

AMERICAN ARBITRATION ASSOCIATION

SUNLIGHT GENERAL SOMERSET
SOLAR, LLC,

Claimant,

-against-

POWER PARTNERS MASTEC, LLC,

Respondent.

POWER PARTNERS MASTEC, LLC,

Claimant,

-against-

SUNLIGHT GENERAL MORRIS
SOLAR, LLC,

Respondent.

POWER PARTNERS MASTEC, LLC,

Claimant,

-against-

SUNLIGHT GENERAL SUSSEX
SOLAR, LLC,

Respondent.

Case Nos.: 13 158 Y 02021 12
13 158 Y 02045 12
13 158 Y 02044 12

FINDINGS OF FACT

1. Power Partners MasTec, LLC (“Power Partners”) is a limited liability corporation duly organized and existing by virtue of the laws of the state of North Carolina.

2. At all relevant times, Power Partners and Wanzek Construction, Inc. (“Wanzek”) (both of which are indirect wholly-owned subsidiaries of MasTec, Inc.) were affiliated companies.

3. SunLight General Somerset Solar, LLC (“SunLight Somerset”) is a limited liability company duly organized and existing by virtue of the laws of the State of New Jersey, with its principal place of business located at 28 W. 44th Street, Suite 1011, New York, New York 10036.

4. SunLight Somerset is indirectly owned by SunLight General Capital, LLC (“SunLight Capital”), which is in turn owned by Stacey L. Hughes, Edouard Klehe, James B. Mann, David J. Wolf, and William C. Zachary.

5. SunLight General Morris Solar, LLC (“SunLight Morris”) is a limited liability company duly organized and existing by virtue of the laws of the State of New Jersey, with its principal place of business located at 28 W. 44th Street, Suite 1011, New York, New York 10036. SunLight Morris is indirectly owned by Firststar Development, LLC (“Firststar”), an affiliate of U.S. Bank, N.A., and SunLight Capital.

6. SunLight General Sussex Solar, LLC (“SunLight Sussex,” and together with SunLight Somerset and SunLight Morris, the “Project Companies”) is a limited liability company duly organized and existing by virtue of the laws of the State of New Jersey, with its principal place of business located at 28 W. 44th Street, Suite 1011, New

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York, New York 10036. SunLight Sussex is indirectly owned by Firststar and SunLight Capital.

7. The Somerset County Improvement Authority (“SCIA”) is a county improvement authority operating pursuant to the New Jersey County Improvement Authorities Law, N.J.S.A., § 40:37A-44 *et seq.* The SCIA assumed responsibility to implement the Somerset County renewable energy program (“Somerset II” or the “Somerset Project”).

8. The Morris County Improvement Authority (“MCIA”) is also a county improvement authority operating pursuant to the County Improvement Authorities Law. The MCIA assumed responsibility to implement the Morris County renewable energy program (“Morris II” or the “Morris Project”) and the Sussex County renewable energy program (“Sussex I” or the “Sussex Project”).

9. Numerous municipalities, county colleges, boards of education and other public entities (the “Local Units”) within the Counties of Somerset, Morris and Sussex agreed to participate in the Counties’ renewable energy programs. The Local Units agreed to, among other things, cooperate and permit the SCIA and MCIA to contract with developers to design, construct and install solar generating facilities (“SGFs”) on the public buildings and lands. The Local Units also agreed to pay for the electricity generated from the SGFs at discounted, pre-determined rates for a period of 15 years.

10. At all times relevant to this arbitration, a solar renewable energy credit (“SREC”) market existed in New Jersey with prices fluctuating based on the principles of supply and demand.

11. The American Recovery and Reinvestment Act of 2009 (“ARRA”) impacted the New Jersey solar market. Under ARRA, developers of solar projects had the option to receive federal cash grants or an investment tax credit. Under the first option, the U.S. Department of Treasury awards a grant equal to 30% of the eligible costs of solar renewable energy projects (§1603 Grant). Eligible costs include the actual costs of construction and certain “soft costs” incurred in developing the projects. Under the second option, developers would receive an investment tax credit equal to 30% of the eligible costs.

12. By mid-2011, SREC prices in New Jersey were above \$600 per credit. By mid-2012, SREC prices in New Jersey had plummeted to below \$100 per credit. [Ex. 2269 p. 17.](#)

13. In late 2009, several of the principals of SunLight Capital, decided to form SunLight Capital to take advantage of the solar boom and develop solar renewable energy projects.

14. By 2011, the principals were David Wolf, Edouard Klehe, Stacey Hughes, Bill Zachary, and Jay Mann.

15. On March 15, 2011, the SCIA issued a request for proposals (“SCIA RFP”) for the design, development and construction of solar energy facilities (the “SGFs”), in connection with the SCIA’s second renewable energy program for Somerset County.

16. The SCIA’s renewable energy program included, among other things, the construction of solar energy facilities on local government buildings, schools, parking

canopies and other structures owned or controlled by Local Units within the County of Somerset, New Jersey.

17. Initially, the SCIA RFP specified the construction of, among other things, roof mounts and parking canopies at 33 distinct local public properties (“sites”) within Somerset County for a total estimated capacity of 6.18 MW. The SCIA RFP did not originally contemplate ground mounts.

18. The Somerset RFP listed and provided drafts of the Program Documents, including specifically the Power Purchase Agreement (“PPA”), the Lease, the Bond Resolution, and the Site License Agreements. Ex. 248, Appendix A.

19. The SCIA set May 17, 2011, as the original bid deadline and established certain dates for site visits by potential bidders.

20. The SCIA RFP noted that detailed site review and proposed renewable energy project “designs by or on behalf of Respondents . . . including assessment of roof and building conditions, panel selection, shading analysis, etc. may change the final Renewable Energy Project scope and kW capacities” for each project.

21. Bidders were requested to do independent investigation and vetting of the sites and the conceptual designs in the RFP and provide their own proposed “achievable” designs. Ex. 248 at 36-37.

22. In four RFP addenda to the Somerset RFP, some sites were removed from the Projects, some added, and some modified. Exs. 5405, 5518-5520.

23. Similar addenda were issued for the RFPs for the latter Morris and Sussex Projects. *See e.g.*, Ex. 5810.

24. In early 2011, Adam Raskin of BAM Construction introduced Ms. Hughes and Mr. Klehe to Joe Duey, the controller of Power Partners who was also in charge of business development in the solar field.

25. In early 2011, SunLight Capital and Power Partners discussed and ultimately agreed to submit a proposal in response to the SCIA RFP.

26. In connection with preparing the Somerset Proposal, representatives of the SCIA advised Power Partners and SunLight Capital that, consistent with the Somerset RFP's provisions, the site roster was preliminary and plenty of alternative sites were available if initial site investigations showed that any particular site was not feasible as bid.

27. PPM retained the services of an Arizona entity known as ProConn to prepare the concept designs for the proposed SGFs to be submitted with the parties' joint bid. [Ex. 288](#).

28. Ms. Hughes advised ProConn to issue concepts showing "as big of a system as possible." She further advised ProConn that "when in doubt, assume that we can trim/remove trees as necessary." [Ex. 255 and 252](#).

29. On June 1, 2011, in response to the SCIA RFP, SunLight Capital, together with Power Partners, submitted a joint proposal to the SCIA ("Somerset RFP Response").

30. The Response designated Power Partners as the proposed subcontractor responsible for performing SunLight Capital's obligation to design and construct the solar projects and the party that would furnish the required performance bond.

31. The Response proposed total project costs of \$33,618,860, which included total construction costs of \$30,293,860. The Somerset Response also proposed that the

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SCIA issue Series 2011A Bonds and Series 2011B Bonds in the respective amounts of \$24,700,000 and \$1,300,000. The Somerset Proposal offered that the respondents would contribute \$7,618,860 in “equity” towards the project. The “equity” proposed is based on Power Partners’ agreement to defer payment of 30% of its estimated construction price until receipt of ARRA 1603 Grant funds by Power Partners.

32. The availability of the Section 1603 Grant meant the County Authorities could issue fewer bonds (and expose the Counties to lower guarantees). The Section 1603 Grant could not be applied for until a specific SGF had begun generating electricity (called “placed in service”) and would not be received until several months after application. Ex. 2124.

33. The Section 1603 Grant program was set to expire by the end of December 2011 and therefore any project which hoped to qualify had to close before that day and establish that a certain amount of materials for each project had actually been acquired by then.

34. Pursuant to the SCIA RFP, the Somerset Proposal contained schedules of the expected electricity production and a proposed guaranty of electricity production for fifteen years. SunLight and PPM based the proposed electricity projections on the preliminary site capacities, concept designs, and configurations provided by the SCIA’s engineers and ProConn. [Ex. 257](#) at [PC0062182-PC0062183](#).

35. As part of the Project SunLight Capital created a special purpose entity Sunlight Somerset which agreed to enter into a 15-year power purchase agreement and lease agreement with SCIA and the local units wherein SunLight Capital would repay the SCIA’s bonds with revenues to be earned from the sale of electricity from the constructed

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SGFs and SRECs. Sunlight Somerset, at all times, was thinly capitalized with no reserve other than what could be generated by the sale of electricity from SGFs.

36. In or about June 2011, the SCIA selected SunLight Capital as the Successful Respondent.

37. After the SCIA accepted the Somerset Proposal but prior to the parties executing any agreement, representatives of the SCIA, SunLight Capital, and Power Partners attended a “kick-off” meeting. Birdsall Services Group (“Birdsall”) and Gabel Associates (“Gabel,” and collectively with Birdsall, “Birdsall/Gabel”), as the SCIA’s joint representatives for Somerset II, and Innovative Engineering, Inc. (“IEI”), as Power Partners’ anticipated design and engineering subcontractor, also attended the meeting. [Ex. 3399](#).

38. According to the meeting minutes, the parties discussed the scope of work, including “the number of sites, various system sizes, and any specific construction issues that might be encountered.” The minutes noted that “any specific site requirements would be addressed at pre-construction meetings that [would] be held with the specific local units.”

39. The minutes reflect the parties’ discussion of building department requirements and board of education reviews. Birdsall/Gabel also noted the potential for “zoning, planning, environmental, wet lands, etc.” reviews, stating that “each of these will have to be addressed as necessary if required by the local municipality.”

40. The parties in attendance at the kick-off meeting also pointed out that site removals and additions might be necessary:

[F]ollowing field investigation[s], some sites may not be able to accommodate the proposed PV systems for a variety of reasons including structural, roofing related, electrical, and environmental. The Program Documents allow for the removal and subsequent adding of sites to the project.

41. The parties also discussed the contemplated preliminary site visits during the kick-off meeting. Birdsall/Gabel made it clear that one of its representatives would coordinate access with the Local Unit personnel before any site visit. Birdsall/Gabel also made it clear that any problem discovered during site visits were to be discussed with Birdsall/Gabel and not with Local Unit personnel.

42. Chadbourne and Parke, LLP acted as Power Partners' counsel in negotiating the EPC Contracts and reviewing and commenting on the Program Documents for the transactions from July, 2011. Nixon Peabody represented the Project Companies in the same capacity.

43. To partially finance the Somerset Project, the SCIA issued Series 2011A and B Notes in the amounts of \$23,980,000 and \$2,810,000, respectively. [Ex. 292](#).

44. The SCIA deposited the net proceeds from the sale of the Series 2011A and B Notes (the "Somerset Project Funds") in the net amount (after payment of bond counsel fees and bond issuance costs incurred by the SCIA) of \$24,395,132 into a separate account maintained by U.S. Bank, N.A. (the "Trustee"). At no time did the SCIA issue additional bonds to pay for the Somerset Project.

45. As part of the Somerset Response, the SCIA, SunLight Somerset and Local Units negotiated certain documents including a Power Purchase Agreement ("Somerset PPA"), a Lease Purchase Agreement ("Somerset Lease") and License and

Access Agreements (“Somerset License Agreements”). These agreements are referred to as the “Program Documents”.

46. On or about August 1, 2011, the SCIA executed the Somerset License Agreements with the Local Units. [Ex. 286](#), Section 3.1(a).

47. On August 1, 2011, the SCIA and SunLight Somerset executed the Somerset PPA. The Somerset PPA established the terms of the relationship among the Local Units and SunLight Somerset for the delivery and sale of electricity. [Ex. 4893](#).

48. The term of the Somerset PPA is 15 years from the time when SunLight Somerset completes the last SGF in a particular Local Unit.

49. The Somerset PPA also requires SunLight Somerset to complete construction of the SGFs by August 25, 2012, unless extended by Force Majeure or a Local Unit Event of Default. Force Majeure and Local Unit Events of Default are the “sole cause[s]” for SunLight Somerset to receive an extension to complete the SGFs per the PPA’s terms. [Id.](#), Section 3.6(d).

50. SunLight Somerset agreed to begin construction of the first Somerset SGF by February 15, 2012, and to start construction for all Somerset SGFs by June 15, 2012. [Id.](#) If SunLight Somerset did not complete the SGFs by August 25, 2012, the Local Units had the right to charge liquidated damages against SunLight Somerset unless SunLight Somerset secured an extension of the completion date under the Somerset PPA. [Id.](#)

51. The Somerset PPA also requires the SCIA, SunLight Somerset, and each Local Unit to appoint a Designated Representative with complete authority to bind its principal on all construction and operational matters. The Designated Representatives

are required to develop an initial project schedule and meet every two weeks. Id., Section 3.3(a)-(b).

52. Based on Section 3.4 of the PPA, the SCIA and the Local Units are required to provide the site access to inspect, design, construct, and install each SGF. The SCIA and Local Units are required to cooperate in securing the necessary governmental approvals associated with the public building and lands on which SGFs are to be built. Id., Section 4.1(b).

53. According to Section 4.1 of the PPA, “[i]f despite commercially reasonable efforts, [SunLight Somerset] is unable to obtain a required permit; such occurrence shall be deemed an event of Force Majeure,” which entitled SunLight Somerset to an extension to complete the SGF. [Ex. 4893](#).

54. In connection with the proposed designs of the SGFs, the Somerset PPA requires SunLight Somerset to provide the SCIA and the Local Units with preliminary plans and specifications.

55. The Somerset PPA also requires SunLight Somerset to investigate and secure an opinion from a structural engineer for all roof mounted SGFs. [Ex. 4893](#), Section 4.6(a). If SunLight Somerset discovers structural, latent, subsurface conditions or issues that would jeopardize warranties or make it impracticable to construct an SGF, the SGF could be removed from the list. Id., Section 4.6(b).

