: Name: Title: Date:  |

**EXHIBIT A**

Form of Letter of Credit

IRREVOCABLE NONTRANSFERABLE STANDBY

LETTER OF CREDIT

Reference Number:

Transaction Date:

BENEFICIARY:

San Diego Gas & Electric Company

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attention Credit Manager

Ladies and Gentlemen:

 (the “Bank”) hereby establishes this Irrevocable Nontransferable Standby Letter of Credit (“Letter of Credit”) in favor of San Diego Gas & Electric Company, a California corporation (the “Beneficiary”), for the account of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_ corporation (the “Applicant”), for the amount of XXX AND XX/100 Dollars ($ ) (the “Available Amount”), effective immediately and expiring at 5:00 p.m., California time, on \_\_\_\_\_\_\_\_\_\_\_\_ (the “Expiration Date”).

This Letter of Credit shall be of no further force or effect upon the close of business on the Expiration Date or, if such day is not a Business Day (as hereinafter defined), on the next Business Day.

For the purposes hereof, “Business Day” shall mean any day on which commercial banks are not authorized or required to close in Los Angeles, California.

Subject to the terms and conditions herein, funds under this Letter of Credit are available to Beneficiary by presentation in compliance on or before 5:00 p.m. California time, on or before the Expiration Date of the following:

1. The original or a photocopy of this Letter of Credit and all amendments; and
2. The Drawing Certificate issued in the form of Attachment A attached hereto and which forms an integral part hereof, duly completed and purportedly bearing the signature of an authorized representative of the Beneficiary.

Notwithstanding the foregoing, any full or partial drawing hereunder may be requested by transmitting the requisite documents as described above to the Bank by facsimile at \_\_\_\_\_\_\_\_\_\_\_\_\_\_ or such other number as specified from time-to-time by the Bank.

The facsimile transmittal shall be deemed delivered when received. Drawings made by facsimile transmittal are deemed to be the operative instrument without the need of originally signed documents.

Partial drawing of funds shall be permitted under this Letter of Credit, and this Letter of Credit shall remain in full force and effect with respect to any continuing balance; *provided*, the Available Amount shall be reduced by the amount of each such drawing.

This Letter of Credit is not transferable or assignable. Any purported transfer or assignment shall be void and of no force or effect.

Banking charges shall be the sole responsibility of the Applicant.

This Letter of Credit sets forth in full our obligations and such obligations shall not in any way be modified, amended, amplified or limited by reference to any documents, instruments or agreements referred to herein, except only the attachment referred to herein; and any such reference shall not be deemed to incorporate by reference any document, instrument or agreement except for such attachment.

The Bank engages with the Beneficiary that Beneficiary’s drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to the Bank on or before the Expiration Date.

 Except so far as otherwise stated, this Letter of Credit is subject to the International Standby Practices ISP98 (also known as ICC Publication No. 590), or revision currently in effect (the “ISP”). To the extent that any of the terms of this Letter of Credit are inconsistent with the ISP, the terms of this Letter of Credit shall govern. As to matters not covered by the ISP or this Letter of Credit, the laws of the State of California, without regard to the principles of conflicts of laws thereunder, shall govern all matters with respect to this Letter of Credit.

AUTHORIZED SIGNATURE for Issuer

(Name)

Title:

**ATTACHMENT A**

TO ***[ISSUING BANK NAME]***

IRREVOCABLE NON-TRANSFERABLE STANDBY LETTER OF CREDIT

No.

DRAWING CERTIFICATE

Bank

Bank Address

Subject: Irrevocable Non-transferable Standby Letter of Credit

 Reference Number:

The undersigned , an authorized representative of San Diego Gas & Electric Company (the “Beneficiary”), hereby certifies to ***[Issuing Bank Name]*** (the “Bank”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Applicant”), with reference to Irrevocable Nontransferable Standby Letter of Credit No. { }, dated , (the “Letter of Credit”), issued by the Bank in favor of the Beneficiary, as follows as of the date hereof:

1. The Beneficiary is entitled to draw under the Letter of Credit an amount equal to
$ , for the following reason(s) [check applicable provision]:

[ ]A. An Event of Default, as defined in that certain Energy Efficiency Resource Purchase Agreement between Applicant and Beneficiary, dated as of***[Date of Execution]*** (the “Agreement”) with respect to the Applicant has occurred and is continuing.

