

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and the United States Attorney’s Office for District of Puerto Rico, on behalf of the United States Army Corps of Engineers (“USACE”) (collectively the “United States”); and PowerSecure, Inc. (“PowerSecure”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. PowerSecure is a distributed energy infrastructure company headquartered in Durham, North Carolina.

B. The United States contends that it has certain civil claims against PowerSecure. Specifically, the United States contends that when negotiating Contract No. W912EP-18-C-0003 with USACE in October 2017 for the restoration of Puerto Rico’s power grid following Hurricane Maria, PowerSecure failed to disclose certified cost or pricing data as required by Federal Acquisition Regulation (“FAR”) 52.215-21. The United States further contends that PowerSecure’s failure to disclose cost or pricing data regarding the rates that PowerSecure had used on a prior restoration project in 2017 following Hurricane Irma caused USACE to agree to pay approximately \$3.6 million in inflated amounts for labor and equipment (the “L&E Covered Conduct”) and approximately \$2.4 million for basecamp services (the “Basecamp Covered Conduct”). This conduct is collectively referred to throughout this agreement as the Covered Conduct.

C. This Settlement Agreement is neither an admission of liability by PowerSecure nor a concession by the United States that its claims are not well founded.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. PowerSecure shall pay to the United States \$8,400,000 plus interest accrued thereon at the rate of 2.33% per annum from November 1, 2022, and continuing until and including the day before the final payment is made under this Agreement (the "Settlement Amount"), of which \$6,000,000 is restitution, by electronic funds transfer pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice no later than ten days after the Effective Date of this Agreement.

2. Subject to the exceptions in Paragraph 3 (concerning reserved claims) below, and conditioned upon the United States' receipt of the Settlement Amount, the United States:


a. Releases PowerSecure, together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the corporate successors and assigns of any of them, from any civil or administrative monetary claim the United States has for the L&E Covered Conduct under the Truth in Negotiations Act, 10 U.S.C. §2306a; or the common law theories of breach of contract, payment by mistake, and unjust enrichment; and

b. Releases PowerSecure, together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the corporate successors and assigns of any of them, from any civil or administrative monetary claim the United States has for the Basecamp Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; the anti-fraud provision of the Contract Disputes Act, 41 U.S.C. § 7103(c); the Truth in Negotiations Act, 10 U.S.C. §2306a; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

3. Notwithstanding the release given in Paragraph 2 of this Agreement, or any other term of this Agreement, the following claims and rights of the United States are specifically reserved and are not released by this Agreement:


- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability or enforcement right, or any administrative remedy, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;

- f. Any liability of individuals;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due;
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

 4. PowerSecure waives and shall not assert any defenses PowerSecure may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

5. PowerSecure fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that PowerSecure has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

6. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of PowerSecure, and its present or former officers, directors, employees, shareholders, and agents in connection with:

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- (1) the matters covered by this Agreement;
 - (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
 - (3) PowerSecure's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
 - (4) the negotiation and performance of this Agreement;
 - (5) the payment PowerSecure makes to the United States pursuant to this Agreement,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by PowerSecure, and PowerSecure shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, PowerSecure shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by PowerSecure or any of its subsidiaries or affiliates from the United States. PowerSecure agrees that the United States, at a minimum, shall be entitled to recoup from PowerSecure any overpayment

plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine PowerSecure's books and records and to disagree with any calculations submitted by PowerSecure or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by PowerSecure, or the effect of any such Unallowable Costs on the amount of such payments.

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7. This Agreement is intended to be for the benefit of the Parties only.

8. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

9. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

10. This Agreement is governed by the laws of the United States. The exclusive venue for any dispute relating to this Agreement is the United States District Court for the District of Puerto Rico. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

11. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

12. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

13. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

14. This Agreement is binding on PowerSecure's successors, transferees, heirs, and assigns.

15. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

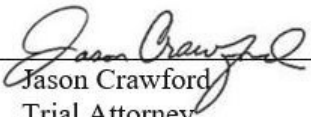
16. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.




[SIGNATURE PAGES FOLLOW]

THE UNITED STATES OF AMERICA

DATED: 11/17/2022

BY: 
Jason Crawford
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

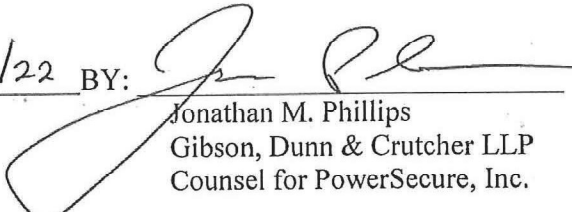
DATED: 11/17/2022

BY: 
David Martorani
Assistant United States Attorney
District of Puerto Rico

POWERSECURE, INC.

11/16/2022
DATED: _____ BY: _____

Eric Dupont
SVP & Chief Development Officer
PowerSecure, Inc.

DATED: 11/16/22 BY: 
Jonathan M. Phillips
Gibson, Dunn & Crutcher LLP
Counsel for PowerSecure, Inc.