56. If it was agreed that a proposed SGF is to be removed from the list, the SCIA and SunLight Somerset have a right to seek alternative sites within the Local Unit or the County. Id. at 27-28, Section 4.6(c). If a new site is located, the Somerset PPA

requires the SCIA and SunLight Somerset to set new commencement and completion dates for the replacement SGF. Id., Section 4.6(d).

57. Under the PPA, SunLight Somerset has the right to select its own subcontractors with the prior approval of the SCIA. Id., Section 4.8. According to Exhibit H of the Somerset PPA, the SCIA and SunLight Somerset identified Power Partners as SunLight Somerset's only approved subcontractor.

58. SunLight Somerset also has the right to substitute products and equipment provided such products are of equal or better quality and performance. Id. Section 4.1(b).

59. Under the Somerset PPA, the Local Units are required to take and pay for all electricity produced from the applicable SGF.

60. Section 6.1(b) of the Somerset PPA provides:

The plans and specifications for the [SGFs] shall provide for the output guaranteed by [SunLight Somerset] in Section 6(b) of its Form A-1 of the Company Proposal attached hereto as Exhibit C (which, in accordance with Form A-1 of the Company Proposal, needs to be adjusted to reflect the actual solar insolation measured at the site for the time period under review), unless [Local Unit] agrees in writing to a different output to be set forth in such Plans and Specifications. For the avoidance of doubt, the Parties hereto expressly agree that the proposed output for the [SGFs] for the Series 2011 Local Units so set forth in Form A-1 of the Company Proposal and as detailed in Company Proposal Table 6(b) that is made a part of Exhibit C hereto shall be the standard against which the output guaranty contemplated by this Power Purchase Agreement shall be measured, notwithstanding the fact that the anticipated output for such [SGFs] shall be as detailed in Company Proposal Table 6(a) and also incorporated in Exhibit C hereto. The Parties hereto agree that Exhibit C hereto shall be amended upon the completion and sizing of the Projects.

Id., Section 6.1(b).

61. SunLight Somerset also agreed that, after the parties calculated the expected output for each SGF based on the PVWatts formula, SunLight Somerset guaranteed the output cumulatively through the 5th, 10th and 15th year of the Somerset PPA within 90% of the targeted output. Id., Section 6.1(c). If SunLight Somerset does not meet the expected cumulative long-term output, the SCIA can charge SunLight Somerset liquidated damages. Id., Section 6.1(d).

62. On August 1, 2011, the SCIA and SunLight Somerset executed the Somerset Lease.

63. The Somerset Lease also requires SunLight Somerset to execute a contract with a contractor to design and construct the SGFs. [Ex. 285](#), Section 502(a)-(b).

64. The Somerset Lease specifically provides that the Somerset Project Funds can only be used to pay for costs of construction of the Somerset SGFs and SunLight Somerset's Development Fees and Expenses up to an aggregate amount of \$625,000.

65. In order to draw down Somerset Project Funds, SunLight Somerset is required to prepare payment applications that identify the party to be paid, identify the amount due, identify the SGF for which payment is sought, attest to the construction costs incurred, and attach invoices, bills, or other evidence of payment, and to secure the written approval of the Local Unit and the SCIA for each payment application. [Ex. 285](#), Section 510(c).

66. According to the Somerset Lease, SunLight Somerset is required to make lease payments to or on behalf of the SCIA. The first four lease payments were as follows:

Date	Amount
September 15, 2012	\$4,085,526.04
March 15, 2013	\$412,065.50
September 15, 2013	\$2,062,065.50
March 15, 2014	\$402,289.25

Id. at A-3-I, Ex. A-3.

67. SunLight Somerset and the SCIA expressly agreed that SunLight Somerset will fund its lease payments from the income generated from the sale of electricity (i.e., PPA revenue) and SRECs. SunLight Somerset granted the SCIA a collateral security interest in the PPA and SREC revenues. SunLight Somerset also granted the Trustee a security interest in SunLight Somerset’s right to 1603 Grant funds as collateral for SunLight Somerset’s obligations under the Somerset Lease. Id., Sections 309(b)-(c).

68. SunLight Somerset and the SCIA expressly agreed, however, that the security interests in favor of the SCIA and the Trustee are “subordinate to [the security interests] of [Power Partners] under the EPC Contract.” Id.

69. Between the date that the SCIA declared SunLight Somerset the Successful Respondent and August 24, 2011, SunLight Somerset and Power Partners negotiated the Turnkey Design, Engineering, Procurement and Construction Contract (“Somerset EPC”).

70. A first draft of the EPC Contract was sent to Duey on July 8, and he advised that he would forward it to MasTec internal counsel and to Chadbourne. Ex. 3983.

71. Power Partners agreed to assume the role of SunLight Somerset's subcontractor for all design, permitting, engineering, procurement, construction, and testing of the SGFs, as detailed in the Somerset EPC. Id.

72. During the course of the negotiations, Stacey Hughes and Eduoard Klehe took the lead on behalf of SunLight Somerset. Kevin Taylor took the lead on behalf of Power Partners.

73. Price was a heavily negotiated issue and negotiations continued until the day the EPC Contract was signed. Ex. 5310.

74. The financial model that the parties agreed to was based on a "blended" price per watt representing the weighted average of the price for each SGF (using the pricing Power Partners had provided for the RFP Response and the total capacity in megawatts of the Project). That "weighted average" price, along with the expected production of the SGFs as designed by Power Partners for the RFP Response, were inputs into the financial model which led to the total amount of bonds the RFP Response proposed be issued and the PPA price offered.

75. The parties addressed the "weighted average" issue, and ultimately agreed on the total EPC price for all SGFs and to set prices in the EPC Contract for the types of SGFs based on their size in what became Attachment V-A of the EPC Contract.

76. The parties negotiated the availability of change orders. SunLight Somerset initially insisted that the Somerset EPC exclude any possibility of change orders. Power Partners, however, refused to sign an EPC without time and price change order provisions. Reluctantly, Sunlight Somerset agreed to this modification.

77. Under the Somerset EPC, Power Partners was responsible for obtaining all permits and government approval. But only to the extent consistent with Sunlight Somerset's duties under Section 4.1 of the EPC. The language of the Somerset EPC limited the scope of Power Partners' permitting responsibility to those "required in connection with the construction of the SGFs, and as otherwise are required to perform the Work."

78. With the understanding that changes would occur and the uncertainty of what those changes would be, the parties were to have the opportunity to agree to a new price for a changed site. The Somerset EPC was negotiated to include fallback provisions to adjust the price if the parties could not agree to a new price for a SGF. For SGFs that changed 20% or less in kW capacity, the pricing adjustment was calculated according to a price-per-kW table set forth in Attachment XVIII B. For sites that changed more than 20% or that otherwise materially changed, a new price was to be determined, and if a new price could not be agreed upon then work would proceed and Power Partners would be reimbursed pursuant to Article 8 of the EPC.

79. Before Power Partners agreed to execute the Somerset EPC, Power Partners' senior management also raised significant concerns about payment security.

80. On August 24, 2011, Mr. Klehe, Mr. Taylor and other representatives of both parties had conversations concerning payment security for Power Partners. In an email hours before Power Partners executed the Somerset EPC, Mr. Klehe made the following representations to Power Partners concerning "payment security":

- Amount of Bond (Series A and B) issued of 26.79mm
- Minus expenses fees to counsel, . . . of \$1.5 mm nets out to approximately \$25mm or 85% of the contract cost

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- The funds are held by a Trustee (US Bank), not by SunLight
- Section 1603 grant anticipated receipt of approximately \$11mm (larger than 30% of construction costs as basis include other elements)
- This “over-collateralize” your exposure under the EPC contract by a significant amount (25mm net bond + 11mm expected grant divided by 28.9mm contract price equals 125%)
- Section 1603 grant will be applied on a per project so based on your expected completion of project, a significant portion would be paid off a long time before final completion
- Fee/Equity distribution for SunLight per the program documents (Lease Agreement) is only after all construction is finalized on the last project (i.e. we are paid last)
- More bonds (series B) can be issued to finance additional project costs
- Last item is not really needed but keep in mind you have contractor lien on entire project and Somerset County is rated AAA and is ultimately the legal owner (lessor) and has the final resources and incentives at the end of the day to ensure all contractors are paid and liens are removed.

[Ex. 290.](#)

81. The testimony and the email chains show that business people, with their counsel, were attempting to finalize a contract and they did so. Exs. 3, 4660, 3975, 5300; 5306, 5313, 5310, 5309. Four months later, the same parties executed two more, virtually identical contracts for the Morris and Sussex Projects. Exs. 3666 and 3667.

82. The parties executed the Somerset EPC on August 25, 2011.

83. A Notice to Proceed was issued on August 25, 2011 immediately after the bond issue closed. Ex. 293.

84. The Somerset EPC contains an integration provision, which includes the EPC, the attachments, and the exhibits. Id. at 51-52, Article 20.12. The Somerset EPC may only be modified in a writing signed by the parties. The Somerset EPC specifically incorporated the Program Documents.

85. Article 1.3 of the Somerset EPC provides that, in the event of a conflict between the language in the Articles of the Somerset EPC and the exhibits, the language in the Articles of the EPC prevails. If, however, requirements of Program Documents impose different or greater requirements than the language in the EPC, then the Program Documents shall prevail. Under the EPC, all the documents are to be explained and interpreted, if possible, “in a manner which gives effect to each part and which avoids or minimizes conflicts among such parts.” Article 1.3.

86. The Recitals of the Agreement are not incorporated into the Somerset EPC except for specific defined terms in Attachment I (“Authority,” “Lease Agreement,” “License Agreement,” “Local Unit,” “PPA,” “Program,” “Program Documents,” “RFP,” and “SGF”).

87. The Somerset EPC provides that time limits stated in this Agreement are of the essence. Article 5.2.

88. The parties agreed on a Scope of Work based on the preliminary specifications and concepts prepared by the SCIA. The Scope of Work in the Somerset EPC is described in Attachment III, and the Parties specifically agreed that the Scope of Work could be “expanded, supplemented, and amended in a Change Order by the Plans and Specifications prepared by” Power Partners and approved by SunLight Somerset and the Local Units. [Ex. 3674](#), Att. I.

89. Attachment III of the Somerset EPC contains the initial technical parameters for Power Partners’ Work and is prefaced as follows:

This preliminary scope of work is provided by Turnkey Contractor and for the avoidance of doubt (a) incorporates by reference the joint proposal submitted by the Parties (or their Affiliates) in response to the RFP and the

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Technical Requirements of the RFP, attached to the Lease Agreement, and (b) in case of any conflict between terms set forth in this preliminary scope of work and the terms set forth in the body of the Agreement, the terms in the body of the Agreement will prevail. A more detailed Scope of Work will be provided after completion of the Premises investigations and preparation of the preliminary Plans and Specifications by Turnkey Contractor and will be subject to review and approval by Owner.

[Ex. 3674](#), Att. III.

90. Article 3 of the Somerset EPC sets forth the responsibilities of Power Partners.

91. Under the Somerset EPC, Power Partners is responsible for “all aspects of the design, engineering, permitting, procurement, construction, and installation of each SGF.” Article 3.1.

92. PPM warranted that all the work in designing, engineering and constructing the SGFs would be performed in accordance with generally accepted professional standards, including Good Solar Industry Practices and would meet the specifications set forth in Attachment III (Scope of Work). See Article 3.1 and Article 13.

93. Power Partners is also required to obtain and pay for all Government Approvals required in connection with the design and construction of the SGFs. Article 3.3; Article 3.7.

94. Power Partners is also required to prepare or cause to be prepared “proposed preliminary Plans and Specifications for each SGF” within ninety (90) days after SunLight Somerset issues the notice to proceed. Article 3.5.1. Plans and Specifications are defined as the “architectural and engineering drawings and

specifications prepared by or on behalf of [Power Partners] describing the SGFs.” [Ex. 3674](#), Att. I.

95. Under the Somerset EPC, SunLight Somerset has the right to review and, within five (5) days, either approve or comment on the preliminary Plans and Specifications “as to their compliance with the requirements of [the Somerset EPC].” [Id.](#) at 6, Article 3.5.3(a). The SCIA and Local Unit Designated Representatives also have an opportunity to review and approve the Plans and Specifications within required time constraints. Article 3.5.3(b). As noted, Birdsall/Gabel directed that the SCIA and Local Units reviews are to be done in conjunction with the building department reviews.

96. Article 3.5.2.(a) provides that, within 30 days after a notice to proceed, Power Partners is required to investigate and secure an opinion of a structural engineer to ensure the roofs are structurally sound. If Power Partners determines that, as a result of its site investigations or the discovery of latent subsurface or structural conditions during the course of construction that were not reasonably discoverable during its site investigations, conditions are not suitable for construction of any SGF, an alternate site will be located. If a new site is located, the new site will have a new completion date and a Change Order will be executed pursuant to Article 8 of the Somerset EPC memorializing the change in site. If the price for the new site is different than the price for the original site, the price is determined pursuant to the provisions of Article 8. [Ex. 3674](#), Article 3.5.2.

97. In addition to the preliminary Plans and Specifications, Power Partners is also required to procure all detailed design and engineering work for each SGF. [Ex. 3674](#)

p. 7, Article 3.5.4. Although SunLight Somerset has a right to review Power Partner’s designs, Article 3.5.4 provides, in pertinent part, that:

[n]otwithstanding that [SunLight Somerset] may have provided or may provide any information relative to the SGFs’ designs, [Power Partners] shall nonetheless be completely responsible for all aspects of SGF design, and if it decides to use any of such information, which it shall not be obliged to do, [Power Partners] shall assure that it is appropriate in all respects and consistent with [Power Partner’s] obligations under this Agreement.

Id.

98. Similarly, Article 3.5.7 provides that Power Partners:

is solely responsible for the design of the SGFs and none of [SunLight Somerset], Owner’s Engineer, the Authority, any Local Units . . . shall have authority to require that design changes be made beyond the applicable design specifications included in the Program Documents or, after they have been approved by [SunLight Somerset] and the Applicable Local Units, in the Plans and Specifications except in a Change Order

Article 3.5.7.

99. Under the Somerset EPC, Power Partners’ designs are required to conform to the Scope of Work (set forth in Attachment III), the National Electrical Code (“NEC”) standards, Good Solar Industry Practice and Industry Codes as defined in the EPC, and the requirements of the local electric utility. Article 3.5.5.

100. Power Partners is also responsible for all aspects of sequencing, means, methods, and techniques in connection with the performance of the Work. Article 3.10.