[ ]B. A Letter of Credit Default (as defined in the Agreement) has occurred and is continuing.

[ ]C. An Early Termination Date (as defined in the Agreement) has occurred or been designated as a result of an Event of Default (as defined in the Agreement) with respect to the Applicant for which there exist any unsatisfied payment obligations.

[ ]D. The Letter of Credit will expire in fewer than sixty (60) calendar days (as defined in the Agreement) from the date hereof, and Applicant has not provided Beneficiary alternative Performance Assurance (as defined in the Agreement) acceptable to Beneficiary.

[ ]E. The Bank or Applicant has heretofore provided written notice to the Beneficiary of the Bank’s or Applicant’s intent not to renew the Letter of Credit following the present Expiration Date thereof, and Applicant has failed to provide the Beneficiary with a replacement letter of credit satisfactory to Beneficiary in its sole discretion within thirty (30) days following the date of the notice of non-renewal.

[ ]F. The Beneficiary has not been paid any or all of the Applicant’s payment obligations now due and payable under the Agreement.

1. Based upon the foregoing, the Beneficiary hereby makes demand under the Letter of Credit for payment of U.S. DOLLARS AND \_\_\_\_/100ths (U.S.$ ), which amount does not exceed (i) the amount set forth in paragraph 1 above, and (ii) the Available Amount under the Letter of Credit as of the date hereof.
2. Funds paid pursuant to the provisions of the Letter of Credit shall be wire transferred to the Beneficiary in accordance with the following instructions:

Unless otherwise provided herein, capitalized terms which are used and not defined herein shall have the meaning given each such term in the Letter of Credit.

IN WITNESS WHEREOF, this Certificate has been duly executed and delivered on behalf of the Beneficiary by its authorized representative as of this \_\_\_\_ day of , \_\_\_\_\_.

Beneficiary: SAN DIEGO GAS & ELECTRIC COMPANY

By:

Name:

Title:

**EXHIBIT B**

**PROJECT DESCRIPTION & M&V PLAN**

This Exhibit B (which includes Exhibits B-1, B-2, B-3 and B-4) describes the Project and the Measures that will deliver the capacity savings defined in this Agreement and sets forth the M&V Plan for determining the Peak Capacity Savings for the Project.

A. Project Description

1. Goals & Objectives. [*To be developed based on bid*]

2 Marketing. [*To be developed based on bid*].

3. End-Use Customers. Seller shall exclusively target End-Use Customers in the following market segments:

|  |  |  |
| --- | --- | --- |
| **Market Segment** | **NAICS Code** | **Description** |
|  |  |  |
|  |  |  |

Seller shall also work with SDG&E to identify high-cost CAISO PNodes and prioritize these areas for implementation.

2. Eligible Measures. Seller’s Project shall only comprise of the following type of measures:

|  |
| --- |
| **Measure** |
|  |
|  |

Each of the above-permitted measures are further described in the Work Paper for such measure attached hereto in Exhibit B-1 (the “Work Papers”). In addition, measures eligible to be installed by Seller for the Project under this Agreement shall meet the following criteria:

(a) Baseline Energy Performance. [*To be developed*]

(b) Minimum Useful Life. Measures shall have a minimum effective useful life of five (5) years. SDG&E may allow certain Measures with an effective useful life of less than five (5) years at its sole and absolute discretion.

(c) Permanent Installation. Measures must be permanently installed and cannot be easily removed, as reasonably determined by SDG&E.

