**2014 RFO Model Agreement**

**ENERGY EFFICIENCY RESOURCE PURCHASE AGREEMENT**

*between*

***[Name of Contractor]***

*and*

**San Diego Gas & Electric Company**

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**ENERGY EFFICIENCY AGREEMENT**

**BY AND BETWEEN**

***[SELLER]***

**AND**

**SAN DIEGO GAS & ELECTRIC COMPANY**

This Energy Efficiency 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) at the Site (as defined below) of an End-Use Customer(s) (as defined below) that will result in improved energy efficiency and energy and capacity reductions at 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**

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

“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.

 “Arbitrator” has the meaning set forth in Section 8.3.

“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.

“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.

“Cash” means U.S. Dollars held by or on behalf of a Party as Delivery Date Security hereunder.

“Cash Interest Rate” means the Federal Funds Effective Rate - the rate for that day opposite the caption “Federal Funds (Effective)” as set forth in the weekly statistical release designated as H.15 (519), or any successor publication, published by the Board of Governors of the Federal Reserve System.

“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.

“Construction Start Date has the meaning set forth in Section 1.1.

“Contract Price” has the meaning set forth in Section 1.1.

“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 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 SDG&E, in SDG&E’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.

“Customized Guidelines” has the meaning set forth in Exhibit B.

“Defaulting Party” has the meaning set forth in Section 7.1.

“Delivery Date Security” has the meaning set forth in Section 4.1(a).

“Dispute” has the meaning set forth in Section 8.1.

“Double Incentive” means Rebates, discounts, Incentives or services from any other energy efficiency program 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/activity at multiple market intervention points (e.g., energy savings or reductions claimed upstream, midstream, and at the End-Use Customer) where a particular Measure was installed or an activity occurred.

“Early Termination Date” has the meaning set forth in Section 7.2(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.

“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 Project Measurement and Verification Protocol and the applicable M&V Plan, and issue a Pre-Installation Equipment Inspection Report, Primary Post-Installation Inspection Report, or Post-Installation Inspection Report. 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, Section C, subsection (b)-(d), (ii) have sufficient depth and breadth in the skills required to perform the tasks identified in the Project Measurement and Verification Protocol and the applicable 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 7.1.

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

“Expected Capacity Savings” is the expected capacity reductions set forth in Section 1.1, as measured in accordance with Exhibit B, from the Measurement Baseline of the Project.

“Expected Summer Off-Peak Energy Savings” is the expected energy reductions set forth in Section 1.1, as measured in accordance with Exhibit B, from the Measurement Baseline of the Project from the Project Completion Date until the end of the Term.

“Expected Summer On-Peak Energy Savings” is the expected energy reductions set forth in Section 1.1, as measured in accordance with Exhibit B, from the Measurement Baseline of the Project from the Project Completion Date until the end of the Term.

“Expected Winter On-Peak Energy Savings” is the expected energy reductions set forth in Section 1.1, as measured in accordance with Exhibit B, from the Measurement Baseline of the Project from the Project Completion Date until the end of the Term.

“Expected Project Completion Date” has the meaning set forth in Section 1.1.

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

“Force Majeure” means an event or circumstance 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) Seller’s ability to sell the Project or any individual Measure at a price greater than the Contract Price; (iv) a failure of performance of any other entity, except to the extent that such failure was caused by an event that would otherwise qualify as a Force Majeure event; or (v) breakage or malfunction of equipment, except to the extent that such failure was caused by an event that would otherwise qualify as a Force Majeure event.

“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 Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, Expected Winter On-Peak Energy Savings and Expected Capacity Savings. In determining Gains, a Party shall not consider the payment percentages set forth in Section 3.1 as a reflection of the realized and future Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, Expected Winter On-Peak Energy Savings and Expected 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, including Rebates and low-interest loans, to install Measures.

“Individual Measurement Baseline” means the on-site energy use and capacity use associated with a single type of equipment or single process that is the subject of a Measure before such Measure is installed. For determining the amount of on-site energy use and capacity use for each type of equipment or each process that is the subject of a Measure, such use shall be the lesser of (i) the actual energy use and capacity use of the equipment or process prior to installation and operation of the Measure; or (ii) the energy use and capacity use of the equipment or process as if such equipment or process satisfied Title 20 and/or Title 24, as applicable. *[Note to Seller: If no Title 24 and/or Title 20 standards exist, SDG&E will work with Seller to develop a definition of “Industry Standards.”]*

“Inspections” means, collectively, the Pre-Installation Equipment Inspection, the Primary Post-Installation Inspection, and each Post-Installation Inspection.

“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 Cash 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.

“IPMVP” has the meaning set forth in Exhibit B.

“JAMS” has the meaning set forth in Section 8.2.

