



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

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The New York Power Authority (“NYPA”), the New York State Energy Research and Development Authority (“NYSERDA”) and the New York State Education Department (“NYSED”) have jointly developed a program known as “K-Solar,” under which a school district may benefit from the production of electricity generated by a photovoltaic (“PV”) system installed on its premises with no up-front capital expense in accordance with a Solar Power Purchase Agreement (“Solar PPA”). A template Solar PPA prepared by NYPA in conjunction with National Renewable Energy Labs (“NREL”) is attached hereto for use by participants in the K-Solar Program. Commentary was solicited from the solar industry and its third party financiers, school districts counsels, NYSEDA as well as NYSED.

This memorandum discusses how the construct of the savings provided for by the Solar PPA template developed for the K-Solar program meets the requirements of NYCRR § 155.20(7)(ii), specifically, the guaranteed recovery of contract costs from energy savings. The information contained in this document is provided as guidance and is not a substitute for school district due diligence and consultation with local counsel.

The Solar PPA gives school districts the ability to purchase electricity generated by the PV system for up to 18 years. The K-Solar program presumes that the Solar PPA is viewed as an energy performance contract under Article 9 of the NYS Energy Law and its applicable regulations, including specifically, New York Codes Rules and Regulations (“NYCRR”) Title 8 § 155.20, which governs energy performance contracts entered into by school districts.

Energy Law § 9-102(4) defines an “energy performance contract” as “an agreement for the provision of energy services, including but not limited to electricity, ... in which a person agrees to install, maintain or manage energy systems or equipment to ... produce energy in connection with, a building or facility in exchange for a portion of the energy savings or revenues.” Commissioner’s Regulations § 155.20(b)(1) contains the same definition, but the regulation provides additional criteria that an energy performance contract must meet before it may be approved by the Commissioner of Education, which is required by the Department prior to the system being available for use by a school district.

NYCRR § 155.20(7)(ii) requires the following certification:

“(ii) the energy performance contractor shall certify that such energy performance contractor has guaranteed recovery of contract costs from energy savings realized by the school district during the term of the energy performance contract, which shall not exceed 18 years, or the useful life of the equipment being installed, whichever is less. This certification shall be based on an analysis of energy costs and savings, which shall not include any costs savings attributable to State building aid. If a simple payback calculation is used to demonstrate compliance with the 18 year payback limitation, it shall be calculated by dividing the initial contract cost by the first year cost savings. If another analysis is used to support the certification, it should be submitted with the certification;”

The regulation requires that the Solar PPA include a requirement that the solar contractor provide an energy production guarantee for the electric output generated by the PV system to be installed on a school site in accordance with the Solar PPA. The solar contractor must guarantee that the actual generation of the PV system during each year, for the term of the Solar PPA, which shall not exceed 18 years in accordance with law and regulation, shall not be less than the expected energy production of the PV system. In developing this guarantee, the solar contractor uses industry-standard modeling data and tools to create an energy production estimate for the PV system after construction is complete based on the as-built conditions of the PV system. The regulation also states that the term of the energy performance contractor shall not be longer than 18 years.

At regular 6-year intervals, known as “true-up terms”, the solar contractor will compare the total expected kWh energy production with the actual production of the system. In the event that performance does not match expectations, the solar contractor will pay a penalty fee on a dollar per kilowatt-hour (\$/kWh) basis for any production shortfalls over the true-up term, which shall be paid to the school district within 30 days of the end of the true-up term.

The Solar PPA also incorporates a tracking trigger mechanism to guarantee that the solar electric costs offered are less than each school district’s current prevailing kilowatt-hour price, not including demand or other fixed charges, purchased from the local utility or other electricity provider.

Within sixty (60) days after the end of each six calendar year period, commencing on the commercial operation date, the solar contractor shall provide a calculation of the Generation Cost Differential for each 6-year period during the term of the K-Solar PPA as indicated below:

Generation Cost Differential = School district’s cost of utility electricity (per kWh) in a given 6-year period less the cost of solar electricity under the Solar PPA (per kWh) for such period.

The school district shall provide the solar contractor with reasonable evidence of the school district’s cost of utility electricity for each 6-year period. The calculation performed for each 6-year period shall set forth the Generation Cost Differential for the preceding 6 year period.

- if the Generation Cost Differential > 0 , then the school district shall accrue a billing debit equal to the actual kWh production for the relevant period, multiplied by the Generation Cost Differential for such period (the “Purchaser Debit”).
- if the Generation Cost Differential < 0 , then the school district shall accrue a billing credit equal to the actual kWh production for the relevant period, multiplied by the Generation Cost Differential for such period (the “Purchaser Credit”).

Any Purchaser Debit or Credit from a given period shall accumulate and carry over into succeeding periods. If a cumulative Purchaser Credit remains at the end of the term of the Solar PPA, the solar contractor shall either (a) continue to provide solar electric power to the school district at no charge beyond the term of the Solar PPA until the such time as the cumulative Purchaser Credit is fully utilized; or, (b) the solar contractor shall make payment of same to the school district within 30 days following the end of the Solar PPA term.

Under the K-Solar program, the school district makes no initial investment in the PV system. As such, there is no investment cost to be offset by savings. Instead, the solar contractor is providing a guarantee of performance and a cost savings guarantee as compared against local utility energy costs. When viewed together, they satisfy the requirement that the school district realize net cost savings by taking into consideration the lower cost of purchasing solar electricity under the Solar PPA, and without consideration of State building aid. Solar PPA projects do not qualify for State Building aid.