

CONSTRUCTION SERVICES AGREEMENT

FOR

SAN MATEO UNION HIGH SCHOOL DISTRICT  
NEW PENINSULA HIGH SCHOOL INCREMENT 1 SITE DEVELOPMENT

Dated as of \_\_\_\_\_, 2019

Between

SAN MATEO UNION HIGH SCHOOL DISTRICT

and

[INSERT]

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## CONSTRUCTION SERVICES AGREEMENT

This Construction Services Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_, 2019, by and between the San Mateo Union High School District, a California School District organized and existing under the laws of the State of California (hereinafter called the "District"), and [insert], a California corporation with its principal place of business at \_\_\_\_\_, California ("Contractor").

### RECITALS

WHEREAS, the District desires to demolish existing concrete building and site improvements. The New Peninsula High School Increment 1 Site Development Work project includes rough grading, including any required import or export of soils; the installation of site utilities, including storm drain, sanitary sewer, fire water and domestic water; electrical main service work in conjunction with PG&E; installation of underground conduits for AT&T and CATV; and installation of cast-in-drilled hole pilings, footings and grade beams, including rebar. This Increment 1 Site Development work is in preparation of the installation of modular classroom buildings at the Site ("New Peninsula High School Increment 1 Site Development Project" or "Project") located at 860 Hinckley Road in Burlingame, California ("Site") and the District has hired \_\_\_\_\_ as the Project architect ("Architect") to prepare plans and specifications for the Project; and

WHEREAS, the District has determined that it is necessary to retain the services of a construction firm to assist in providing constructability and value engineering services related to the plans and specifications for the Project; and

WHEREAS, after review of responses to Request for Proposals, the District has selected Contractor as the firm best qualified to meet the needs of the District in providing such construction services for the Project; and

WHEREAS, California Education Code section 17406 permits the governing board of a school district to let, for a minimum rental of one dollar (\$1) a year, to a person, firm, or corporation real property that belongs to the district if the instrument by which this property is let requires the lessee therein to construct thereon a building for the use of the district during the term of the lease, and provides that title to that building shall vest in the district at the expiration of that term ("Lease-Leaseback"); and

WHEREAS, California Education Code section 17406 provides that a Lease-Leaseback instrument shall be awarded based on a competitive solicitation process to the proposer providing the best value to the school district, taking into consideration the proposer's demonstrated competence and professional qualifications necessary for the satisfactory performance of the services required; and

WHEREAS, in connection with the approval of this Construction Services Agreement, the District will enter into a site lease with Contractor (the "Site Lease"), under which it will lease to Contractor the Site, which constitutes the real property located at 860 Hinckley Road, Burlingame, California, which are necessary to access in order for Contractor to construct the Project; and

WHEREAS, Contractor will lease the Site and the Project back to the District pursuant to a Development and Facility Lease Agreement (the "Facility Lease"), under which the District will be required to make Tenant Improvement Payments to Contractor for the use and occupancy of the Site and Project; and

WHEREAS, at the expiration of the Site Lease and Facility Lease terms, title in all of the Site and the Project shall vest in the District; and

WHEREAS, the District and Contractor desire to enter into this Construction Services Agreement to ensure that the Project will meet the District's expectations prior to the construction of the Project and the Lease of the Project back to the District; and

WHEREAS, Contractor is experienced in construction of the type of improvements included in the Project that is desired by the District and is willing to perform construction work for the District, all as more fully set forth herein.

NOW, THEREFORE, in consideration of the covenants hereinafter contained, the District and Contractor agree as follows:

SECTION 1. **CONTRACTOR'S DUTIES AND STATUS**

Contractor accepts the contractual relationship established between it and the District by this Construction Services Agreement, and Contractor covenants with the District to furnish reasonable skill and judgment in constructing the Project as set forth in the Construction Documents, as defined in Section 2.D. and incorporated herein by reference, for the Project which is described and/or set forth in the Scope of Work attached hereto as Exhibit A. Contractor agrees to furnish efficient business administration and superintendence and to furnish at all times an adequate supply of professionals, workers, and materials and to perform the work appropriately, expeditiously, economically, and consistent with the Construction Services Agreement and Construction Documents as defined in Section 2, paragraphs A and D, below.

SECTION 2. **DEFINITIONS**

- A. **"Construction Services Agreement"** means this Construction Services Agreement, together with attached exhibits, any duly authorized and executed amendments hereto.
- B. **"Construction Services"** means all labor and services necessary for the construction of the Project, and all materials, equipment, tools, supplies and incidentals incorporated or to be incorporated in such construction as fully described in the Construction Scope of Work set forth in Section 8 and Exhibit A. Unless otherwise expressly stipulated, Contractor shall perform all work and provide and pay for all materials, labor, tools, equipment and utilities necessary for the proper execution and completion of the Project shown on the drawings and described in the plans and specifications set forth in Exhibit A.
- C. **"Construction Costs"** means any and all costs incurred by Contractor with respect to the pre-construction services and construction and equipping, as the case may be, of the Project, whether paid or incurred prior to or after the date hereof, including, without limitation, costs for preparation of the Site, the removal or demolition of existing structures, the construction of the Project and related facilities and improvements, and all other work in connection therewith, Contractor's overhead and supervisors' fees and costs directly allocable to the Project, all costs and expenses including any taxes or insurance premiums paid by Contractor with respect to the Property, administrative and other expenses necessary or incident to the Project. The term "Construction Costs", however, excludes property and other taxes related to the Site, as described in Exhibit "A" of the Site Lease. The term "Construction Costs" also excludes Contractor's management fee established in Section 4.A. hereof. The term "Construction Costs" includes all Contractor's costs associated with preparing or generating additional copies of any Construction Documents, as defined below, related to or required for the Project, including preparation or generation of additional plans and specifications for Contractor's subcontractors.
- D. **"Construction Documents"** means the final Division of the State Architect ("DSA") approved drawings, profiles, cross sections, design development drawings, construction drawings, and supplemental drawings based on the plans and specifications and value engineering proposed by Contractor and developed for the Project, including any reference specifications or reproductions prepared by the Architect and specifications approved by the District and the DSA, which show or describe the location, character, dimensions or details of the Project and specifications for construction thereof.