“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 Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, Expected Winter On-Peak Energy Savings and Expected Capacity Savings. In determining Losses, a Party shall not consider the payment percentages set forth in Section 3.1 as a reflection of the realized and future Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, Expected Winter On-Peak Energy Savings and Expected 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.

“M&V Plan” has the meaning set forth in Exhibit B.

“Measure” a service or product whose installation and operation at an End-Use Customer’s premises results in a reduction in the End-Use Customer’s on-site energy and/or capacity use, compared to what would have happened without the service or product installation.

“Measurement Baseline” means the aggregate of all of the Individual Measurement Baselines for energy use and capacity use.

“Mediator” has the meaning set forth in Section 8.2.

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

“Non-Defaulting Party” has the meaning set forth in Section 7.2.

“Notice” means notices, requests, statements or payments provided in accordance with Article 6.

“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.

“Post-Installation Inspection” means an inspection of the Project which satisfies the requirements described in 1.5(c)(i) and Exhibit B.

“Post-Installation Inspection Report” means the report prepared by an Evaluator setting forth the Evaluator’s findings from the Post-Installation Inspection. At a minimum, the Post-Installation Inspection Report must include the information identified in Exhibit B.

“Potential Event of Default” means an event which, with Notice or passage of time or both, would constitute an Event of Default.

“Pre-Installation Description” is the description set forth in Exhibit B, Section A.

“Pre-Installation Equipment Inspection” means an inspection of the Project which satisfies the requirements described in Section 1.5(a)(i) and Exhibit B.

“Pre-Installation Equipment Inspection Report” means the report prepared by an Evaluator setting forth the Evaluator’s findings from the Pre-Installation Equipment Inspection. At a minimum, the Pre-Installation Equipment Inspection Report must include the information identified in Exhibit B.

“Primary Post-Installation Inspection” means an inspection of the Project which satisfies the requirements described in Section 1.5(b)(i) and Exhibit B.

“Primary Post-Installation Inspection Report” means the report prepared by an Evaluator setting forth the Evaluator’s findings from the Primary Post-Installation Inspection. At a minimum, the Primary Post-Installation Inspection Report must include the information identified in Exhibit B.

“Procurement Review Group” has the meaning set forth in Article 11.

“Project” means all of the proposed Measures at an End-Use Customer(s) Site and as more fully described in Exhibit B.

“Project Completion Date” has the meaning set forth in Section 1.5(b).

“Project Completion Deadline” has the meaning set forth in Section 1.1.

“Project Measurement and Verification Protocol” is the parameters, procedures, rules, and instructions that govern the creation of an M&V Plan in order for the Evaluator to measure and verify the capacity and energy savings from the Project as more fully described in Exhibit B.

“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 a customer for the installation of one or more identified Measure at the customer’s facility.

“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 the Non-Defaulting Party’s Costs and Losses, on the one hand, netted against its Gains, on the other. If the Non-Defaulting Party’s Costs and Losses exceed its Gains, then the Settlement Amount shall be an amount owing to the Non-Defaulting Party. If the Non-Defaulting Party’s Gains exceed its Costs and Losses, then the Settlement Amount shall be Zero dollars ($0). The Settlement Amount shall not include consequential, incidental, punitive, exemplary or indirect or business interruption damages.

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

“Summer Off-Peak Hours” has the meaning set forth in Exhibit B.

“Summer On-Peak Hours” has the meaning set forth in Exhibit B.

“Term” has the meaning set forth in Section 1.3.

“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.

“Title 20” means the California Code of Regulations, Title 20, or its successor, as of the Execution Date.

“Title 24” means the “2013 Building Energy Efficiency Standards for Residential and Nonresidential Buildings,” Title 24, Part 6 and associated administrative regulations in Part 1 found on the CEC website at: <http://www.energy.ca.gov/title24/2013standards/>

“Transfer” means, with respect to any Delivery Date Security 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.

“Winter On-Peak Hours” has the meaning set forth in Exhibit B.

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

#  TRANSACTION

## 1.1 Project

 Seller shall design, construct and install the Project by the Expected Project Completion Date, and SDG&E shall pay the Contract Price as adjusted in accordance with Exhibit B 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. Seller shall not begin any construction or installation of the Project (or any Measure of the Project) before the Construction Start Date.

|  |  |
| --- | --- |
| **Contract Price ($)** |  |
| **Expected Capacity Savings (kW)** |  |
| **Expected Summer On-Peak Energy Savings (kWh)**  | *[Note to Seller: amount should be savings over the Term.]* |
| **Expected Summer Off-Peak Energy Savings (kWh)** | *[Note to Seller: amount should be savings over the Term.]* |
| **Expected Winter On-Peak Energy Savings (kWh)** | *[Note to Seller: amount should be savings over the Term.]* |
| **Construction Start Date** |  |
| **Expected Project Completion Date** |  |
| **Project Completion Deadline** | *[One Hundred Eighty (180) days after the Expected Project Completion Date]* |

## 1.2 Project Deadline

Notwithstanding any other provision in this Agreement, Seller must completely install the Project and the Project must meet the criteria set forth in Section 1.5(b)(i)(A)-(D) by obtaining a Project Completion Date by the Project Completion Deadline.