101. Power Partners is also allowed access under the EPC to the Local Units’ property to perform the Work from Monday through Saturday from the hours of 7:00 a.m. to 8:00 p.m., subject to reasonable restrictions. [Ex. 3674](#), Article 3.12.

102. The Somerset EPC requires Power Partners to be familiar with the local and general conditions of the various SGFs which includes, among other things,

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“technical information and requirements, conditions affecting transportation, disposal, handling, and storage of materials at the Site; availability and conditions of roads; availability of housing; climatic conditions and seasons; and equipment and facilities needed for performance of Work.” Article 3.19.

103. Although Power Partners is required to become familiar with the “local conditions,” the parties specifically acknowledged that they

(a) contemplate more intensive investigations of the particular Premises for the SGFs and consultations with the Local Units, a result of which may be minor adjustments in the design and capacity of some SGFs or, in more extreme cases, the relocation or elimination of an SGF, or (b) likewise provide for potential relocation or elimination of an SGF under conditions specified in said Section if latent structural or subsurface conditions are discovered . . . all of which shall be handled pursuant to the provisions of ARTICLE 8.

Id.

104. Article 4 of the Somerset EPC specified the duties and responsibilities of SunLight Somerset. See Article 4.

105. Under the Somerset EPC, SunLight Somerset is required to designate in writing an “Owner Representative” to represent SunLight Somerset and to receive communications from Power Partners. The Owner Representative must have full power to act for SunLight Somerset, “including the authority to approve Change Orders.” Hearing Ex. 3674, Article 4.1; I-7, Att. I. SunLight Somerset never designated an “Owner Representative” until late October 2011.

106. SunLight Somerset is also required to secure site access for Power Partners by coordinating with the Local Units. Article 4.2.2. SunLight Somerset’s site access “must afford [Power Partners] a commercially reasonable opportunity to achieve

Substantial Completion for the relevant SGF by their respective Substantial Completion Dates without incurring additional costs for acceleration of Work or otherwise.”

107. In addition to site access, SunLight Somerset is required to cooperate with Power Partners “in obtaining . . . all requisite Governmental Approvals necessary for engineering, procurement, installation, construction and commissioning of the SGF.” Id., Article 4.3. SunLight Somerset agreed to “coordinate with the Local Unit, the [SCIA] and [Power Partners] in obtaining such Governmental Approvals.”

108. Under the Somerset EPC, Power Partners is required to “commence construction on the first [Somerset] SGF on or before February 15, 2012 and construction of all [Somerset] SGFs on or before June 15, 2012, provided such construction commencement date(s) shall be subject to adjustment by Change Order pursuant to ARTICLE 8” Article 5.1.

109. The Somerset EPC, in conjunction with the Somerset PPA at Section 4.6, provides that replacement sites will be provided to Power Partners by the SCIA and SunLight Somerset in the event that the parties remove previously identified sites as a result of premises investigations. [Hearing Ex. 3674](#), Article 3.5.2.

110. Under this scenario, the parties to the EPC are to execute Change Orders removing the unsuitable site from the Scope of Work and adding the replacement site to the Scope of Work, along with any applicable price and schedule adjustments.

111. SunLight Somerset and Power Partners agreed on original Contract Prices for each initial Somerset SGF for a total sum of \$28,987,425. Article 6.1 at V-A-I, Att. V-A.

112. The EPC provides that the Contract Price for each SGF may be adjusted pursuant to the Change Order provisions of Article 8 of the EPC. Article 6.2.

113. The Somerset EPC permits Power Partners to submit bi-monthly payment applications based on certain milestones and requires SunLight Somerset to pay all undisputed amounts set forth in payment applications within fifteen (15) days of receipt. Article 6.5.1., Att. V-B.

114. Power Partners was required to submit documents required by Article 6.5.1 and as are reasonably necessary and acceptable to SunLight Somerset and representatives of the SCIA and Local Units to substantiate Power Partners' right to payment under the Program Documents. For Change Orders, Power Partners is required to submit documents as "reasonably requested" by SunLight Somerset and the SCIA. [Hearing Ex. 3674](#), Article 6.5.1, 6.5.3.

115. If SunLight Somerset "in good faith disputes all or part of an Application for Payment," the Somerset EPC requires SunLight Somerset to "promptly advise [Power Partners] in writing of the basis of the dispute and, if consistent with this Agreement, cause the undisputed amount to be paid to [Power Partners]." Article 6.5.5.

116. SunLight Somerset is prohibited from withholding "any amount of an Application for Payment if the aggregate amount of payments disputed by [SunLight Somerset] exceeds thirty percent (30%) of the Contract Price" Article 6.5.5.

117. If SunLight Somerset fails to make any undisputed payment to Power Partners when due and fails to cure within 30 days after written notice to cure, SunLight Somerset is in default of the Somerset EPC. Article 15.2.1.

118. SunLight Somerset has the right to offset amounts due and owing by Power Partners, including Delay Liquidated Damages, against amounts due Power Partners subject to the cap set forth in Article 6.5.5. Article 6.7.

119. In the event of a dispute concerning Delay Liquidated Damages, the Somerset EPC required SunLight Somerset to set-off amounts due to Power Partners and promptly resolve the disputed Liquidated Damages pursuant to Articles 19 and 20. Article 7.3.

120. Article 7 of the EPC provides the remedy of liquidated damages in the event of any delay by Power Partners to complete a SGF by its Guaranteed Substantial Completion Date or in the event a SGF failed to meet a performance guarantee prescribed by the Somerset EPC. The term “Guaranteed Substantial Completion Date” is defined as, “with respect to each SGF, the date set forth on Attachment VIII as the Guaranteed Substantial Completion Date for such SGF, as such date may be adjusted pursuant to Change Order.” Id., Att. I.

121. Article 7.1 provides as follows:

The Work to be performed for each SGF under this Agreement shall commence on the date of delivery of the Notice to Proceed for such SGF, and subject to the extensions provided for in this Agreement, [Power Partners] shall perform the Work such that Substantial Completion of each SGF shall occur not later than the Guaranteed Substantial Completion Date for such SGF. In the event [Power Partners] does not achieve Substantial Completion of a SGF by its Guaranteed Substantial Completion Date, [Power Partners] shall be liable for Delay Liquidated Damages pursuant to Section 7.2.

Article 7.1

122. Article 7.2 of the Somerset EPC provides the methodology by which Delay Liquidated Damages may be calculated. That Article provides that

[f]or each day of delay in achieving Substantial Completion of a SGF that elapses after its respective Guaranteed Substantial Completion Date, until Substantial Completion of such SGF does occur, [Power Partners] shall be liable . . . [for Delay Liquidated Damages for] (a) the amount [SunLight Somerset] is required to pay for such day of delay under the terms and conditions of the Program Documents, plus (b) an amount calculated . . . to compensate [SunLight Somerset] for lost revenue under the PPA for the forgone delivery and sale of electricity from such SGF and lost revenue for the foregone generation of SRECs by such SGF

[Ex. 3674](#), Article 7.2.

123. Article 7.2 also notes that the outside date to complete all SGFs, August 15, 2012, “is subject to extension with respect to each SGF on a day-to-day basis for each day by which the Guaranteed Substantial Completion Date for such SGF is extended”

124. Power Partners’ liability for Delay Liquidated Damages is limited to 15% of the applicable price for the particular SGF that is not completed by its Guaranteed Substantial Completion Dates. Article 7.2; id., Article 12.1.1.

125. Delay Liquidated Damages are the “sole and exclusive measure of damages” for any alleged delay by Power Partners. Article 7.4.

126. The parties also agreed that, “in no event shall either Party be liable to the other Party for any punitive, indirect, special, or consequential loss or damage, including loss of use, lost profits or revenues, cost of capital, increased operating costs, or loss of goodwill.” Article 12.3.

127. SunLight Somerset’s ability to charge Power Partners with performance damages is set forth in Article 7.5 and Attachment IV to the Somerset EPC. Article 7.5 provides, in pertinent part, that

[Power Partners] warrants and guarantees that, by the Guaranteed Substantial Completion Date for each SGF, performance testing will have demonstrated the achievement of the performance guarantees with respect to such SGF set out in Attachment IV (“Performance Guarantees”) If the Performance Guarantees are not met by the Guaranteed Substantial Completion Date, then [Power Partners] may . . . pay damages with respect to the performance deficiency calculated in accordance with the provisions set forth in Attachment IV (‘Shortfall Damages’).

Article 7.5(a).

128. The SGFs Power Partners constructed all achieved the performance guarantees set out in Attachment IV of the Somerset EPC. SunLight Somerset has not asserted any claims against Power Partners for Shortfall Damages.

129. In Somerset the following sites were Substantially Complete prior to Power Partner’s Termination:

Somerset 8 SGFs:
Bedminster DPW Garage
Bedminster DPW Police
Clarence Dillon Library
Bernards DPW
Environmental Education Center
Bedwell Elementary School
Warren Central Elementary School
Warren Middle School

Morris 8 SGFs:
Dickerson School
Pearl Miller Middle School
Stonybrook School
Canfield Avenue School
Randolph High School Roof
Randolph High School Canopy
Randolph Middle School Ground
Ironia School

Sussex 8 SGFs:
Byram Lakes School Roof
Byram Lakes School Canopy
Wheatsworth Facility

High Point High School
Merriam Avenue School Roof
Merriam Avenue School Canopy
Newton High School Roof
Newton DPW

130. The Somerset EPC also contains provisions concerning the Change Order process and the circumstances when Change Orders are triggered. Under the Somerset EPC, a Change Order is required when there is a change in Work or a Change Order Event occurs. The Change Order process is set forth in Article 8.

131. For purposes of a Change Order, a change of Work is defined to include any deviation from the Scope of Work set forth in Attachment III of the EPC. Id.

132. A Change Order Event is defined to include:

1. changes in the Project requested or directed by Owner [SunLight Somerset];
2. changes in the Project proposed by Turnkey Contractor [Power Partners] and approved by Owner;
3. the existence of Hazardous Materials at a Site . . . ;
4. direction by Owner to uncover or dismantle Work for which Power Partners is entitled to adjustments to the Contract Price and/or Project Schedule . . . ;
5. events of Force Majeure;
6. Local Unit/Authority Caused Delay;
7. Owner Caused Delay; and
8. any other event for which Turnkey Contractor is expressly entitled to receive a Change Order under the provisions of this Agreement.

[Hearing Ex. 3674](#), Att. I.

133. Attachment 1 of the Somerset EPC defines a Local Unit/Authority Caused Delay as “(i) any delay by the Applicable Local Unit or Authority . . . in performing or

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failing to perform any of its obligations under a program document or (ii) active interference or negligence of the Applicable Local Unit or the Authority. . . that has a material adverse impact on Turnkey Contractor’s performance of the Work.” An exception to said delay is if the Turnkey Contractor’s fault or an event of Force Majeure causes said delay.

134. An Owner Caused Delay as defined by the EPC includes failure of SunLight Somerset to perform its obligations under the EPC or the Program Documents that materially impacts Power Partners’ performance or if the Owner does not seek relief under the Program Documents to mitigate a Local Unit/Authority Caused Delay. Att. I.

135. An event of Force Majeure is defined in the EPC, among other things, as “adverse weather conditions, breakdown or failure of the utility transmission or distribution system,” and “any failure by a Governmental Authority to issue, reissue or renew any Governmental Approval” after application is made. Att. I.

136. If Power Partners’ cost to perform the Work is increased or decreased or Power Partners is delayed in the performance of the Work, Power Partners can apply for a Change Order upon the occurrence of a Change Order Event. Article 8.2.

167a. The process for a change order is set forth in Article 8.3.

137. If the parties do not agree on the effect on the Contract Price or the Guaranteed Substantial Completion Date for a SunLight Somerset directed change, Power Partners is nevertheless required to proceed to perform the Work subject to its dispute rights under the Somerset EPC. Id.

138. If a Change Order Event occurs for which relief may be available under the Program Documents, SunLight Somerset is required to seek relief thereunder, and to

the extent it obtains any such relief, “a Change Order shall be issued to [Power Partners] providing [Power Partners] with such relief.” [Ex. 3674](#), Article 4.7, 8.6.

139. In negotiating new Contract Prices associated with Change Orders, the parties can agree to proceed to a lump sum amount, a unit price amount, or an amount equal to costs plus an agreed-to percentage of costs. If SunLight Somerset and Power Partners do not agree on the adjustment to the Contract Price for the affected SGF and SunLight Somerset nevertheless directs Power Partners to proceed with a Change Order, “then the Contract Price shall be adjusted in an amount equal to one hundred ten percent (110%) of the reasonable Direct Costs incurred, or avoided, as the case may be, by [Power Partners] to make the such changes [sic] to the Work (such Direct Costs to include the salary related expenses of Turnkey Contractor personnel performing work necessary to make, or avoided by making, such changes, but excluding home office overhead, management and administrative expenses of [Power Partners] relating to such changes).” Article 8.4.1.

140. Direct Costs are also defined in the Somerset EPC to include Power Partners’ “actual and verifiable cost (on an open book basis) of labor, support labor, material, equipment, services, tools, supplies, subcontracts, job site facilities, utilities, and job site staffing necessary to perform the work.” [Hearing Ex. 3674](#), Att. I. Power Partners is also entitled to charge for its equipment in an amount equal to 90% of the “blue book” monthly rental prices. Id.

141. Notwithstanding the terms of Article 8.4.1, a change in SGF capacity (increase or decrease in kW) that does not exceed “twenty percent (20%) of such SGF’s original or prior capacity (and that does not involve material changes in the type or layout

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of equipment) . . . the increase or decrease in the applicable Local Unit Price (and the Contract Price) will be calculated on a unit price basis in accordance with Attachment XVIII-B.” Article 8.4.2; XVIII-B-I, Att. XVIII-B.

142. If a SGF changes in capacity by more than twenty percent (20%), or involves a material change, “the Contract Price adjustment provisions of Section 8.4.1 shall apply” (i.e., lump sum, unit price, or cost plus). Article 8.4.2.

143. Article 13.5 of the Somerset EPC states:

EXCEPT AS PROVIDED IN THIS AGREEMENT, TURNKEY CONTRACTOR MAKES NO WARRANTIES OR GUARANTEES, EXPRESS OR IMPLIED, AND TURNKEY CONTRACTOR DISCLAIMS ANY WARRANTY OR GUARANTY IMPLIED BY LAW, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND IMPLIED WARRANTIES OF CUSTOM OR USAGE.

[Hearing Ex. 3674](#), Article 13.5 (emphasis in original).

