

2.12 23-1614 Amendment to the Agreement with West Tambo Clean Power II, LLC for Long Term Renewable Energy.

## Legislation Text

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**File #: 23-1614, Version: 1**

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**Amendment to the Agreement with West Tambo Clean Power II, LLC for Long Term Renewable Energy.**

Adopt a resolution authorizing the Director of the Energy Department or her designee to execute a second amendment to the June 8, 2022 agreement with West Tambo Clean Power II, LLC, a subsidiary of Renewable America, LLC, to buy renewable energy, renewable energy credits, and attributes associated with a solar photovoltaic facility, in order to increase the term from 15 years to 20 years; delay the in-service date from April 30, 2023 to June 1, 2024; increase the development security and the commercial operation date delay damages; reduce the price by 15.7% if West Tambo obtains a 50% investment tax credit instead of the 40% investment tax credit it had expected; and make other conforming changes in consultation with the City Attorney, and resulting in an agreement with an estimated annual amount of \$409,000 and a not-to-exceed amount of \$8,180,000, to be paid solely from the San José Clean Energy Operating Fund, subject to the annual appropriation of funds.

CEQA: Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment. (Energy)



COUNCIL AGENDA: 11/28/23  
FILE: 23-1614  
ITEM: 2.12

## Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Lori Mitchell

**SUBJECT: LONG TERM RENEWABLE  
ENERGY AGREEMENT WITH WEST  
TAMBO CLEAN POWER II, LLC**

**DATE:** November 6, 2023

Approved

Date

11/15/23

### **RECOMMENDATION**

Adopt a resolution authorizing the Director of the Energy Department or her designee to execute a second amendment to the June 8, 2022 agreement with West Tambo Clean Power II, LLC, a subsidiary of Renewable America, LLC, to buy renewable energy, renewable energy credits, and attributes associated with a solar photovoltaic facility, in order to increase the term from 15 years to 20 years; delay the in-service date from April 30, 2023 to June 1, 2024; increase the development security and the commercial operation date delay damages; reduce the price by 15.7% if West Tambo obtains a 50% investment tax credit instead of the 40% investment tax credit it had expected; and make other conforming changes in consultation with the City Attorney, and resulting in an agreement with an estimated annual amount of \$409,000 and a not-to-exceed amount of \$8,180,000, to be paid solely from the San José Clean Energy Operating Fund, subject to the annual appropriation of funds.

### **SUMMARY AND OUTCOME**

This memorandum requests authority to enter into a second amendment of the June 8, 2022 agreement with West Tambo Clean Power II, LLC (West Tambo). San José entered into the agreement with West Tambo pursuant to the Disadvantaged Communities-Green Tariff (DAC-GT) program authorized by the California Public Utilities Commission (CPUC). Through the program, San José Clean Energy (SJCE) offers discounted renewable power to low-income customers in disadvantaged communities. The program requires utilities and community choice aggregators offering the program to obtain power from a new solar facility located in a qualifying disadvantaged community after an interim period. The program gives subsidies to utilities and community choice aggregators to make solar energy from the project available at a 20% bill discount to income-qualified, residential customers in disadvantaged communities who may be unable to install solar on their roof.

The Energy Department contracted with West Tambo for construction of a new solar project and commenced offering the DAC-GT program to qualifying SJCE customers with solar power bought from Marin Clean Energy until the new project comes on-line. West Tambo seeks an amendment to the agreement to qualify for additional financial incentives made available by the federal Inflation Reduction Act and to mitigate the risk of not obtaining the additional incentives. Amending the agreement will allow the Energy Department to continue offering the DAC-GT program without having to seek an alternative new solar project with a later in-service date.

## **BACKGROUND**

In June 2018, the CPUC issued D.18-06-027, adopting three new programs to promote the installation of renewable energy generation in disadvantaged communities, as directed by the California Legislature in Assembly Bill 327. One of these programs is the DAC-GT program, which provides 100% solar energy and a 20% discount on electricity bills for income-qualifying customers who live in disadvantaged communities. This discount is in addition to customer discounts received through the California Alternate Rates for Energy or Family Electric Rate Assistance programs. The CPUC allocated 1.4 megawatts of energy for an SJCE DAC-GT program, which can provide renewable power to approximately 500 SJCE customers. The DAC-GT program is fully funded by the CPUC through California greenhouse gas allowance proceeds and public purpose programs funds.

