

EXHIBIT
CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (Agreement) is made this ___ day of _____, 2018 by and between East Bay Community Energy Authority, a California joint powers authority (“EBCE”) and _____, a _____ (“Company”) for the purpose of _____.

SECTION 1. RECITALS

- 1.1 Company has experience in developing energy projects and is interested in bidding on the Oakland Clean Energy Initiative;
- 1.2 EBCE may provide to Company certain Confidential Information, as that term is described below to assist Company in preparing a response to the Oakland Clean Energy Initiative Solicitation (“OCEI Solicitation”) and company may provide Confidential Information to EBCE as part of the OCEI Solicitation process;
- 1.3 Because disclosure of Confidential Information may impact the clean energy market, the Parties recognize the importance and necessity of not disclosing Confidential Information and carefully monitoring its dissemination so that only those who require the information to respond to or evaluate bids from the OCEI Solicitation have access to Confidential Information.

NOW THEREFORE, for good and valuable consideration, the amount and sufficiency of which is hereby acknowledged, EBCE and Company agree as follows:

SECTION 2. CONFIDENTIAL INFORMATION

“Confidential Information” means any information furnished to Company, including without limitation, customer data, electricity usage data, electricity load data, electricity storage capacity and other proprietary or personal customer information. All Confidential Information must be kept confidential and handled in accordance with this Agreement. EBCE recognizes that Company will be providing certain proprietary information in response to the OCEI Solicitation including without limitation, Company data, capabilities and pricing. Company recognizes and understands that the EBCE operates in an open and transparent manner under the California Public Records Act. Company must clearly mark the document or material it believes to be proprietary information as “Confidential Information” and state the specific provision in the Public Records Act that provides the exemption as well as the factual basis for claiming the exemption. Confidential Information is not limited to any particular format; it may be written, oral, electronic, images, or in any other format or media.

SECTION 3. NONDISCLOSURE AND NONUSE OF CONFIDENTIAL INFORMATION

The Parties agree to protect Confidential Information in perpetuity, using at least the same degree of care that each Party uses to protect its own confidential and proprietary information of similar importance, but no less than a reasonable degree of care. Company agrees to use Confidential Information obtained in the course of this OCEI Solicitation for purposes of preparing and submitting an offer in the OCEI Solicitation and the evaluation or negotiation of an Agreement if Company is selected. Company shall not disclose, publish or disseminate Confidential Information to anyone other than those of its employees, financial advisors, lawyers or others who have a need to know in order to prepare a response to the OCEI Solicitation and who are bound by a written agreement that prohibits unauthorized disclosure or use of Confidential Information. Company will be responsible for any violation of the terms of this Agreement by its employees, Subcontractors and agents. Company agrees not to use Confidential Information for any other purpose or for its own or any third party's benefit. Company may disclose Confidential Information to the extent required by law, provided Company gives notice of such requirement prior to any disclosure and takes reasonable steps to obtain protective treatment of the Confidential Information, unless such notice is otherwise prohibited by law.

With respect to information that Company has identified as Confidential Information pursuant to Section 2, above, and although the California Public Records Act recognizes that certain confidential information may be protected from disclosure (e.g. trade secret information), EBCE may not be in a position to establish that the information that Company submits is a trade secret or otherwise may be excluded from release under the Public Records Act. Prior to any disclosure to a third party of information identified in writing as "Confidential," "Confidential Information," "Trade Secret" or "Proprietary," EBCE will provide Company notice of the proposed disclosure with reasonable notice to seek protection from disclosure by a court of competent jurisdiction. Notice under this Section may be given via electronic mail without the requirement for a written notice of receipt. If Company does not seek protection from the court, the Parties agree that EBCE in its independent discretion may release the document(s) in which case, no liability will attach to EBCE under this Confidentiality Agreement and EBCE will not be deemed in default of the mutual confidentiality obligations in Section 2, above.

SECTION 4. INDEMNITY FOR MISUSE OF INFORMATION

In the event of a legal challenge relating to EBCE's withholding of Company Confidential Information from release under the Public Records Act, Company Agrees to indemnify, defend, protect and hold EBCE harmless, with counsel reasonably acceptable to EBCE, from and against any and all expenses, claims, costs, attorneys' fees, damages and penalties.

SECTION 5. LICENSE TO CONFIDENTIAL INFORMATION

Except as expressly set forth in this Agreement, no license or other rights to Confidential Information are granted or implied and each Party retains all of its rights therein.

SECTION 6. NO WARRANTY

All information is provided "AS IS," and without any warranty, whether express or implied, as to its accuracy or completeness.

SECTION 7. TERM

This Confidentiality Agreement is effective as of the date first written above. The confidentiality obligations continue in perpetuity unless one of the exceptions in Section 11 apply or unless the Party providing the information notifies the Receiving Party that the information is no longer to be kept confidential.

SECTION 8. DISPOSITION OF CONFIDENTIAL INFORMATION UPON TERMINATION OF THE OCEI SOLICITATION

Upon expiration or termination of the OCEI Solicitation or award of an Agreement, Company must return to EBCE or destroy all EBCE Confidential Information under the control of Company, without retaining any electronic or tangible copies thereof.

SECTION 9. EQUITABLE RELIEF

Either Party will have the right to seek and obtain immediate injunctive relief to enforce confidentiality obligations under this Confidentiality Agreement in addition to any other rights and remedies it may have.