- E. **“Contract Documents”** means those documents which form the entire contract by and between the District and Contractor. The Contract Documents consist of this Construction Services Agreement (including the General Conditions attached hereto as Attachment 1, and by reference incorporated and made part of this Construction Services Agreement), the Request for Qualifications/Request for Proposals, the Construction Documents, the Site Lease, and the Facility Lease.
- F. **“Guaranteed Maximum Price”** or **“GMP”** means the Guaranteed Maximum Price established pursuant to Section 4 to be paid to Contractor for Contractor’s construction of the Project hereunder, subject to any adjustments for Extra Work/Modifications as provided in Section 9.
- G. **“Project”** means the improvements and equipment to be constructed and installed by Contractor, as more particularly described and/or referenced in Exhibit A attached hereto.
- H. **“Site”** means the parcels of land on which is situated the Project, including any buildings and any existing or future improvements or fixtures located thereon.
- I. **“Site Lease”** means the Site Lease dated as of May 9, 2019, by and between the District and Contractor together with any duly authorized and executed amendment thereto under which the District leases the Site to the District.
- J. **“Subcontractor”** means any person or entity, including trade contractors, who have a contract with Contractor to perform any work on the improvements to the Site.
- K. **“Facility Lease”** means the Facility Lease dated as of May 9, 2019 by and between the District and Contractor together with any duly authorized and executed amendment hereto under which the District subleases the Site from Contractor.
- L. **“Tenant Improvement Payment”** means any payment required to be made by the District pursuant to Sections 7 and 21 of this agreement.
- M. **“District’s Agents”** excludes Architect, engineer and inspector.

SECTION 3. **ADDITIONAL SERVICES**

If the District requests Contractor to perform additional services (“Additional Services”) not described in this Construction Services Agreement, Contractor shall provide a cost estimate and a written description of the Additional Services required to perform such work. Compensation for such Additional Services shall be negotiated and agreed upon in writing, in advance of Contractor’s performing or contracting for such Additional Services and paid to Contractor in addition to the GMP established pursuant to Section 4 hereof. In the absence of such written agreement, the District will not compensate Contractor for such work, and Contractor will not be required to perform it. Nothing in this Construction Services Agreement shall be construed as limiting the valuation and amount to be paid to Contractor for such Additional Services or its implementation should a written agreement for such services be executed. Contractor shall not be entitled to compensation for Additional Services required as a result of Contractor’s acts, errors or omissions.

SECTION 4. **ESTABLISHMENT OF GUARANTEED MAXIMUM PRICE “GMP”**

- A. The Preliminary GMP for the Project is estimated as of the date of this Agreement to be \$ \_\_\_\_\_. The final GMP shall be agreed upon after the contract is awarded to the “best value” proposer, receipt of all subcontractor bids for the Project and the District’s acceptance of Contractor’s recommended value engineering in the event the Construction Costs exceed the District’s budget. The Value Engineering Options are attached as Exhibit \_\_\_\_. The preliminary GMP is based on the itemization in Exhibit \_\_\_\_, attached.

The scope of work shall be based upon plans and specifications approved by DSA at the time the Notice to Proceed is issued by the District including any applicable value engineering and subsequent resubmittal for approval. Tenant Improvement Payments by the District to Contractor pursuant to Section 21 hereof and the Facility Lease shall be commensurate with the final GMP.

Contractor's Contingency is for the exclusive use of Contractor to pay for miscellaneous work items, which are required to complete the Project. Contractor shall not use Contractor's Contingency to pay for costs related to the following: (a) errors or omissions in the Construction Documents; (b) discrepancies with the plans and specifications as pertains to applicable building code requirements; (c) and/or enhancements or additions to the Scope of Work desired by the District. Costs related to (a)-(c) above will be paid for pursuant to the provisions of Section 9, below, or from the District's contingency portion of the GMP, if any.

- B. If the District and Contractor cannot agree upon reduction of the Project scope through value engineering solutions to bring the Construction Costs in line with the District's budget, the District may immediately terminate this Agreement for convenience at any time before or after the inception of the Project as set forth in this Agreement upon written notice to Contractor without any cost or expense to the District.

#### SECTION 5. **NOTICE TO PROCEED**

The District shall issue the Notice to Proceed prior to commencement of the Project, provided, however, the District shall not be obligated to issue the Notice to Proceed if the District has not received DSA approved plans for the Project, the approval of the Board of Directors of the District (the "Board") of the final GMP, and if the District has not received fee title or possession of the Site. (See "Effective Date" of the Lease).

In the event a Notice to Proceed for the Project is not issued for the reason set forth in this Section, the District will notify Contractor in writing of its decision not to issue a Notice to Proceed for the Project, or any portion thereof, and Contractor shall not be entitled to any compensation for work performed in connection with the services set forth in this Construction Services Agreement.

#### SECTION 6. **SAVINGS**

- A. The District desires to minimize the expenditure of funds for the construction of the Project on items that exceed the minimum criteria required without a corresponding benefit to the District, and to eliminate any excess quality levels or performance criteria provided in the Construction Documents so long as such elimination does not alter the design, aesthetics, safety standards or configuration or space, and does not increase future maintenance and operation costs (collectively "Savings"). The District and Contractor shall work cooperatively with each other, in good faith, to identify appropriate opportunities to reduce the Project costs and promote Savings.
- B. If Contractor realizes Savings on any aspect of the Project, as enumerated in Section 6.A. only, and shall not include any savings realized by the Contractor by its own efficient operations, self performed work, means and methods, such Savings shall be set aside as the District's contingency portion of the GMP and shall be expended in a manner consistent with other funds in the District's contingency portion of the GMP. Contractor shall document all Savings on an ongoing Project budget tracking summary and presented to the District at regularly scheduled construction meetings with the District. Any Savings, including unspent District contingency, realized on the Project will be returned to the District at Project completion.