In the event that (a) the Project Completion Date will not or does not occur on or before the Project Completion Deadline; (b) the Project Completion Date will not occur due to any termination of this Agreement as a result of an Event of Default by Seller occurring on or before the Project Completion Deadline; or (c) Seller abandons the Project, SDG&E shall be entitled to:

(i) The Delivery Date Security in the Settlement Amount, including the right to draw on and retain for its sole benefit any Letter of Credit and the proceeds thereof, as well as any Cash, posted as Delivery Date Security; and (ii) Terminate this Agreement.

If SDG&E terminates this Agreement pursuant to this Section 1.2, any amount of Delivery Date Security that Seller has not yet posted with SDG&E will be immediately due and payable by Seller to SDG&E.

## 1.3 Term

The “Term” of this Agreement shall commence upon the Execution Date and shall continue, unless terminated earlier in accordance with the terms of this Agreement, until the expiration of the Delivery Period.

## 1.4 Eligibility

Notwithstanding any other provision in this Agreement, the Project must meet the following requirements in order to receive the Contract Price (or any portion thereof):

1. The Project, and every Measure in the Project, must be within SDG&E’s Service Territory;
2. The Project, and every Measure in the Project, cannot use, submit, claim, or receive a Double Incentive; and
3. The Project’s energy reductions must exceed the Title 24 and/or Title 20 energy efficiency requirements set by the CEC. *[Note to Seller: If no Title 24 and/or Title 20 standards exist, SDG&E will work with Seller to develop a definition of “Industry Standards.”]*

## 1.5 Inspections

*[Note to Seller: This Section will be customized for each Agreement based on the proposed Project. The Inspections and other M&V related content will be based upon the Seller’s proposed M&V Plan, with SDG&E approval, and standard M&V practices. The following content describes a process to verify savings related to a Project comprised of one or more, large, comprehensive custom projects.]*

Seller shall, and shall cause all End-Use Customer(s) to, provide all Evaluators access to the Site 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 a Project, Site, or Measure changes during the Term of the Agreement.

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 within five (5) Business Days of SDG&E’s request. SDG&E shall also have the right to review all records and documents related to an inspection or inspection report. SDG&E may, in its sole discretion, request access to the Site and Project to examine, test, measure, and inspect the Project. Seller shall, and shall cause all End-Use Customer(s) to, provide access to the Site and Project to SDG&E and/or an Evaluator engaged by SDG&E.

Prior to any Inspection, the Evaluator will provide SDG&E with the M&V Plan in accordance with the procedure set forth in Exhibit B.

1. Pre-Installation Equipment Inspection.
2. Seller, at Seller’s expense, shall engage an Evaluator to conduct an on-site “Pre-Installation Equipment Inspection” to verify the accuracy of the Pre-Installation Description and to test and make any measurements needed to calculate and establish the Measurement Baseline and each Individual Measurement Baseline for purposes of measuring the Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, Expected Winter On-Peak Energy Savings and Expected Capacity Savings. The Pre-Installation Equipment Inspection shall take place no later than ninety (90) days before the Construction Start Date, but no earlier than one-hundred twenty (120) days before the Construction Start Date. Such inspection shall be conducted consistent with the Project Measurement and Verification Protocol and the applicable M&V Plan, and shall be completed at least fifty (50) days before the Construction Start Date. The selection of any Evaluator under this subsection (i) shall be subject to SDG&E’s consent, which shall not be unreasonably withheld.
3. Seller shall cause the Evaluator to issue a Pre-Installation Equipment Inspection Report consistent with Exhibit B within *[number] [#]* days after the completion of the Pre-Installation Equipment Inspection. Subject to Section 1.5(a)(iii), such report and its findings shall be binding on the Parties for purposes of measuring the Measurement Baseline and each Individual Measurement Baseline, and verifying the accuracy of the Pre-Installation Description.
4. If SDG&E reasonably believes the Pre-Installation Equipment Inspection Report is materially inaccurate or incomplete, does not properly measure the Measurement Baseline or any Individual Measurement Baseline, does not verify the accuracy of the Pre-Installation Description, does not provide enough information in support of the verification of the Pre-Installation Description or establishment of the Measurement Baseline or any Individual Measurement Baseline, indicates that the Pre-Installation Equipment Inspection was not conducted consistent with the Project Measurement and Verification Protocol or applicable M&V Plan, or is materially deficient in any manner whatsoever, and SDG&E provides Notice of such belief within thirty (30) days of receipt of the Pre-Installation Equipment Inspection Report, then SDG&E, at SDG&E’s expense, may engage a new Evaluator to conduct a Pre-Installation Equipment Inspection and to issue a Pre-Installation Equipment Inspection Report. The findings of such report obtained by SDG&E, including the verification of the accuracy of the Pre-Installation Description and the establishment of the Measurement Baseline and each Individual Measurement Baseline, shall be binding on the Parties for all purposes under this Agreement, and the Pre-Installation Equipment Inspection Report obtained by Seller shall have no force and effect. The selection of any Evaluator under this subsection (iii) shall be subject to Seller’s consent, which shall not be unreasonably withheld.
5. Primary Post-Installation Inspection.
6. After Seller has completed and installed the Project, Seller, at Seller’s expense, shall engage an Evaluator to conduct an on-site “Primary Post-Installation Inspection” that is consistent with the Project Measurement and Verification Protocol and the applicable M&V Plan, to verify that:
7. the Project has been completed and installed in accordance with Exhibit B;
8. all Measures in the Project are operating as planned and designed;
9. the Project reduced the capacity use at the Site in an amount equal to the Expected Capacity Savings; and
10. the Project will result in a reduction in the energy use at the Site in an amount equal to the Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, and Expected Winter On-Peak Energy Savings.