SECTION 10. NO EXPORT

Company agrees that no Confidential Information, or any portion thereof, will be exported to any country in violation of the United States Export Administration Act and regulations thereunder, or any other applicable export control laws or regulations.

SECTION 11. EXCEPTIONS

The obligations imposed by this Confidentiality Agreement do not apply, or will cease to apply, to any Confidential Information if or when, but only to the extent that, such Confidential Information:

- 11.1** was known to the Party receiving the information ("Receiving Party") prior to the receipt of the Confidential Information; or
- 11.2** was, or becomes through no breach of the Receiving Party's obligations hereunder, known to the public; or

- 11.3 becomes known to the Receiving Party from sources other than the OCEI Solicitation Process or the other Party to this Confidentiality Agreement under circumstances not involving any breach of any confidentiality obligation;
- 11.4 is independently developed by the Receiving Party prior to the OCEI Solicitation, as evidenced by written records; or
- 11.5 is disclosed through legal process as more fully described above.

SECTION 12. SURVIVAL OF CONFIDENTIALITY OBLIGATIONS

The confidentiality obligations in this Confidentiality Agreement, including the indemnity obligations will survive the expiration or early termination of this Agreement.

SECTION 13. STATUS OF EBCE

EBCE, as a Joint Powers Authority, is a separate public entity from its constituent members and will be solely responsible for all debts, obligations and liabilities accruing and arising out of this Confidentiality Agreement. Company acknowledges that it will have no rights and agrees not to make any claims, take any actions or assert any remedies against any of EBCE's constituent members in connection with this Confidentiality Agreement.

SECTION 14. MISCELLANEOUS TERMS AND CONDITIONS

14.1 Waiver.

Waiver by either party of any one or more conditions, Sections, provisions or performance of this Agreement will not be a waiver of any other provision; nor will failure to enforce a provision or Section in one instance waive the right to enforce such provision or Section in the future.

14.2 Governing Law.

Company and EBCE agree that this Agreement will be interpreted under the laws of the State of California.

14.3 Venue.

Any litigation resulting from this Agreement will be filed and resolved by a state court in Alameda County, California, or if appropriate, the federal courts in the Northern District of California located in San Francisco.

14.4 Audit Rights.

All records or documents required to be kept pursuant to this Confidentiality Agreement must be made available for audit at no cost to EBCE, at any time during regular business hours, upon written request by EBCE. Copies of such records or documents

shall be provided to EBCE at EBCE's offices unless an alternative location is mutually agreed upon.

14.5 Recitals and Exhibits.

The Recitals in Section 1 above are intentionally made a part of this Confidentiality Agreement. All Exhibits and any other documents incorporated by reference are a part of this Confidentiality Agreement.

14.6 Notices.

Any notices required to be given under this Confidentiality Agreement must be made in writing and may be delivered a) personally, in which case they are effective upon receipt; b) by U.S. Mail, in which case they are effective three (3) days following deposit in the U.S. Mail, unless accompanied by a return receipt in which case, they are effective upon the date on the receipt; or c) by electronic mail, in which case they are effective upon confirmation of receipt, and if no confirmation of receipt, they are effective one day after transmission, providing that a hard copy is also sent via U.S. mail. All notices must be sent to the addresses below:

EBCE

Attn: Melissa Brandt
1111 Broadway, 3rd Floor
Oakland, CA 94607
Email: MBrandt@ebce.org
Phone: 510-570-5110

Company

Attn:

Email:
Phone:

14.7 Counterparts and Signature Authority. This Confidentiality Agreement may be signed in counterparts, each of which will be considered an original and will be binding against the Party that signed it. The Parties agree that this Confidentiality Agreement may be signed and delivered by facsimile or PDF transmission through electronic mail, in which case, the execution and delivery will have the same force and effect as delivery of hard copies with original signatures. The Parties further represent and warrant that the individual(s) signing on behalf of each Party has been duly authorized to bind the entity to this Confidentiality Agreement and will immediately provide proof of such authorization upon request.

14.8 Integrated Agreement.

The Recitals, this Confidentiality Agreement and the Exhibits attached to this Confidentiality Agreement contain the complete understanding between EBCE and Company with respect to information exchanged during the OCEI Solicitation and supersedes any prior or contemporaneous negotiations, representations, agreements, understandings and statements, written or oral up through the Effective Date of this Confidentiality Agreement.

14.9 Amendments.

Any and all amendments or modifications to this Confidentiality Agreement must be made in writing and signed by each Party before such amendment will be effective.

14.10 Government Claims Act.

Nothing in this Confidentiality Agreement waives the requirements to comply with the Governmental Claims Act, where applicable.

14.11 Severability.

If a court of competent jurisdiction holds any Section or part of this Confidentiality Agreement to be invalid or unenforceable for any reason, the Parties agree to sever the invalid or unenforceable Section from this Confidentiality Agreement and that all remaining Sections or parts of this Confidentiality Agreement will continue to be enforceable.

IN WITNESS WHEREOF, the duly authorized representatives of the Parties have executed this Confidentiality Agreement on the date first written above.

EBCE, a California Joint Powers Authority

(full name of Company and the entities status e.g. "a California Corporation")

Nick Chaset, CEO

By:
Title:

Date:

By:
Title:
Date:

Approved as to form:

Leah S. Goldberg
General Counsel

