

This Agreement is between the State of North Dakota acting by and through its Industrial Commission (Commission) and XXX (Contractor).

1. Independent Contractor

The Contractor is an independent entity under this Agreement, and is not a Commission employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. The Contractor retains sole and absolute discretion in the manner and means of carrying out Contractor’s activities and responsibilities under this Agreement except to the extent specified in this Agreement.

2. Scope of Work

a. The Contractor agrees to perform the work described in Exhibit A, entitled “XXX,” which is attached to this Agreement and is made a part of it.

b. The Contractor shall provide reports for the work mentioned in Paragraph 2a as follows:

- Status Report (for XXX – XXX): XXX
- Status Report (for XXX – XXX): XXX
- Status Report (for XXX – XXX): XXX
- Final Report (for XXX – XXX and Comprehensive): XXX

The reports shall comply with REC - 5.11 of the Renewable Energy Development Program Policies. Each Report must provide documentation on expenditures and verification of the receipt and expenditure of the private matching funds.

The project data and non-confidential reports shall be provided to the Commission in both electronic and hard-copy formats with permission for unrestricted distribution. The electronic versions must be in a suitable format for hosting on the Industrial Commission website. Specifically, the Final Report must include a single page project summary describing the purpose of the project, the work accomplished, the project’s results, and the potential applications of the project.

In addition, information on the following deliverables must be provided:

- Report on XXX

If requested, the Contractor will provide a tour of the facility where the work is being conducted and allow the Renewable Energy Council members, Commission or its staff to be present.

3. Consideration

a. The purpose of this funding is to encourage the use of renewable energy, benefit businesses that operate in the State of North Dakota and to utilize North Dakota workforce. For performing the work described in Paragraph 2, the Commission agrees to grant to the Contractor an amount not to exceed \$XX according to the following schedule:

| | |
|---|------|
| Upon receipt of documentation of expenditures, matching funds expenditures, and consideration of status reports | \$XX |
| Upon receipt of documentation of expenditures, matching funds expenditures, and consideration of final report | \$XX |

b. If after reviewing a report, the Commission believes that the report is inadequate or that the Contractor is not complying with the scope of work or satisfactorily carrying out the work, the Commission may withhold all or part of a scheduled payment until the Contractor, in the opinion of the Commission, has remedied any deficiency.

c. If the Contractor either: (i) moves its primary business operation out of North Dakota or (ii) sells

the technology developed with Renewable Energy Program funding to an entity whose primary business operation utilizing this technology is conducted outside of North Dakota, the entire amount of the funding must be repaid with 4% interest of the funds received. If there is a relocation or a sale prior to the funding being disbursed to the Contractor, the remaining payments will be withheld by the Commission.

- d. If the Contractor is enjoined from complying with the scope of work or satisfactorily carrying out the work due to a claim of infringement or misappropriation of intellectual property, the Commission may withhold all or part of the scheduled payment until the Contractor, in the opinion of the Commission, has remedied the claims.

4. Authority to Contract and Subcontract

The Contractor does not have the authority to contract for or incur obligations on behalf of the Commission.

The Contractor may not assign or otherwise transfer or delegate any right or duty related to this Agreement without the Commission's express written consent.

After approval by the Commission, the Contractor may, however, enter into subcontracts provided that any subcontract acknowledges the binding nature of this Agreement and incorporates this Agreement, including any attachments into the subcontract. The Contractor is solely responsible for the performance of any subcontractor with whom the Contractor contracts.

By execution of this Agreement, the Commission approves XXX as a subcontractor for this project.

5. Funds Available and Authorized

Commission certifies at the time of the execution of this Agreement sufficient funds are available and authorized for expenditure to finance costs of this Agreement within the Commission's current appropriation or limitation to July 1, 2021. It is agreed that in the event the appropriation or funding to the Commission is not continued at a level sufficient to allow for payments to the Contractor for the services identified in Paragraph 2, the obligations of each party hereunder terminate upon delivery of written notice to the Contractor.

6. Termination

This Agreement may be terminated by mutual consent of both parties in writing and delivered by certified mail or in person.

