

[Ava / SJCE Letterhead]

\_\_\_\_\_, 2024

[Respondent]  
Attention:  
[Address]  
[Address]

RE: Exclusive Negotiating Agreement for IPE OA/PPA Negotiation for [Project Name]

Dear Respondent:

[Ava Community Energy Authority, a California joint powers authority (“Ava”) [City of San José, a California municipal corporation, doing business as San José Clean Energy (“SJCE”)] is pleased to confirm that the Offer (as defined below) submitted by [redacted] (“Respondent”) for the [redacted] (“Project”) in the recent 2024 Renewable Energy & Storage Request for Offers (“RFO”) has been placed on the shortlist for further negotiations. If you wish to proceed with negotiations for [Tranche 2: an Interconnection Process Enhancement Offtake Agreement (“IPE OA”)] [Tranche 1: a Power Purchase Agreement (“PPA”)] (as relevant “IPE OA/PPA”) under the terms and conditions set forth in this letter (the “Exclusive Negotiating Agreement”), please countersign where provided below and return it to [[2024-rfo@avaenergy.org](mailto:2024-rfo@avaenergy.org)][[rfo@sanjosecleanenergy.org](mailto:rfo@sanjosecleanenergy.org)] no later than seven (7) business days after the date set forth above, along with the required items for short-listed Offers, as described in the RFO Protocol. As used herein, [Ava/SJCE] and Respondent are each individually a “Party” and together the “Parties” and “Offer” shall mean the Term Sheet provided by Respondent.

**I. Representations and Warranties**

In accepting a position on the shortlist, Respondent hereby makes the following representations and warranties:

- (i) Respondent has not engaged and will not engage in oral, written, or any other form of communication with any other entity submitting an offer in response to the RFO with respect to the terms of Respondent’s Offer or such other entities’ offer(s) in the RFO; and
- (ii) Respondent will promptly notify [Ava/SJCE] of any material change in circumstances that may affect Respondent’s ability to fulfill the terms of its Offer, at any time from Respondent’s submission of the Offer until [Ava/SJCE]’s execution of IPE OA/PPA(s), or Respondent’s withdrawal of the Offer.

Respondent understands and agrees that any breach by Respondent of the above representations and warranties is grounds for immediate disqualification of Respondent from the RFO.

**II. Exclusivity**

In consideration of its shortlist position, Respondent hereby grants [Ava/SJCE] exclusivity with respect to the Offer until the earlier of the following events (the “**Exclusivity Deadline**”):

1. [Ava/SJCE]’s termination of negotiations of the IPE OA/PPA;
2. One hundred twenty (120) days after the date of Respondent’s execution of this Exclusive Negotiating Agreement.

In the event that [Ava/SJCE] does not terminate exclusive negotiations under this Agreement, the Exclusivity Deadline shall be extended automatically if the Parties are continuing to negotiate in good faith with respect to the Offer; provided, however, that after the initial one hundred twenty (120) day period, Respondent may terminate the Exclusivity Deadline on ten (10) business days’ prior written notice to [Ava/SJCE]. Respondent agrees prior to the Exclusivity Deadline it shall not enter into any agreements nor otherwise discuss the sale of output from the Project with any third party under which it or its affiliates may agree, conditionally or unconditionally, to enter into an IPE OA/PPA for the output of the Project.

As a condition of [Ava/SJCE]’s obligations under this Exclusive Negotiating Agreement, Respondent agrees to provide [Ava/SJCE] with a non-refundable deposit in the form of either (a) cash or (b) a Letter of Credit (as defined below) in the amount of **\$3.00/kW times the Project’s guaranteed capacity** (the “**Shortlist Deposit**”) within three (3) business days of Respondent’s countersignature of this Exclusive Negotiating Agreement.

“**Letter of Credit**” means an irrevocable standby letter of credit, in a form reasonably acceptable to [Ava/SJCE], issued either by (i) a U.S. commercial bank, or (ii) a U.S. branch of a foreign commercial bank that meets the following conditions: (A) it has sufficient assets in the U.S. as determined by [Ava/SJCE], and (B) it is otherwise acceptable to [Ava/SJCE] in its sole discretion. The issuing bank must have a credit rating of at least A- from S&P or A3 from Moody’s, with a stable or better outlook designation. All costs of the Letter of Credit shall be borne by Respondent. The Letter of Credit should be sent by overnight delivery to the applicable entity:

Ava Community Energy Authority  
Attn: Howard Chang  
1999 Harrison Street, Suite 2300  
Oakland, CA 94612

With electronic copy to: [2024-rfo@avaenergy.org](mailto:2024-rfo@avaenergy.org)

City of San José  
Attn: Deputy Director of Power Resources

4 N. 2nd St, Ste 700  
San José, CA 95113

With electronic copy to: [rfo@sanjosecleanenergy.org](mailto:rfo@sanjosecleanenergy.org)

Electronic delivery will be equivalent to physical delivery and notice given by email shall be effective upon actual receipt if received during the recipient’s normal business hours, or at the beginning of the recipient’s next business day after receipt if not received during the recipient’s normal business hours.

Wire instructions will be provided to Respondent for cash deposits.

The Shortlist Deposit will be promptly returned to Respondent in its entirety under one or more of the following conditions: (a) following execution of the IPE OA/PPA and provision of the required security in accordance with the terms of such IPE OA/PPA, (b) [Ava/SJCE]'s rejection of Respondent's Offer following shortlist selection, (c) failure of both [Ava/SJCE] and Respondent to agree on the terms of the IPE OA/PPA, or (d) [Ava/SJCE]'s termination of the RFO process. To initiate return of cash deposits, Bidder must meet [Ava/SJCE]'s reasonable invoicing requirements. Currently these are an invoice/notice on letterhead and a W-9, both of which must match the company information associated with the original cash deposit. Notwithstanding the foregoing, Respondent hereby acknowledges and agrees that Respondent will forfeit its Shortlist Deposit and [Ava/SJCE] shall have the right to draw on the Shortlist Deposit in its entirety if (i) material misrepresentations of information related to the Offer are identified during the negotiating process, (ii) Respondent fails to comply with the terms and conditions of this Exclusive Negotiating Agreement or the RFO, including the RFO Protocol, (iii) Respondent unilaterally withdraws the Offer or attempts to materially modify the terms of its Offer prior to the Exclusivity Deadline, or (iv) prior to the Exclusivity Deadline, Respondent enters into discussions with any third party under which such third party, or any of such third party's affiliates may agree, conditionally or unconditionally, to enter into a IPE OA/PPA for the output of the Project associated with the Offer.

Respondent agrees that [Ava/SJCE] is not obligated to enter into any transaction with Respondent until a final negotiated IPE OA/PPA has been submitted for, and received, approval from the [Ava Board of Directors][San José City Council], as applicable, and fully executed by the Parties thereto.

**IN NO EVENT SHALL [Ava/SJCE], RESPONDENT, OR ANY OF THEIR AFFILIATES AND/OR REPRESENTATIVES BE LIABLE FOR ANY LOST OR PROSPECTIVE PROFITS OR ANY OTHER CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE, INDIRECT OR EXEMPLARY DAMAGES UNDER OR IN RESPECT TO THIS EXCLUSIVE NEGOTIATING AGREEMENT.**

Very truly yours,

**[AVA COMMUNITY ENERGY AUTHORITY,  
a California joint powers authority**

By: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

]

**[CITY OF SAN JOSÉ,  
a California municipality**

By: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**Acknowledged and agreed:  
 [RESPONDENT], a [State of Formation]  
 [Entity Type]**

By: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**Approved as to form:**

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

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

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

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