



**BOARD OF SUPERVISORS AGENDA ITEM REPORT  
CONTRACTS / AWARDS / GRANTS**

Award  Contract  Grant

**Requested Board Meeting Date:** June 19, 2018

\* = *Mandatory, information must be provided*

or Procurement Director Award

**\*Contractor/Vendor Name/Grantor (DBA):**

SOLON Development, LLC (Headquarters: Beltsville, MD)

**\*Project Title/Description:**

Solar Covered Parking Structure for Pima Animal Care Center (PACC), Phase II

**\*Purpose:**

Award: Master Agreement No. MA-PO-18-337. This Master Agreement is for a twenty (20) year term in the not-to-exceed amount of \$1,733,876.00, for the Pima Animal Care Center, Phase II, Solar Covered Parking Structure project. The guaranteed savings for this Amendment \$619,738.00.

Administering Department: Facilities Management.

**\*Procurement Method:**

Pursuant with Pima County Procurement Code 11.12.060, Solon Development, LLC was selected for the Solar Covered Parking Structures by a Limited Competition Procurement. This approval includes the authority for the Procurement Director to amend the contract amount based on the change in guaranteed minimum output without further action by the Board of Supervisors, provided the total expense does not exceed \$1,733,876.00.

PRCUID: 303183

Attachment: Solar Service Agreement/Solar License Agreement (SSA/SLA).

**\*Program Goals/Predicted Outcomes:**

In accordance with Pima County's Board of Supervisor's Climate Change Resolution (2017-51) and Sustainable Action Plan, this project will reduce Pima County's electricity and operational costs and provide shaded parking for employees and members of the public. The expenditures do not increase general fund expenses; expenditures herein will displace expenditures that would otherwise be paid to TEP while avoiding future TEP rate increases. Assuming a 3% annual increase in TEP costs, the production quantity of energy (kWh) is expected to save Pima County a guaranteed minimum of \$619,738.00, as shown in Exhibit 1.1 of the Solar Licensing Agreement (SLA), during the 20-year term of the contract.

**\*Public Benefit:**

Reduction in Pima County's operational costs.

**\*Metrics Available to Measure Performance:**

Contractor's delivery of kilowatt hours of electricity to the Pima Animal Care Center each month shall be monitored by FM.

**\*Retroactive:**

No.

JUN 14 10:04:44 AM 2018  
PRCUID: 303183

**Contract / Award Information**

Document Type: MA Department Code: PO Contract Number (i.e.,15-123): 18-337

Effective Date: 06/19/18 Termination Date: 06/18/38 Prior Contract Number (Synergen/CMS): \_\_\_\_\_

**Expense Amount: \$\*** 1,733,876.00  Revenue Amount: \$ \_\_\_\_\_

**\*Funding Source(s) required:** Facilities Management Electricity Operating Budget

Funding from General Fund?  Yes  No If Yes \$ 1,733,876.00 % 100

Contract is fully or partially funded with Federal Funds?  Yes  No

**\*Is the Contract to a vendor or subrecipient?**

Were insurance or indemnity clauses modified?  Yes  No

*If Yes, attach Risk's approval*

Vendor is using a Social Security Number?  Yes  No

*If Yes, attach the required form per Administrative Procedure 22-73.*

**Amendment / Revised Award Information**

Document Type: \_\_\_\_\_ Department Code: \_\_\_\_\_ Contract Number (i.e.,15-123): \_\_\_\_\_

Amendment No.: \_\_\_\_\_ AMS Version No.: \_\_\_\_\_

Effective Date: \_\_\_\_\_ New Termination Date: \_\_\_\_\_

Prior Contract No. (Synergen/CMS): \_\_\_\_\_

Expense or  Revenue  Increase  Decrease Amount This Amendment: \$ \_\_\_\_\_

Is there revenue included?  Yes  No If Yes \$ \_\_\_\_\_

**\*Funding Source(s) required:** Facilities Management Electricity Operating Budget

Funding from General Fund?  Yes  No If Yes \$ \_\_\_\_\_ % \_\_\_\_\_

**Grant/Amendment Information** (for grants acceptance and awards)  Award  Amendment

Document Type: \_\_\_\_\_ Department Code: \_\_\_\_\_ Grant Number (i.e.,15-123): \_\_\_\_\_

Effective Date: \_\_\_\_\_ Termination Date: \_\_\_\_\_ Amendment Number: \_\_\_\_\_

Match Amount: \$ \_\_\_\_\_  Revenue Amount: \$ \_\_\_\_\_

**\*All Funding Source(s) required:**

**\*Match funding from General Fund?**  Yes  No If Yes \$ \_\_\_\_\_ % \_\_\_\_\_

**\*Match funding from other sources?**  Yes  No If Yes \$ \_\_\_\_\_ % \_\_\_\_\_

**\*Funding Source:** \_\_\_\_\_

**\*If Federal funds are received, is funding coming directly from the Federal government or passed through other organization(s)?**

Contact: Procurement Officer, Nancy Page *MP*

Department: Procurement *Magee* Telephone: 520-724-3563

Department Director Signature/Date: *[Signature]* 6/14/18

Deputy County Administrator Signature/Date: *[Signature]* 6-14-18

County Administrator Signature/Date: *[Signature]* 6-14-18

*(Required for Board Agenda/Addendum Items)*

<b>CONTRACT</b>	
<b>NO.</b>	<u>MA-PO-18-337</u>
<b>AMENDMENT NO.</b>	_____
This number must appear on all invoices, correspondence and documents pertaining to this contract.	

Solar PV Energy Facility Project  
SOLAR SERVICES AGREEMENT

Site: Pima Animal Care Center (PACC) Phase II

**Solar Services Agreement (“SSA”)**  
Attachments and Exhibits

Exhibit 1 Electricity Pricing, Minimum Output Guarantees and Billing Methodology

Exhibit 2 Billing Formulas and Examples

Exhibit 3 Sample Solar Invoice

Exhibit 4 Termination Fee Schedule

Exhibit 5 Lender Accommodations

Exhibit 6 Solar License Agreement (“SLA”)

## SOLAR SERVICES AGREEMENT

This SOLAR SERVICES AGREEMENT ("SSA" or this "Agreement") is made this 20th day of June, 2018 (the "Effective Date") by and between PIMA COUNTY (hereinafter "COUNTY"), a body politic and corporate of the State of Arizona, and SOLON Development, LLC, an Arizona Corporation ("LICENSEE"). COUNTY and LICENSEE are sometimes individually referred to herein as a "Party" or, collectively, as the "Parties." Any terms not defined herein have the meanings ascribed to them in the Solar License Agreement ("SLA") (as defined below).

Whereas, COUNTY and LICENSEE desire to agree to terms whereby LICENSEE will supply certain services to COUNTY including the sizing and placement of solar photovoltaic facilities, the financing of costs, including the possible monetizing of tax benefits, the production of solar generated electricity to serve COUNTY's facilities by way of this SSA, and the continuing maintenance in connection with the solar facility; and

Whereas, COUNTY is authorized by Pima County Code §11.12.060, Emergency and other limited competition procurement, to contract without using normal purchasing procedures, and since Licensee has constructed another system on this site, LICENSEE was selected to perform Phase II; and

Whereas, concurrent with this SSA the COUNTY will grant to LICENSEE a license pursuant to an SLA to design, finance, construct, maintain, operate solar electric generating System(s), and/or own, on COUNTY's facilities to serve COUNTY's electric loads;

Now, therefore, COUNTY and LICENSEE agree as follows:

### 1. DEFINITIONS

In addition to the terms that are defined elsewhere in this SSA, the following terms have the following meanings when used herein:

- 1.1 "Access Procedures" has the meaning set forth in Section 6.6 of the SLA and in its Exhibit "IV".
- 1.2 "Alterations" has the meaning set forth in Section 6.7 of the SLA.
- 1.3 "Applicable Laws" has the meaning set forth in Section 12.11 of the SLA.
- 1.4 "Commercial Operation Date" means the date that the COUNTY has issued a Certification of Completion for the construction and installation of the System(s) pursuant to Section 6.3 of the SLA.
- 1.5 "Contract Price" means the price of Electricity pursuant to Exhibit 1.1 of the SSA.
- 1.6 "Day" means calendar day unless otherwise specified herein.
- 1.7 "Electricity" means electrical energy, measured in kilowatts and kilowatt-hours that (a) is produced by the System, (b) is delivered by LICENSEE to COUNTY at the Electrical Interconnection Point, (c) meets the Green-e standard and (d) conforms to applicable utility and/or authoritative regulatory body standards.
- 1.8 "Electrical Interconnection Point" means the point(s) specified in the Project Design where the System connects to the existing electrical systems serving the Facility.
- 1.9 "Energy Management System" means County's automatic controls system capable of receiving energy production data from the System.