The selection of any Evaluator under this subsection (i) shall be subject to SDG&E’s consent, which shall not be unreasonably withheld.

1. Seller shall cause the Evaluator to issue a Primary Post-Installation Inspection Report consistent with Exhibit B within *[number] [#]* days after the completion of the Primary Post-Installation Inspection. Subject to Section 1.5(b)(iv), such report shall be binding on the Parties for purposes of determining whether the criteria set forth in Section 1.5(b)(i)(A)-(D) have been satisfied.
2. If any Primary Post-Installation Inspection Report provides that the Project has not met all of the criteria set forth in Section 1.5(b)(i)(A)-(D), then SDG&E may terminate this Agreement pursuant to Article 7.
3. Within thirty (30) days of receipt of a Primary Post-Installation Inspection Report that provides that the Project has met all of the criteria set forth in Section 1.5(b)(i)(A)-(D), SDG&E shall either (x) provide Notice to Seller that it has accepted the Primary Post-Installation Inspection Report, or (y) provide Notice that, within SDG&E’s reasonable belief, the Primary Post-Installation Inspection Report is materially inaccurate or incomplete, does not properly determine whether the Project meets all of the criteria set forth in Section 1.5(b)(i)(A)-(D), does not provide enough information in support of finding that the Project meets all of the criteria set forth in Section 1.5(b)(i)(A)-(D), indicates that the Primary Post-Installation Inspection was not conducted consistent with the Project Measurement and Verification Protocol or applicable M&V Plan, or is materially deficient in any manner whatsoever. If SDG&E provides the Notice under subsection (x), then the “Project Completion Date” shall be deemed the date the Primary Post-Installation Inspection Report was provided to SDG&E. If SDG&E provides the Notice under subsection (y), then SDG&E, at Seller’s expense, may engage a new Evaluator to conduct a Primary Post-Installation Inspection and to issue a Primary Post-Installation Inspection Report. The findings of such report obtained by SDG&E shall be binding on the Parties for purposes of determining whether the criteria set forth in Section 1.5(b)(i)(A)-(D) have been satisfied, and the Primary Post-Installation Inspection Report obtained by Seller shall have no force and effect. If the Primary Post-Installation Inspection Report obtained by SDG&E finds that all of the criteria set forth in Section 1.5(b)(i)(A)-(D) have been met, then the “Project Completion Date,” solely for purposes of meeting the Project Completion Deadline, shall be deemed the date the Primary Post-Installation Inspection Report obtained by Seller was provided to SDG&E. For all other purposes, the “Project Completion Date” shall be the date the Primary Post-Installation Inspection Report obtained by SDG&E was provided to SDG&E. The selection of any Evaluator under this subsection (iv) shall be subject to Seller’s consent, which shall not be unreasonably withheld.
4. Post-Installation Inspection.
5. After the Project Completion Date, and upon reasonable Notice, SDG&E may request that Seller engage an Evaluator to conduct a “Post-Installation Inspection” in order to re-verify that the Project still meets the criteria set forth Section 1.5(b)(i)(A)-(D); provided, the Evaluator must consider the actual energy savings of the Project since the Project Completion Date in determining whether Seller has satisfied Section 1.5(b)(i)(D). The Post-Installation Inspection must be conducted consistent with the Project Measurement and Verification Protocol and the applicable M&V Plan. The selection of any Evaluator under this subsection (i) shall be subject to SDG&E’s consent, which shall not be unreasonably withheld. SDG&E may, but is not obligated to, request up to two (2) Post-Installation Inspections in every calendar year of the Term. Each Post-Installation Inspection must be completed within sixty (60) days of SDG&E’s Notice to perform a Post-Installation Inspection.
6. Seller shall cause the Evaluator to issue a Post-Installation Inspection Report consistent with Exhibit B within *[number] [#]* days after the completion of the Post-Installation Inspection. Subject to Section 1.5(c)(iv), such report shall be binding on the Parties for purposes of determining whether the criteria set forth in Section 1.5(b)(i)(A)-(D) have been satisfied.
7. If the Post-Installation Inspection Report provides that the Project has not met all of the criteria set forth in Section 1.5(b)(i)(A)-(D), then SDG&E may terminate this Agreement pursuant to Article 7.
8. Within thirty (30) days of receipt of a Post-Installation Inspection Report that provides that the Project has met all of the criteria set forth in Section 1.5(b)(i)(A)-(D), SDG&E shall either (x) provide Notice to Seller that it has accepted the Post-Installation Inspection Report, or (y) provide Notice that, within SDG&E’s reasonable belief, the Post-Installation Inspection Report is materially inaccurate or incomplete, does not properly determine whether the Project meets all of the criteria set forth in Section 1.5(b)(i)(A)-(D), does not provide enough information in support of finding that the Project meets all of the criteria set forth in Section 1.5(b)(i)(A)-(D), indicates that the Post-Installation Inspection Report was not conducted consistent with the Project Measurement and Verification Protocol or applicable M&V Plan, or is materially deficient in any manner whatsoever. If SDG&E provides the Notice under subsection (y), then SDG&E, at Seller’s expense, may engage a new Evaluator to conduct a Post-Installation Inspection and to issue a Post-Installation Inspection Report. The findings of such report obtained by SDG&E shall be binding on the Parties for purposes of determining whether the criteria set forth in Section 1.5(b)(i)(A)-(D) have been satisfied, and the Post-Installation Inspection Report obtained by Seller shall have no force and effect. The selection of any Evaluator under this subsection (iv) shall be subject to Seller’s consent, which shall not be unreasonably withheld.