Commission may terminate this Agreement effective upon delivery of written notice to the Contractor, or any later date stated in this notice, if:

- a. The Contractor fails to provide services required by the Agreement within the time specified or any extension agreed to by the Commission; or
- b. The Contractor fails to perform any of the other obligations under this Agreement or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms.

The rights and remedies of the Commission provided in Paragraph 6 are not exclusive but are in addition to any other rights and remedies provided by law or under this Agreement. Further, in the event of termination under Section 6, it is understood that no further funding will be provided to the Contractor.

If the Commission terminates this Agreement for default by the Contractor, the Contractor shall immediately reimburse the Commission the amount of all money paid by the Commission to the Contractor hereunder.

7. Agreement Management

Notwithstanding the Contractor's responsibility for total management of the work described herein and in Exhibit A, the administration of the Agreement will require coordination between the Renewable Energy Council, the Commission, and the Contractor.

Commission's Technical Representative

The Commission's Technical Representative (TR) has been designated by the Commission to monitor all technical aspects and assist in administration of the Agreement. The actions within the purview of the TR's authority are to assure that the Contractor performs the technical requirements of the Agreement; to perform, or cause to be performed, inspections necessary in connection with the performance of the Agreement; to maintain both written and oral communications with the Contractor concerning the aspects of the written interpretations of the technical requirements of the statement of work; to monitor the Contractor's performance under the Agreement; and to notify the Commission of any deficiencies.

Commission's Authorized Officer

The Commission's Authorized Officer will carry out all contractual administration of this Agreement. Communications pertaining to this Agreement must be addressed to:

The Industrial Commission of North Dakota
Attention: Executive Director/Secretary
State Capitol 14th Floor
600 E Boulevard Ave Dept 405
Bismarck, North Dakota 58505-0840

The Commission's Authorized Officer is the only person, other than the Commission, authorized to approve changes to any of the requirements under this Agreement.

8. Access to Records

The Commission, the State Auditor of the State of North Dakota, and the Office of the Attorney General of the State of North Dakota, and their duly authorized representatives, shall have access to the books, documents, papers and records of the Contractor relating to the work performed by the Contractor hereunder for the purpose of auditing, examining and copying the same.

9. Indemnity and Insurance

The Contractor shall save and hold harmless the State of North Dakota and the Commission, its officers, agents, employees, and members, from all claims, suits, or actions of whatsoever nature resulting from or arising out of the activities of the Contractor or its subcontractors, agents, or employees under this Agreement. By execution of this Agreement, the Contractor verifies it has liability insurance coverage with limits of liability equal to or greater than those damage limits prescribed in N.D.C.C. §32-12.2-02.

The State of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy on a primary and noncontributory basis, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this Agreement or by the contractual indemnity obligations of the Contractor.

10. Ownership of Work Product, Patent Rights and Fees

All work product, patent rights and fees of the Contractor resulting from this Agreement shall be governed by REC - 6 of the Renewable Energy Development Program Policies.

The Contractor shall notify the Commission within 30 days of any assignment or sale of the technology developed with this funding. Should there be a sale of the technology to an entity whose primary business operation utilizing this technology is conducted outside of North Dakota, the provisions of Paragraph 3 (c) are triggered.

11. Intellectual Property Infringement Indemnification

The Contractor, at its own expense, shall defend, indemnify, save, and hold harmless State of North Dakota and the Commission, its officers, agents, employees, and members, against all liabilities, damages, loses, costs, or expenses, including, without limitation, reasonable attorney fees and expenses, directly arising out of any suit, claims, or proceedings brought by a third party alleging that work performed under this Agreement violate, infringe, or misappropriate a United States patent, copyright, trade secret, trademark, or any other proprietary rights of a third party protected under United States law. The Contractor's obligation shall not extend to a claim based on any alleged infringement arising from any additions, changes, or modifications to the work performed by or on behalf of the Commission.

12. Nondiscrimination – Compliance with Laws

The Contractor shall comply with all federal, state, and local laws and ordinances applicable to the work to be done under this Agreement. Further, the Contractor agrees to comply with all laws, rules, and policies, including those relating to nondiscrimination, accessibility and civil rights. The Contractor agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation, and workers' compensation premiums. The Contractor shall have and keep current at all times during the term of this Agreement all licenses and permits required by law. The Contractor's failure to comply with this section may be deemed a material breach by the Contractor entitling the Commission to terminate in accordance with the Termination section of this Agreement.