- 1.10 "Energy Service Provider" means investor owned utility, a municipal utility or other electricity provider that serves electricity commodity to the Facility or to the campus where the Facility is located.
- 1.11 "Environmental Law(s)" means each and every applicable federal, state, county and local law, statute, ordinance, regulation, rule, judicial or administrative order or decree, permit, license, approval, authorization or similar requirement of each and every federal, state, county and local governmental agency or other governmental authority pertaining to the protection of human health and safety or the environment.
- 1.12 "Facility" or "Facilities" means the land or improvements owned and operated by COUNTY on which the Systems will be installed. Facility and Facilities may be used interchangeably.
- 1.13 "Fiscal Year" means the COUNTY' s Fiscal Year, beginning on July 1 of each calendar year and ending on June 30 of the following calendar year.
- 1.14 "Force Majeure" means an act of God (such as earthquakes, fires, riots), actions or inactions of a regulatory authority, or actions of others such as strikes, lockouts, or other industrial disturbances, not within the control or arising from the fault of the COUNTY claiming Force Majeure. Any party claiming Force Majeure will advise the other party as soon as possible of the occurrence of the event and will provide the other party with the basis of the claim, in writing, within ten (10) days of the occurrence of the event. Parties will make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance.
- 1.15 "Interest Rate" means the then-current prime rate for Bank of America, N.A., as that rate is announced from time to time.
- 1.16 "Hazardous Material" means, without limitation, any substance defined as "hazardous substance," "hazardous waste," "extremely hazardous waste," under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. Section 1317 et seq.; Ariz. Rev. Stat. §§ 49-201(19) and 49-921(5); and any substance regulated pursuant to any federal or Arizona Environmental Law(s). The term "Hazardous Material" includes, but is not restricted to, asbestos, polychlorinated biphenyls (PCBs), and petroleum.
- 1.17 "Lender" has the definition provided for in Section 19.1.
- 1.18 "Licensed Area" means the area of the Facility used by LICENSEE to install, operate and maintain the System, as described in Exhibit "II" of the SLA.
- 1.19 "LICENSEE" means the party to this SSA that will install, operate and own the System and sell Electricity to COUNTY at the Facility.
- 1.20 "Lost Savings" means the cost to COUNTY of Electricity not provided by the System as calculated in Exhibit 1 to the SSA, Section 2.
- 1.21 "Operational Year" means each twelve-month period commencing on the Commercial Operation Date.
- 1.22 "Renewable Energy Credit" means renewable energy credit(s) or certificates, separated or unbundled from the underlying electricity supplied System.
- 1.23 "Savings Value" means the difference between the annual average otherwise applicable tariff prices as calculated per Exhibit 1.1 to the SSA, Section 3, and the contract price for electricity.

- 1.24 "Solar License Agreement" or "SLA" means that certain Solar License Agreement between COUNTY and LICENSEE, of even date herewith, for the installation and operation of the System at the Facility.
- 1.25 "SSA" means this agreement between the COUNTY and LICENSEE as described in the recitals above and incorporates the Pima County solicitation documents, including all published addenda, used to establish this contract by reference.
- 1.26 "State" means the State of Arizona.
- 1.27 "System" means the integrated assembly of any solar concentrator components, photovoltaic panels, mounting assemblies, inverters, converters, meters, transformers, disconnects, combiners, switches, wiring devices and wiring, installed in the Licensed Area for the purpose of generating Electricity for purchase by the COUNTY, as more particularly described in Exhibit III of the Solar License Agreement.
- 1.28 "Term" means the term of this SSA as set forth in Section 3.
- 1.29 "Termination Fee" means the payment by the COUNTY, described in **Exhibit 4** thereof, upon early termination of this SSA.
- 1.30 "Utility" means the local provider of electric transmission and distribution services to the COUNTY in the absence of the System.

## 2. AGREEMENT

2.1 Sale of Electricity by LICENSEE. LICENSEE will sell to COUNTY all Electricity supplied by the System during the Term, at the price per kilowatt-hour as specified in Exhibit 1.1. As long as no Event of Default (as defined in Section 11.4 hereof) by COUNTY has occurred and is continuing LICENSEE will not offer or sell such Electricity to anyone other than COUNTY without the prior written consent of COUNTY.

2.2 Purchase of Electricity by COUNTY. Consistent with LICENSEE's obligations above to sell to COUNTY all Electricity supplied by the System during the Term, COUNTY will purchase from LICENSEE all Electricity supplied by the System during the Term, with pricing as set forth in Exhibit 1.1. COUNTY represents and warrants that it has received all necessary authorizations and approvals required to enter into this SSA and when executed the SSA and SLA will be binding upon COUNTY.

2.3 Installation of System. LICENSEE will install the System at or on the Facility in accordance with the SLA attached hereto as **Exhibit 6**.

2.4 Services. LICENSEE will provide the services as set forth below in this Section.

2.4.1 *Meter*. LICENSEE will measure the actual amount of Electricity delivered to COUNTY by the System at the solar site meter utilizing a commercially available revenue grade interval data-recording meter (the "Meter").

2.4.1.1 The Meter will be installed and maintained at LICENSEE's expense and will have standard industry telemetry capabilities that will provide COUNTY with the ability to monitor the Meter for the purpose of incorporating the System electrical output data into the energy usage database.

2.4.1.2 LICENSEE will have the Meter tested every three years at LICENSEE's expense by a certified, independent, third party approved by COUNTY. COUNTY will be allowed to observe the Meter test, and LICENSEE will provide notice of the testing to COUNTY at least ten (10) business days prior to the test date. LICENSEE will provide signed copies of the results of the Meter test to COUNTY. In addition to the triennial test, LICENSEE will test the Meter at any reasonable time upon the request of COUNTY. COUNTY will reimburse LICENSEE for the cost of any test requested by COUNTY, unless such testing demonstrates that the Meter was operating outside of industry standard tolerance allowances or as such are defined by the Arizona Corporation Commission for meter calibration and operation.

2.4.1.3 If a Meter is determined to be inaccurate and such inaccuracy exceeds industry standard tolerance allowances, as such are defined by the Arizona Corporation Commission for electric meters, and if it is unknown when the Meter inaccuracy commenced, then the invoices covering the period of time since the last Meter test will be adjusted for the amount of the inaccuracy on the assumption that the inaccuracy persisted during one half of such period. Adjustments that benefit COUNTY will be reflected on the next invoice following the date of detection of the inaccuracy. Adjustments that benefit LICENSEE will be included on LICENSEE's next invoice to COUNTY.

2.4.2 *Billing System:* LICENSEE will bill COUNTY and COUNTY will pay LICENSEE for Electricity at the rate and in the manner set forth in **Exhibits 1, 2, and 3.**

2.4.3 *Customer Service:* LICENSEE will provide the following during the Term:

2.4.3.1 LICENSEE will produce and send bills to COUNTY or its designee within fifteen (15) business days after the end of each billing cycle. Invoices will be sent to:

Pima County Finance Accounts Payable Administration Building 130 W. Congress, 7th Floor Tucson, AZ 85701	Copy of Invoice To: Energy Manager Pima County Facilities Management 150 W. Congress, 3rd Floor Tucson, AZ 85701 Email: <a href="mailto:patrick.olearyjr@pima.gov">patrick.olearyjr@pima.gov</a>
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2.4.3.2 LICENSEE will post *meter reads* to a password protected web site and make this web site available to COUNTY.

2.5 Billing Validation and Verification. COUNTY may during the term conduct occasional billing inquiries, validation and verification activities, or reconciliation procedures. During such COUNTY inquiries, activities, and procedures, LICENSEE will provide COUNTY with the data



and other information, including any billing algorithms and interval Meter data representing System output, used to generate billing determinants. COUNTY will use its best efforts to provide or arrange for Utility metered interval data and billing data and information that can support LICENSEE's billing process, either directly through a data file transmission, receipt through regular mail services, or through the appropriate and established arrangement with the Utility. For purposes of this paragraph, Parties agree that "best effort" means that COUNTY will authorize the applicable Utility to provide metered interval data and billing data and information directly to LICENSEE, as per the Utility's rules and applicable regulations.

### 3. TERM AND TERMINATION

The Term of this SSA commences on the Effective Date and ends at 11:59 P.M. of the day preceding the twentieth (20<sup>th</sup>) anniversary of the Commercial Operation Date (as defined herein) unless earlier terminated by a party pursuant to the terms of the SSA, or pursuant to termination of the SLA. **Exhibit 4** of this SSA sets forth a Termination Fee for the System in connection with termination of this SSA.

3.1 COUNTY Termination Rights. COUNTY has the right to terminate the SSA as follows:

3.1.1 *For Cause*. COUNTY may terminate this SSA (a) pursuant to Section 11.2, below as a result of LICENSEE's material default; or (b) thirty (30) days after delivery of written notice to LICENSEE and any Lender if a Force Majeure event has occurred and LICENSEE is unable to produce Electricity for more than ninety (90) consecutive days.

3.1.2 *For Convenience*. In addition to the termination rights in Section 3.1.1 above, COUNTY may terminate this SSA for convenience sixty (60) days after delivery of written notice to LICENSEE and any Lender. If COUNTY terminates this SSA for convenience pursuant to this section, COUNTY will pay LICENSEE a Termination Fee as described and calculated in Exhibit 4 hereto.