144. Article 15 of the EPC delineates what comprises an event of default by PPM (Art. 15.1) or Sunlight Somerset (Art. 15.2).

145. The Somerset EPC provides that SunLight Somerset is in breach of the EPC if it fails to pay Power Partners any undisputed amount, or breaches any other material provision of the EPC, and fails to cure within 30 days of written notice. Article 15.2.1-15.2.2.

146. The EPC also provides that SunLight Somerset is in breach if any of the representations or warranties set forth in the agreement were false or misleading as of the Effective Date of the EPC and Power Partners was adversely and materially affected and SunLight Somerset did not cure after receiving written notice of the breach. Id. at 39, Article 15.2.4.

147. In the event of a default by SunLight Somerset, Power Partners has a right to terminate the EPC. Article 15.3. Likewise Sunlight Somerset can terminate PPM if it causes an Event of Default. Article 15.4.

148. Article 15.3 provides that once Power Partners terminates SunLight Somerset, SunLight Somerset must pay Power Partners all amounts due Power Partners in the event of a termination by Owner for convenience plus “an amount equal to ten percent (10%) of the unpaid Contract Price as full compensation for all damages suffered as a consequence of such Owner Event of Default” Provided, however, if termination is pursuant to Art. 15.2.2, then the 10% addition applies only to the affected SGFs.

149. Article 15.5 of the Somerset EPC provides that, in the event of a termination for convenience by SunLight Somerset, Power Partners

shall accept as its sole remedy a sum equal to (i) with respect to the Local Unit SGFs that are terminated, all unpaid Work performed hereunder for such terminated Local Unit’s SGFs up to the termination date in accordance with the provisions of Attachment V-B (based on Milestones completed but not yet paid for and the percentage of completion of Milestones that have not been completed), and (ii) the reasonable Direct Costs incurred by [Power Partners] in closing out the terminated Work.

150. Article 15.5 also provides that if some but not all sites are terminated (e.g., dropped sites), Power Partners is entitled to be paid no “less than five percent (5%) of the Local Unit Price for such Local Unit’s SGFs.”

151. Under Article 19 of the Somerset EPC, any Disputes between the parties are to be resolved through a two-step process. Upon written notification by one party to the other of a Dispute, senior management personnel of the parties are to “meet and

diligently attempt in good faith to resolve the Dispute,” and if that fails, the parties are to arbitrate the Dispute. [Ex. 3674](#), Article 19.1-19.2.

152. Each party is to bear its own costs in arbitration, but the prevailing party is to be “awarded its reasonable attorney’s fees, expert fees, expenses and costs incurred in connection with the Dispute.” Article 19.2.6.

153. During the pendency of the Dispute, SunLight Somerset is obligated to make undisputed payments to Power Partners, and Power Partners is obligated to continue to perform the Work. Article 19.3.

154. Any award of the arbitrators shall include accrued interest from the date of any damages incurred for breach or other violation of this agreement until the date such amount is paid in full at the Late Payment Rate. Article 19.2.5.

155. Article 20.11 of the Somerset EPC provides that “each Party shall cooperate in good faith with the other Party in its efforts to fulfill its obligation under this Agreement.” The Article further provides that neither Party shall “unreasonably deny or withhold or otherwise delay its approval or consent upon the reasonable request for such approval or consent of the other party.” Article 20.11.

156. Attachment II-A to the Somerset EPC provides, in bracketed language, that “the list of the Local Units and the SGFs to be constructed on the Premises of such Local Unit” are provided in Exhibit A-1, to the Lease Agreement, which contains a list of Local Units and SGFs with corresponding system type and kW capacity. Att. II-A.

157. Attachment II-B provides, also in bracketed language, that “[f]inal layouts . . . will be fixed after Premises investigations and consultations with Applicable Local

Units and in the course of preparation of Plans and Specifications, and this attachment will be updated by a change order. [Ex. 3674](#), Att. II-B.

158. Attachment V-A of the Somerset EPC sets forth a list of Local Units, SGFs, kW capacities, and SGF Contract Prices. Att. V-A.

159. The Attachment also provides that these items are subject to:

The Local Unit Prices set forth in this Attachment V-A are subject to adjustment to reflect the final capacity of the SGFs established after completion of Premises investigations, consultations with Applicable Local Units and in the course of preparation of the Plans and Specifications. Adjustments shall be in accordance with the capacity unit price adjustment provisions in Section 8.4.2 of the Agreement.

Att. V-A.

160. Attachment V-B of the Somerset EPC provides the Payment Milestone Schedule with the percentages of Local Unit Price to be paid by SunLight Somerset with respect to each SGF upon Power Partners' achievement of particular phases of design, procurement, permitting, construction, installation, and testing. Id. at V-B-I, Att. V-B.

161. On July 7, 2011, the MCIA issued a request for proposals ("Morris RFP") for the Morris Project. [Hearing Ex. 282](#) pp. E1-1 to E1-2.

162. The Morris RFP noted that the initial pre-bid meeting would be held on July 13, 2011, with Local Unit site visits of approximately 45 minutes per site between July 13, 2011 and July 20, 2011. Like the Somerset RFP, the Morris RFP attached concept drawings and technical specifications, and the MCIA recognized that the drawings and specifications were only a "preliminary guide." The Morris RFP set a proposal deadline of September 8, 2011. Id. at 45, Section 4.2.

163. On September 8, 2011, SunLight Capital and Power Partners submitted a joint response to the Morris RFP (“Morris Proposal”). Like the Somerset Proposal, the Morris Proposal proposed that the MCIA issue Series A and B Bonds in the respective amounts of \$29,925,000 and \$1,575,000 to pay a majority of the costs of construction with Power Partners agreeing to be paid the balance of the construction costs of \$11,532,700 from ARRA 1603 Grant funds.

164. Like the Somerset Proposal, the Morris Proposal included an expected output table and a guaranteed output table.

165. The MCIA accepted the Morris Proposal and deemed SunLight Capital the Successful Respondent.

166. Between September and late November 2011, SunLight Morris and the MCIA negotiated the Program Documents for Morris II. The Morris Program Documents were similar to the Somerset Program Documents but for specific changes.

167. The MCIA issued the Series 2011A and B Notes in the amounts of \$33,100,000 and \$1,200,000, respectively. [Ex. 395](#). At no time did the MCIA issue more bonds to pay for the Morris Project.

168. The MCIA deposited the net proceeds from the sale of the Series 2011A and B Notes (the “Morris Project Funds”) in the net amount (after payment of legal fees and bond issuance costs incurred by the MCIA) of \$30,500,000 into a separate account maintained by the Trustee. [Ex. 370](#) p. 23 (Maximum Gross Bond Fund Amount definition). [Ex. 3072](#).

169. In early December 2011, the MCIA executed License and Access Agreements with each of the Morris County Local Units. [Exs. 358-367, 372](#).

170. On December 1, 2011, the MCIA executed a Power Purchase Agreement (“Morris PPA”) with SunLight Morris. .

171. The Morris PPA further required SunLight Morris and the MCIA to agree on the kilowatt capacities and expected kilowatt production expectations after “completion and sizing of the Projects.” Id. at 32, Section 6.1(b). Although the Morris Proposal offered an initial PPA price of \$0.075 kWh, the Morris PPA set the initial price at \$0.0667 kWh. Ex. B.

172. The MCIA and SunLight Morris also executed a Lease Purchase Agreement on December 1, 2011 (the “Morris Lease”). The Morris Lease is similar to the Somerset Lease but for several provisions specific to the Morris Project. For example, under the Morris Lease, SunLight Morris has a right to draw down a maximum of \$700,000 as Development Fees and Expenses from the Morris Project bond funds, but in no event may SunLight Morris draw down more than \$500,000 before all construction is complete. [Ex. 370](#), Section 509(d).

173. The Morris Lease also required SunLight Morris to make its first three lease payments as follows:

Date	Amount
January 1, 2013	\$2,885,795.65
July 1, 2013	\$581,511.75
January 1, 2014	\$2,871,511.75

Id., Ex. A-3.

174. Between the date the MCIA deemed SunLight Morris the Successful Respondent and December 6, 2011, SunLight Morris and Power Partners negotiated the terms of a Turnkey Design, Engineering, Procurement and Construction Contract {140101-002/P0026739 - 1}

(“Morris EPC”). The material terms of the Morris EPC concerning priority and interpretation, Power Partners’ responsibilities, SunLight Morris’s responsibilities, Contract Price adjustments, liquidated and shortfall damages, warranties or guarantees, default and termination, dispute resolution, lien rights, and express covenant of good faith cooperation are virtually identical to the Somerset EPC. Provisions in the Morris EPC that are different from but analogous to the same topics in the Somerset EPC include the Scope of Work, Local Unit price mechanism, the Milestone Payment Schedule, and substantial completion schedule.

175. The Morris EPC provides that Power Partners is required to complete all Morris SGFs by December 8, 2012, to commence construction on the first Morris SGF by June 15, 2012 and to start construction on all Morris SGFs by October 15, 2012. Like the Somerset EPC, the Morris EPC contemplated Change Orders may be needed to adjust a scheduled completion date. [Ex. 3675](#), Article 5.1; Article 7.2; Article 8.

176. The parties agreed to an initial Contract Price for each Local Unit as set forth on Attachment V-A of the Morris EPC for a total agreed initial price of \$36,002,598. Article 6.1; Att. V-A.

177. The parties also agreed to the same mechanisms as in the Somerset EPC for change orders and adjustments to the Contract Price for each SGF. Article 8.1-8.4.2.

178. They also agreed to cap delay liquidated damages and to bar consequential damages for any breach as they did in the Somerset EPC. Article 7.1-7.4; Article 12.1, 12.3; Section VI. I.

179. On September 8, 2011, the MCIA issued a request for proposals (“Sussex RFP”) for the Sussex Project. [Ex. 302](#).

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180. The Sussex RFP noted that the initial pre-bid meeting would be held on September 13, 2011, with Local Unit sites visits of approximately 45 minutes per SGF between July 13, 2011 and July 20, 2011. [Ex. 3675](#) p. E1-3; Section 3.3. Like the Somerset and Morris RFPs, the MCIA noted that the Sussex RFP design concepts and technical specifications were only a “preliminary guide.” Section 4.2. The Sussex RFP set a proposal deadline of October 13, 2011. [Id.](#) at E1-3.

181. On October 13, 2011, SunLight Capital and Power Partners submitted a joint response to the Sussex RFP (“Sussex Proposal”). [Ex. 325](#). Like the Somerset and Morris Proposals, the Sussex Proposal proposed that the MCIA issue Series A and B Bonds in the respective amounts of \$24,700,000 and \$1,300,000 to pay a majority of the costs of construction with Power Partners agreeing to be paid the balance of the construction costs of \$7,618,860 from ARRA 1603 Grant funds.

182. Like the Somerset Proposal and the Morris Proposal, the Sussex Proposal included an expected output table and a guaranteed output table.

183. The MCIA accepted the Sussex Proposal and deemed SunLight Capital the Successful Respondent.

184. Between October and late November 2011, SunLight Sussex and the MCIA negotiated the Program Documents for Sussex I. The Sussex Program Documents are similar to the Somerset Program Documents and virtually identical to the Morris Program Documents but for specific changes related to certain particulars of the Sussex Project.

185. The MCIA issued the Series 2011A and B Notes in the amounts of \$26,715,000 and \$985,000, respectively. [Ex. 403](#). At no time did the MCIA issue more bonds to pay for the Sussex Project.

186. The MCIA deposited the net proceeds from the sale of the Series 2011A and B Notes (the “Sussex Project Funds”) in the net amount (after payment of bond counsel fees and bond issuance costs incurred by the MCIA) of \$24,700,000 into a separate account maintained by the Trustee. [Ex. 3072](#) pp. 3-4.

187. In early December 2011, the MCIA executed License and Access Agreements with each of the Sussex County Local Units. [Exs. 371, 373, 374](#).

188. As of December 1, 2011, the MCIA executed a Power Purchase Agreement (“Sussex PPA”) with SunLight Sussex. [Hearing Ex. 376](#).

189. The Sussex PPA also required SunLight Sussex, the MCIA and the Local Units to appoint a designated representative capable of binding the principal and to develop an initial project schedule. [Ex. 376](#), Section 3.3.

190. The MCIA and SunLight Sussex also executed a Lease Purchase Agreement on December 1, 2011 (“Sussex Lease”). [Ex. 375](#). The Sussex Lease is virtually identical to the Morris Lease but for a several provisions specific to the Sussex County project.

191. The Sussex Lease required SunLight Sussex to make its first three lease payments as follows:

Date	Amount
January 15, 2013	\$2,356,394.59
July 15, 2013	\$485,425.45
January 15, 2014	\$2,335,425.45

[Hearing Ex. 375](#), Ex. A-3.

192. Between the date the MCIA deemed SunLight Morris the Successful Respondent and December 12, 2011, SunLight Sussex and Power Partners negotiated the terms of a Turnkey Design, Engineering, Procurement and Construction Contract (“Sussex EPC”). The material terms of the Sussex EPC were virtually identical to the Morris EPC.

193. The Sussex EPC provides that Power Partners is required to complete all Sussex SGFs by December 14, 2012, to commence construction on the first Sussex SGF by June 15, 2012 and to start construction on all Sussex SGFs by October 15, 2012. Like the other EPCs, the Sussex EPC contemplated Change Orders could be used to adjust a scheduled completion date. [Ex. 399](#), Article 5.1; Article 7.2; *id.*, Article 8.

194. The parties agreed to an initial Contract Price for each Local Unit as set forth on Attachment V-A of the Sussex EPC for a total agreed price of \$26,403,700. *Id.*, Section 6.1; *id.*, Att. V-A.

195. The parties also agreed to the same mechanisms for change orders and adjustments to the Contract Price for each SGF as in the Somerset and Morris EPCs. *Id.*; Article 8.1- 8.4.2.

196. They also agreed to cap delay liquidated damages and to bar consequential damages for any breach as in the Somerset and Morris EPCs. *Id.*, Article 7.1-7.4; *id.*, Article 12.1, 12.3.

197. On August 25, 2011, SunLight Somerset issued a Notice to Proceed for the Somerset Project. [Ex. 293](#).

198. Article 3.1 of the Somerset EPC provides, in pertinent part, that “[u]pon receipt of the Notice to Proceed with respect to a SGF, [Power Partners] shall design, engineer, procure, erect, install, test, start-up, and perform related activities” with respect to that SGF.

199. Article 7 provides that, “[t]he Work to be performed for each SGF under this Agreement shall commence on the date of delivery of the Notice to Proceed for such SGF.” [Hearing Ex. 399](#), Article 7.1.