On November 17, 2020, City Council authorized the Energy Department to submit an Advice Letter to the CPUC to implement a DAC-GT program for SJCE. The CPUC approved this program on April 15, 2021. The Energy Department launched the SJCE DAC-GT program on November 8, 2021, after contracting to buy qualifying solar power from Marin Clean Energy on an interim basis. While it allows initial operation using this interim approach, DAC-GT program rules require construction of a new solar project in a disadvantaged community within Pacific Gas and Electric's service territory to serve SJCE customers.

On September 1, 2021, the Energy Department issued a Request for Offers for a power purchase agreement to sell solar energy from a newly constructed power plant to San José for the SJCE DAC-GT program. The Energy Department selected West Tambo to construct a small solar facility in Merced County, as the Energy Department did not receive any bids for projects in San José. On June 8, 2022, the Energy Department Director signed an agreement with West Tambo with an expected in-service date of April 30, 2023.

On August 16, 2022, the President of the United States signed the Inflation Reduction Act of 2022, which included increases in the investment tax credit available for solar power projects meeting certain requirements.

On April 24, 2023, the Energy Department Director signed a first amendment to the June 8, 2022 agreement with West Tambo. The amendment increased the expected volume from the project by 23%, reduced the per megawatt hours price by 3%, reduced the liability limit on the umbrella

insurance requirement, confirmed a delay in the guaranteed commercial operation date of 180 days due to force majeure, and increased by 30 days the days by which West Tambo can miss the commercial operation date before San José can terminate the agreement.

On August 10, 2023, the United States Department of the Treasury and the Internal Revenue Service issued rules setting forth the detailed requirements for increases to the investment tax credit pursuant to the Inflation Reduction Act of 2022. Three details affect the West Tambo project.

- The timelines for applying for and obtaining the investment tax credit increases are such that West Tambo would not be eligible if the project were on-line in October 2023 (the revised guaranteed commercial operation date).
- The rules for the investment tax credit increase made West Tambo eligible for a 20% increase rather than the 10% increase it had expected.
- There is a megawatt cap on the total amount of investment tax credit increases that will be made available for the category West Tambo could qualify for (at least 50% of project beneficiaries are low-income households.)

West Tambo is again requesting San José amend the power purchase agreement.

On November 2, 2023, the City Manager's Risk Oversight Committee recommended that the Energy Department submit to City Council for approval a resolution granting the Director of the Energy Department authority to amend the West Tambo agreement as described in the resolution section above.

## **ANALYSIS**

West Tambo seeks an extension of the agreement from 15 years to 20 years. West Tambo states that it requires the longer agreement term to mitigate the risk of not obtaining an increased investment tax credit if the federal funds available for the increase are exhausted before West Tambo gets an allocation. West Tambo proposes that if West Tambo receives an investment tax credit of 50%, the price will be reduced by 15.7%.

West Tambo also seeks an in-service date delay to June 1, 2024, in order to qualify for the investment tax credit increase.

In exchange for these amendments, the Energy Department obtained West Tambo agreement to:

- Increase the development security deposit amount;
- Increase daily commercial operation delay damages;
- Decrease the period available for commercial operation delays; and
- File a timely application for a 50% investment tax credit and pursue it diligently.

### ***Benefits of the Agreement***

The City of San José is focused on advancing equity within its programs and services. Implementing a DAC-GT program in San José is an important step in increasing access to 100% renewable energy generation among customers that otherwise cannot afford it. Providing this option to SJCE customers will benefit people who rent their home, whose home is unsuitable for solar, or otherwise cannot afford access to solar energy.

### ***Project Terms***

Estimated annual cost: \$409,000

Maximum total contract cost: \$8,180,000

Term: 20 years

Expected Commercial online date: June 1, 2024

See the redacted agreement posted on GILES for more information on the agreement.<sup>1</sup> See the **Attachment** - Redacted Draft Amendment - for more information on the amendment to the agreement.

### ***Alternative Projects***

The DAC-GT program requires that San José contract for a new solar facility to be built in a disadvantaged community in Pacific Gas and Electric's service area. There are limited projects available that meet the DAC-GT requirements and replacing the existing agreement with another would result in substantial further in-service date delays.

### ***Staff Recommendation***

Staff recommends increasing the term of the West Tambo agreement, providing for a price reduction if West Tambo obtains a 50% investment tax credit, delaying the guaranteed commercial operation date, and making the other changes outlined in the resolution part of this memorandum.

### ***Climate Smart San José Analysis***

Proceeding with the agreement with West Tambo allows SJCE to continue to participate in the DAC-GT program. Through the program, SJCE will continue to offer solar power to SJCE's low-income customers living in disadvantaged communities at a discounted price, thus increasing demand for renewable energy.