## 1.6 Permits and Licenses

Seller, at its own expense, shall obtain and maintain any and all Permits needed to install the Project and to maintain and operate the Project at the Site.

## 1.7 Advertising and Marketing

Seller shall not use SDG&E’s corporate name, trademark, trade name, logo, identity or any affiliation for any reason, without SDG&E’s prior written consent.

## 1.8 Records

1. 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 1.8(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 1.8(a).

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.

1. SDG&E has the right to disclose to the CPUC all such information provided by Seller pursuant to this Section 1.8(b).
2. 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 1.8(b).
3. Prior to commencement of any construction activities on the Site, provide SDG&E a report from an independent engineer (acceptable to both SDG&E and Seller) certifying that Seller has a written plan for the safe construction and operation of the Project.

## 1.9 Permanent Installation

Notwithstanding any other provision in this Agreement, Seller shall ensure that the Project, and every Measure in the Project, remains installed at the Site for its useful life.

# CPUC APPROVAL

Unless otherwise specified herein, notwithstanding SDG&E’s execution and delivery of this Agreement, SDG&E’s obligations under this Agreement shall only become effective upon CPUC Approval.

SDG&E shall file with the Commission the appropriate request for CPUC Approval. SDG&E shall seek CPUC Approval, including promptly responding to any requests for information related to the request for 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 [insert number] Business Days after such Notice is given, if CPUC Approval has not been obtained or waived by SDG&E in its sole discretion within [insert number] days after SDG&E files its request for CPUC Approval and a Notice of termination is given on or before the [insert number] day after SDG&E files the request for CPUC Approval.

Failure to obtain CPUC Approval in accordance with this Article 2 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

## 3.1 Payment to Seller and Invoicing

After the Project Completion Date, SDG&E shall pay Seller the Contract Price as adjusted in accordance with Exhibit B in [insert number] installments and in accordance with the following:

1. Upon the later of the Project Completion Date and the Expected Project Completion Date and so long as (i) no Event of Default with respect to the Seller has occurred and is continuing, (ii) no Early Termination Date has occurred or been designated as a result of an Event of Default with respect to the Seller, Seller shall send an invoice to SDG&E’s “Accounts Payable Department” as set forth in Section 6.2, for [insert percentage] of the Contract Price as adjusted in accordance with Exhibit B no earlier than the tenth (10th) day of the first full month after the Project Completion Date (or, if later, the Expected Project Completion Date). SDG&E shall have ten (10) days to provide Notice of approval or denial of the accuracy of such invoice. If such invoice is approved, Seller shall send such invoice to the “Accounts Payable Department,” as set forth in Section 6.2, and SDG&E shall pay such invoice within sixty (60) days after the Accounts Payable Department has received such invoice. If such invoice is declined, then Seller shall resubmit a corrected invoice to the “Accounts Payable Department” to be reviewed in accordance with the process described in this Section 3.1(a).
2. So long as (i) no Event of Default with respect to the Seller has occurred and is continuing, (ii) no Early Termination Date has occurred or been designated as a result of an Event of Default with respect to the Seller, or (iii) an Evaluator has not issued a Post-Installation Inspection Report that provides that the Project has not met all of the criteria set forth in Section 1.5(b)(i)(A)-(D), Seller shall send an invoice to SDG&E’s “Accounts Payable Department” as set forth in Section 6.2, for [insert percentage] of the Contract Price as adjusted in accordance with Exhibit B one (1) year after Seller first invoiced SDG&E for payment in Section 3.1(a). SDG&E shall have ten (10) days to provide Notice of approval or denial of the accuracy of such invoice. If such invoice is approved, Seller shall send such invoice to the “Accounts Payable Department,” as set forth in Section 6.2, and SDG&E shall pay, such invoice within sixty (60) days after the “Accounts Payable Department” has received such invoice. If such invoice is declined, then Seller shall resubmit a corrected invoice to the “Accounts Payable Department” to be reviewed in accordance with the process described in this Section 3.1(b).
3. [NOTE TO SELLER: Insert repeat sections for each payment installment]

Notwithstanding any other provision in this Agreement, SDG&E shall have no obligation to make any payment if the Project Completion Date has not been set under Section 1.5(b) or at any time prior to the Expected Project Completion Date.

## 3.2 Payment

1. Unless otherwise agreed to in writing by the Parties, payment to Seller will be in the form of a [INSERT].
2. SDG&E may offset any future payments by any amount(s) that were previously overpaid.
3. SDG&E may deduct any amounts that would otherwise be due to Seller under this Agreement from any amounts owing and unpaid by Seller to SDG&E: (i) under this Agreement; or (ii) arising out of or related to any other agreement, tariff, obligation or liability.

#  PROJECT DELIVERY SECURITY

## 4.1 Delivery Date Security

1. Seller shall post and thereafter maintain delivery date security (“Delivery Date Security”) equal to *[$\_\_\_\_/kW times the Expected Capacity Savings]*.
2. Seller shall post the Delivery Date Security in accordance with the following terms and conditions:
3. Seller shall post the Delivery Date Security on or before the Execution Date;
4. The Delivery Date Security shall be held by SDG&E as security for Seller achieving the Project Completion Date on or before the Project Completion Deadline;
5. The Delivery Date Security must be in the form of either Cash or a Letter of Credit;
6. If Seller posts any Delivery Date Security in cash, Seller will receive Interest Amounts in accordance with the procedure specified in Section 4.4(a)(ii); and
7. If Seller establishes the Delivery Date Security by means of a Letter of Credit, such Letter of Credit must be provided substantially in the form of Exhibit A.

## 4.2 Return of Delivery Date Security

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:

1. Within the later of (a) the date that all obligations have been indefeasibly paid in full and (b) fifteen (15) Business Days after the End of the Term of the Agreement, SDG&E shall return Delivery Date Security.
2. If this Agreement is terminated pursuant to Article 2 or 12, SDG&E shall return the full Delivery Date Security within fifteen (15) Business Days of such termination; provided*,* a termination under Article 12 only entitles Seller to a return of the Delivery Date Security if the termination is based on a Force Majeure that prevents the Project Completion Date from occurring on or before the Project Completion Deadline.

## 4.3 Grant of Security Interest/Remedies

1. 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 Delivery Date Security 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 Delivery Date Security 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 Delivery Date Security, 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 Delivery Date Security 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.
2. The Seller shall pay on request and indemnify SDG&E against any taxes (including without limitation, any applicable transfer taxes and stamp, registration or other documentary taxes), assessments, or charges that may become payable by reason of the security interests, general first lien and right of offset granted under this Agreement or the execution, delivery, performance or enforcement of this Agreement, as well as any penalties with respect thereto.

## 4.4 Administration of Delivery Date Security

1. Cash. Delivery Date Security 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, rehypothecate, assign, invest, use, commingle or otherwise use in its business any Cash that it holds as Delivery Date Security 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 Delivery Date Security 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 Delivery Date Security 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. Delivery Date Security 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 Delivery Date Security, 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 Delivery Date Security as security for the Seller’s obligations to SDG&E and SDG&E shall have the rights and remedies set forth in Section 4.5 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 Delivery Date Security 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 Delivery Date Security. Except as otherwise provided in Section 4.4(a)(i) and beyond the exercise of reasonable care in the custody thereof, SDG&E shall have no duty as to any Delivery Date Security 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 Delivery Date Security in its possession if the Delivery Date Security 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 Delivery Date Security, 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 Delivery Date Security Transferred to it.