## SECTION 7. **SELECTION OF SUBCONTRACTORS**

If used, electrical, mechanical, and plumbing subcontractors shall be subject to the same prequalification requirements for prospective bidders described in subdivisions (b) to (m), inclusive, of Section 20111.6 of the Public Contract Code, including the requirement for the completion and submission of a standardized prequalification questionnaire and financial statement that is verified under oath and is not a public record.

As required by Ed. Code section 17406(a)(4), in awarding construction subcontracts with a value exceeding one-half of 1 percent of the price allocable to the construction work to subcontractors not identified in Contractor's original proposal, Contractor shall (1) provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the school district, including a fixed date and time on which qualifications statements, bids, or proposals will be due; (2) establish reasonable qualification criteria and standards; and (3) award the subcontract either on a best value basis or to the lowest responsible bidder.

In the event Contractor does not comply with this provision, the District may terminate this Construction Services Agreement in accordance with the provisions of Section 11 below.

### 1. **DVBE Requirements**

Compliance with Disabled Veteran Business Enterprise (DVBE) contracting goals is required under this Construction Services Agreement. In accordance with Education Code section 17076.11 the District has a DVBE participation goal of 3% per year of the overall dollar amount of state funds allocated to the District pursuant to the Leroy F. Greene School Facilities Act of 1998, and expended each year by the District. The District is seeking DVBE participation under this Construction Services Agreement.

Contractor must make a good faith effort to contact and utilize DVBE contractors and suppliers in securing bids for performance of the Project. Information regarding certified DVBE firms can be obtained from the Office of Small Business Certification and Resources (OSBCR) at (916) 375-4940 as well as the OSBCR website at [www.dgs.ca.gov/osbcr](http://www.dgs.ca.gov/osbcr). Verification of DVBE status must be obtained from the OSBCR by receiving an approved certification letter and reference number from that office. Contractor is encouraged to retain documentation of its good faith efforts, in the event such documentation is requested by the District. Good faith efforts are demonstrated by evidence of the following: a) Contact was made with the District regarding the identification of DVBEs; b) Contact was made with other state agencies and with local DVBE organizations to identify DVBEs; c) Advertising was published in trade papers and papers focusing on DVBEs; d) Invitations to bid were submitted to potential DVBE contractors; and e) Available DVBEs were considered.

Contractor shall certify, under penalty of perjury, that a good faith effort was made to include DVBE contractors and suppliers in the Project.

## SECTION 8. **CONSTRUCTION SCOPE OF WORK**

Please refer to Exhibit A, "Scope of Work," attached hereto.

- A. **CPM Master Schedule.** Prior to commencing, Contractor shall submit to the District a reasonably detailed CPM (Critical Path Method) Master Schedule for the construction, as set forth in Section 10.E. herein, consistent with the estimated start dates described in Exhibit A.



- B. **Pre-Construction Orientation/Construction Meetings.** Contractor, in conjunction with the Architect, shall conduct pre-construction orientation conferences for the benefit of Subcontractors to orient the Subcontractors to the various reporting procedures and site rules prior to the commencement of actual construction. Contractor shall also conduct construction and progress meetings with the District Representatives and other interested parties, as requested by the District, to discuss such matters as procedures, progress problems and scheduling. Contractor shall prepare and promptly distribute official minutes of such meetings to all parties in attendance including Architect, the District and Inspector.
- C. **Budget/Cash Flow Reports.** Contractor shall incorporate approved changes as they occur, and develop cash flow reports and forecasts for submittal to the District on a monthly basis. Contractor shall provide regular monitoring of the approved estimates of Construction Costs, showing actual costs for activities in progress, and estimates for uncompleted tasks. Contractor shall identify variances between actual and budgeted or estimated costs, and advise the District and the Architect whenever Project costs exceed budgets or estimates. Contractor shall maintain cost accounting records on authorized additional services or work performed under unit costs, additional work performed on the basis of actual costs of labor and materials, or other work requiring accounting records.
- D. **Progress Reports.** Contractor shall record the progress of the Project, and shall submit monthly written progress reports to the District and the Architect including information on the entire Project, showing percentages of completion and the number and amounts of proposed Extra Work/Modifications and their effect on the Construction Costs as of the date of the report. Contractor shall also keep a daily log containing a record of weather, Subcontractors, work on the sites, number of workers, work accomplished, problems encountered, and other similar relevant data as the District may require. Contractor shall make the log available to the District and the Architect. The District shall be promptly informed of all anticipated delays. In the event that Contractor determines that a schedule modification is necessary, Contractor shall promptly submit a revised Schedule for approval by the District.
- E. **Scheduling.** Contractor shall complete the construction pursuant to the CPM Master Schedule and Construction Documents, subject to DSA approval and reduction in scope, performing all work set forth in the Scope of Work (Exhibit A to this Construction Services Agreement).
- F. **District Permit and Other Obligations.** It is expressly understood that the District shall pay the DSA for the DSA inspector, soils testing, DSA fees, special testing, etc. If additional review or permits become necessary for reasons not due to Contractor's fault or because of DSA requirements or regulations implemented after the date the GMP is established and not reasonably anticipated at the time the GMP is established, Contractor may seek additional compensation for the cost of that review as an additional cost. In the alternative, the District may pay such costs directly to DSA.
- G. **Contractor Permit Obligations.** The District shall pay for all remaining general building permits and ancillary permits and licenses not paid by the District prior to the commencement of this Construction Services Agreement. The District shall also be responsible for arranging and overseeing, all necessary inspections and tests, including inspections by the DSA, permits and occupancy permits, and ensure compliance with any Federal and State laws. Contractor shall be responsible for arranging and overseeing safety procedures and requirements and construction employee training programs which cover among other items, hazardous chemicals and materials.
- H. **Protection.** Contractor shall establish procedures for the protection of all existing structures, equipment, utilities, and other existing improvements, both on-site and off-site.
- I. **Nuisance Abatement.** Contractor shall develop a mutually agreed upon program with the District to abate and minimize noise, dust, and disruption to normal activities at the existing facilities on the Site, including procedures to control on-site noise, dust, and pollution during construction.