3.1.3 *Change of Licensee's Regulatory Status*. Both parties acknowledge that the Arizona Constitution, Art. 15, § 2 defines the term "public service corporation" ("PSC") and the Arizona Corporation Commission ("ACC") has broad authority to regulate any such PSC. The parties further acknowledge that clear guidance does not exist regarding whether LICENSEE may be considered a PSC by the ACC based on the services provided under this SSA. Due to the foregoing, there is a level of uncertainty that the ACC could determine that LICENSEE as a provider under this SSA is subject to regulation by the ACC as a PSC. Each party hereto covenants and agrees that in the event that the ACC determines that LICENSEE is subject to its regulation as a PSC or the ACC makes any other determination that would make it commercially unreasonable, in the sole discretion of LICENSEE, to fulfill its obligations under this Agreement or the SLA (each of the foregoing ACC determinations is referred to herein as an "ACC Determination"), both parties will discuss all commercially reasonable steps to amend this Agreement (and the SLA) or may negotiate in good faith to establish an alternative structure, arrangement and agreement whereby each party receives substantially similar consideration provided for under this Agreement. Notwithstanding the foregoing, either party may immediately

terminate this SSA in the event of an ACC Determination. Furthermore, each party hereto covenants and agrees that in the event that the ACC has issued an order or guidance that declares that providers of services under agreements similar to this SSA that conform to certain criteria are not PSCs and are not subject to the ACC's regulations related thereto then both parties will take commercially reasonable steps to amend this SSA and the SLA to implement and reflect the ACC's order, guidance and criteria as soon as reasonably practicable following the issuance thereof. Notwithstanding the foregoing, COUNTY and LICENSEE will not be required to make any amendments to this SSA or the SLA pursuant to this Section 3.1.3 that would put them in a materially adverse position to the terms and conditions of this Agreement as originally executed.

3.1.4 *Termination of SLA.* This SSA will terminate simultaneously with any termination of the SLA.

3.2 LICENSEE Termination Rights. LICENSEE has the right to terminate this SSA at any time upon written notice to COUNTY, without further liability, if any of the following occur: a) If, prior to the first date of scheduled delivery of Electricity, LICENSEE determines that the System cannot be built as planned or that its construction and operation would not be economically viable for the LICENSEE, including LICENSEE's determination that (i) the installation of the System is not economically viable as a result of the need to comply with any environmental regulation or (ii) LICENSEE does not obtain third-party financing for the System acceptable to LICENSEE in its sole discretion or (iii) LICENSEE has not received assurance reasonably acceptable to it that LICENSEE will be able to enter into an interconnection agreement with the Utility. LICENSEE will be responsible for repairing any damage to the Facility arising from activities conducted by LICENSEE pursuant to the SSA or SLA and will reimburse COUNTY for any direct costs associated with negotiation, review, and approval of the SSA and SLA, reasonable alteration to the physical area in or around the Facility site, and installation of the System; b) Upon occurrence of a Force Majeure event, including, but not limited to, LICENSEE's inability, after diligent efforts, to obtain or maintain required approval or permits from any governmental authority for the installation or operation of the System; c) In the event that, through no fault of LICENSEE and for other than a Force Majeure event, the System is permanently shut down due to renovation, damage, destruction, or closure of the Facility, and COUNTY and LICENSEE cannot agree upon an alternative location for the System; or d) Upon an Event of Default by COUNTY (as defined in Section 11.4). COUNTY will pay LICENSEE a termination Fee as described and calculated in **Exhibit 4** in the event of a termination by COUNTY under Section 3.1.2 above or as remedy for COUNTY default under Sections 11.4.1, 11.4.4 as limited by Section 11.5.2, and 11.4.6 as limited by Section 11.5.2, or otherwise as compensation under Sections 13.2, 14 or 18.6 below. Appropriate remedies in connection with other termination events triggered by this provision will be determined pursuant to Section 11.7.

#### **4. CONFLICT OF INTEREST**

This Contract is subject to cancellation for conflict of interest pursuant to A.R.S. § 38-511, the pertinent provisions of which are incorporated into this Contract by reference.

## **5. GUARANTEE OF MINIMUM OUTPUT PERFORMANCE/TECHNOLOGY ASSESSMENTS AND UPGRADES**

LICENSEE has estimated that the System will deliver the Expected Performance Output as indicated in **Exhibit 1**. LICENSEE guarantees a Minimum Output Performance from the System of eighty-five percent (85%) of the Expected Performance Output from the System over the course of an Operational Year commencing with the Commercial Operation Date. If LICENSEE fails to meet the Minimum Output Performance requirement on an Operational Year basis, for reasons other than COUNTY's shading of the System as described in Section 14 below, LICENSEE will pay COUNTY, or COUNTY may, at its option, offset against future payments due LICENSEE, an amount equal to COUNTY's Lost Savings. The formula for calculating Lost Savings is found in **Exhibit 1** to this SSA. If LICENSEE fails to pay COUNTY the amount due for any annual shortfall of the Guaranteed Minimum Output performance within sixty (60) days after notice to make such payment (and such shortfall is not under dispute by LICENSEE pursuant to written notice to COUNTY), COUNTY has the express right to withhold payment, up to the shortfall amount due, from any payments otherwise payable to LICENSEE for Electricity, regardless of assignment of payments given as security by LICENSEE under the provisions hereof. LICENSEE and COUNTY agree that System performance will degrade by an Annual Degradation Factor as indicated in **Exhibit 1.1** of this SSA for every year of operation. The Expected Performance Output will be reduced by the Annual Degradation Factor every Operational Year for the term of this SSA. The degradation factor will be applied to the kWh energy values of the Expected Performance Output at the beginning of each Operational Year to determine whether or not the LICENSEE has met the Minimum Output performance guarantee at the end of the Operational Year. The degradation factor will be applied on a pro rata basis for System operations that do not span the entire Operational Year by multiplying the Annual Degradation Factor times the fraction of the Operational Year.

All services, equipment, materials or parts must be models of current production. The output from the System will not have any adverse effects on County electrical distribution systems or the operations or performance of existing electrical equipment and will be free of any quality issues, including surges, under voltage, overvoltage or harmonics conditions.

LICENSEE may perform technological and financial reviews at its discretion to determine the feasibility of upgrading the existing System utilizing improved solar products, strategies and/or solutions. Should an upgrade be deemed advantageous to LICENSEE (in its sole discretion), LICENSEE may upgrade the System or processes associated with the same at its sole expense and LICENSEE will be entitled to the entirety of the benefit associated with or related to such upgrades. Notwithstanding anything to the contrary in this Section 5, LICENSEE may not materially alter the System in a manner that increases the obligations or burden on COUNTY as set forth in this SSA and the SLA, and, in particular, LICENSEE cannot undertake any upgrade that results in an increase in COUNTY's rates for power purchased from Tucson Electric Power (TEP). The result of such upgrade will be allocated to LICENSEE and COUNTY in proportion to the amount each contributed to the upgrade.

## **6. POTENTIAL REVENUE FROM RENEWABLE ENERGY CREDITS (RECs)**

Unless otherwise set forth herein, all right title and interest to the RECs will be transferred from LICENSEE to COUNTY under this Agreement.

## **7. REBATES AND OTHER INCENTIVES**

Any grantor incentive payment, rebate or credit by the Utility, the Federal Government, the State of Arizona, or any other agency paid as a result of the design, construction, and operation of the System will inure to the benefit of LICENSEE except that COUNTY will be granted Possession and control of the RECs as set forth in Section 6 above. COUNTY will cooperate in good faith by, among other things, taking all reasonable actions requested by LICENSEE, at no cost to COUNTY, as necessary to enable LICENSEE to obtain all available incentives and rebates, including assignment to LICENSEE of any incentive received by COUNTY, as consistent with this SSA and the SLA.

## **8. INDEMNIFICATION**

LICENSEE will indemnify, defend, and hold harmless COUNTY, its officers, employees, and agents from and against any and all suits, actions, legal administrative proceedings, claims, or demands and all costs attendant thereto, arising out of any negligence or intentional misconduct by LICENSEE, its agents, employees, or anyone under its direction or control or on its behalf in connection with performance of this Agreement. Notwithstanding anything to the contrary contained herein, no individual representative of LICENSEE will have any personal liability to the other party as a result of a breach of any representation, warranty, covenant or agreement contained herein.

LICENSEE warrants that the System provided under this Agreement does not infringe on any third-party intellectual property rights. LICENSEE will indemnify, defend, and hold COUNTY harmless from any claim of infringement of intellectual property arising from the System provided for under this Agreement.

COUNTY agrees that, from and after the execution of this Agreement, except as expressly set forth in this Agreement, with respect to any breach or violation (other than any willful, intentional or fraudulent breach or violation) by LICENSEE of any representation or covenant set forth in the Agreement, the only relief available to COUNTY for such breach in respect of such breach will be as set forth in this Section 8. Other than as explicitly set forth in this SSA or the SLA, LICENSEE will not be liable to COUNTY for any special, punitive, exemplary, indirect, or consequential damages, or losses or damages for lost revenue or lost profits, whether foreseeable or not, arising out of, or in connection with this SSA.

## **9. EMERGENCIES**

In cases of emergency in which COUNTY determines that the continued operation of the System presents an imminent threat requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services, the Parties agree that COUNTY may disconnect the System from the Facility prior to notification of LICENSEE. If COUNTY disconnects the System pursuant to this provision, COUNTY will notify LICENSEE no later than eight (8) hours after the System is disconnected. The parties agree that only LICENSEE or an agent designated by LICENSEE will be authorized to reconnect the System after the System is disconnected by COUNTY pursuant to this emergency section.