200. On or about September 6, 2011, Tom Kosto, the Somerset Project Manager, and several other Wanzek/Power Partners management personnel arrived in New Jersey to work on the Project.

201. Power Partners issued a Limited Notice to Proceed to IEI, the electrical engineering consultant, as of September 9, 2011. By this time, IEI had assembled a project team, for which Ron Ignieri was the project manager. Final signing of IEI’s subcontract did not occur until October 31, 2011.

202. From the outset of IEI’s work, Mr. Ignieri maintained a spreadsheet “tracker” that he updated daily throughout the duration of the Somerset Project. The tracker contained information concerning IEI’s concepts, field work, structural assessments, geotechnical assessment, and engineering progress (with separate fields to track electrical, structural, civil). [Ex. 5415](#).

203. On the same day that Power Partners issued IEI the Limited Notice to Proceed, Power Partners and IEI started site walks for preliminary site investigations. [Ex. 304](#); [Ex. 5128](#) ¶ 6. The purpose of the site walks was to assess the feasibility of building SGFs at the sites as contemplated in the Somerset EPC.

204. IEI had visited each initially proposed site by mid-September 2011. [Ex. 5415](#).

205. In some cases, IEI had to revisit sites to perform additional assessments. There were a number of rooftop sites where IEI was unable to get the information it needed on the initial site visit. IEI needed to employ specialized equipment, such as man lifts and extension ladders, on some sites to access the structural elements of the roofs and measure the physical dimensions of roof beams. To accommodate these needs, subsequent site visits were scheduled and performed.

206. Some of the rooftop sites were eliminated after the preliminary assessment due to structural inadequacy. Other roof sites were reduced in size based on structural evaluations. [Ex. 5128](#). ¶11; [Ex. 3723](#).

207. After IEI and Power Partners performed the preliminary investigations, IEI began preparing concepts/preliminary designs for the sites that were initially deemed suitable for construction. These preliminary designs consisted of a one-page summary of the panel layout, the kW capacity based on the number of panels, and the number of arrays. IEI accompanied its concepts with an electrical single-line diagram prepared by the electrical group. In performing their duties, IEI did not review the EPC, the Program Documents or the ProConn drawings.

208. During this same time, Power Partners worked on finding and securing warehouse space to store inventory it was ordering, met with Local Unit officials, vetted subcontractors, and coordinated with IEI on initial concept plans and began to order inventory for the Somerset project, including solar panels.

209. To qualify for 1603 Grants, SunLight Somerset was required to procure and pay for at least 5% of the project costs for each SGF to ensure SunLight Somerset satisfied the Section 1603 Grant “safe-harbor” rules for each SGF before the end of 2011. To satisfy the “safe-harbor” requirements, SunLight Somerset authorized Power Partner to procure Canadian Solar and MX Solar panels, which needed to be delivered and paid for prior to the end of 2011.

210. By December 2011, Power Partners ordered, received and paid for 8,976 Canadian Solar 290 panels for a total cost of \$2,863,344 and 2,055 MX Solar MX 60 panels for a total cost of \$598,437.00 on the Somerset Project. [Ex. 5658](#), tab 1, pp. 2-3.

211. Power Partners received and stored the Somerset 1603 panels in its rented warehouse in New Jersey.

212. Based on the 1603 “safe-harbor” rules, Power Partners submitted its first payment applications on all three projects seeking to be reimbursed for the “safe-harbor” panels. SunLight Somerset in turn submitted a draw request to the Trustee and ultimately paid Power Partners \$3,461,781 for the Somerset Projects before the year-end deadline. [Ex. 4885](#).

213. On or about October 24, 2011, SunLight Capital hired Stephen Goodbody.

214. When he was hired by SunLight Capital, Mr. Goodbody understood his role to be an “owner’s representative.”

215. On November 3, 2011, 70 days after the parties signed the Somerset EPC, Mr. Goodbody led a meeting with Mr. Kosto and the IEI team in which he presented his point-by-point list of requirements. He summarized these expectations and added others in an email sent on November 4, 2011. [Ex. 342](#).

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216. The meeting took place at IEI's office and included nearly the entire IEI team. By November 3, 2011, IEI had completed its Somerset site visits and was working on its concepts designs. The vast majority of the meeting was comprised of Mr. Goodbody's reviewing his design requirements.

217. The requirements Mr. Goodbody specified in his November 4, 2011 email were additions, enhancements, and clarifications to the Somerset EPC Scope of Work. Many of these were not required by the standards set forth in the EPC.

218. One design criterion Mr. Goodbody dictated was a shading model that was different from the one that IEI or others in the solar industry typically employed. IEI's ongoing work on SGF concepts at this point included its shading analysis (according to IEI's own shading model) and layout planning. The Goodbody shading model and other requirements caused IEI to have to redo concept design work. [Hearing Tr. p. 5771](#).

219. Concerns about the completion of site visits, preliminary plans, general timing, and the final structural roof report were brought up to PPM by Sunlight Somerset. Power Partners promised that the Project was on schedule, even providing timelines and other information to support this, through November 2011, into the new year.

220. By January, Horne concluded that the Somerset Project was behind schedule. Ex. 444.

221. On or about December 8, 2011, SunLight Morris issued a Notice to Proceed in connection with the Morris EPC. [Ex. 396](#).

222. On or about December 15, 2011, SunLight Sussex issued a Notice to Proceed in connection with the Sussex EPC. [Ex. 405](#).

223. Both the Morris and Sussex Notices to Proceed were the same in form as the Somerset Notice to Proceed, with no reference to any particular SGF.

224. On December 20, 2011, representatives of the MCIA, Birdsall/Gabel, SunLight Morris, IEI and Power Partners attended a pre-construction meeting in connection with the Morris II project. Like the Somerset project “kick-off” meeting, the parties discussed, among other things, the Scope of Work, the permitting and inspection process, the project schedule, design reviews, and coordination with Local Unit representatives. [Ex. 3370](#).

225. In connection with the Morris Project schedules, the representatives “understood that the schedule will depend on when designs have been completed” and that “[e]ach local unit will have its own schedule.” The representatives also agreed that Birdsall/Gabel would reach out to the Local Units to coordinate site visits and that, if any site specific problems (structural, electrical, etc.) were discovered, the issue(s) were not to be raised by PPM with the Local Unit representatives. [Id.](#), ¶ 17.

226. On January 10, 2012, a month after SunLight Sussex and Power Partners executed the Sussex EPC, representatives of Sussex County, the MCIA, Birdsall/Gabel, SunLight Sussex, IEI and Power Partners attended a pre-construction meeting in connection with the Sussex project. Like the Somerset and Morris project “kick-off” meetings, the parties discussed, among other things, the Scope of Work, the permitting and inspection process, the project schedule, design reviews, and coordination with Local Unit representatives. [Ex. 3371](#). The Sussex meeting minutes reflect virtually the same discussions that occurred during the Morris County pre-construction meeting on December 20, 2011. [Id.](#)

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227. In the Morris and Sussex EPCs, the Scope of Work was changed from the Somerset EPC to reflect the changes Steve Goodbody had imposed at the November 3, 2011 meeting.

228. Similar to the Somerset Project, SunLight Morris and SunLight Sussex were required to procure and pay for at least 5% of the project costs for each SGF to ensure SunLight Morris satisfied the Section 1603 Grant “safe-harbor” rules for each SGF before the end of 2011.

229. To satisfy their respective “safe-harbor” requirements, SunLight Morris and SunLight Sussex authorized Power Partner to procure Canadian Solar panels, which needed to be delivered and paid for prior to the end of the year.

230. During December 2011, Power Partners ordered, received and paid for 11,833 Canadian Solar 290 panels for a total cost of \$3,775,365 on the Morris projects and 8,336 Canadian Solar 290 panels for a total cost of \$2,659,184 on the Sussex projects. [Ex. 5656](#), tab 1; [Ex. 5660](#), tab 1.

231. Power Partners received and stored the Morris and Sussex panels in its rented warehouse in New Jersey. [Hearing Tr. pp. 6555-57, 6576-77](#).

232. Based on the 1603 “safe-harbor” rules, Power Partners submitted its first payment applications on the Morris and Sussex Projects seeking to be reimbursed for the “safe-harbor” panels. SunLight Morris and SunLight Sussex in turn submitted draw requests for the Projects to the Trustee and ultimately paid Power Partners \$3,775,365 and \$2,659,184 for the Morris and Sussex projects, respectively, before the year-end deadline. [Ex. 4885](#).

233. Between November 30, 2011 and December 31, 2011, the price of SRECs in New Jersey dropped by approximately \$250, from \$450 to \$200. By May 1, 2012, SRECs in New Jersey were settling at approximately \$80 per credit. In October 2012, SRECs were trading at approximately \$50. See Flett Exchange 2011 and 2012 New Jersey SREC Settlement Price, www.flettexchange.com/index.php.

234. As a result of the SREC market crash in December 2011 and the continuing decline into late 2012, SunLight Capital's financial models used in the Response to RFP were severely and negatively impacted.

235. Power Partners' expert, James Spano, an experienced solar developer in the New Jersey market, opined that, based on SunLight Capital's failure to secure forward SREC pricing contracts, not one of these Projects remained financially viable by the end of 2011. [Hearing Tr. pp. 7105-07; Hearing Ex. 2269](#) p. 7.

236. In December 2011, Mr. Wolf, a SunLight Capital principal who had no direct involvement in the Somerset EPC negotiations, raised the following question with Mr. Klehe concerning the Somerset EPC requirements:

What kwh number are we holding Mastec to on Somerset? The expected 8.17 mm kwh in the RFP submittal? Do you recall how it was generated – by us, Mastec, pvwatts, pvsys,...

Mr. Klehe replied:

Not a kWh. But design specifics. I.e. site XYZ is 15 tilt/170 azimuth. No LT performance warranty.

Steve has a good handle. We should sit down all three to go over it. I can walk you through how it was generated. Ben's spreadsheet based on the number sent by PPM.

Ex. 4938.

237. In January 2012, Mr. Goodbody prepared spreadsheets attempting “to capture the current Somerset situation/status using [Mr. Klehe’s] spreadsheet model for the county.” [Ex. 4933](#). The spreadsheet contained data concerning projected kW capacities and kWh production for each Somerset site together with a projection of PPA and SREC revenues for the Somerset project.

238. Based on Mr. Goodbody’s assumptions, SunLight Somerset’s gross “profit” dropped by \$5 Million compared to the models prepared at the time of the Somerset Proposal. [Exs. 4933, 4934](#).

239. As a result of the dramatic fall in revenue projections, Mr. Goodbody wrote that “[c]learly we need a price reduction strategy with [Power Partners].” Mr. Goodbody suggested a macro price reduction strategy “that addresses the total costs against the total production.” [Id.](#)

240. In a subsequent email dated February 1, 2012, more than five months into the Somerset Project, Mr. Goodbody advised Mr. Klehe that the Project Companies needed “a workable resolution that doesn’t hurt us but that stands a chance of being accepted by [Power Partners] and quickly.”

241. Mr. Goodbody then described the “current situation” on the Somerset project. With respect to Power Partners’ obligations under the Somerset EPC, Mr. Goodbody wrote: “Our EPC with MasTec doesn’t take into account production, only kW size. That’s a fundamental disconnect when the production can’t realistically be achieved with a practical system.” [Id.](#)

242. Mr. Goodbody also noted that he was

already unable to approve a bunch of practical and pragmatic designs, and will soon be unable to approve a bunch more (all 21, in fact), because they don't meet the proposals draft production numbers and I can't commit us to paying for those systems under the EPC \$/W adjustment basis (and I would be doing so if I approved those designs before this issue is resolved). This is already holding up the project schedule, and [Power Partners] will undoubtedly claim that this is a contributory reason for their delays Every day that we don't get this resolved means that the situation is getting worse, not better for both [Power Partners] and us.

Id. (emphasis in original).

243. In an email dated February 7, 2012 from Stacey Hughes to Power Partners' project personnel (that is, Tom Kosto, Rafael Marrero, and David Masterson), Ms. Hughes formally raised SunLight Somerset's "price reduction strategy" with Power Partners. Ms. Hughes did not copy Kevin Taylor, who negotiated the Somerset EPC on behalf of Power Partners, on her email to Power Partners' project personnel. [Ex. 460](#).

244. In her email, Ms. Hughes advised that SunLight Somerset would accept the current designs "as long as we are neutral from an investment perspective." She suggested that the parties "look at the original \$ per kWh for the set of projects under consideration for change." She then advised that, if Power Partners agreed to SunLight Somerset's price reduction strategy, SunLight Somerset "will move forward ASAP to review/approve your modified designs on this basis." Id.

245. The Somerset EPC does not contain any SGF design or layout. Rather, Attachment II-A to the Somerset EPC provides, in bracketed placeholder language, that "the list of the Local Units and the SGFs to be constructed on the Premises of such Local Unit" are provided in Exhibit A-4 to the Lease Agreement, which is a list of Local Units and SGFs with corresponding system type and kW capacity. [Hearing Ex. 285](#), Ex. A-4. Attachment II-B of the Somerset EPC provides that "[f]inal layouts . . . will be fixed after

the Premises investigations and consultations with Applicable Local Units and in the course of preparation of Plans and Specifications, and this Attachment will be updated by a Change Order.” [Ex. 3674](#), Att. II-B.

246. The Somerset EPC is not priced based.

247. On January 10, 2012, representatives of Birdsall/Gabel, IEI, Power Partners, and SunLight Somerset participated in a construction progress meeting on the Somerset Project. [Ex. 4751](#).

248. According to the meeting minutes, IEI and SunLight Somerset had completed due diligence at almost all sites except potential additions to the Project. ¶ 1. The parties noted that the due diligence process had dictated system size changes. The parties referred to this process as the “merry go round” process. [Id.](#) ¶ 2.

249. Based on the “merry go round” process and the delays caused by that process, during this meeting SunLight Somerset “requested an extension of the construction period.” Birdsall/Gabel advised SunLight Somerset of the process that needed to be followed to secure an extension from the SCIA.

250. At this meeting, SunLight Somerset specifically discussed the removal of certain sites. For example, SunLight Somerset requested that the Clarence Dillon Library be removed because the Library had “not yet begun the design and replacement of the roof which was required to be completed for the solar project.” [Id.](#)

251. SunLight also requested that the Bernards DPW and the Bayberry Elementary School sites be removed based on dramatic decreases in system size. SunLight Somerset advised Birdsall/Gabel that its contract with Power Partners includes a cost-per-watt based on system size, and that the pricing changes upward when a project

drops below 100 kW. As a result, SunLight Somerset sought to drop the site for economic reasons.