- J. **Site Mitigation and Remediation.** The District shall perform any required Site mitigation or remediation at its sole cost, unless such Site mitigation or remediation is necessitated by any of the conditions described in Section 32 hereof, in which event the provisions of that section shall govern. The District shall be responsible for any asbestos and lead abatement and/or remediation work, unless specifically required by construction documents to be performed by Contractor.
- K. **Utilities.** Contractor shall perform and pay for all temporary utility hook-ups and connections. The District shall pay for use of utilities during construction, as well as any fees owed to utility suppliers for connection to existing mainline facilities.

SECTION 9. **EXTRA WORK/MODIFICATIONS**

- A. The District may prescribe extra work or a modification or reduction of requirements or of methods of performing the Construction which differ from the work or requirements set forth in the Construction Documents ("Extra Work/Modifications"); and for such purposes, the District may at any time during the life of this Construction Services Agreement by written order, make such changes as it shall find necessary in the design, line, grade, form, location, dimensions, plan, or material of any part of the work or equipment specified herein or in the Construction Documents, or in the quantity or character of the work or equipment to be furnished. In the event conditions develop which make strict compliance with the specifications impractical, Contractor shall notify the District of the need for such Extra Work/Modification by placing the matter on the agenda of regularly scheduled construction meetings with the District for discussion as soon as practicable after the need for such Extra Work/Modification is determined. Additionally, Contractor shall submit to the District for its consideration and approval or disapproval, a written request for Extra Work/Modifications before such work is performed. If the District approves such request in writing, the costs of the Extra Work/Modifications, as established pursuant to this Section 9, shall be added to or deducted from the GMP, as applicable.
- B. Value of any such Extra Work/Modification, change, or deduction shall be determined at the discretion of the District, in consultation with the Architect, in one or more of the following ways:
1. By acceptable lump sum proposal from Contractor with itemization as required by the District and/or the Architect.
  2. By unit prices contained in Contractor's cost estimates and incorporated in the Contract Documents or fixed by subsequent agreement between the District and Contractor.
  3. By the cost of material and labor and a percentage for Contractor's construction management fee. The following form shall be followed as applicable for additions and deductions to the Construction Services Agreement:

		EXTRA/(CREDIT)
a.	Material (attach itemized quantity and unit cost plus sales tax)	_____
b.	Labor (attach itemized hours and base rates from identified prevailing wage rate schedules)	_____
c.	Commercial General Liability and Property Damage Insurance, Workers' Compensation Insurance, Social Security and Unemployment taxes at actual and verified cost	_____

d.	Subtotal	<hr/>
e.	Contractor's Construction Management Fee, not to exceed 5% of Item (d)	<hr/>
f.	Subtotal	<hr/>
g.	Bond Premium, not to exceed 1% of Item (f)	<hr/>
h.	Total	<hr/>

- C. Regardless of whether the cost of the Extra Work/Modification is determined pursuant to 1, 2, or 3, above, in addition to the cost of the material and labor for deleted items, Contractor shall credit back an appropriate and reasonable amount for the bonding mark up for deleted items at the time of the request for the Extra Work/Modification.
- D. Should Contractor claim that any instruction, request, drawing, specification, action, condition, omission, default, or other situation: (i) obligates the District to pay additional compensation to Contractor; or (ii) obligates the District to grant an extension of time for the completion of the Construction Services Agreement; or (iii) constitutes a waiver of any provision in this Construction Services Agreement, CONTRACTOR SHALL NOTIFY THE DISTRICT, IN WRITING, OF SUCH CLAIM AS SOON AS POSSIBLE, BUT IN NO EVENT WITHIN MORE THAN TEN (10) BUSINESS DAYS FROM THE DATE CONTRACTOR HAS ACTUAL OR CONSTRUCTIVE NOTICE OF THE CLAIM. CONTRACTOR SHALL ALSO PROVIDE DISTRICT WITH SUFFICIENT WRITTEN DOCUMENTATION SUPPORTING THE FACTUAL BASIS OF THE CLAIM including in the documentation items B.3.a.-h. described in this Section. Contractor shall be required to certify under penalty of perjury the validity and accuracy of any claims submitted. Contractor's failure to notify the District within such ten (10) business day period shall be deemed a waiver and relinquishment of the claim against the District. If such notice be given within the specified time, the procedure for its consideration shall be as stated above in this Section.
- E. In the event a mutual agreement cannot be reached on the cost of an Extra Work/Modification item, Contractor and the District agree that an industry estimating guide, such as an estimating guide published by Means, shall be used to determine the cost of a disputed Extra Work/Modification item.
- F. All costs associated with the Extra Work/Modification may be in terms of time, money or both.
- G. Expenses of reconstruction and/or costs to replace and/or repair damaged materials and supplies, provided that Contractor is not fully compensated for such expenses and/or costs by insurance or otherwise, may be added to the GMP, if said expenses are the result of the negligent acts or omissions or willful misconduct of the District or its Architect, subcontractors, principals, agents, servants, or employees.