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<sup>1</sup> <https://records.sanjoseca.gov/Contracts/OC-003743-000.pdf>

### **EVALUATION AND FOLLOW-UP**

No additional follow-up is expected at this time.

### **COST SUMMARY/IMPLICATIONS**

The agreement with West Tambo, as amended, will cost an estimated \$409,000 annually, and \$8,180,000 over the life of the agreement. The amendment increases the total not-to-exceed cost by \$2,045,000 from the prior not to exceed cost of \$6,135,000.

Funding for the agreement in the San José Clean Energy Fund (Fund 501) in 2024 is included in the 2023-2024 Adopted Operating Budget, and funding in future years will be brought forward as part of future budget processes. Funding for the agreement is subject to City Council-approved appropriation of funds. The Energy Department recommends SJCE customer rates to City Council on an annual basis sufficient to meet the SJCE's costs including power agreement costs.

### **COORDINATION**

This memorandum has been coordinated with the City Attorney's Office and the City Manager's Budget Office.

### **PUBLIC OUTREACH**

This memorandum will be posted on the City's Council Agenda website for the November 28, 2023 City Council meeting.

### **COMMISSION RECOMMENDATION AND INPUT**

No commission recommendation or input is associated with this action.

### **CEQA**

Not a Project, File No. PP17-003. Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

HONORABLE MAYOR AND CITY COUNCIL

November 6, 2023

**Subject: Long Term Renewable Energy Agreement with West Tambo**

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**PUBLIC SUBSIDY REPORTING**

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/

LORI MITCHELL

Director, Energy Department

For questions, please contact Lori Mitchell, Director of Energy Department, at [lori.mitchell@sanjoseca.gov](mailto:lori.mitchell@sanjoseca.gov) or (408) 535-4880.

**ATTACHMENT**

ATTACHMENT – Redacted Draft Amendment



**SECOND AMENDMENT TO  
DISADVANTAGED COMMUNITIES GREEN TARIFF (DAC-GT)  
RENEWABLE POWER PURCHASE AGREEMENT**

THIS SECOND AMENDMENT TO DISADVANTAGED COMMUNITIES GREEN TARIFF (DAC-GT) RENEWABLE POWER PURCHASE AGREEMENT (this “Second Amendment”), executed as of the last dated signature on the signature page hereto (the “Effective Date”), by and between the CITY OF SAN JOSE, a California municipal corporation (formerly referred to as a California municipality) (“Buyer”), and WEST TAMBO CLEAN POWER II LLC, a Delaware limited liability company (“Seller”). Buyer and Seller may sometimes hereinafter be referred to individually as “Party” and collectively as the “Parties.”

**RECITALS**

**WHEREAS**, the Parties entered into that certain Disadvantaged Communities Green Tariff (DAC-GT) Renewable Power Purchase Agreement, dated May 8, 2022 and entered into that certain First Amendment to Disadvantaged Communities Green Tariff (DAC-GT) Renewable Power Purchase Agreement, dated April 24, 2023 (together, the “Agreement”); and

**WHEREAS**, the Parties hereby desire to amend the Agreement as set forth herein in this Second Amendment, in accordance with section 19.2 of the Agreement;

**NOW THEREFORE**, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

**AGREEMENT**

**1. Amendments to the Agreement.**

- a. The Cover Sheet of the Agreement is hereby amended as follows:
  - i. The ‘Milestones’ is hereby amended by deleting “4/30/23” for the ‘Expected Commercial Operation Date’ and replacing it with “6/01/2024”.
  - ii. The ‘Delivery Term’ is hereby amended by deleting “Fifteen (15) Contract Years” and replacing it with “Twenty (20) Contract Years”.
  - iii. The Expected Energy table is hereby deleted in its entirety and replaced with the following table:

