

# FORM

[DATE]

[COUNTERPARTY LEGAL NAME]

[COUNTERPARTY ADDRESS]

Attn: [NAME OF INDIVIDUAL]

**Re: Mutual Confidentiality Agreement**

Ladies and Gentlemen:

In connection with the Request for Qualifications (the “**RFQ**”) for “Qualified Lenders” for the program of the City of New York (the “**City**”) known as the “NYC Accelerator, PACE financing program” (the “**Program**”), certain information and materials (all such information and materials, collectively the “**Application**”) may be provided by [FULL LEGAL NAME OF COUNTERPARTY], a [NAME OF STATE] [TYPE OF ENTITY] (the “**Applicant**”) to the New York City Energy Efficiency Corporation, a New York not-for-profit corporation (“**Administrator**”) or by Administrator to Applicant. The party hereto disclosing Confidential Information (as defined below) is also referred to herein as the “**Disclosing Party**” and the party hereto receiving such information is also referred to herein as the “**Receiving Party.**”

**1. Confidential Information.** For purposes of this Mutual Confidentiality Agreement (this “**Agreement**”), the term “**Confidential Information**” means all non-public, confidential or proprietary information concerning the Disclosing Party (including, without limitation, data, reports, interpretations, forecasts, records and all other materials containing or otherwise reflecting information concerning the Disclosing Party), that is furnished in writing by or on behalf of the Disclosing Party to the Receiving Party on or after the date of this Agreement in connection with the RFQ and is identified as confidential; provided, that the term “Confidential Information” does not include information which: (a) is or becomes generally available to the public through no breach hereof by the Receiving Party; (b) is obtained by the Receiving Party on a non-confidential basis; provided, that the source of such information was not known, by the Receiving Party, to be legally bound to maintain the information as proprietary or confidential; (c) was known to the Receiving Party prior to its disclosure to the Receiving Party without any obligation to keep it confidential; or (d) is the subject of a written agreement whereby the Disclosing Party consents to the use or disclosure of such Confidential Information.

**2. Protection of Confidential Information.** Each party hereto agrees to use the Confidential Information solely for the purpose of submitting or evaluating the Application, to protect such information from disclosure and not to disclose such information to anyone other than its Representatives (as defined below) in accordance with the terms of this Agreement. Each party hereto shall, at a minimum, protect the Confidential Information in the same manner as it protects its own proprietary or confidential information; and in no event using less than reasonable care.

**3. Exceptions.** (a) Notwithstanding anything to the contrary contained herein, either Receiving Party may disclose Confidential Information to: (i) its affiliates (if any) and its and their directors, officers, partners, principals, employees, agents, legal counsel, and other representatives and advisors (such persons that actually receive Confidential Information are collectively referred to herein as, the “**Representatives**”) who the Receiving Party determines have a business-related need to have access to such Confidential Information in connection with the Application or the RFQ; provided, that such Representatives are informed by the Receiving Party of the confidential nature of the Confidential Information and agree to treat such information in a manner consistent with the terms of this Agreement; (ii) the City or any other governmental authority, agency or regulatory body having or claiming to have authority to regulate or oversee any aspect of Administrator’s business or that of its Representatives in connection with the exercise of such authority or claimed authority; and (iii) any individual or entity, to the extent necessary to enforce any right or remedy or in connection with any claims asserted by or against either party to this Agreement or its respective Representatives or against any other person or entity involved in the submittal or review of the Application or the administration of the Program.

(b) If the Receiving Party or any of its Representatives is required or ordered (orally or in writing, by interrogatory, court order, subpoena, deposition, administrative proceeding, inspection, audit, civil investigatory demand or other legal, governmental or regulatory process) to disclose any Confidential Information, the Receiving Party shall, to the extent permitted by applicable law, give the Disclosing Party prompt advance written notice thereof so that the Disclosing Party may seek (at its sole cost and expense) a protective order or other appropriate remedy; provided, that if the Receiving Party or any such Representative is required or ordered to disclose any such information, disclosure pursuant to such requirement or order may be made by the Receiving Party or its Representative without liability hereunder. However, any such disclosure will be limited in scope to that information that is so required pursuant to such order or other such requirement.

(c) Notwithstanding anything to the contrary contained herein, Confidential Information provided to Administrator may be subject to applicable freedom of information laws (“**FOIL**”) when Administrator, in its sole discretion, determines the information requested does not fall into one of FOIL's exceptions to disclosure.

**4. Publicity.** The parties agree not to issue or release, for publication, any articles or advertising or publicity matter relating to this Agreement, the Program, the RFQ or the Application which mention or imply the name of the other party hereto or any of its Representatives, or the subject matter hereof, unless prior written consent is granted by the other party hereto, except such disclosure as may be required by law, judicial or administrative process, in which case the provisions of Paragraph 3 above shall apply.

**5. Term; Return or Destruction of Materials.** (a) The term of this Agreement commences as of the date first set forth above and continues in full force and effect until the earlier of (i) the date on which Applicant (or an appropriate affiliate thereof) and Administrator enter into a Master Lender Agreement (“**Master Lender Agreement**”) and Applicant (or an appropriate affiliate

thereof) becomes a qualified lender in the Program, or (ii) the first anniversary of the date first set forth above.