#### SECTION 10. **TIME OF COMPLETION**

- A. Once the District has issued a Notice to Proceed, Contractor shall proceed with the Construction of the Project with due diligence. Contractor agrees that the Project will be completed as specified herein by the date indicated in Exhibit A, or the CPM schedule approved by the District, as said time may be extended for such periods of time as Contractor is prevented from proceeding with or completing the Project for any cause described in this Section 10, or as otherwise agreed to in writing by the District and Contractor. It being impractical and infeasible to determine the amount of actual damage, it is agreed that Contractor shall pay to the District as fixed and liquidated damages, and

not as a penalty, the sum of One Thousand Dollars (\$1,000.00) per day for each calendar day of delay:

(i) until Contractor is ready and able to begin work on the Project at the Site and has indeed begun work in good faith, if the agreed-upon start date has been missed;

(ii) until work for the Site is Substantially Completed (the "Substantial Completion Date") if the Substantial Completion Date is past the agreed-upon completion date; and

(iii) until work for the Site is Fully Completed and Accepted (the "Full Completion Date") if the Full Completion Date is past the agreed-upon completion date.

Contractor and his surety shall be liable for the amount thereof. Any money due or to become due Contractor may be retained by the District to cover said liquidated damages.

- B. In the event that the performance and/or completion of the Project, is delayed at any time by any act or omission of the District or of any employee, agent or tenant of the District, by any separate Contractor employed by the District, its Architect, or by changes or alterations in the Project not caused by any fault or omission by Contractor, by strikes, by lockouts, by fire, by embargoes, by windstorm, by flood, by earthquake, by acts of war or God, by changes in public laws, regulations or ordinances enacted after the date of execution of this Construction Services Agreement by acts of public officials not caused by any fault or omission of Contractor, by an inability to obtain materials or equipment not caused by any act or omission of Contractor, or by any other cause beyond the reasonable control of Contractor, the aforesaid date for completion of the Project, as to the affected Site or Site, shall be extended for a period commensurate with the delay. Contractor shall not be charged liquidated damages because of such delays in completion of work or delays otherwise due to unforeseeable causes beyond the control and without the fault or negligence of Contractor.
- C. The term "Substantially Completed" or "Substantial Completion" as used herein shall mean completed in such fashion as to enable the District, upon performance of any separate work to be done by the District under separate contract or by day labor, beneficially to occupy the Project and to commence operation therein, provided such occupancy and use does not substantially interfere with Contractor's performance of the remainder of the work, as agreed upon between Contractor and the District, which may be accomplished prior to the completion of the work.
- D. The term "Fully Completed and Accepted" or "Full Completion and Acceptance" as used herein, shall mean that all work has been completed in accordance with the Construction Documents and that successful testing, startup and satisfactory operation of the Project, or any Site, as a total unit has been accomplished in substantial conformance with the Construction Documents.
- E. Within five (5) business days after the District's delivery of a Notice to Proceed for the Project, Contractor shall furnish the District with a reasonably detailed CPM (Critical Path Method) Schedule, setting forth the expected dates for commencement and completion of each of the various stages of construction to be performed by Contractor pursuant to this Construction Services Agreement (the "Time Schedule"). Contractor shall submit the master schedule to the District for acceptance and update the master schedule as appropriate on at least a monthly basis. Contractor shall incorporate the activities of Contractors on the Project and delivery of products requiring long lead time procurement. Contractor shall also include the District's occupancy requirements showing portions of the Projects having occupancy priority. Contractor shall be responsible for providing the District with an Estimated Monthly Cost Projection Schedule within five (5) working days of the District's issuance of a Notice to Proceed, which will be updated every ninety (90) days, or as needed. It is specifically understood that the District will utilize said Time Schedule as it is revised from time to time to determine completion dates of various aspects of the Project. Lease Prepayments under the Facility Lease shall be conditioned upon completion of various aspects of

the Project as determined by the District's Inspector pursuant to the Time Schedule and the Estimated Monthly Cost Projection Schedule.

- F. Contractor shall not be assessed liquidated damages for this Construction Services Agreement and shall not be subject to any damages for delay in completion of the Project, when such delay was caused by the failure of the District or the owner of the utility to provide for removal or relocation of the existing main or trunkline utility facilities; however, when Contractor is aware that removal or relocation of an existing utility has not been provided for, Contractor shall promptly notify the District and the utility in writing, so that provision for such removal or relocation may be made to avoid and minimize any delay which might be caused by the failure to remove or relocate the main or trunkline utility facilities, or to provide for its removal or relocation. In accordance with Section 4215 of the Government Code, if Contractor while performing the work on the project discovers any existing main or trunkline utility facilities not identified by the public agency (the District) in the contract plans or specifications, Contractor shall immediately notify the public agency (the District) and utility in writing. The public utility, where they are the owner, shall have the sole discretion to perform repairs or relocation work or permit Contractor to do such repairs or relocation work at a reasonable price. Contractor shall be compensated for the costs of locating, repairing damage not due to the failure of Contractor to exercise reasonable care, and removing or relocating such utility facilities not indicated in the plans and specifications with reasonable accuracy, and for equipment on the Project necessarily idled during such work. Such compensation shall be in accordance with the extra work provisions set out in Section 9 hereof.