## 4.5 Exercise of Rights Against Delivery Date Security

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 Delivery Date Security held by or for the benefit of SDG&E;
3. the right to set off any Delivery Date Security 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.

## 4.6 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.

## 4.7 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 4 and Article 7, 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 4 and Article 7 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

## 5.1 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. 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.

## 5.2 Additional Seller Representations, Warranties and Covenants

1. Seller hereby covenants to SDG&E that:
	1. the Project will meet the eligibility requirements set forth in Section 1.4; and
	2. Seller will not sell, assign, attribute, claim, or otherwise transfer the Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, Expected Winter On-Peak Energy Savings or the Expected Capacity Savings or any other energy or capacity savings, reductions or efficiency attributable to the Project, or any Measure of the Project, to any third party (except for any energy or capacity savings or reductions received by the End-Use Customer as a result of the installation of the Project at the End-Use Customer’s Site) other than to SDG&E pursuant to this Agreement.
2. As of the Effective Date, Seller hereby represents and warrants that the Pre-Installation Description is correct and accurate. *[SDG&E Note: if Seller is unable to provide information on the End-Use Customers as of the Effective Date, modify language to provide that Seller makes the representation and warranty each time Seller submits the information of an End-Use Customer to be included in the Pre-Installation Description]*
3. On each day on which Delivery Date Security 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 Delivery Date Security, 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 Delivery Date Security, other than the security interests and liens created under this Agreement;
5. upon the Transfer of Delivery Date Security 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 Delivery Date Security with respect hereto.

# NOTICES

## 6.1 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 6.2. 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.

## 6.2 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 6.2 are designated by each Party as their respective authorized representatives to act on their behalf for the purposes described therein.

# EVENTS OF DEFAULT; TERMINATION

## 7.1 Events of Default

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

1. With respect to either Party:
2. 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;
3. 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;
4. 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;
5. such Party becomes Bankrupt; or
6. such Party disaffirms, disclaims, or rejects, in whole or in part, or challenges the validity of this Agreement.
7. With respect to Seller:
8. the failure of Seller to satisfy the collateral requirements set forth in Article 4, including failure to post and maintain Delivery Date Security;
9. the failure of Seller to obtain a Project Completion Date by the Project Completion Deadline;
10. Seller abandons the Project;
11. the Pre-Installation Description is inaccurate, and SDG&E reasonably believes that this inaccuracy will result in a reduction in the Expected Summer On-Peak Energy Savings, Expected Summer Off-Peak Energy Savings, Expected Winter On-Peak Energy Savings or Expected Capacity Savings;
12. an Evaluator issues a Primary Post-Installation Inspection Report or Post-Installation Inspection Report that provides that the Project has not met all of the criteria set forth in Section 1.5(b)(i)(A)-(D);
13. the failure to install the Project as described in Exhibit B;
14. the failure to maintain the necessary Permits under Section 1.6; or
15. the occurrence and continuation of a default, event of default or other similar condition or event under one or more agreements or instruments relating to indebtedness for borrowed money, which results in the indebtedness becoming, or becoming capable at such time of being declared, immediately due and payable.

## 7.2 Early Termination

If an Event of Default shall have occurred, the Party taking the default (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”);
2. Withhold any payments due to the Defaulting Party under this Agreement;
3. Suspend performance of this Agreement, but excluding the obligation to post and maintain Delivery Date Security in accordance with Article 4; and
4. To pursue all 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.

## 7.3 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.

The Parties shall negotiate in good faith to resolve any disputes regarding the calculation of the Termination Payment.

## 7.4 Right of Set-Off

After calculation of a Termination Payment in accordance with Section 7.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party. The remedy provided for in this section shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

## 7.5 Suspension of Performance

Notwithstanding any other provision of this Agreement, if (a) an Event of Default or (b) a Potential Event of Default shall have occurred and be continuing, the Non-Defaulting Party, upon Notice to the Defaulting Party, shall have the right (i) to suspend performance under this Agreement and (ii) to the extent an Event of Default shall have occurred and be continuing to exercise any remedy available at law or in equity.

# RESERVED

#  INDEMNIFICATION

## 9.1 Seller’s Indemnification Obligations

1. 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 SDG&E’s directors, officers, employees, agents, assigns, and successors in interest, 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 out of or in connection with:
2. any breach made by Seller of its representations, warranties and covenants in Article 5;
3. any violation of a local, state, or federal law, statute or regulation, 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, statute or regulation; and
4. injury or death to persons, including SDG&E employees or its designee, and physical damage to property, including SDG&E property, where the damage arises out of, is related to, or is in connection with, Seller’s obligations or performance under this Agreement.