## 10. COMMUNICATIONS AND CONTACTS

The representatives of the Parties during the term of this SSA will be:

COUNTY	LICENSEE
Name: Patrick J. O'Leary, Jr., PE, Energy Manager	Name: Brian Seibel Title: President
COUNTY	LICENSEE
Address: Pima County Facilities Management 150 W. Congress, 3 <sup>rd</sup> floor Tucson AZ 85701	Address: 3840 S Palo Verde Road, #205, Tucson, AZ 85714
Phone: 520-724-3093	Phone: 602-510-4794
Email: <a href="mailto:patrick.olearyjr@pima.gov">patrick.olearyjr@pima.gov</a>	Email: <a href="mailto:brain.seibel@solonamerica.com">brain.seibel@solonamerica.com</a>
With a copy to: Lisa Josker, Director Pima County Facilities Management 150 W. Congress, 3 <sup>rd</sup> floor Tucson, AZ 85701	With a copy to:

## 11. DEFAULT

11.1 No Waiver. A waiver by either party of any term, covenant, or condition of this SSA does not constitute a subsequent waiver of the same by that party.

11.2 Default by LICENSEE. At the option of COUNTY as the non-defaulting party, the occurrence of any of the following constitutes a material default and breach of this SSA:

11.2.1 LICENSEE's failure to deliver Electricity from the System for a continuous period of thirty (30) days or for a cumulative ninety (90) days within any continuous six (6) month period.

11.2.2 Unreasonable interference by LICENSEE with the operations of COUNTY at the Facility if the interference is curable by suspension of operation of the System and LICENSEE fails to suspend operation of the System within forty-eight (48) hours of COUNTY's notice to LICENSEE regarding the unreasonable interference.

11.2.3 The making by LICENSEE of any general assignment for the benefit of creditors, or the filing of a petition to have LICENSEE adjudicated as bankrupt, or the filing of a petition for reorganization or arrangement under any law relating to bankruptcy unless in the case of a petition filed against LICENSEE, the same is dismissed within sixty (60) days; or the appointment of a trustee or receiver to take possession of substantially all of LICENSEE' s assets located on the Facility or of LICENSEE's interest in this SSA, when possession is not restored to LICENSEE within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of LICENSEE's assets located on the Facility or of LICENSEE's interest in this SSA, when such seizure is not discharged within sixty (60) days.

11.2.4 Failure by LICENSEE to perform or comply with any other material term of the SSA within ninety (90) days after written notice to LICENSEE and any Lender by COUNTY, unless COUNTY agrees in writing to a longer period to cure the default.

11.2.5 Occurrence of an Event of Default as defined in Section 11.1 of the SLA.

11.2.6 LICENSEE's failure to pay any undisputed amount owing to COUNTY for a continuous period of sixty (60) or more days.

11.3 COUNTY Remedies. If any default by LICENSEE continues uncured, following notice of default where required herein, for the period applicable to the default alleged, COUNTY may resort to any one or more of the following remedies:

11.3.1 *Termination*. COUNTY may terminate the SSA by providing written notice to LICENSEE indicating that the SSA and the SLA have been terminated and requesting that the System be removed and the Facility restored to the pre-installation condition subject to ordinary wear and tear. If LICENSEE fails to remove the System and restore the Facility within one hundred twenty (120) days of notice by COUNTY, COUNTY may dispose of the System subject to applicable law.

11.3.2 *Recovery of Damages and Expenses*. Subject to the limitations of Section 8, COUNTY may recover from LICENSEE any damages and expenses reasonably incurred as a result of LICENSEE's Default, including attorneys' fees and the cost to repair the Facility to pre-installation condition.

11.3.3 *Right of Offset*. COUNTY may elect to offset any damages resulting from LICENSEE's default against any monies owing or to be owed to LICENSEE under this SSA. If COUNTY elects not to terminate the SSA and SLA following the Event of Default by LICENSEE, this election will not constitute a waiver by COUNTY as to any subsequent Event of Default by LICENSEE.

11.4 Default by COUNTY. At the option of LICENSEE as the non-defaulting party, the occurrence of any of the following constitutes a material default and breach of this SSA:

11.4.1 COUNTY's failure to pay undisputed invoices for a continuous period of sixty (60) or more days. LICENSEE acknowledges that payment (or portion thereof) will be

considered disputed under this Agreement for so long as COUNTY disputes such payment (or portion thereof) in good faith, and until such time as either COUNTY agrees in writing that such payment is undisputed or until a final determination has been rendered pursuant to Section 11.7 that such payment (or portion thereof) is due and owed by COUNTY. For so long as a payment remains in dispute, LICENSEE may not terminate this Agreement on the basis of non-payment by COUNTY of such amount, and COUNTY will not be subject to any Termination Fees under Exhibit 4 to this Agreement as the result of the non-payment of the disputed amount.

11.4.2 The renovation, damage, destruction, or closure of the Facility for other than a Force Majeure event, which results in the permanent shutdown of the System at the Facility, if COUNTY and LICENSEE are unable to agree upon an alternative location for the System as defined in Section 13 below.

11.4.3 COUNTY's refusal to sign authorizations (and other documents) reasonably required by LICENSEE to obtain any rebate or subsidy contemplated in Section 7 above or COUNTY's refusal to sign or comply with any material term of the approved interconnection agreement required by the Utility for interconnection of the System.

11.4.4 Failure by COUNTY to perform or comply with any other material term of the SSA within sixty (60) days after written notice by LICENSEE, unless LICENSEE agrees to a longer period to cure the default.

11.4.5 COUNTY's material alteration or interference with the Electrical Interconnection Point and such failure does not result from LICENSEE's negligence or willful misconduct or failure to comply with its interconnection agreement; provided that in the event of any such material alteration or interference with the Electrical Interconnection Point by COUNTY, including relating to growth plans or changes in circumstances, COUNTY will reimburse LICENSEE for additional Utility demand fees, labor and materials, including additional equipment related to establishing a new electrical interconnection point, and lost revenue or lost profits during the period in which the System does not operate.

11.4.6 The occurrence of any default by COUNTY pursuant to Section 10.3 of the SLA.

11.5 LICENSEE Remedies. If any default by COUNTY continues uncured, following notice of default where required herein, for the period applicable to the default alleged, LICENSEE may resort to any one or more of the following remedies:

11.5.1 *Termination*. LICENSEE may terminate the SSA and the SLA by providing written notice to COUNTY indicating that the SSA and the SLA have been terminated.

11.5.2 *Damages*.

11.5.2.1 In the event of a termination pursuant to Section 11.5.1 as a consequence of a (i) default by COUNTY described in Section 11.4.1 for failure to pay undisputed invoices; (ii) a default by COUNTY described in Section 11.4.4 as a consequence of COUNTY's intentional interference with, or infliction of damage

to, the System; or (iii) a default by COUNTY described in Section 11.4.6 as a consequence of COUNTY's failure to provide access to the Licensed Area (as defined in the SLA) for a permitted Use (as defined in the SLA), then in any such case described in clauses (i) through (iii), COUNTY will pay to LICENSEE the Termination Fee, as set forth in **Exhibit 4**. The Parties acknowledge and agree that in the event of such termination, the actual damages would be difficult or impossible to compute and that this Termination Fee calculation provision represents the reasonable estimate of such damages established by the parties in good faith consideration of the facts and circumstances surrounding the transactions contemplated by this SSA as of the effective date.

11.5.2.2 In circumstances other than as described in Section 11.5.2.1 above, LICENSEE may recover from COUNTY any damages and expenses reasonably incurred as a result of COUNTY's default, subject to the limitation of damages provisions otherwise set forth in this Agreement. The parties further agree that in the event COUNTY is subject to payment of Termination Fees as set forth in this Agreement, such Termination Fees represent LICENSEE's and LENDER's sole remedy for the default associated with the payment of such Fees, provided that this clause 11.5.2.2 does not limit any right LICENSEE may otherwise have to recover any costs LICENSEE may incur to enforce its right to receive such Termination Fees.

11.5.3 *Removal*. In addition to the other remedies specified herein, LICENSEE may remove the System at LICENSEE's cost, provided the Facility is restored to a condition substantially similar to the pre-installation condition subject to ordinary wear and tear as called for by this SSA.

11.6 Force Majeure. Any Party claiming Force Majeure with respect to its performance hereunder will advise the other party as soon as possible of the occurrence of the event and will provide the other Party with the basis of the claim, in writing, within ten (10) days of the occurrence of the event. Each Party will make reasonable efforts to avoid the adverse impacts of a Force Majeure event and to resolve the event or occurrence once it has occurred in order to resume performance

11.7 Disputes. Each party will continue to perform its responsibilities under this SSA during any dispute. In the event that disputes arise between the parties which cannot be resolved through conference and negotiation, such disputes are controlled by Arizona law and both parties have the right to have the dispute adjudicated by the Arizona courts in Pima County, provided however, that it is a condition precedent to the filing of any lawsuit that the parties first submit the dispute to nonbinding mediation with a qualified mediator, with relevant experience in the industry, mutually agreed to by the Parties as governed by the rules and procedures of the American Arbitration Association. The parties are bound to participate in such non-binding mediation in good faith and in confidence.