252. In addition to SunLight Somerset's request to remove sites from the Somerset Project, SunLight Somerset "discussed the need to amend the projected and guaranteed production numbers for the Projects based on changes in design of each system." SunLight Somerset noted that "the tilt angles of some systems may change to accommodate structural concerns."

253. In response to SunLight Somerset's point regarding amendments to production numbers, Birdsall/Gabel stated that, consistent with the Program Documents (e.g., [Ex. 4893](#) p. 31, Article 6.1(b)), "this was understood and following completion of the merry-go-round, [SunLight Somerset] would be required to provide updated project[ed] and guaranteed production numbers." *Id.* ¶ 7; see also [Ex. 4893](#), Section 6.1(b).

254. SunLight Somerset also requested an extension to the program for new sites being added in Bernards School District. Birdsall/Gabel explained that the SCIA would be flexible on the construction schedules for late additions to the program. *Id.*

255. On January 30, 2012, Steve Goodbody prepared a draft email to Joe Santaiti of Gabel, the SCIA's representative, seeking "to secure a schedule extension to the Somerset County program completion timeline for all sites." [Ex. 454](#).

256. In that email, Mr. Goodbody noted that:

There have been (and continue to be) changes to the program sites that could not have been foreseen at the time of PPA execution and which have resulted in either; wasted time and effort to date, or the requirement for additional and unplanned time and effort going forward. Generally this results from; the removal of some sites from the program due to Local

Unit or host decisions, the elimination of some sites from the program due to engineering due-diligence findings, and the resultant substitution of new sites into the program to compensate for these removals and eliminations.

Id.

257. Mr. Goodbody then requests a five-month schedule extension based on the timing and impact of the site deletions and additions. Mr. Goodbody cites specific examples of delays at numerous sites within the Somerset County program:

- 10/18/11 (2 months) — Warren Twp — Angelo Tomasso ES — Canopy deletion.
- 10/18/11 (2 months) — Warren Twp — Central ES — Canopy deletion.
- 10/18/11 (2 months elapsed) — Warren Twp — Middle School — Canopy deletion.
- 10/25/11 (2 months elapsed) — Peapack Gladstone-Municipal Building — Deletion (following structural review completion).
- 10/25/11 (2 months elapsed) — Franklin Twp-DPW Garage — Deletion (following structural review completion).
- 10/25/11 (2 months elapsed) — North Plainfield BoE - Stony Brook School — Deletion (following structural review completion).
- 10/25/11 (2 months elapsed) — Watchung BoE - Valley View Middle School — Deletion (following structural review completion).
- 10/31/11 (2 months elapsed) — Bedminster TWP — Clarence Dillon Library-Parking canopy layout design presented to host. Host had issues with canopy RFP concept. Roof now potentially favored by host. Roof structural, shading, layout designs, electrical designs undertaken by SLG/PPM.
- 11/14/11 (3 months elapsed) — Bedminster TWP — Clarence Dillon Library-Board of Trustees accept roof system design, and permit to obtaining re-roofing quotations.
- 1/4/12 (4.5 months elapsed) — Bernards BoE — additional sites offered for investigation and possible incorporation into the Somerset II program.

- 1/10/12 (4.5 months elapsed) — Somerset County-Patriots Stadium — additional parking lot added to Somerset II program.
- 1/27/12 (5 months elapsed) — Bedminster Twp-Clarence Dillon Library — placed on permanent hold/deleted (roof replacement quotations not obtained by host)
- 12/16/11 – 1/30/12 (5 months elapsed) — Watchung BoE — Bayberry School - On-hold / redesign necessary arising from local non-code 30psf snow-load structural decision

Id.

258. The SCIA eventually granted SunLight Somerset an eight-month extension to April 1, 2013. [Exs. 845, 1019](#).

259. On February 1, 2012, two days after Mr. Goodbody drafted his email to Mr. Santaiti requesting a five-month extension for the entire Somerset program, and three weeks after Mr. Goodbody raised a schedule extension with Birdsall/Gabel during the January 10, 2012 bi-weekly meeting, SunLight Somerset issued Late Completion Notice No. 1 to Power Partners. [Ex. 457](#).

260. In Late Completion Notice No. 1, SunLight Somerset purported to assess liquidated damages against Power Partners for Power Partners' alleged failure to construct 25% of the originally contemplated 6,990.46 kW contained within the 44 original SGFs in Attachment V-A to the Somerset EPC. Id.

261. By February 1, 2012, 10 of the original 44 proposed SGFs had already been deleted from the Somerset program ([Ex. 459](#)).

262. On February 8, 2012, Tom Kosto (Ex. 462) responded to Ms. Hughes' February 6, 2012 price reduction strategy email. Mr. Kosto noted that Ms. Hughes' email

raised serious issues, and that the changes SunLight Somerset was making were changing the scope of the project and causing delays to PPM's performance.

263. Mr. Kosto also advised SunLight Capital that SunLight Somerset's refusal to approve designs had delayed the Project, and that Power Partners was entitled to schedule extensions. [Ex. 462](#).

264. On February 10, 2012, Mr. Taylor wrote to Ms. Hughes to respond to her email concerning SunLight Somerset's kWh requirements, to highlight the significant delays and other issues concerning the Projects, and to reiterate the need for change orders, which Power Partners had already requested. [Ex. 4792](#).

265. Mr. Taylor objected to the assessment of liquidated damages in Late Completion Notice No. 1.

266. In February 2012, Power Partners demanded a Recovery Plan from IEI (Ex. 485) and then terminated IEI from a portion of the Sussex Project and replaced it with KMB.

267. After Mr. Taylor sent his February 10, 2012, letter, he requested a meeting with SunLight Capital's principals in an effort to resolve the design log-jam and to discuss a reasonable path forward to complete all three of the Projects.

268. Mr. Taylor met with Sunlight principals in New York City in February 2012 for the first of a series of meetings that were aimed at addressing the issues that had been raised concerning the Projects.

269. During the initial meeting, Mr. Taylor pointed out that the Somerset EPC is based on kW. He learned that SunLight had been "pushing" for kWh production on a site-by-site basis.

270. In an effort to align the parties' interests, Taylor proposed to provide SunLight Capital with additional capacity at Power Partners' cost to address any alleged kilowatt-hour production concerns. The parties also discussed the issue of the design approval process/engineering log-jam, the ability to quickly move forward with construction, and the delays. PPM proposed the introduction of an "approved with comments" procedure that would allow Power Partners to begin construction and incorporate design changes into the as-built drawings.

271. Mr. Taylor and SunLight Capital's principals tasked Mr. Kosto and Mr. Goodbody to work on specific issues that the parties later described as the "Grand Deal." The "Grand Deal" grew to include, among other things, the kWh vs. kW issue, extensions of time in conjunction with purported liquidated damages, payment of damages for construction delays, changes in site capacities, SGF configurations and prices, issues related to Solectria inverters on the Morris and Sussex projects, and revisions to the Somerset Scope of Work to reflect the design requirements listed in Mr. Goodbody's November 4, 2011, email.

272. The parties continued to discuss the "Grand Deal" into the summer of 2012. During the "Grand Deal" negotiations, Power Partners did not issue individual proposed change orders for the delays, changes to sites, dropped sites, and additional costs incurred by Power Partners during that period.

273. The Project Companies, however, continued to issue Late Completion Notices. Power Partners objected in writing to the Project Companies' ongoing purported assessment of Liquidated Damages. [Exs. 3976, 4780, 4781](#).

274. As of July 2012, SunLight Somerset had secured an eight-month extension from the SCIA for the completion of the Somerset SGFs. SunLight did not, however, advise Power Partners that it had secured the extension. Rather, Power Partners months later learned of the extension during a project meeting with Birdsall/Gable.

275. The Projects continued to significantly change throughout these discussions and the parties could not reach agreement on key issues. The “Grand Deal” did not achieve a resolution.

276. Even though the “Grand Deal” discussions did not result in a global agreement, in late August and early September 2012 the SunLight Capital principals and senior executives at Power Partners continued to discuss the prospect of a settlement concerning the outstanding issues on the Projects.

277. The discussions in August and September 2012 did not result in an agreement. Rather, on September 13, 2012, SunLight Somerset filed an arbitration demand against Power Partners and, on September 16, 2012, Power Partners commenced arbitrations against SunLight Morris and SunLight Sussex.

278. According to the February 14, 2012 bi-weekly Morris Project meeting minutes, Power Partners had completed its preliminary site visits and structural assessments for all of the Morris SGFs, and additional due diligence was ongoing with respect to proposed changes in the layout and location of many sites to address feasibility issues. [Ex. 4723](#).

279. According to the March 9, 2012, bi-weekly Sussex Project meeting minutes, Power Partners had performed site assessments at all SGFs, and IEI structural reviews were underway with completion expected by mid-March. The due diligence

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process had already identified many Sussex sites with feasibility concerns, which Power Partners proposed to address with specific layout and location changes. [Ex. 4695](#).

280. The Morris roof structural report for Sussex was not submitted until March 5, 2012, almost two months late, and the deadlines for preliminary Plans and Specifications was not met either. [Ex. 5735](#).

281. After Mr. Goodbody's arrival, and well after the parties discussed proceeding on an "approved with comment" basis to move the Projects forward, the Projects became stuck in an "engineering do-loop," which hindered Power Partners ability to proceed beyond the design phase.

282. The "engineering do-loop" consisted of Mr. Goodbody's iterative reviews of designs proposed by IEI and Power Partners. Through his reviews of the designs, Mr. Goodbody demanded, before any construction could begin additional design features that PPM believed were not required by industry standards or the EPC, and Power Partners and IEI did not agree to because of the "fast-track" nature of the project.

283. Mr. Goodbody did not approve plans for the Somerset or Morris Projects until they were satisfactory in his personal view. As a result, instead of one or two revisions, which are typical in similar projects where a redline process is followed, many sites in the Somerset and Morris Projects had four to five revisions requiring resubmission to Mr. Goodbody, and it was not uncommon for sites to have even more.

284. In addition, pursuant to SunLight Somerset's direction, Power Partners would sometimes be working on multiple alternative designs for the same site "as SunLight made up their mind which way they wanted to go" on the site.

285. This custom engineering was contrary to “standardized solar practice,” which was to utilize a standard set of equipment and configurations for the sites. This standard practice, known as “applications engineering,” was what Power Partners agreed to provide in the EPCs. What SunLight imposed, by contrast, was “custom” or “preference” engineering.

286. The process imposed by Mr. Goodbody also prevented the approval of civil or structural engineering packages, even where they were ready for approval, while electrical engineering packages were still pending.

287. The delays in design approvals and the resulting lack of construction resulted in a September 2012 meeting with Power Partners, the Project Companies, SCIA and MCIA regarding this issue. A positive outcome of that meeting was that designs could be sent out to the field for construction with redlines.

288. Power Partners had originally planned to commence and complete construction on rooftop SGFs in all three Counties early in the construction sequence because rooftop sites were relatively easy and quick to build as compared to carports and ground mounts, thereby facilitating PPM’s compliance with the Attachment VIII initial completion schedule.

289. In or about April 2012, however, the Project Companies and the Authorities dictated that Power Partners sequencing of work on the SGFs had to prioritize carport canopies.

290. Throughout 2012, the Projects underwent significant changes with respect to the SGFs that were included and the kW capacity of the contemplated SGFs.

291. In Somerset, a total of 12 SGFs dropped between August 25, 2011 and February 2012, and four sites were added to the Project.

292. In Morris, four sites were dropped. Several additional sites were considered and investigated by Power Partners but ultimately were not selected for SGFs. By October 2012, of the original 9.1 MW contemplated in the EPC and Program Documents for the Morris Project, 2.5 MW dropped from the projects' scope without being replaced by the Project Companies.

293. In Sussex, six sites dropped. By October 2012, 2012, of the original 6.9 MW contemplated in the EPC and Program Documents for the Sussex Project, nearly 2 MW dropped from the projects' scope without being replaced by the Project Companies.

294. Throughout 2012, the design kW capacity of many of the SGFs fluctuated.

295. In early 2012, the MCIA made potential replacement sites available to SunLight Morris and SunLight Sussex. SunLight did not, however, offer these replacement sites to Power Partners even though Power Partners purchased panel inventory in anticipation of the total capacity contemplated in each EPC.

296. Beginning in September 2012, after the termination of the "Grand Deal" negotiations and subsequent discussions regarding a potential alternative resolution, Power Partners began the process of compiling and submitting proposed Change Orders pursuant to Article 8 of the EPCs.

297. The Change Orders sought by Power Partners addressed delays to progress and completion of the Projects, cost increases, and overall SGF price adjustments due to design changes under Article 8 of the EPCs. Power Partners had not previously

submitted proposed Change Orders relating to these issues, because the parties had discussed and sought to resolve them through the comprehensive draft “Grand Deal” Change Orders.

298. The delay-related Change Orders requested extensions in relation to SGF design delays; delays caused by Local Unit decisions and restrictions; construction-related delays; delays caused by Hurricane Sandy; and delays in the process for permitting, land use, and environmental approvals. The Project Companies rejected these Change Orders contending they either did not have appropriate backup documentation or were not allowed under the EPC.

299. The Change Orders also related to cost increases whereby PPM sought SGF price adjustments for costs incurred in connection with equipment upgrades requested by SunLight Capital and work performed by subcontractors for sites that had changed by 20% or less in kW capacity and did not otherwise materially change. SunLight largely rejected these proposed Change Orders.

300. The pricing Change Orders sought the SGF price adjustments provided in Articles 8.4.1 and 8.4.2 of the EPCs. As provided in those Articles, these Change Orders sought Cost-Plus pricing for SGFs that changed by more than 20% in kW capacity or otherwise changed materially, and they sought Attachment XVIII-B pricing for SGFs that changed by 20% or less in kW capacity and did not otherwise change materially. SunLight rejected these proposed Change Orders.

301. In derogation of the EPC language and the Project Companies’ concession during contractual negotiations to add Change Order provisions, Ms. Hughes’ characterization of the EPCs as “non-change order” and “fixed price,” the Project

Companies never had any expectation or intention of granting price-related Change Orders to Power Partners because of the “project finance” nature of the Projects and their belief that the EPC was a fixed price contract.

302. Likewise, according to Ms. Hughes, the nature of the projects meant that Power Partners was not entitled to extensions of the completion schedule even where the Project Companies received them from the SCIA and the MCIA.