This indemnity applies notwithstanding SDG&E’s active or passive negligence. However, SDG&E will not be indemnified for its loss, liability, damage, claim, cost, charge, demand or expense to the extent caused by its gross negligence or willful misconduct.

1. 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 local, state, or federal law or regulation, attorney's fees, disbursements, and other response costs incurred as a result of such releases or spills are expressly within the scope of this indemnity.

## 9.2 Indemnification Claims.

All claims for indemnification by SDG&E 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.
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.

## 9.3 Survival

All indemnity rights shall survive the termination of this Agreement for a period of four (4) years.

# 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 DELIVERY DATE SECURITY.

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

(a) General. Neither Party shall disclose the non-public terms or conditions of this Agreement or any transaction hereunder to a third party, other than (i) 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, (ii) for disclosure to the Buyer’s Procurement Review Group, as defined in CPUC Decision (D) 02-08-071, subject to a confidentiality agreement, (iii) to the CPUC under seal for purposes of review, (iv) 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 disclosing Party (“Disclosing Party”), other than to those entities set forth in subsection (v); or (v) 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(a) (“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.

 (b) Publicity. Except as otherwise agreed to in this Section 11(a) above, 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.

# FORCE MAJEURE

A Party shall not be in default in the performance of its obligations under this Agreement when and to the extent that the failure or delay of its performance is due to an event of Force Majeure.

If, because of a Force Majeure, either Party is unable to perform its obligations under this Agreement, such Party (the “Claiming Party”) shall be excused from whatever performance (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure) is affected or would have been required by or but for the Force Majeure only to the extent so affected, provided:

1. the Claiming Party, no more than [insert number] 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 [insert number] 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.

# 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) $1,000,000,* *per occurrence* *and $2,000,000 annual 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 annual 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.

# MISCELLANEOUS

## 14.1 General

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. 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.
3. The headings used herein are for convenience and reference purposes only.
4. Each Party agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement.
5. Words having well-known technical or industry meanings have these meanings unless otherwise specifically defined in this Agreement.
6. Whenever this Agreement specifically refers to any law, tariff, government department or agency, or credit rating agency, the Parties hereby agree that the reference also refers to any successor to such law, tariff or organization.
7. Nothing in this Agreement relieves either Party from, or modifies, any obligation or requirement that exists in any law, tariff, rule, or regulation.

## 14.2 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. EACH PARTY WAIVES ITS RESPECTIVE RIGHT TO ANY JURY TRIAL WITH RESPECT TO ANY DISPUTE ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT.

## 14.3 Amendment

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

## 14.4 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) transfer, sell, pledge, encumber or 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 any person or entity whose creditworthiness is equal to or higher than that of such Party, (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, 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; 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.

## 14.5 Successors and Assigns

This Agreement shall be binding upon and inure to the benefit of, the Parties and their respective successors and assigns. This Agreement is not intended to confer any rights or remedies upon any other persons other than the Parties.

## 14.6 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.

## 14.7 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, Section 1.9, settlement, and confidentiality, shall so survive.

## 14.8 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.

## 14.9 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).

## 14.10 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.

## 14.11 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.

## 14.12 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.

## 14.13 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.

## 14.14 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.

[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

555 W. 5th St. ML18A3

Los Angeles,CA 90013

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 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 Delivery Date Security (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.

[ ]G. The Beneficiary is entitled to retain the entire Delivery Date Security: (i) because Project Completion Date (as defined in the Agreement) has not occurred on or before the Project Completion Deadline (as defined in the Agreement); or (ii) because the Agreement has been terminated due to an Event of Default by Applicant before the Project Completion Deadline.

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, SCOPE OF WORK,**

**&**

**Project Measurement and Verification Protocol**

This Exhibit B describes the Project that will deliver the capacity and energy savings defined in this Agreement, sets forth the required Scope of Work in performance of this Agreement, and specifically defines the Project Measurement and Verification Protocol that will be used for the Project.

[***Note to Seller:*** Exhibit B will be customized for the proposed program and will be finalized during contract negotiations. Seller should expect that Exhibit B will include the all or some of the following items; however, Seller should not assume that the items described and scope of work required will be limited to that listed below.

* General and specific description of the Project
* Definition of the customer or target customer segment
* Description of the Site or target sites
* Detailed description of all Measures including measure cost, installation cost, energy savings (kW and kWh), pre and post conditions
* Marketing activities
* Administrative and reporting requirements
* Detailed M&V Plan
* A definition of Delivered Capacity
* Applicable workpaper(s)
* Contract Price adjustment formula]