## **12. TEMPORARY SHUTDOWN OF SYSTEM**

12.1 In-lieu Payments. If, during the Term, renovation or damage to the Facility occurs, for reasons other than a Force Majeure and through no fault of LICENSEE, which reduces to a level



less than 98% of Expected Performance Output or eliminates the use by COUNTY of electricity from the System or requires the temporary shutdown of the System, LICENSEE may, in its sole discretion, choose to do the following as a means of avoiding default under this SSA:

12.1.1 If such renovation or damage can be completed during the Term hereof, and if COUNTY elects to proceed with such renovation or repair, then COUNTY will pay in lieu fees to LICENSEE during the duration of the reduction or shutdown as set forth in the next sentence. Such in-lieu fees will equal the actual payments made by COUNTY during the same period on a daily basis in the previous calendar year less the appropriate system degradation factor unless the COUNTY and LICENSEE mutually agree to an alternative in-lieu fee methodology. The in lieu payments may be made to LICENSEE to offset foregone consideration in this SSA and do not entitle COUNTY to Electricity at a later date. A corresponding reduction will be made to the Guaranteed Minimum Output required under this SSA to reflect the reduction in performance or production of Electricity, if any, due to such renovation or damage or temporary shutdown to the Facility discussed in this Section 12.

12.2 Notice. COUNTY will make a good faith effort to give as much notice as possible to LICENSEE prior to any act or omission to act which may result in a shutdown of the System or reduction in the Expected Performance Output of the System below the threshold specified in Section 12.1.

### **13. PERMANENT SHUTDOWN OF THE SYSTEM AT FACILITY**

If, through no fault of LICENSEE and for reasons other than Force Majeure, the System is permanently shut down due to renovation, damage, destruction, or closure of any of the Facilities, or if COUNTY elects to relocate the System, LICENSEE is entitled to the following:

13.1 Notice of Shutdown. Within thirty (30) days after permanent shutdown of the System, COUNTY will provide written notice to LICENSEE indicating whether or not the COUNTY intends to restore operation of the Facilities or whether relocation(s) of the System will be pursued.

13.2 Alternative Location(s). If, within ninety (90) days after permanent shutdown of the System, COUNTY and LICENSEE agree on an alternative location(s) from which LICENSEE can provide Electricity to COUNTY, then COUNTY will pay the costs associated with relocation of the System. This alternative location(s), in the reasonable opinion of LICENSEE, must have the potential to provide substantially similar overall system output as the original Facility, measured in total kilowatt-hours over a 12-month period, unless COUNTY and LICENSEE mutually agree that this output level is not required. If COUNTY and LICENSEE mutually agree upon an alternative location(s) that is substantially inferior to the Facility for purposes of installation or Utility rates (assuming different portions of the Facility have different Utility rates), then the pricing formula identified in **Exhibits 1, 2, and 3** will be equitably adjusted to compensate for the alternative location(s) such that LICENSEE receives payments comparable to those which it would have received from the System at the Facility. LICENSEE will be reimbursed for the period of System shutdown prior to relocation, if any, under the payment mechanisms specified in Section 12.1 above for Temporary Shutdown of the System. If, within sixty (60) days after permanent shutdown of the System, COUNTY and LICENSEE have not agreed upon an alternative location(s) for the System, LICENSEE may terminate this SSA and

receive a Termination Fee (as defined in Section described in section 11.5.2.1, above, and in **Exhibit 4**). A corresponding reduction will be made to the Guaranteed Minimum Output required under this SSA to reflect the reduction in performance or production of Electricity, if any, due to any shutdown period that occurs pursuant to this Section 13 or Section 9 EMERGENCIES.

#### **14. RESTRICTIONS ON SHADING**

COUNTY will make all good faith efforts to avoid activities which result in overshadowing or shading of the System in a manner that would prevent LICENSEE from meeting the Expected Performance Output as described in **Exhibit 1**. In the event that COUNTY's activities result in the System being shaded in manner that causes the System to produce less than ninety-eight percent (98%) of the Expected Performance Output on a kWh basis over any twelve (12) month period, COUNTY agrees to pay "in lieu" fees up to the Expected Performance Output as described in Section 12.1.1 above for the duration of the period for which the shadowing occurs. LICENSEE will provide and justify data that reasonably demonstrates the approximate loss of generation that occurred due to shading. In the event COUNTY reasonably determines that additional information is necessary to support LICENSEE's calculations of lost generation due to shading, COUNTY may submit a written request to LICENSEE within thirty (30) days of receipt of LICENSEE calculations that specifies what information it believes necessary to confirm the accuracy of such calculations. If COUNTY does not deliver such written request for additional information, then COUNTY will be deemed to agree to LICENSEE's calculations of lost generation due to shading, including any in lieu fees associated with the same. If COUNTY delivers a written request to LICENSEE for additional information, then LICENSEE and COUNTY will work in good-faith to timely agree to an amount of lost generation due to shading, including the in-lieu fees associated with the sale. If LICENSEE and COUNTY cannot come to an agreement on such amounts within thirty (30) days of the delivery of COUNTY's notice, then the matter will be submitted to binding mediation or arbitration with the proceedings governed under the provisions of the American Arbitration Association, the costs of which will be paid by LICENSEE and COUNTY equally. Any mediator or arbitrator chosen by mutual agreement of the parties must have requisite knowledge of the industry in which LICENSEE operates. Notwithstanding any other provision of this SSA, the Parties agree that if COUNTY's actions, directly or indirectly, result in shading of the System such that the System produces less than ninety eight percent (98%) of the Expected Performance Output, the Parties will make every effort to relocate the System to a mutually agreeable location: If the Parties cannot agree on an alternative location for the System and the shading of the System is a result of COUNTY's action, then LICENSEE is entitled to a Termination Fee pursuant to Section 13, "permanent Shutdown of the System at the Facility," **Exhibit 4**. Shading resulting from actions outside of the control of COUNTY will not give rise to a Termination Fee provided for in this Section.

#### **15. COMPLIANCE WITH APPLICABLE LAWS, INCLUDING UTILITY INTERCONNECTION STANDARDS**

LICENSEE, at its own cost and expense, will comply with all Applicable Laws relating to the operation of the System and the generation and sale of Electricity to COUNTY, including obtaining and maintaining all relevant approvals and permits. In particular, LICENSEE, throughout the Term of the SSA, will fully comply with any and all operational standards and

requirements imposed by the Utility, and comply with the electrical interconnection requirements as stated in the applicable and controlling Utility tariff. COUNTY will cooperate with LICENSEE and, if necessary, will provide consents and execute with the Utility such agreements (if such agreements do not have an acceptable or prohibited terms and/or conditions, or impose additional costs on COUNTY) as are necessary to permit the interconnection of the System. This electrical interconnection will be done at no cost or liability to COUNTY, and LICENSEE will reimburse COUNTY for all reasonable out of pocket costs incurred in connection with any Interconnection agreement. Should the Utility demand fees or equipment at a cost exceeding twenty-five thousand dollars (\$25,000.00) for electrical interconnection requirements, LICENSEE may at its sole discretion cease to proceed with installation of the System without further obligation to COUNTY other than obligations which were incurred prior to notice from the Utility of the fees or the equipment costs and the obligation to restore the Facility to pre-installation condition if installation was initiated.

## **16. NON-DISCRIMINATION AND AMERICANS WITH DISABILITIES ACT**

16.1 Non-Discrimination. LICENSEE agrees to comply with all provisions and requirements of Arizona Executive Order 2009-09 which is hereby incorporated into this contract as if set forth in full herein including flow down of all provisions and requirements to any subcontractors. During the performance of this contract, LICENSEE will not discriminate against any employee, client or any other individual in any way because of that person's age, race, creed, color, religion, sec disability or national origin.

16.2 ADA. LICENSEE will comply with all applicable provisions of the Americans with Disabilities Act (or "ADA") (Public Law 101-336, 42 U.S.C. 12101-12213) and all applicable federal regulations under title Act, including 28 CFR Parts 35 and 36.

16.3 Inclusion in Subcontracts. LICENSEE represents and warrants that it will include the substance of the nondiscrimination, ADA, and compliance provisions of this Section 16 in all subcontracts in connection with its obligations hereunder.

## **17. TAXES**

LICENSEE will pay all taxes, assessments or charges that at any time may be lawfully imposed upon LICENSEE as the owner of the System. COUNTY will pay all taxes, assessments or charges that at any time may be lawfully imposed upon County including any taxes, assessments, or charges imposed upon COUNTY where LICENSEE is required to withhold or collect such imposed taxes, assessments, or charges and pay over such taxes, assessments, or charges to the taxing authorities such as any excise taxes (if any) that may be levied upon the user of Electricity and are collected by LICENSEE as the producer of such electricity and paid over to the taxing jurisdiction.

## **18. ASSIGNMENT**

The duties and obligations of LICENSEE under this SSA are not assignable by LICENSEE in whole or in part without the written consent of COUNTY, which consent will not be unreasonably withheld after assignee of licensee shows to County proof of their financial capacity (including

access to sufficient funding) and relevant industry knowledge, experience and ability to fully and completely perform the obligations required in this SSA. COUNTY's consent to one assignment is not consent to any subsequent assignment. Any assignment of this SSA by LICENSEE (or any future assignees) is also an assignment of the SLA (unless otherwise agreed in writing by the parties) and consent to assignment of this SSA by COUNTY is consent to assignment of the SLA.

18.1 Event of Default. In the event of default by any assignee of LICENSEE or any successor to LICENSEE in the performance of the terms hereof, COUNTY may proceed directly against LICENSEE for any claims that it may have against LICENSEE for its actions without the necessity of exhausting remedies against such assignee.