## SECTION 11. **TERMINATION OF AGREEMENT**

### A. **Termination for Breach**

1. If Contractor refuses or fails to prosecute the Construction of the Project or any separable part thereof, with such diligence as will insure its completion within the time specified by this Construction Services Agreement or any extension thereof, or fails to complete the Project, within such time, or if Contractor should be adjudged bankrupt, or if it should make a general assignment for the benefit of its creditors, or if a receiver should be appointed on account of its insolvency, or Contractor or any of its subcontractors should violate any of the provisions of this Construction Services Agreement, the District may serve written notice upon Contractor and its Surety of the District's intention to terminate this Construction Services Agreement. This notice of intent to terminate shall contain the reasons for such intention to terminate this Construction Services Agreement and a statement to that effect that Contractor's right to perform work on the Project shall cease and terminate upon the expiration of fifteen (15) days unless such violations have ceased and arrangements satisfactory to the District have been made for correction of said violations.
2. In the event that the District serves such written notice of termination upon Contractor and the Surety, the Surety shall have the right to take over and perform this Construction Services Agreement in its entirety. If the Surety does not: (1) give the District written notice of Surety's intention to take over and commence performance of this Construction Services Agreement within fifteen (15) days of the District's service of said notice of intent to terminate upon Surety; and (2) actually commence performance of this Construction Services Agreement within thirty (30) days of the District's service of said notice upon Surety; then the District may take over the Project and prosecute the same to completion by separate contract or by any other method it may deem advisable for the account and at the expense of Contractor.
3. In the event that the District elects to obtain an alternative performance of the Construction Services Agreement as specified above: (1) the District may, without liability for so doing, take possession of and utilize in completion of the Project such materials, appliances, plants and other property belonging to Contractor that are on the site and reasonably necessary

for such completion; and (2) Surety shall be liable to the District for any cost or other damage to the District necessitated by the District securing an alternate performance pursuant to this Section 11.

**B. Termination for Convenience**

1. The District may terminate performance of the Project called for by the Contract Documents in whole or, from time to time, in part, if the District determines that a termination is in the District's interest.
2. Contractor shall terminate all or any part of the Project upon delivery to Contractor of a "Notice of Termination" specifying that the termination is for the convenience of the District, the extent of termination, and the effective date of such termination.
3. After receipt of Notice of Termination, and except as directed by the District's representative, Contractor shall, regardless of any delay in determining or adjusting any amounts due under this Termination for Convenience clause, immediately proceed with the following obligations:
  - a. Stop Work as specified in the Notice of Termination.
  - b. Complete any work specified in the Notice of Termination in a least cost/shortest time manner while still maintaining the quality called for under the Contract Documents.
  - c. Leave the Property upon which Contractor was working and upon which the facility (or facilities) forming the basis of the Contract Documents is situated in a safe and sanitary manner such that it does not pose any threat to the public health or safety.
  - d. Terminate all subcontracts to the extent that they relate to the portions of the work terminated.
  - e. Place no further subcontracts or orders, except as necessary to complete the continued portion of the Construction Services Agreement.
  - f. Submit to the District's Representative, within ten (10) days from the effective date of the Notice of Termination, all of the usual documentation called for by the Contract Documents to substantiate all costs incurred by Contractor for labor, materials and equipment through the effective date of the Notice of Termination. Any documentation substantiating costs incurred by Contractor solely as a result of the District's exercise of its right to terminate this Construction Services Agreement pursuant to this clause, which costs Contractor is authorized under the Construction Services Agreement to incur, shall: (i) be submitted to and received by the District no later than thirty (30) days after the effective date of the Notice of Termination; (ii) describe the costs incurred with particularity; and (iii) be conspicuously identified as "Termination Costs occasioned by the District's Termination for Convenience."
4. Termination of the Construction Services Agreement shall not relieve the Surety of its obligation for any just claims arising out of or relating to the work performed on the Project.
5. In the event that the District exercises its right to terminate this Construction Services Agreement pursuant to this clause, the District shall pay Contractor, upon Contractor's

submission of the documentation required by this provision, and other applicable provisions of the Construction Services Agreement, the following amounts:

- a. All actual costs incurred according to the provisions of this Construction Services Agreement including but not limited to insurance costs incurred in connection with the Project.
- b. A reasonable allowance for profit on the cost of the work on the Project performed, provided Contractor establishes to the satisfaction of the District, that it is reasonably probable that Contractor would have made a profit had the Construction Services Agreement been completed and provided further, that the profit allowed shall in no event exceed ten percent (10%) of costs. In no event shall the total amount exceed GMP.
- c. A reasonable allowance for Contractor's administrative and demobilization costs in determining the amount payable due to termination of the Construction Services Agreement under this Section 11.

C. **Termination of Agreement by Contractor**

1. Contractor may terminate the Construction Services Agreement upon ten (10) days written notice to the District, whenever: (1) the entire Project has been suspended for ninety (90) consecutive days through no fault or negligence of Contractor and notice to resume the Construction Services Agreement or to terminate the Construction Services Agreement has not been received from the District within this time period; or (2) the District should fail to pay Contractor any substantial sums due it in accordance with the terms of the Construction Services Agreement and within the time limits prescribed; or (3) the District shall elect not to appropriate funds and/or not to make any two (2) successive Tenant Improvement Payments following the receipt by the District or a request from Contractor in its capacity as Lessor for each such Tenant Improvement Payment submitted pursuant to Section 7.A. (or Section 27.A.) of the Facility Lease. In the event of such termination, Contractor shall have no claims against the District except for work performed on the Project as of the date of termination.