Contract Year	Expected Energy (MWh)
---------------	-----------------------

1 - 20	
--------	--

- iv. The 'Contract Price' is hereby amended to read, "shall be \$ [REDACTED] unless Seller qualifies for a total ITC rate of 50%, in which case it shall be \$ [REDACTED]"
  - v. The 'Development Security and Performance Security' is hereby amended by deleting "\$ [REDACTED]" for Development Security and replacing it with "\$ [REDACTED]".
  - b. The Definition of 'COD Delay Damages' set forth in Section 1.1 of the Agreement is amended by deleting the phrase "[REDACTED] (\$ [REDACTED])" and replacing it with the following: "[REDACTED] (\$ [REDACTED])".
  - c. Exhibit B, Section 3 is amended by deleting "[REDACTED]" and replacing it with "[REDACTED]".
2. **CPUC Approval.** Within sixty (60) days after the Effective Date of this Second Amendment, Buyer shall file with the CPUC the appropriate request for CPUC Approval. As requested by Buyer, Seller shall use commercially reasonable efforts to support Buyer in obtaining CPUC Approval. Buyer has no obligation to seek rehearing or to appeal a CPUC decision which fails to approve this Second Amendment or which contains findings required for CPUC Approval with conditions or modifications unacceptable to either Party. Either Party has the right to terminate this Agreement on Notice, which will be effective five (5) Business Days after such Notice is given, if CPUC Approval has not been obtained or waived by Buyer in its sole discretion within one hundred eighty (180) days after Buyer files its request for CPUC Approval and a Notice of termination is given on or before the two hundred tenth (210th) day after Buyer files the request for CPUC Approval. For purposes of this Section 2 only, CPUC Approval means a final and non-appealable order or approval of the CPUC, without conditions or modifications unacceptable to the Parties, or either of them, which approves this Second Amendment in its entirety, including payments to be made by the Buyer. CPUC Approval will be deemed to have occurred on the date that the approval becomes final and non-appealable.
3. **ITC Bonus Rate.**
- a. This Second Amendment is conditioned on Seller having submitted a commercially reasonable application for an ITC rate of 50% within thirty days of having the opportunity to do so and in no event later than November 18, 2023. If Seller has not submitted a commercially reasonable application for an ITC rate of 50% by the date stated in the prior sentence, this amendment shall be null and void unless the parties otherwise agree in writing.

- b. Seller shall diligently pursue obtaining an ITC rate of 50%, including timely making any required submissions, responses, or other communications.
- 4. In the event that Seller qualifies for a total ITC rate of 50%, the 'Contract Price' shall be deleted in its entirety and replaced with the following: "**Contract Price**: shall be \$ [REDACTED]".
- 5. **Development Cure Period.** As set forth in Section 2 of the First Amendment to Disadvantaged Communities Green Tariff (DAC-GT) Renewable Power Purchase Agreement dated April 24, 2023, Seller has already extended both the Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date by [REDACTED] days, which is the maximum extension available under the Development Cure Period, and no further extension shall be granted under the Development Cure Period for any reason, including Force Majeure Event, absent the written agreement of the Parties. For the avoidance of doubt, this second amendment does not change Section 2 of the First Amendment to Disadvantaged Communities Green Tariff (DAC-GT) Renewable Power Purchase Agreement dated April 24, 2023 or restore the Development Cure Period.
- 6. **Miscellaneous.**
  - a. Recitals. The Recitals set forth above herein are accurate and correct and shall be incorporated herein as though fully set forth herein.
  - b. Definitions. All capitalized terms used in this Second Amendment (including the Recitals hereof) and not otherwise defined herein shall have the meanings assigned to them in the Agreement.
  - c. Agreement not Otherwise Affected. Except for the amendments pursuant hereto, the Agreement remains unchanged and in full force and effect and is hereby ratified and confirmed in all respects. The execution and delivery of, or acceptance of, this Second Amendment and any other documents and instruments in connection herewith by either Party shall not be deemed to create a course of dealing or otherwise create any express or implied duty by it to provide any other or further amendments, consents, or waivers in the future.
  - d. Entire Agreement. This Second Amendment and the Agreement (as amended by the First Amendment) constitute the entire agreement and understanding of the Parties with respect to its subject matter and supersede all oral communication or prior writings related thereto.
  - e. Binding Effect. This Second Amendment shall be binding upon, inure to the benefit of and be enforceable by the Parties hereto and their respective successors and assigns.