18.2 Unique Expertise. Notwithstanding the foregoing, LICENSEE acknowledges that COUNTY is relying upon the unique expertise and capability of LICENSEE. LICENSEE must demonstrate that any proposed assignee has the financial capacity to perform the obligations required under the SSA at a level deemed reasonably appropriate by COUNTY and the proposed assignee is willing and sufficiently funded to assume the indemnification obligations set forth in this SSA, as reasonably determined by COUNTY.

18.3 Definition of Assignment. For purposes of this section, the sale, assignment, transfer, or disposition, directly or indirectly, of any type which results in a change of control of LICENSEE is an assignment of this SSA. Change of control will be as defined in common law, and may be the result of a single or multiple related transactions which result in the cumulative transfer of more than fifty percent (50%) of the voting stock or equity interests of LICENSEE. However, in no event will the transfer of shares: (i) to a Lender which assumes LICENSEE's obligations hereunder; or (ii) to another limited liability company of which LICENSEE is the managing member; or (iii) in an open market transaction sale of shares of a public held company be considered an assignment needing COUNTY's approval. LICENSEE has a continuing duty to provide COUNTY with written notice of any material change in the LICENSEE'S business structure and/or financial status.

18.4 Consent to Assignment. COUNTY will consent to the assignment by LICENSEE to the Lender, of LICENSEE's right, title, and interest in and to this SSA, provided that, in the reasonable opinion of the COUNTY, the proposed assignee is reasonably capable of fulfilling LICENSEE's financial and System management obligations hereunder.

18.5 Assignment for Security. Nothing in this paragraph 18: (i) prohibits LICENSEE from assigning or granting a lien on LICENSEE's rights to payments under this SSA for purposes of collateral security; or (ii) except as permitted under section 18.3 above or with COUNTY's consent in accordance with section 18.4, above, allows LICENSEE to assign its duties and obligations under this SSA.

18.6 Assignment by COUNTY. Not earlier than six (6) months after the Commercial Operation date, COUNTY may assign or otherwise transfer any of its rights under this Agreement; provided, however, that if COUNTY sells, assigns or otherwise transfers ownership of the Facilities or the Licensed Area and it is determined by LICENSEE that this sale, assignment or transfer materially affects LICENSEE's ability to perform its obligations hereunder or under the SLA or the

creditworthiness of the person obligated to perform COUNTY's obligations hereunder following any such assignment is insufficient to pay Termination Fees as set forth in **Exhibit 4** as of the date of assignment or transfer of rights, then LICENSEE may terminate the SSA and SLA. COUNTY will pay LICENSEE a Termination Fee, and the termination schedule set forth in **Exhibit 4** hereto will apply to any such termination by LICENSEE pursuant to this Section 18.6.

**18.7 Assignments to Subsidiaries and Affiliates.** Notwithstanding anything to the contrary contained in this Agreement (including this Section 18) or the SLA, any Licensee may assign (including, without limitation, by way of a change of control) this Agreement and the SLA for the sole underlying purpose of financing a solar project, regardless of the form of the financing assignment transaction (including but not limited to a loan, sale, lease, sale and leaseback or other transaction) without the consent of County so long as (i) the occurrence of any such assignment will not in any way limit the rights granted to the County, and (ii) LICENSEE or its subsidiaries or affiliates maintains responsibility to engineer, and construct the solar facility contemplated in this agreement. For purposes of this SSA, "affiliate" means any corporation, firm, limited liability company, partnership, or other entity that directly or indirectly controls or is controlled by or under common control of LICENSEE. As used in this Section, control means ownership, of fifty percent or more of the shares of common stock entitled to vote for the election of directors, in the case of a corporation, or fifty percent or more of the equity interests in the case of any other type of legal entity, or status as a general partner in any partnership, or any other arrangement whereby a party controls or has the right to control the Board of Directors or equivalent governing body of a corporation or other entity. Any Licensee making an assignment pursuant to this paragraph will promptly notify County in writing of such assignment and will provide County the name of the entity to which the assignment has been made.

## **19. FINANCING**

**19.1 Non-Subordination.** COUNTY will not subordinate its interest in the Facility as security for any loans or financing (a "LICENSEE Loan") provided to LICENSEE by one or more financial institutions (each a "Lender") in connection with LICENSEE's acquisition, development, construction and installation of the System; provided, however, notwithstanding the provisions of Section 19.2 below, LICENSEE may pledge or otherwise encumber LICENSEE's right, title and interest in the SSA, including any rights to payment from COUNTY under the SSA, and LICENSEE's right, title and interest in the System as security for any LICENSEE Loan. If a Lender requests additional terms and conditions to those already provided for in this SSA, COUNTY will consider any such requests, but may refuse such requests in its reasonable discretion and may withhold consent or approval of such additional terms and conditions in its reasonable discretion.

**19.2 Security Interests in System.** COUNTY acknowledges that LICENSEE may finance LICENSEE's acquisition, development, construction and installation of the System with a LICENSEE Loan from one or more Lenders and that LICENSEE's obligations to a Lender may be secured by another property a pledge or collateral assignment of this SSA and LICENSEE's rights to payment and a first priority security interest in the System. In order to facilitate a LICENSEE Loan, and with respect to any LICENSEE Lender of which LICENSEE has notified COUNTY in writing, COUNTY agrees as follows:

19.2.1 *Classification of System as Personal Property.* COUNTY acknowledges that as part of the collateral securing the LICENSEE Loan, LICENSEE may grant a first priority security interest ("Security Interest") in the System to a Lender, which Security Interest may require, among other things, the filing of financing statement(s) ("Financing Statements") under the Uniform Commercial Code ("UCC") to perfect such Security Interest. COUNTY consents to the filing of any Financing Statements so long as such filings reflect the Parties' intent that the System is personal property only and is not a fixture to the Facility.

19.2.2 Neither the filing of the Financing Statements, nor any other document or instrument executed in connection with the LICENSEE Loan will create any interest in or lien upon the real property underlying the Facility, the Facility, or the interest of COUNTY therein and will expressly disclaim the creation of such an interest or a lien.

19.2.3 COUNTY will notify its successors and assign the ownership of the System by LICENSEE, the existence of the Lender's Security Interest, and the fact that the System is not part of the Facility or a fixture thereof.

19.2.4 In connection with any collateral assignment of this SSA and/or the SLA to a Lender, COUNTY will be bound by the "lender accommodations" described in **Exhibit 5**. LICENSEE's Lender will be a third party beneficiary of this Section 19.2.4.

## **20. AMENDMENT**

No amendment or variation of the terms of this SSA is valid unless made in writing, signed by the parties and approved as required; provided, however, that the Chair of the Pima County Board of Supervisors and authorized representatives of LICENSEE are hereby authorized to execute additional agreements that are determined by both parties to be necessary to meet the goals and objectives of this Agreement. No oral understanding or agreement not incorporated in this SSA is binding on either party.

## **21. LEGAL ARIZONA WORKERS COMPLIANCE**

LICENSEE hereby warrants and represents that it will, at all times during the term of this Agreement, comply with all federal immigration laws applicable to LICENSEE'S employment of its employees, and with the requirements of A.R.S. § 23-214 (A) (together the "State and Federal Immigration Laws"). LICENSEE will further ensure that each subcontractor who performs any work for LICENSEE under this Agreement likewise complies with the Federal Immigration Laws. COUNTY has the right to inspect the records of LICENSEE and any subcontractor at any time in order to verify such party's compliance with the Federal Immigration Laws. Any material breach of LICENSEE'S or any of LICENSEE'S subcontractor's warranty of compliance with the Federal Immigration Laws, or of any other provision of this section is a material breach of this Agreement and may, at COUNTY'S sole option, result in termination of this Agreement. If the breach is by a subcontractor, and the subcontract is suspended or terminated as a result, LICENSEE will be required to take such steps as may be necessary to either self- perform the services that would have been provided under the subcontract or retain a replacement subcontractor, as soon as possible so as not to delay project completion.

LICENSEE will advise each subcontractor of COUNTY'S rights, and the subcontractor's obligations, under this section.

## **22. AUDIT**

Each Party has the right, at its sole expense and during normal working hours, to examine copies of the records and supporting documentation of the other party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this SSA. Each party will maintain such records for a possible audit for a minimum of three (3) years, unless a longer period of records retention is stipulated. Each Party will allow the auditor(s) access to such records during normal business hours after reasonable notice and to allow interviews of any employees who might reasonably have information related to such records. If any examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and bears interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; provided, however, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof and thereafter any objection is waived.

## **23. INDEPENDENT CONTRACTOR**

LICENSEE, and its agent's and employees, will act in an independent capacity and not as officers or employees or agents of COUNTY in the performance of this SSA.

## **24. TIMELINESS**

Time is of the essence in this SSA.

## **25. GOVERNING LAW**

This contract is governed by and will be interpreted in accordance with the laws of the State of Arizona. All actions pursuant to this Agreement must be brought and maintained in the Superior Court of Arizona in Pima County.

## **26. UNENFORCEABLE PROVISION**

In the event that any provision of this SSA is unenforceable or held to be enforceable, then all other remaining provisions of this SSA that can be given effect without the unenforceable provision have force and effect and are not affected thereby.

## **27. COUNTERPARTS**

This SSA may be executed in multiple copies, each of which is an original, but all of which constitute one agreement after each Party has signed such a counterpart.