3. Measure Installation, Review, and Certification.

(a) Measure Installation Notices. Prior to the commencement of any construction or installation work for the installation of any measure for the Project, Seller shall notify SDG&E of its intent to install such measure using the form attached hereto as Exhibit B-2 (“Measure Installation Notice”) and obtain SDG&E’s signed approval to install such measure; provided that (i) SDG&E shall be afforded no more than thirty (30) days following receipt of such Measure Installation Notice to approve or disapprove of such measure, and if SDG&E does not provide a notice of disapproval within such thirty (30) days, then SDG&E shall be deemed to have approved of such measure and signed such Measure Installation Notice, and (ii) SDG&E shall only be permitted to disapprove of such measure for good and reasonable cause, which causes may include, but is not limited to (A) non-compliance of Seller or such measure with any of the requirements of the Agreement (including Section 6.2(a) and this Exhibit B), (B) non-compliance of such measure or the installation thereof with applicable Law, (C) use of a contractor or subcontractor to construct or install such measure that is not permitted by this Agreement, or (D) uncured breach by Seller of its obligations to maintain the insurance requirements under Article 13 of the Agreement.

(b) Measure Installation Certificates. Following the completion of the installation of measure that is to be included in the Project, and as a condition to such measure being deemed a “Measure” for purposes of this Agreement, Seller shall submit a Measure Installation Certificate in the form attached hereto as Exhibit B-3 (“Measure Installation Certificate”).

4. List of Installed Measures. Exhibit B-4 attached hereto is an ongoing list of installed Measures for the Project, along with information regarding each such Measure’s End-Use Customer Site and a description of such Measure. No later than five (5) Business Days following the end of each calendar month during the Delivery Period, Seller shall provide SDG&E an updated Exhibit B-4, and Seller represents and warrants that the information contained in each such updated Exhibit B-4 provided by Seller is true, accurate and complete as of the last day of such calendar month.

B. Annual Energy Savings Calculation. The Annual Peak Capacity Savings and Annual Energy Savings for each type of Measure installed shall be calculated utilizing the methodologies specified in the following documents, guidelines and publications:

1. The Work Paper for such Measure;
2. [*SDG&E to insert industry-standard guidelines for calculating savings for non-residential EE programs*] (“Customized Guidelines”);

1. *Energy Efficiency Evaluation Protocol*, California Public Utilities Commission (2006), or its successor (“CPUC Protocols”); and
2. *International Performance Measurement and Verification Protocol: Concepts and Options for Determining Energy and Water Savings, Volume 1*, Efficiency Valuation Organization (January 2012), or its successor (“IPMVP Protocols”).

In the event of any conflict between terms contained in this Agreement or any of the other documents identified in clauses (a)-(d) above, the conflict shall be resolved by the following priority of documents: (i) Agreement (including this Exhibit B), (ii) the Work Paper for such Measure, (iii) Customized Guidelines, (iv) CPUC Protocols, and (v) IPMVP Protocols

C. M&V Plan

[*To be developed from bid*]

**EXHIBIT B-1**

**MEASURE WORK PAPERS**

[*To be provided by Seller for each eligible Measure*]

**EXHIBIT B-2**

**MEASURE INSTALLATION NOTICE**

**[*To be developed*]**

**EXHIBIT B-3**

**MEASURE INSTALLATION CERTIFICATE**

**[*To be developed*]**

**EXHIBIT B-4**

**INSTALLED MEASURES**

**(As of [*Insert Date*])**

|  |  |  |
| --- | --- | --- |
| **End-Use Customer ID** | **Site Description** | **Installed Measure Description** |
|  |  |  |
|  |  |  |
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**EXHIBIT C**

 **CONTRACTED ANNUAL ENERGY SAVINGS**

|  |  |
| --- | --- |
| **Contract Year** | **MWh** |
|  |  |

**EXHIBIT D**

 **CONTRACTED ANNUAL PEAK CAPACITY SAVINGS**

|  |  |
| --- | --- |
| **Contract Year** | **MW** |
|  |  |