SECTION 12. **PERSONNEL ASSIGNMENT**

- A. Contractor shall assign \_\_\_\_\_ as Construction Manager (whose responsibilities are defined in Section 26) for the Project. So long as the Construction Manager remains in the employ of Contractor, such person shall not be changed or substituted from the Project. In the event Contractor deems it necessary, Contractor shall replace the Construction Manager for the Project with a replacement with like qualifications and experience, subject to the prior written consent of the District, which consent shall not be unreasonably withheld. Any violation of the terms and provisions of this Section 12.A. shall entitle the District to terminate this Construction Services Agreement for breach, pursuant to the provisions of Section 11.
- B. Notwithstanding the foregoing provisions of Section 12.A., above, if the Construction Manager proves not to be satisfactory to the District, upon written notice from the District to the Contractor such person shall be promptly replaced by a person who is acceptable to the District in accordance with the following procedures:
  1. Within five (5) business days after receipt of a notice from the District requesting the replacement of the Construction Manager or promptly following the discovery by Contractor that the Construction Manager is leaving the employ of Contractor, as the case may be, Contractor shall provide the District with the name of an acceptable replacement/substitution (together with such person's resume and other information

regarding such person's experience and qualifications). The replacement/substitution shall commence work on the Project no later than five (5) business days following the District's approval of such replacement, which approval shall not be unreasonably withheld. In the event that the District and Contractor cannot agree as to the substitution of replacement Construction Manager, the District shall be entitled to terminate this Construction Services Agreement for breach, pursuant to the provisions of Section 11.

#### SECTION 13. **MAINTENANCE OF RECORDS; AUDIT**

- A. Contractor, and any subcontractors, shall keep or cause to be kept true and complete books, records, and accounts of all financial transactions in the course of its activities and operations related to the Project. These documents may include sales slips, invoices, payrolls, personnel records, requests for subcontractor payment, and other data relating to all matters covered by the Contract Documents. At all times during the construction of the Project, and for four (4) years following the termination of the term of the last Document, Contractor, and any subcontractors, shall retain such data and records. During construction of the Project, Contractor shall make available all requested data and records at reasonable locations within the County of Imperial, at any time during normal business hours, and as often as the District deems necessary. If records are not made available within the County of Imperial during the construction of the Project, Contractor shall pay the District's travel costs to the location where the records are maintained. Upon completion of the construction of the Project, and when requested in writing by the District, Contractor shall provide the District with one (1) complete copy of all books, records and accounts of all financial transactions in the course of its activities and operations related to the Project, including but not limited to sales slips, invoices, payrolls, personnel records, requests for subcontractor payment and other data relating to all matters covered by the Contract Documents. Failure to make requested records available for audit by the date requested will result in immediate termination of this Construction Services Agreement.
- B. At its own cost, the District shall have the right to review and audit, upon reasonable notice, the books and records of Contractor concerning any monies associated with the Project. This right does not extend to books and records that do not, in any way, relate to or concern the accounting of monies associated with the Project. Any such audit shall be performed by an independent auditor, having no direct or indirect relationship with the functions or activities being audited or with the business conducted by Contractor or the District. In the event the independent auditor determines that savings realized during the prosecution and progress of the Project were not added to the contingency portion of the GMP, as provided for in Section 6 of this Construction Services Agreement, the District shall be entitled to deduct such amount of such savings from the next Tenant Improvement Payment due or Lease Prepayments, as applicable, under the provisions of the Facility Lease between the District and Contractor. If Contractor disputes the findings of the independent auditor, such dispute shall be handled in accordance with the provisions of Section 35 of this Construction Services Agreement.

#### SECTION 14. **LABOR COMPLIANCE PROGRAM**

- A. Contractor acknowledges that construction beginning on or after April 1, 2003, shall comply with the laws and regulations governing Assembly Bill No. 1506 ("AB 1506") and Labor Code Section 1771.7, which requires the District to implement a labor compliance plan and requires Contractor, and any subcontractors, to comply with the District's labor compliance plan. Section 1771.7 does not apply to the design and preconstruction services performed during Phase 1, including, but not limited to, inspection and land surveying work. Contractor agrees to comply with the District's labor compliance plans, procedures, and rules at no additional cost to the District. Failure to comply with the District's labor compliance plan shall result in the withholding of contract payments by the District. Contractor expressly acknowledges these provisions and agrees to comply with the provisions of the District's labor compliance plan.
- B. Contractor shall include provision (A) in this Section in all subcontracts and require subcontractors to comply with these provisions at no additional cost to the District.



SECTION 15. **PREVAILING RATES OF WAGES**

- A. Contractor is aware of the requirements of California Labor Code Sections 1720 *et seq.* and 1770 *et seq.*, as well as California Code of Regulations, Title 8, section 16000 *et seq.* ("Prevailing Wage Laws"), which require the payment of prevailing wage rates and the performance of other requirements on certain "public works" and "maintenance" projects. Since this Construction Services Agreement involves an applicable "public works" or "maintenance" project, as defined by the Prevailing Wage Laws, and since the total compensation is \$1,000 or more, Contractor agrees to fully comply with such Prevailing Wage Laws. The District shall provide Contractor with a copy of the prevailing rates of per diem wages in effect at the commencement of this Construction Services Agreement. Contractor shall make copies of the prevailing rates of per diem wages for each craft, classification or type of worker needed to perform work on the Project available to interested parties upon request, and shall post copies at Contractor's principal place of business and at the Project Site. Contractor shall defend, indemnify and hold the District, its elected officials, officers, employees and agents free and harmless from any claims, liabilities, costs, penalties or interest arising out of any failure or alleged failure to comply with the Prevailing Wage Laws. When determining GMP, Contractor shall include to the extent possible anticipated general prevailing wage rates for the time when work on the Project will actually be performed.
- B. Contractor and each subcontractor shall forfeit as a penalty to the District not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the stipulated prevailing rate for any work done by him, or by any subcontract under him, in violation of the provisions of the California Labor Code. The difference between such stipulated prevailing wage rate and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the stipulated prevailing wage rate shall be paid to each worker by Contractor.
- C. As a further material part of this Construction Management Agreement, Consultant agrees to hold harmless and indemnify the District, its Board and each member of the Board, its officers, employees and agents from any and all claims, liability, loss, costs, damages, expenses, fines and penalties, of whatever kind or nature, including all costs of defense and attorneys' fees, arising from any alleged failure of Contractor or its subcontractors to comply with the prevailing wage laws of the State of California. If the District or any of the indemnified parties are named as a party in any dispute arising from the failure of Contractor or its subcontractors to pay prevailing wages, Contractor agrees that the District and the other indemnified parties may appoint their own independent counsel, and Contractor agrees to pay all attorneys' fees and defense costs of the District and the other indemnified parties as billed, in addition to all other damages, fines, penalties and losses incurred by the District and the other indemnified parties as a result of the action.