(b) If either party hereto elects not to proceed with further discussions or negotiations concerning the Program, upon the Disclosing Party's written request (email is acceptable), the Receiving Party shall, subject to applicable law and Administrator's document retention policies and procedures, promptly deliver to the Disclosing Party or destroy (to the extent commercially reasonable and technologically feasible), any Confidential Information, including copies thereof, which have been furnished to a party hereto pursuant to this Agreement. Confidential Information not delivered or destroyed pursuant to this Part (b) of Paragraph 5 shall be retained by the Receiving Party or its Representatives in accordance with the terms of this Agreement for the duration of the term hereof.

**6. Injunctive Relief.** It is agreed that the unauthorized disclosure or use of any Confidential Information may cause immediate or irreparable injury to the Disclosing Party, and that the Disclosing Party may not be adequately compensated for such injury in monetary damages. The Receiving Party therefore acknowledges and agrees that, in such event, in addition to all other remedies available at law or in equity, the Disclosing Party may, at its sole cost and expense, seek equitable relief, including (without limitation) in the form of temporary or permanent injunction or orders for specific performance, to prevent such unauthorized disclosure or use, or threat of disclosure or use.

**7. No License.** No license to either party hereto, under any trademark, patent, copyright, mask work or any other intellectual property right, is either granted or implied by the disclosure of Confidential Information hereunder. The fact that the Disclosing Party discloses Confidential Information to the Receiving Party shall not be deemed to constitute any representation, warranty, assurance, guarantee or inducement by the Disclosing Party to the other of any kind with respect to the Confidential Information, including (without limitation) that use thereof will not infringe any trademarks, patents, copyrights, mask work or any other intellectual property rights, or other rights of third persons or of the Disclosing Party.

**8. Limit on Obligations.** The parties hereto acknowledge that this Agreement does not obligate either party hereto to enter into any further agreement or to proceed with or participate in the Program or refrain from entering into any agreement or negotiations with any other individual or entity.

**9. City Not a Party.** This Agreement does not create any privity of contract between Applicant and the City. The City shall have no liability under this Agreement, including by virtue of any act, omission, negligence or obligation of either party hereto.

**10. Choice of Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

**11. WAIVER OF JURY TRIAL.** ANY RIGHTS TO TRIAL BY JURY WITH RESPECT TO ANY CLAIM, ACTION OR PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT ARE HEREBY EXPRESSLY AND IRREVOCABLY WAIVED BY THE PARTIES HERETO.

**12. FORUM SELECTION.** ANY AND ALL CLAIMS ASSERTED BY OR AGAINST ADMINISTRATOR ARISING UNDER THIS AGREEMENT OR RELATED HERETO SHALL BE HEARD AND DETERMINED EITHER IN THE FEDERAL COURTS OF THE SOUTHERN DISTRICT OF NEW YORK, OR IN THE NEW YORK STATE COURTS LOCATED IN THE CITY AND COUNTY OF NEW YORK.

**13. No Construction Against Drafter.** Each party hereby represents and warrants to the other party that it, together with its counsel, has had the opportunity to review and participate in the drafting and negotiation of this Agreement. As such, this Agreement shall be deemed to be the product of both parties and any rules of construction relating to interpretation against the drafter of an agreement shall not apply to this Agreement and are expressly waived to the maximum extent permitted by applicable law.

**14. General Provisions.** This Agreement (a) contains the full and complete understanding of the parties with respect to the subject matter hereof, and supersedes all prior representations and understandings, whether oral or written with respect to such subject matter; (b) shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that Applicant shall not assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of Administrator; (c) shall not be amended or modified, and no provision herein may be waived, in whole or in part, except by written agreement signed by the parties hereto and if any provision of this Agreement is determined by competent judicial or administrative authority to be prohibited by law, then such provision shall be ineffective to the extent of such prohibition, without invalidating the remaining provisions of this Agreement; and (d) and any waiver or amendment hereto, may be executed by the parties hereto in separate counterparts, all of which shall together constitute one and the same instrument. Any signature (including any signature delivered by e-mail transmission in “.pdf” format and any electronic symbol or process attached to, or associated with, this Agreement or any other record related hereto that is adopted or approved by an individual with the intent to sign, authenticate, approve or accept this Agreement) to this Agreement or to any waiver or amendment hereto, shall have the same legal validity and enforceability as a manually executed signature or use of a paper-based recordkeeping system to the fullest extent permitted by applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any similar state law based on the Uniform Electronic Transactions Act, and the parties hereto hereby waive any objection to the contrary.

*[signature page follows]*



If the foregoing accurately reflects the terms of our understanding with respect to the matters addressed herein, please execute and return to the undersigned the enclosed copy of this Agreement.

Very truly yours,

**New York City Energy Efficiency Corporation**

By: \_\_\_\_\_  
Curtis Probst  
President

Accepted and agreed to

\_\_\_\_\_, 20\_\_\_\_  
(month) (day)

**[FULL LEGAL NAME OF COUNTERPARTY]**

By: \_\_\_\_\_  
Name: [NAME]  
Title: [TITLE]