303. As noted, in December 2011, Power Partners purchased 1603 Grant “safe harbor” panels for each project. Power Partners then immediately billed the Project Companies for 100% of the 1603 Grant panels purchased. To preserve the 1603 Grant “safe harbor,” the Project Companies paid these bills from the respective Project Funds before December 31, 2011.

304. Under the EPCs, Power Partners had a right to bill the Project Companies pursuant to certain milestones set forth in Attachment V-B. The payment milestone schedule in the Somerset EPC differed, in part, from the schedules in the Morris and Sussex EPCs. Specifically, the Somerset EPC did not permit Power Partners to bill for panel inventory until Power Partners installed the panels on the SGFs. [Ex. 3674](#), Att. V-B. The Morris and Sussex EPCs, however, provided Power Partners with the right to bill for all panels purchased and stored in the warehouse. [Ex. 399](#), Att. V-B; [Ex. 3675](#); Att. V-B. The Morris and Sussex EPCs specifically provided that Power Partners is entitled to 20% of the Local Unit Price once Solar Panels are delivered to the local warehouses.

305. In April 2012, however, Power Partners and SunLight Somerset executed a change order (“Change Order 1”) for the Somerset EPC. Change Order 1 granted Power Partners the right to bill for the costs of the panels once purchased and stored in its

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warehouse, bringing the Somerset payment schedule into alignment with the Morris and Sussex payment schedules. [Ex. 3075](#).

306. Panels are one of the most significant costs associated with solar projects and have lead times for delivery. In anticipation of building the total capacities contemplated under each EPC, Power Partners purchased more than \$21 million worth of panels inclusive, of the 1603 Grant panels for each Project, which it had shipped to its New Jersey warehouse. As Power Partners constructed SGFs, it moved the panels from the warehouse to the SGFs for installation.

307. By May 2012, Power Partners had purchased virtually all of the panels anticipated for the Projects. Under the Morris and Sussex EPCs and pursuant to Change Order 1, the Project Companies owed Power Partners Milestone Payments equal to 20% of the total Contract Prices for each Project. [Ex. 399](#), Att. V-B; [Ex. 3674](#), Att. V-B; [Ex. 3675](#), Att. V-B.

308. The Project Companies, however, disputed Power Partners entitlement to payment of the 20% Milestone for taking delivery of the panels, claiming that Milestone payments were necessarily sequential and refusing to make any additional payment for panel purchases. Between August 2011 and September 2012, the Project Companies had only paid Power Partners for the 1603 Grant safe harbor panels. [Hearing Exs. 5004, 5054, 5093](#).

309. In September 2012, Power Partners submitted Applications for Payment (“AFPs”) on each Project and marked those applications “for settlement purposes only.” By the end of September, SunLight had made limited payments to Power Partners, but the payments did not match the September AFPs.

310. Power Partners also submitted AFPs dated October 15, 2012. [Exs. 5823, 5824, 5825](#). The October AFPs contained reservation-of-rights language on the cover page of each application. Specifically, Power Partners reserved its right to assert all price adjustment provisions under Article 8 of the EPCs. The October AFPs also contained a “Turnkey Contractor Certification,” a major vendor detail report, and partial lien releases from Power Partners’ major vendors and subcontractors.

311. The Turnkey Contractor Certification reserved Power Partners’ rights to assert Change Orders under the EPCs and specifically noted that the prices of the EPCs would change. The major vendor detail contained information from each major vendor/subcontractor on the Projects such as invoice numbers, invoice dates, and the amount due/paid to the vendors.

312. The Project Companies did not pay Power Partners any of the amounts due pursuant to the October AFPs.

313. On November 15, 2012, Power Partners submitted additional AFPs to the Project Companies for each Project. The November AFPs contained the same reservation language on their cover pages, Turnkey Contractor certifications, and updated major vendor details and lien releases. Power Partners sought the following sums in the November payment applications:

Somerset	\$5,184,249.72 (Hearing Ex. 5824)
Morris	\$4,920,239.92 (Hearing Ex. 5823)
Sussex	\$3,342,719.91 (Hearing Ex. 5825)

314. As in the past, Power Partners submitted its November AFPs, the Project Companies used Power Partners’ applications and the work Power Partners performed on

the Projects to requisition funds from the Trustee on each project. The Trustee paid the Project Companies the amounts the Project Companies' requisitioned in November 2012.

315. Rather than pay Power Partners the Project Funds received from the Trustee, the Project Companies assessed and withheld disputed liquidated damages in the amounts of \$1,122,421, \$2,431,172, and \$783,316, on the Morris, Somerset and Sussex Projects, respectively. [Exs. 1380, 1384, 1391](#).

316. By November 29, 2012, Power Partners had performed major work on virtually all the SGFs it constructed and had spent tens of millions of dollars for vendors, materials, subcontractors, suppliers and labor. The Project Companies had only paid Power Partners a portion of its costs and expended the funds released by the trustee for its own purposes despite knowing these funds represented disputed liquidated damages subject to the EPC's dispute resolution provisions.

317. On December 28, 2012, the Project Companies issued demands for assurances of performances as to several SGFs on each of the Projects that were experiencing ongoing delays. The sites referred to in those demands were Somerset County Parking Deck canopy, Bridgewater Township Municipal Building/Police ground mount, Troy Hills Parsippany Library roof mount, Troy Hills Parsippany Library ground mount, Long Valley Middle School ground mount, Hanover Municipal Building/Police ground mount, Kittatinny Regional High School roof mount, Sussex County Tech School ground mount, and Hardyston Middle School ground mount.

318. Power Partners responded to the Project Companies' demands for assurances in letters dated January 4, 2013. In these letters, Power Partners explained the

status of the referenced sites and made its own demands for assurances as to payment in light of the Project Companies' ongoing payment defaults.

319. The Project Companies did not respond to Power Partners' January 4, 2013 letters. Power Partners followed up on those letters by submitting proposed Change Orders on or about February 7, 2013 as to the SGFs at issue that addressed the delays and costs associated with the sites and again demanded assurances of payment.

320. On February 12, 2013, the Project Companies responded by issuing Notices of Termination with respect to the SGFs at issue. Ex. 1674-1676.

321. On or about September 19, 2012, Power Partners issued Notices of Owner Events of Default and Demands to Cure for the Projects due to the Project Companies' ongoing failure to meet its payment obligations under the EPCs.

322. Power Partners subsequently issued a Second Notice of Owner Event of Default and Notice to Cure dated December 10, 2012 for each of the Projects.

323. The Project Companies' payment defaults continued, and at no point did it provide the assurances of payment that Power Partners had requested. Power Partners continued to perform and move SGFs toward completion despite the lack of payment.

324. On or about May 21, 2013, Power Partners notified the Project Companies that it was suspending work on the Projects. Nevertheless, Power Partners continued to maintain the SGFs and performed punch list and close out work to the extent it could without incurring additional excessive out-of-pocket costs.

325. On or about July 19, 2013, the Project Companies issued Notices of Default to Power Partners on all three Projects. It subsequently issued Notices of Termination for the remaining SGFs on the Projects on July 27, 2013.

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326. Power Partners issued to the Project Companies Notices of Termination for Owner defaults on all three Projects on July 29, 2013.

327. Based on the limitations concerning the use of the Project Funds, the Authorities and the Project Companies amended the Program Documents on August 25, 2012 for the Somerset Project and on December 1, 2012 for the Morris and Sussex Projects (together, “Amendments No. 1”). Amendments No. 1 permit the Project Companies to draw down on the Project Funds to reimburse themselves above the cap in the Lease Agreements, to pay the Authorities’ legal fees and expenses, to take liquidated damages even if disputed by Power Partners, and to make lease payments to the Trustee from those funds. [Exs. 1019, 1389, 1390](#).

328. Amendment No. 1 for the Somerset Project memorialized the extension for the Project Companies to complete the Somerset SGFs to April 1, 2013, which the SCIA had granted in July 2012. [Exs. 845, 1019](#). Amendments No. 1 for Morris and Sussex also extended the completion date for the respective Project Company for all SGFs to July 1, 2013. [Exs. 1389, 1390](#). Amendments No. 1 also identify a roster of SGFs, the kilowatt capacities of the SGFs, and, consistent with PPA Section 6.1(b), an output amount per SGF or the letters “TBD,” denoting that the kWh will be calculated at a later date after the SGFs are placed in service. [Exs. 1019, 1389, 1390](#).

329. The Project Companies did not secure Power Partners’ consent to amend the Program Documents. Power Partners did not learn about Amendments No. 1 until early 2013.

330. After the Authorities and the Project Companies executed the Amendments No. 1, the Project Companies drew down \$1,317,055 from the Sussex

Project Funds and \$313,342 from the Morris Project Funds to partially make their January 2013 lease payments.

331. During 2013, as the Project Companies placed each SGF in service, the Project Companies began filing applications with the U.S. Department of Treasury to be reimbursed up to 30% of the eligible costs for each SGF. The Project Companies represented the dates on which each SGF was or would be placed in service—that is, generating electricity and revenue—in its applications.

332. In its 1603 Applications, the Project Companies sought reimbursement for the prices for each SGF as calculated by multiplying the installed kW capacity for each SGF by the pricing table in Attachment XVIII-B of each SGF. Alternatively, the Project Companies sought reimbursement for Power Partners' prices for each SGF, which included Direct Costs plus 10% for SGFs that changed by more than 20% or otherwise materially changed. In its 1603 Applications, the Project Companies noted that it disputed the amounts due Power Partners. In addition to the grant related to construction costs (which the Project Companies have not paid), the Project Companies also sought reimbursement for all their alleged soft costs (legal, engineering, accounting, etc.) and a development fee equal to 20% of the construction and soft costs.

333. By September 23, 2013, the Project Companies had received \$2,813,896, \$1,615,223, and \$1,857,456 for Somerset, Morris, and Sussex, respectively, of 1603 Grant funds. [Ex. 4884](#). By January 2014, the Project Companies had received \$6,850,107, \$6,596,220 and \$4,382,477 in 1603 Grant funds for Somerset, Morris, and Sussex, respectively. [Ex. 5299](#).

334. The record indicates the Project Companies have received \$17,828,804 in total 1603 Grant funds and have or expect in the near future to receive approximately \$2 million more.

335. The Project Companies have not paid any of the 1603 Grant funds to Power Partners.

336. In the award letters from the Department of Treasury, the Department denied the Project Companies' requests to be reimbursed for its legal fees and development fees because the development fees did not reflect arms-length pricing. The Treasury noted, however, that the Project Companies have the right to amend their applications if the Panel ultimately rules in favor of Power Partners in connection with the Direct Cost-Plus SGFs.

337. The Project Companies had significant lease payments due on September 15, 2013 through January 15, 2014, respectively. At that time, the Project Funds had been frozen pursuant to an Order from the New Jersey Supreme Court.

338. According to the Lease Agreements, the Trustee's security interests in the 1603 Grants funds are subordinate to Power Partners' interest in the Project Funds unless the Project Companies are in default of the Lease. Lease Agreements at Section 309. The Authorities have never declared a default of the Project Companies under the Lease Agreement.

339. The Authorities and Project Companies amended the Program Documents in October 2013 ("October Amendments"). The October Amendments provide specific detail concerning the payments to be made to the Authorities and the sources of those

funds. The October Amendments also granted the Project Companies further extensions to complete the non-Power Partners SGFs to April 2014. [Hearing Exs. 2088, 2091, 2092.](#)

340. For each SGF, Power Partners tracked project costs which it contends were “Direct Costs”, which included costs associated with the panels installed, the inverters installed, the racking systems installed, the monitoring system costs, the subcontracted engineering for IEI and/or KMB, and the costs of subcontractors that installed the solar arrays for each site.

341. In addition to the direct project costs, Power Partners separately tracked other direct costs that could not be specifically allocated to each site which it denominated as “Allocated Direct Costs”. The Allocated Direct Costs are alleged to include an exact calculation of, among other things, the costs of the warehouses to store inventory, bond premiums, insurance costs, subcontractor project management, and Power Partners’ project personnel, which included, among others, project managers, QA/QC personnel, and in-house engineers.

342. Power Partners has submitted an analysis together with supporting documentation for all of its direct and Allocated Direct Costs. Power Partners’ documentary evidence included, among other things, invoices from its vendors. Power Partners also submitted evidence of its internal payroll costs including time sheets and equipment charges for each County project.

343. As part of its tracking of costs, Power Partners separately accounted for costs associated with change orders in connection with sites that did not materially change or did not change by more than 20%. On the Somerset project, a total of 11 SGFs

changed by 20% or less and did not otherwise materially change. The 11 sites did, however, have change orders for additional costs in the following amounts:

SGF Name	Change Order Amount
Bedminster Twp Municipal Bldg	\$21,474
Bridgewater Raritan HS Teacher Parking Lot	\$24,561
North Plainfield BOE Somerset School	\$29,616
North Plainfield BOE West End School	\$26,228
Somerset County Parking Deck	\$21,755
Somerset County Joint PW Salt Spreader	\$29,029
Somerset County Votech School-Bldg A	\$23,925
Somerset County Votech School-Bldg F	\$22,483
Warren TWP BOE-Angelo Tomaso ES	\$19,111
Warren TWP BOE-Central ES	\$22,609
Warren TWP BOE-Middle School	\$32,030

[See Power Partners' Proffered Documents on PCOs for Non-Cost Plus Sites.](#)

344. On the Sussex Project, a total of three sites changed by 20% or less and did not otherwise materially change. The three (3) sites did, however, have change orders for additional costs in the following amounts:

SGF Name	Change Order Amount
Byram Lakes Elem/Int School – Roof	\$11,837
Byram Lakes Elem/Int School – Canopy	\$273,547
Newton BOE – Merriam Avenue School	\$6,984

See id.

345. On the Morris project, all sites changed by more than 20% and/or had a material change to layout and/or equipment. Most of the County College of Morris (“CCM”) parking lot canopies each changed by more than 20%. Taken together, as contemplated by the Morris EPC, the overall CCM SGF underwent a material change to the layout and equipment. In addition, the layout and equipment at CCM materially changed.

346. In addition to Power Partners’ direct, Allocated Direct Costs and change order accounting, Power Partners also separately accounted for costs associated with preparation for Hurricane Sandy. The total costs incurred by Power Partners associated with Hurricane Sandy include the following amount for each Project:

Project	Hurricane Costs
Somerset County	\$59,810
Morris County	\$43,286
Sussex County	\$57,349

See Exs. 5657, 5658, 5659.