## **28. PUBLIC INFORMATION**

Pursuant to A.R.S. § 39 -121 et seq., and A.R.S. § 34-603(H) in the case of construction or Architectural and Engineering services procured under A.R.S. Title 34, Chapter 6, all information submitted to COUNTY by LICENSEE, including, but not limited to, pricing, product specifications, work plans, and any supplementing data becomes public information and upon request, is subject to release and/or review by the general public including competitors. Any records submitted to COUNTY that LICENSEE reasonably believes constitute proprietary, trade secret or otherwise confidential information must be appropriately and prominently marked as CONFIDENTIAL by LICENSEE prior to the execution of this SSA.

Notwithstanding the above provisions, in the event records marked CONFIDENTIAL are requested for public release pursuant to A.R.S. § 39-121 et seq., COUNTY will release records marked CONFIDENTIAL ten (10) business days after the date of notice to the LICENSEE of the request for release, unless LICENSEE has, within the ten (10) day period, secured a protective order, injunctive relief or other appropriate order from a competent jurisdiction, enjoining the release of the records. For the purposes of this paragraph, the day of the request for release will not be counted in the time calculation. LICENSEE will be notified of any request for such release on the same day County receives the request for public release or as soon thereafter as practicable. COUNTY will not, under any circumstances, be responsible for securing a protective order or other relief enjoining the release of records marked CONFIDENTIAL, nor will COUNTY be in any way financially responsible for any costs associated with securing such an order.

## **29. INTERNAL REVENUE CODE SECTION 7701(e)**

It is the intention of the parties that the provisions in this SSA meet all of the requirements set forth in Section 7701(e) (4) of the Internal Revenue Code of 1986, as amended (the "Code"), and any related Treasury Regulations and IRS administrative pronouncement so that the SSA is deemed to be treated as a "service contract" and not as a "lease" pursuant to Code Section 7701(e). All duty and responsibility for such compliance rests with LICENSEE. Amendments to this SSA required to achieve such compliance require COUNTY approval, with such approval not to be unreasonably withheld.

## **30. ISRAEL BOYCOTT CERTIFICATION**

LICENSEE hereby certifies that it is not currently engaged in, and will not for the duration of this Contract engage in, a boycott of Israel as defined by A.R.S. § 35-393.01. Violation of this certification by LICENSEE may result in action by the County up to and including termination of this Contract.

## **31. INTEGRATION**

This Agreement, along with the SLA entered into on the date hereof, constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the parties hereto in connection herewith and therewith,



and no covenant, representation or condition not expressed in this Agreement or in the SLA affects, or is effective to interpret, change or restrict the express provisions of this Agreement.

IN WITNESS WHEREOF and in confirmation of their consent to the terms and conditions contained in this SSA and intending to be legally bound hereby, COUNTY and LICENSEE have executed this SSA as of the Effective Date.

COUNTY:

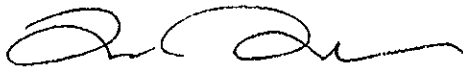
\_\_\_\_\_  
Chair, Board of Supervisors

Attest:

\_\_\_\_\_  
Clerk, Board of Supervisors

Date: \_\_\_\_\_

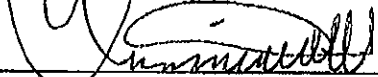
Approved as to Content:



\_\_\_\_\_  
Director, Lisa Josker, Facilities Management

Date: 6/14/18

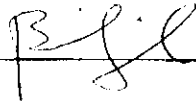
Approved as to Form:



\_\_\_\_\_  
Chris Straub, Deputy County Attorney

Date: 6-14-2018

LICENSEE:

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

Name: Brian Seibel, President

Date: 6/14/18

**EXHIBIT 1**  
**ELECTRICITY PRICING, MINIMUM OUTPUT GUARANTEES**  
**AND**  
**BILLING METHODOLOGY**  
(3 Pages)

**1. Electricity Pricing** per Service meters at the site: Pima Animal Care Center (PACC) Phase II, 4000 N. Silverbell Rd.

Service Meter Name and Meter Number:

Tucson Electric Power Service Address No. 4180874484, Meter TR9R-2762

**2. Calculation of Lost Savings Payment to County**

The first year will be defined as 12-months from the Commercial Operation date and will also define the commencement date of each subsequent year during the term of this agreement. Calculation for each complete prior year and payment if due will be documented and submitted to County by the Licensee within sixty (60) calendar days after the commencement of each year.

Annual Actual Production less Guarantee Minimum Output (GMO), if positive, indicates the GMO was satisfied. If "negative", the supplier will issue a credit or payment equal to the unit cost in column G of **Exhibit 1.1** "Estimated TEP Cost" less the SSA supplier price/kWh for the SSA contract year times the quantity of GMO/kWh not produced. Annual average local utility tariff price is determined by dividing the total cost of delivered electricity by the Energy Service Provider based on an equivalent non-netmetered rate by the total quantity of kWhs delivered to the COUNTY by the Energy Service Provider.

**3. Electricity Purchase and Sales**

**3.1 General Provisions:**

LICENSEE will generate, deliver and sell Electricity, when available from the System, to the COUNTY at the Electrical Interconnection Point during the term of this SSA.

LICENSEE agrees to generate, deliver and sell a quantity of Electricity as noted in Exhibit 1.1 (above) and as guaranteed in SSA Section 5 to the COUNTY from the System and COUNTY agrees to purchase Electricity as measured at the Electrical Interconnection Point.

**3.2 Formulas for Pricing:**

LICENSEE will prepare invoices in accordance with the formulas set forth in Exhibit 2 in the format set forth in Exhibit 3. LICENSEE will render to COUNTY an invoice each month for the preceding billing period during the Term of this SSA setting forth the actual amount of kWh delivered ("Actual Production") and the amounts due LICENSEE for Electricity generated and delivered by the System. COUNTY will remit full payment with each invoice to LICENSEE, subject to any offsets for Guaranteed Minimum Output shortfalls, due under SSA, Section 5.

In the event COUNTY disputes all or any part of any bill submitted by LICENSEE under this SSA, COUNTY will pay the undisputed portion of the invoice when due and will notify LICENSEE

in writing within three (3) months from the date of receipt of any disputed invoice or adjusted invoice. The parties will use best efforts to resolve the dispute amicably and promptly, and upon determination of the correct billing amount, COUNTY will promptly pay or be paid the remaining portion or refund due (if any), with interest at the Interest Rate from the date payment was due until paid (in the case of an underpayment) or from the date paid until refunded (in the case of an overpayment). **Late payment fees will not be applied to amounts that are subject to a good faith dispute, until the dispute is resolved and interest is calculated in accordance with this Section.** In the event that disputed amounts cannot be resolved through the process of conference, disputes will be addressed through the process provided in Section 1 1.8 of the SSA.

**3.3 Invoice Submittal and Billing Contacts:**

LICENSEE will submit invoices to the COUNTY at the address as set forth below. LICENSEE will also submit a duplicate invoice (copy only) to the COUNTY at the address as noted on the subsequent page.

Pima County Billing	Copy Invoice To:
Section/Unit: Pima County Finance	Section/Unit: Pima County Facilities Management
Accounts Payable	Attention: Energy Manager
Address: Administration Building 130 W. Congress, 7th flr. Tucson AZ 85701	Address: Administration Building 150 W. Congress, 3rd flr. Tucson AZ 85701
Phone: 520-724-8144	Phone: 520-724-3093
	Fax: 520-724-3900
	Email: patrick.olearyjr@pima.gov

**3.4 Payment Address Notice:**

COUNTY will submit all payments under this SSA to LICENSEE's project representative at the address listed in SSA Section 9. Parties agree that if COUNTY receives notification to change the LICENSEE's designated address for purposes of payment, COUNTY will notify the project representative at the address listed in SSA Section 9 and any Lender designated by LICENSEE pursuant to Section 12.1.1 of the SLA at least sixty (60) days prior to the first submittal of payment to the new address. Parties also agree that COUNTY will submit payments under this SSA by electronic funds transfer when electronic transfer becomes a readily available payment method for the COUNTY.

## EXHIBIT 1.1

### Expected & Guaranteed Performance Output for Pima Animal Care Center (PACC), Phase II.

- a. The actual Expected Performance Output (Column B) will not exceed in any given year 852,038 kWh.
- b. The Guaranteed Minimum Output (kWh) (Column C) will be calculated at a minimum of 85% of the Expected Performance Output (Column B).
- c. First year Expected Performance Output will be calculated for the 12-month period that commences on the Commercial Operation Date defined by Section 6.3 of the SLA and Exhibit VIII.
- d. The actual cost of electricity purchased from the utility during the 12 months beginning July 3, 2017 and ending June 1, 2018 for Pima Animal Care Center was approximately \$.136/kWh and is reflected in Column G, line 1.