- f. No Reliance. Each Party hereby acknowledges and confirms that it is executing this First Amendment on the basis of its own investigation and for its own reasons without reliance upon any agreement, representation, understanding or communication by or with the other Party or its agents, representatives or attorneys not set forth within the Agreement or this First Amendment.
- g. Costs and Expenses. Each Party shall be responsible for any costs and expenses incurred by such Party in connection with the negotiation, preparation, execution, and delivery of this Second Amendment and any other documents to be delivered in connection herewith.
- h. Governing Law. THIS FIRST AMENDMENT SHALL BE GOVERNED BY, CONSTRUED, AND ENFORCED UNDER THE LAWS OF THE STATE OF CALIFORNIA WITHOUT GIVING EFFECT TO ITS CONFLICTS OF LAW PRINCIPLES THAT WOULD REQUIRE THE APPLICATION OF THE LAWS OF ANOTHER STATE.
- i. Amendments. This Second Amendment may not be modified, amended, or otherwise altered except by written instrument executed by the Parties' duly authorized representatives.
- j. Interpretation. This Second Amendment is the result of negotiations between and has been reviewed by counsel to each of the Parties and is the product of all Parties hereto. Accordingly, this First Amendment shall not be construed against either Party merely because of such Party's involvement in the preparation hereof.
- k. Counterparts. This Second Amendment may be executed and delivered in counterparts, all of which taken together shall constitute one and the same instrument. Delivery of an executed signature page of this Second Amendment by electronic mail transmission (including PDF) shall be the same as delivery of a manually executed signature page.
- l. Electronic Signatures. Unless otherwise prohibited by law or Buyer policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a writing as set forth in Evidence Code Section 1550. The term "electronically signed contract" means a contract that is executed by applying an electronic signature using technology approved by Buyer.

**[Signatures to follow on next page.]**

**[The remainder of this page is intentionally blank.]**

IN WITNESS WHEREOF, the Parties hereto have caused this First Amendment to be duly executed as of the Effective Date.

**SELLER**

**WEST TAMBO CLEAN POWER II LLC,**  
a Delaware limited liability company

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

Approved as to form for Seller:

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

**BUYER**

**CITY OF SAN JOSE,**  
a California municipal corporation

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

Approved as to form for Buyer:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
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3. **ITC Bonus Rate.**
- a. This Second Amendment is conditioned on Seller having submitted a commercially reasonable application for an ITC rate of 50% within thirty days of having the opportunity to do so and in no event later than November 18, 2023. If Seller has not submitted a commercially reasonable application for an ITC rate of 50% by the date stated in the prior sentence, this amendment shall be null and void unless the parties otherwise agree in writing.

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  - a. Recitals. The Recitals set forth above herein are accurate and correct and shall be incorporated herein as though fully set forth herein.
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  - d. Entire Agreement. This Second Amendment and the Agreement (as amended by the First Amendment) constitute the entire agreement and understanding of the Parties with respect to its subject matter and supersede all oral communication or prior writings related thereto.
  - e. Binding Effect. This Second Amendment shall be binding upon, inure to the benefit of and be enforceable by the Parties hereto and their respective successors and assigns.



- f. No Reliance. Each Party hereby acknowledges and confirms that it is executing this First Amendment on the basis of its own investigation and for its own reasons without reliance upon any agreement, representation, understanding or communication by or with the other Party or its agents, representatives or attorneys not set forth within the Agreement or this First Amendment.
- g. Costs and Expenses. Each Party shall be responsible for any costs and expenses incurred by such Party in connection with the negotiation, preparation, execution, and delivery of this Second Amendment and any other documents to be delivered in connection herewith.
- h. Governing Law. THIS FIRST AMENDMENT SHALL BE GOVERNED BY, CONSTRUED, AND ENFORCED UNDER THE LAWS OF THE STATE OF CALIFORNIA WITHOUT GIVING EFFECT TO ITS CONFLICTS OF LAW PRINCIPLES THAT WOULD REQUIRE THE APPLICATION OF THE LAWS OF ANOTHER STATE.
- i. Amendments. This Second Amendment may not be modified, amended, or otherwise altered except by written instrument executed by the Parties' duly authorized representatives.
- j. Interpretation. This Second Amendment is the result of negotiations between and has been reviewed by counsel to each of the Parties and is the product of all Parties hereto. Accordingly, this First Amendment shall not be construed against either Party merely because of such Party's involvement in the preparation hereof.
- k. Counterparts. This Second Amendment may be executed and delivered in counterparts, all of which taken together shall constitute one and the same instrument. Delivery of an executed signature page of this Second Amendment by electronic mail transmission (including PDF) shall be the same as delivery of a manually executed signature page.
- l. Electronic Signatures. Unless otherwise prohibited by law or Buyer policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a writing as set forth in Evidence Code Section 1550. The term "electronically signed contract" means a contract that is executed by applying an electronic signature using technology approved by Buyer.

**[Signatures to follow on next page.]**

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IN WITNESS WHEREOF, the Parties hereto have caused this First Amendment to be duly executed as of the Effective Date.

**SELLER**

**WEST TAMBO CLEAN POWER II LLC,**  
a Delaware limited liability company

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

Approved as to form for Seller:

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

**BUYER**

**CITY OF SAN JOSE,**  
a California municipal corporation

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

Approved as to form for Buyer:

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