13. Applicable Law and Venue

This Agreement shall be governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Agreement must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota. Each party consents to the exclusive jurisdiction of such court and waives any claim for lack of jurisdiction or *forum non conveniens*.

14. Captions

The captions or headings in this Agreement are for convenience only and in no way define, limit, or describe the scope or intent of any provisions of this Agreement.

15. Execution and Counterparts

This Agreement may be executed in several counterparts, each of which shall be an original, all of which shall constitute but one and the same instrument.

16. Amendments

The terms of this Agreement shall not be waived, altered, modified, supplemented, or amended, in any manner whatsoever, except by written instrument signed by the parties.

17. Notices

All notices or other communications required under this Agreement must be given by registered or certified mail and are complete on the date postmarked when addressed to the parties at the following addresses:

| | |
|---------------------------------------|-----|
| Industrial Commission of North Dakota | XXX |
| State Capitol, Fourteenth Floor | XXX |
| 600 E Boulevard Ave Dept 405 | XXX |

Bismarck, ND 58505-0840

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

18. Assignment; Successors in Interest

The Contractor may not assign or otherwise transfer or delegate any right or duty without Commission's express written consent, provided, however, that the Contractor may assign its rights and obligations hereunder in the event of a change of control or sale of all or substantially all of its assets related to this Agreement, whether by merger, reorganization, operation of law, or otherwise. Should assignee be a business or entity with whom the Commission is prohibited from conducting business, the Commission shall have the right to terminate without cause.

The provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective successors and assigns.

19. Attorney Fees

In the event a lawsuit is initiated by the Commission to obtain performance due under this Agreement, and the Commission is the prevailing party, the Contractor shall, except when prohibited by N.D.C.C. § 28-26-04, pay Commission's reasonable attorney fees and costs in connection with the lawsuit.

20. Severability

The parties agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or unenforceable, the validity of the remaining terms and provisions is unaffected, and, if possible, the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular term or provision held to be invalid.

21. Waiver

The failure of the Commission to enforce any provisions of this Agreement shall not constitute a waiver by the Commission of that or any other provision.

22. Merger Clause

This Agreement, including any incorporated attachments, constitutes the entire agreement between the parties. No waiver, consent, modification or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. The Contractor, by the signature below of its authorized representative, hereby acknowledges that the Contractor has read this Agreement, understands it, and agrees to be bound by its terms and conditions.

23. Legal Notice/Disclaimer

The following notice shall be contained in all reports intended to be released to the public:

This report was prepared by XXX pursuant to an agreement with the Industrial Commission of North Dakota, which partially funded the project through the Renewable Energy Program.

XXX or any of its subcontractors, and the Industrial Commission of North Dakota, or any person acting on its behalf, do not:

(A) Make any warranty or representation, express or implied, with respect to the accuracy, completeness, or usefulness of the information contained in this report, or that the use of any

information, apparatus, method, or process disclosed in this report may not infringe privately-owned rights; or

(B) Assume any liabilities with respect to the use of, or for damages resulting from the use of, any information, apparatus, method or process disclosed in this report.

Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise, does not necessarily constitute or imply its endorsement, recommendation, or favoring by the Industrial Commission of North Dakota. The views and opinions of authors expressed herein do not necessarily state or reflect those of the Industrial Commission of North Dakota.

24. Compliance with Public Records Law

The Contractor understands that, except for disclosures prohibited in this Agreement, the Commission must disclose to the public upon request any records it receives from the Contractor. Contractor further understands that any records obtained or generated by the Contractor under this Agreement may, under certain circumstances, be open to the public upon request under the North Dakota public records law. Contractor agrees to contact the Commission promptly upon receiving a request for information under the public records law and to comply with the Commission's instructions on how to respond to the request.

25. Term of Agreement

This Agreement begins on XXX, 202X and ends on XXX, 202X.

XXX

NORTH DAKOTA INDUSTRIAL COMMISSION

By: _____
Name

By: _____
Karlene Fine

Signature

Executive Director

Title

Date: _____

Date: _____