347. Power Partners also separately tracked the costs associated with the purchase of inventory for all the contemplated SGFs under the EPCs, including contemplated replacement SGFs, which the Project Companies did not offer to Power Partners as required under EPC Article 3.5.2(b). As noted, in anticipation of building the total KW originally contemplated for each project, Power Partners ordered significant panel and other inventory to take advantage of bulk purchasing discounts and to address the long lead-times for panel supply. Power Partners ordered, paid for and stored the inventory in its warehouse and released it when needed for each project.

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348. Based on the Project Companies’ decision in the summer of 2012 to complete replacement sites on the Morris and Sussex projects without offering those sites to Power Partners and the Project Companies’ decision to remove sites from Power Partners’ scope in February 2013, Power Partners had significant panel and other inventory on hand in its warehouse that it could not use. According to the Payment Milestone Schedule in the Morris and Sussex EPCs at Attachment V-B, Power Partner was entitled to be paid for panel inventory once delivered and stored in the warehouse. Power Partners is also entitled to be paid for the panels because the cost of the panels relate to terminated sites for which no replacement site was provided by the Project Companies. [Ex. 399](#) p. 42-43, Article 15.5; [Hearing Ex. 3675](#) pp. 42.43, Article 15.5.

349. The total cost of the inventory on hand for each project is as follows:

Project	Total Inventory
Somerset County (inverters)	\$163,096
Morris County (panels)	\$1,740,522
Sussex County (panels)	\$960,012

See [Hearing Exs. 5657, 5658, 5659](#).

350. After the Project Companies elected to remove sites from Power Partners’ scope of work and failed to provide Power Partners with replacement sites to meet the lost capacities of the dropped sites, Power Partners offered to sell the inventory to the Project Companies for Power Partners’ costs. [See Power Partners’ Proffered Documents on Power Partners’ Offers to Sell Inventory](#).

351. The Project Companies declined to purchase the inventory at Power Partners’ costs. Id. Power Partners is seeking damages for the cost of the inventory in

accordance with the Milestone Payment Schedules in each EPC and the terminated site provisions of Article 15.5 of the EPCs.

352. Between February 2012, when the negotiations of the “Grand Deal” began, and September 2012, after the negotiations of the “Grand Deal” and numerous other issues on all three Projects ended, Power Partners and the Project Companies discussed price adjustments for the changing SGFs but did not reach agreement.

353. Beginning in September 2012, Power Partner submitted AFPs in which Power Partners reserved rights to seek the Contract Price adjustments contemplated by the EPCs because the parties did not agree on the prices for SGFs that either materially changed or that changed in capacity by more than 20%.

354. In October 2012, Power Partner again submitted payment applications which continued to reserve rights to seek all Contract Price adjustments contemplated by the EPCs.

355. In November 2012, Power Partner submitted, among other requests, proposed Change Orders to the Project Companies. In the November proposed Change Orders (“PCOs”), Power Partners noted that the Contract Prices for those sites are “TBD,” because as of the dates Power Partners submitted those PCOs, Power Partners did not know all the direct and Allocated Direct Costs that would be incurred for those SGFs. [See Power Partners’ Proffered Documents on PCOs for Cost-Plus SGFs.](#)

356. The Project Companies responded to the PCOs by claiming that any price adjustments for purposes of progress payments would be according to Attachment XVIII-B of the EPCs, “with a final ‘true-up’ when the final price adjustment has been agreed.”

Id.

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357. In February 2013, Power Partners submitted Revised PCOs, which included Contract Price adjustments that were based on actual costs incurred for the direct cost-plus SGFs plus estimated costs to complete those sites.

358. By April 2013, Power Partners had incurred substantially all of its costs in connection with the design and construction of the SGFs. Subsequent to April 2013, Power Partners continued to incur costs but at a much smaller rate and by the end August 2013, Power Partners had ceased incurring costs on the SGFs.

359. In October 2013, Power Partners submitted its Final Applications for Payment on all three Projects. The Final Applications for Payment contained a site-by-site break down of the EPC price adjustments set forth in Section 8.4.2 and Attachment VIII-B of each EPC.

360. During the hearings, Power Partners presented a site-by-site analysis of the EPC price adjustment mechanism for each SGF. For sites that changed by more than 20% or that materially changed, Power Partners presented the direct costs for each SGF, the Allocated Direct Costs for each site, and the estimated costs to complete those sites (which its project managers compiled). In accordance with Section 8.4.1 of the EPCs, Power Partners then multiplied the sum of those three elements of cost by 10%, which results in an adjusted Contract Price by site pursuant to Sections 8.4.2. and 8.4.1 of the EPCs (“Cost Plus Sites”).

361. The changes in the design and construction to Somerset SGF #2 Clarence Dillon Library, #13 Montgomery BOE Lower Middle School, #16 East End School, #42 Bayberry ES; Morris SGF #23 Morris Community College Parking Lots (1, 2, 5, 6, 7, 8);

Sussex SGF #6 Frankford Township School while resulting in changes of less than 20% in KW capacity were all material changes under Article 8 of the EPC.

362. In addition to the Cost Plus Sites, Power Partners calculated the adjusted Contract Prices for sites that did not materially change and that changed in kW capacity by less than 20% (“Non-Cost Plus Site”). In connection with the Non-Cost Plus Sites, Power Partners calculated the final installed kW capacities for each site by the pricing mechanism in Attachment XVIII-B of each EPC.

363. For each of the Non-Cost Plus Sites, Power Partners calculation of price is virtually identical to the Project Companies’ calculations for those sites in its 1603 Applications. [See Power Partners’ Proffered Documents on 1603 Grant Applications and Award Letters.](#)

364. For the Non-Cost Plus Sites, Power Partners also added any disputed change order amounts for additional costs incurred for those sites.

365. In addition to the Cost Plus Sites and Non-Cost Plus Sites, Power Partners is requesting all costs incurred in connection with “terminated sites.” Power Partners spent funds principally for engineering and designs for many sites that dropped or for which the Project Companies elected to remove from Power Partners’ scope.

366. Power Partners then calculates the total unpaid Contract Price pursuant to Articles 15.3 and 15.5 by deducting the payments made by the Project Companies and Power Partners’ estimated costs to complete the sites it constructed on the date Power Partners’ terminated the EPCs. Finally, Power Partners adds 10% to the unpaid Contract Prices for each Project, which results in a total claims as follows:

Project	EPC 15.3 Amount Claimed Due
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Somerset	\$30,936,363
Sussex	\$18,148,278
Morris	\$28,251,342

367. The Project Companies originally asserted numerous categories of “performance” and alternative theories of delay damages ranging between \$54 and \$60 million. During the course of the Arbitration, Power Partners filed several motions seeking to bar or exclude certain categories of damages arguing that the claimed damages are barred as a matter of law.

368. As a result of several interim rulings during the course of the Arbitration, the Panel excluded certain categories of the Project Companies’ damages. On January 23, 2014, the Panel issued an Interim Order wherein the Panel barred as a matter of law the Project Companies claimed losses of accelerated depreciation and 100% bonus depreciation tax benefits. The Panel found that Section 7.2 of the three EPCs set forth the “sole and exclusive measure of damages with respect to any” failure of Power Partners “to complete any SGF by its Guaranteed Substantial Completion Date.” Interim Order at p. 2. As a result of the January 23, 2014, Interim Order, the Panel struck \$7,818,374, \$3,427,265, and \$2,527,896 or a total of \$13,773,535 from the Project Companies’ asserted damages.

369. On March 7, 2014, the Panel issued another Interim Order wherein the Panel barred, among other things, the Project Companies’ claims for the cost of drawing reviews, costs of inspecting and commissioning SGFs, costs of providing As-Built drawings and obtaining utility permissions to operate because these expenses are barred

by the consequential damages provisions in Article 12.3 of each EPC. As a result of this ruling, the Panel struck a total of \$306,804 of the Project Companies' claims.

370. In the March 7, 2014, Interim Order, the Panel also struck the Project Companies' claims for the alleged decrease in value for Solectria inverters in lieu of PV Powered inverters. The Panel ruled that the Project Companies did not meet their burden of proof to establish any damage for the installation of the installed Solectria inverters. As a result of this determination, the Panel struck an additional \$844,077 of alleged damages.

371. The Panel also tentatively granted Power Partners' motion to strike the Project Companies' claims for Power Partners' subcontractors' lien claims because the Panel does not believe that a cognizable legal claim by the subcontractors against the Project Companies exists under either set of liens filed in New Jersey. Interim Order at p. 3. The Panel did, however, request that the parties present what they believe their liability or exposure is to Power Partners' subcontractors. March 7, 2014 Interim Order at ¶C. Based on the tentative ruling, the Project Companies' subcontractor lien claims in the amount of \$6,235,063 will also be struck because the Project Companies are not in contractual privity with Power Partners' subcontractors, and any municipal liens filed by Power Partners' subcontractors attach only, if they attach at all, to the funds due from the Project Companies to Power Partners. The right of any party to enforce liens in these Projects is the subject of the ongoing New Jersey litigation.

372. Based on the Panel's Interim Order dated March 7, 2014, the Project Companies' claims for additional costs to build the remaining SGFs, cost to complete SGFs constructed by Power Partners, and for the alleged decrease in value of the SGFs

based on the installation of zone monitoring in lieu of string monitoring are subject to the Project Companies' ability to identify specific evidence in the record to establish actual damages and costs of building the sites in 2013. The Panel specifically requested that the Project Companies point to record evidence that "establish actual cost increases over contractual price (i.e., invoices, bids, supplier price lists, subcontractor estimates)." Interim Order ¶ 3.

373. In addition, the Project Companies cannot identify evidence in the record to establish that the Project Companies' costs to build the remaining sites in 2013 were greater than any contractual price that may have been set for those sites. Moreover, the Project Companies' claim for additional costs related to the inability to secure certain Canadian Solar panels is also unsupported by the record. The Project Companies did not establish that Canadian Solar panels are not available. In fact, Power Partners has several thousand such panels in its warehouse. The Project Companies have also failed to establish that different rated panels cannot be included on an inverter. Rather, the evidence establishes that different panels could be and have been included on the same inverters on these Projects and others.

374. As such, the Project Companies have not met their burden of proof concerning the additional costs to build remaining sites, the alleged decrease in value for the use of string monitoring and the cost to complete the Power Partners' SGFs in the respective amounts of \$5,907,088, \$706,759, and \$541,323.

375. As a result of the Interim Orders, the Panel has struck and tentatively struck a total of \$20,852,675 of the Project Companies' claims and has also struck all

theories of alternative delay damages. The Project Companies have also failed to satisfy their burden on other categories of damages totaling \$7,155,170.

376. The Project Companies remaining claims are based on the alleged lost production due to lost kilowatt hours and lost productivity of the SGFs and on liquidated damages. The Project Companies contend that Power Partners is liable to the Project Companies because the EPCs require Power Partners to guaranty certain kilowatt hours per system and that the systems constructed by Power Partners are not producing the contemplated hours in the Proposals submitted by Power Partners and SunLight Capital.

377. The Project Companies’ liquidated damages claims are calculated under numerous scenarios. Under one scenario, the Project Companies simply multiply 15%, which is the liquidated damages cap in the EPCs, by their calculation of total adjusted Contract Price, which they calculate by multiplying the kW capacity installed at each SGF times the Attachment XVIII-B price for each site. The Project Companies alternative theory is to multiply 15% by the total original EPC prices for each Project. Finally, the Project Companies contend that the liquidated damages cap of 15% does not apply because Power Partners’ willfully breached the EPCs and therefore Power Partners is liable for liquidated damages through April 25, 2014, without the benefit of any extension.

378. The Project Companies remaining claims for damages that the Panel needs to address include the following categories:

Claim Category	Somerset	Morris	Sussex	Total
<u>Performance Damages</u>				
NPV Lost kWh/Lost Productivity	\$1,312,472	\$388,713	\$1,201,988	\$2,903,173

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<u>Liquidated Damages</u>				
LDs Cap on PPM Base EPC	\$3,887,722	\$3,247,677	\$1,989,154	\$9,124,553
Add'l LDs Cap on PPM Orig Price	\$ 460,391	\$2,152,712	\$1,971,401	\$4,584,505
Willful Delay Damages	\$1,849,826	\$2,638,729	\$1,855,289	\$6,343,843
Total Remaining Claims	\$7,510,411	\$8,427,831	\$7,017,832	\$22,956,074

379. In their opening trial brief, the Project Companies included a chart at page 38 of their brief that contains their calculation of what they contend is the minimum amount due to Power Partners under the EPCs. According to the chart, the Project Companies assert that the minimum amount due Power Partners for each project is as follows:

Category of Amount Due	Somerset	Morris	Sussex	Total
EPC Price (adjusted for kW)	\$25,918,149	\$21,651,183	\$13,261,024	\$60,830,356
1603 Panels Paid for by SLG	\$525,375	\$1,435,819	\$1,274,724	\$3,235,918
Deck Monitoring Change Order	\$48,279	\$	-	\$
Deck Weather Station Change	\$122,955	\$	-	\$
Bryce Penta Fasteners	\$20,320	\$	-	\$
Project Companies' EPC Prices	\$26,635,078	\$23,087,002	\$14,535,748	\$64,257,828

Less: Amounts Paid to PPM	(\$9,268,786)	(\$12,305,647)	(\$7,711,488)	(\$29,285,921)
SunLight's Net Amount Due PPM	\$17,366,292	\$10,781,355	\$6,824,260	\$34,971,907

[Hearing Ex. 4878.](#)

380. The parties agree on the 1603 Panels paid for by Project Companies, the Deck Monitoring Change Order, the Deck Weather Station Change Order, the Bryce Penta Fastners Change Order and the amounts paid to Power Partners to date.

381. The Project Companies calculate the EPC Prices per SGF without regard to EPC Sections 8.4.2, which provides pricing for SGFs that undergo changes in kW by more than 20% or otherwise materially change. The Project Companies' "EPC Price (adjusted for kW)" is the Project Companies' calculation of the adjusted EPC price based on the kW capacities installed at each SGF constructed by Power Partners multiplied by the Attachment XVIII-B prices. Power Partners' calculation for the sites that materially changed or that changed by more than 20% is based on Direct Costs as defined in the EPCs plus 10% pursuant to EPC Sections 8.4.2 and 8.4.1.

382. The Project Companies also reject the change orders in the gross amount of \$565,189 submitted for sites that did not materially change or changed by less than 20%, denying any obligation to pay Power Partners for costs it incurred for unused panel and inverter inventory, deny Power Partners' costs, for engineering at the terminated sites or for Hurricane Sandy expenses.