A. Year	B. Expected Performance Output (kWh)	C. Guaranteed Minimum Output (GMO) (kWh)	D. Supplier Price (\$/kWh) Including Tax	E. Total Annual Cost for Expected Performance. Output Electricity (\$) from Supplier Columns (B x D)	F. Total Annual Cost For Guaranteed Electricity (\$) From Supplier Columns (C x D)	G. Est. TEP Cost \$/kWh+3%/year	H. Total Annual Cost For Guaranteed Electricity (\$) From TEP Columns (C x G)	I. Estimated Pima County Savings per year Columns (H-F)
1	710,031	603,526	\$0.1280	\$90,884	\$77,251	\$0.1360	\$82,080	\$4,828
2	706,481	600,509	\$0.1280	\$90,430	\$76,865	\$0.1401	\$84,119	\$7,254
3	702,948	597,506	\$0.1280	\$89,977	\$76,481	\$0.1443	\$86,210	\$9,729
4	699,434	594,519	\$0.1280	\$89,528	\$76,098	\$0.1486	\$88,352	\$12,254
5	695,937	591,546	\$0.1280	\$89,080	\$75,718	\$0.1531	\$90,547	\$14,830
6	692,457	588,588	\$0.1280	\$88,634	\$75,339	\$0.1577	\$92,798	\$17,458
7	688,995	585,645	\$0.1280	\$88,191	\$74,963	\$0.1624	\$95,104	\$20,141
8	685,550	582,717	\$0.1280	\$87,750	\$74,588	\$0.1673	\$97,467	\$22,879
9	682,122	579,804	\$0.1280	\$87,312	\$74,215	\$0.1723	\$99,889	\$25,674
10	678,711	576,905	\$0.1280	\$86,875	\$73,844	\$0.1774	\$102,371	\$28,527
11	675,318	574,020	\$0.1280	\$86,441	\$73,475	\$0.1828	\$104,915	\$31,441
12	671,941	571,150	\$0.1280	\$86,008	\$73,107	\$0.1883	\$107,522	\$34,415
13	668,581	568,294	\$0.1280	\$85,578	\$72,742	\$0.1939	\$110,194	\$37,453
14	665,238	565,453	\$0.1280	\$85,151	\$72,378	\$0.1997	\$112,933	\$40,555
15	661,912	562,625	\$0.1280	\$84,725	\$72,016	\$0.2057	\$115,739	\$43,723
16	658,603	559,812	\$0.1280	\$84,301	\$71,656	\$0.2119	\$118,615	\$46,959
17	655,310	557,013	\$0.1280	\$83,880	\$71,298	\$0.2182	\$121,563	\$50,265
18	652,033	554,228	\$0.1280	\$83,460	\$70,941	\$0.2248	\$124,583	\$53,642
19	648,773	551,457	\$0.1280	\$83,043	\$70,587	\$0.2315	\$127,679	\$57,093
20	645,529	548,700	\$0.1280	\$82,628	\$70,234	\$0.2385	\$130,852	\$60,619
Total	13,545,903	11,514,018		\$1,733,876	\$1,473,794		\$2,093,532	\$619,738

**EXHIBIT 2**  
**BILLING FORMULAS AND**  
**EXAMPLES**

LICENSEE will provide invoices as indicated in this Exhibit and will indicate the source and calculation of each variable set forth below in a manner so that the COUNTY can readily confirm the accuracy and appropriateness of each invoice.

The total invoice for Electricity delivered by LICENSEE for the month in question will be determined as follows:

$$P = A-E * ACP$$

Where:

P = Monthly payment made to LICENSEE for electricity delivered during the billing period.

AE = the quantity of electricity in kWh actually delivered by the LICENSEE to the COUNTY during the billing period

ACP is the contract price for the monthly or quarterly billing period in \$/kWh as set forth in Exhibit 1.1.

**EXHIBIT 3**

**SAMPLE SOLAR INVOICE**

Facility Name  
Facility Contact Person  
Facility Address

**Invoice No.**

**Account No.**

**Meter No.**

Start Date	End Date	Start Meter Read	End Meter Read	Total
kWh				
Mo/Day/Year				

Contract Price: \$/kWh

Total Cost of Solar Power Delivered: \$

Net due to LICENSEE

## EXHIBIT 4

### TERMINATION FEE SCHEDULE

In the event of a termination of this SSA pursuant to 3.1.2, 11.4.1, 11.4.4 as limited by Section 11.5.2, 11.4.6 as limited by Section 11.5.1, or otherwise as compensation under Section 13.2, 14 or 18.6, COUNTY will pay to LICENSEE an Early termination payment corresponding to the year in which early termination occurs.

The Early Termination Payment will be calculated as described below and specifically set forth in the second column of the table below.

Early Termination Payment = Net Present Value of the annual contract price (per site) multiplied by the Guaranteed Minimum Output, less the operating costs avoided due to the early termination, for each of the remaining years of the contract. If an early termination occurs on a date other than an anniversary of the Commercial Operation Date, the unpaid amount for that year will be calculated by multiplying the Early Termination Payment by a simple ratio of the number of months remaining until the anniversary of the Commercial Operation Date divided by 12 months.

YEAR OF TERMINATION	EARLY TERMINATION PAYMENT
1	\$1,539,000
2	\$1,503,000
3	\$1,480,000
4	\$1,442,000
5	\$1,402,000
6	\$1,361,000
7	\$985,000
8	\$941,000
9	\$896,000
10	\$849,000
11	\$801,000
12	\$751,000
13	\$700,000
14	\$647,000
15	\$592,000
16	\$536,000
17	\$477,000
18	\$417,000
19	\$355,000
20	\$290,000

## EXHIBIT 5

### LENDER ACCOMMODATIONS

(2 Pages)

#### **Certain Agreements for the Benefit of the Financing Parties**

Notwithstanding anything else contained in the SSA or SLA, COUNTY acknowledges that LICENSEE will be financing the installation of the System either through a lessor, Lender or with financing accommodations from one or more financial institutions and that the Licensee may sell or assign the System and/or may secure the Licensee's obligations by, among other collateral, a pledge or collateral assignment of this Agreement and a first security interest in the System. In order to facilitate such necessary sale, conveyance, or financing, and with respect to any such financial institutions of which LICENSEE has notified COUNTY in writing COUNTY agrees as follows:

- (a) Consent to Collateral Assignment. COUNTY consents to either the sale or conveyance to a lessor or the collateral assignment by LICENSEE to a Lender that has provided financing of the System, of the Licensee's right, title and interest in and to this Agreement.
- (b) Notices of Default. COUNTY will deliver to the Lender, concurrently with delivery thereof to LICENSEE, a copy of each notice of default given by COUNTY under the Agreement, inclusive of a reasonable description of LICENSEE default. No such notice will be effective absent delivery to the Lender. COUNTY will not mutually agree with LICENSEE to terminate the Agreement without the written consent of the Lender, but notwithstanding any provision to the contrary in this Exhibit XI, may unilaterally terminate this SSA or the SLA (collectively, the "Agreements") as provided for by the terms and conditions of the Agreements.
- (c) Rights Upon Event of Default. Notwithstanding any contrary term of this Agreement:
  - i. The Lender, as collateral assignee, will be entitled to exercise, in the place and stead of LICENSEE, any and all rights and remedies of LICENSEE under this Agreement in accordance with the terms of this Agreement and only in the event of LICENSEE's or COUNTY's (or any successor in interest for either party) default. The Lender will also be entitled to exercise all rights and remedies of secured parties generally with respect to the Agreements and the System.
  - ii. The Lender will have the right, but not the obligation, to pay all sums due under this Agreement and to perform any other act, duty or obligation required of Licensee thereunder or cause to be cured any default of Licensee thereunder in the time and manner provided by the terms of this Agreement. Nothing herein requires the Lender to cure any default of Licensee under this Agreement or (unless the Lender has succeeded to Licensee's interests under this Agreement) to perform any act, duty or obligation of Licensee under this Agreement, but COUNTY hereby gives it the option to do so.
  - iii. Upon the exercise of remedies under its security interest in the System, including any sale thereof by the Lender, whether by judicial proceeding or under any power of sale



contained therein, or any conveyance from Licensee to the Lender (or any assignee of the Lender) in lieu thereof, the Lender will give notice to COUNTY (or any successor in interest) of the transferee or assignee of this Agreement. Any such exercise of remedies will not constitute a default under this Agreement.

iv. Upon any rejection or other termination of this Agreement pursuant to any process undertaken with respect to LICENSEE under the United States Bankruptcy Code, at the request of the Lender made within ninety (90) days of such termination or rejection, COUNTY (or any successor in interest) will enter into a new agreement with the Lender or its assignee having the same terms and conditions as this Agreement, provided that Lender or Lender's assignee, in sole discretion of COUNTY (or any successor in interest), is deemed reasonably capable of operating and maintaining the System.

(d) Right to Cure.

i. COUNTY (or any successor in interest) will not exercise any right to terminate or suspend this Agreement unless it will have given the Lender prior written notice by sending notice to the Lender (at the address provided by Licensee) of its intent to terminate or suspend this Agreement, specifying the condition giving rise to such right, and the Lender will not have caused to be cured the condition giving rise to the right of termination or suspension within the periods provided for in this Agreement. The parties' respective obligations will otherwise remain in effect during any cure period; provided that if such Licensee default reasonably cannot be cured by the Lender within such period and the Lender commences and continuously pursues cure of such default within such period, such period for cure will be extended for a reasonable period of time under the circumstances, such period not to exceed an additional thirty (30) days.

ii. If the Lender (including any purchaser or transferee), pursuant to an exercise of remedies by the Lender, will acquire title to or control of LICENSEE's assets and will, within the time periods described in sub-section (c)(i) above, cure all defaults under this Agreement existing as of the date of such change in title or control in the manner required by this Agreement, then such person or entity will no longer be in default under this Agreement, and this Agreement will continue in full force and effect.