SECTION 16. **DEBARMENT OF CONTRACTORS AND SUBCONTRACTORS**

Contractor or any subcontractor working under Contractor may not perform work on a public works project with a subcontractor who is ineligible to perform work on a public project pursuant to Section 1777.1 or Section 1777.7 of the California Labor Code. Any contract on a public works project entered into between Contractor and a debarred subcontractor is void as a matter of law. A debarred subcontractor may not receive any public money for performing work as a subcontractor on a public works contract. Any public money that is paid, or may have been paid to a debarred subcontractor by Contractor on the project shall be returned to the District. Contractor shall be responsible for the payment of wages to workers of a debarred subcontractor who has been allowed to work on the project.

SECTION 17. **EMPLOYMENT OF APPRENTICES**

- A. Contractor's attention is directed to the provisions of Sections 1777.5, 1777.6, and 1777.7 of the California Labor Code concerning employment of apprentices by Contractor or any subcontractor under him.

- B. Information relative to apprenticeship standards, wage schedules, and other requirements may be obtained from the Director of Industrial Relations, ex officio the Administrator of Apprenticeship, San Francisco, California, or from the Division of Apprenticeship Standards and its branch offices.
- C. Knowing violations of Section 1777.5 will result in forfeiture not to exceed \$100 for each calendar day of non-compliance pursuant to Section 1777.7.

**SECTION 18. HOURS OF WORK**

- A. Eight (8) hours of work shall constitute a legal day's work. Contractor and each subcontractor shall forfeit, as penalty to the District, twenty-five dollars (\$25) for each worker employed in the execution of work on the Project by Contractor or any subcontractor under him for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any one calendar day and forty (40) hours in any calendar week in violation of the provisions of the Labor Code, and in particular, Section 1810 to Section 1815, thereof, inclusive, except that work performed by employees of Contractor and his subcontractors in excess of eight hours per day at not less than one and one-half times the basic rate of pay, as provided in Labor Code section 1815.
- B. Generally, construction work on the Project shall be accomplished on a regularly scheduled eight (8) hour per day work shift basis, Monday through Friday, between the hours of 7:00 a.m. and 5:00 p.m., however nothing herein shall prevent Contractor from working weekends and after school hours in order to complete the Project so long as not otherwise prohibited by law or local ordinances or regulations.
- C. Any work necessary to be performed after regular working hours, or on Sundays or other holidays shall be performed and included within the GMP, unless otherwise agreed to in writing before the work in question is commenced pursuant to Section 9, Extra Work/Modifications.

**SECTION 19. PAYROLL RECORDS**

- A. Pursuant to Labor Code section 1776, as amended from time to time, Contractor and each subcontractor shall keep records showing the name, address, social security number, work classification, straight time and overtime hours paid each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker or other employee employed by him or her in connection with the work.
- B. The payroll records enumerated under Section 19.A. above shall be certified and shall be available for inspection at all reasonable hours at the principal office of Contractor on the following basis:
  - 1. A certified copy of the employee's payroll records shall be made available for inspection or furnished to such employee or his or her authorized representative on request.
  - 2. A certified copy of all payroll records enumerated in Section 19.A. shall be made available for inspection or furnished upon request to the District, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations.
  - 3. A certified copy of all payroll records enumerated in Section 19.A. shall be made available upon request to the public for inspection or copies thereof made; provided, however, that if request by the public shall be made through either the District, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement, if as requested, payroll records have been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the cost of preparation by Contractor, subcontractors and the entity through which the request was made. The public shall not be given access to such records at the principal office of Contractor.

- C. The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the Division.
- D. Each Contractor shall file a certified copy of the records enumerated in Section 19.A. with the entity that requested such records within ten (10) days after receipt of a written request.
- E. Any copy of records made available for inspection as copies and furnished upon request to the public or the District, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement, shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address, and social security number. The name and address of Contractor or any subcontractor performing work on the Project shall not be marked or obliterated.
- F. Contractor shall inform the District of the location of the records enumerated under Section 19.A., including the street address, city and county, and shall, within five (5) working days, provide a notice of a change of location and address.
- G. In the event of noncompliance with the requirements of this section, Contractor shall have ten (10) days in which to comply subsequent to receipt of written notice specifying in what respects Contractor must comply with this section. Should noncompliance still be evident after such ten (10) day period, Contractor shall, as a penalty to the District, forfeit One Hundred Dollars (\$100.00) for each calendar day, or portion thereof, for each worker until strict compliance is effectuated. Upon the request of the Division of Labor Standards Enforcement, such penalties shall be withheld from Tenant Improvement Payments then due, as applicable.

## SECTION 20. **BONDING REQUIREMENTS**

Contractor shall provide the following bonds:

- A. A "Payment Bond" (material and labor bond) from a California admitted surety and in the form attached hereto, shall be provided by Contractor for the Project within five (5) working days after the District has issued a Notice to Proceed for the Project. The Payment Bond shall be for One Hundred Percent (100%) of the Final GMP of the Project, to satisfy claims of materials suppliers and of mechanics and laborers employed on the Project. The Payment Bond shall be maintained by Contractor in full force and effect for the Project until the Project is fully completed and accepted and until all claims for materials and labor are paid, and shall otherwise comply with California law. The Payment Bond, once obtained, shall be attached to this Construction Services Agreement as Exhibit C. In the event the Final GMP is increased in accordance with the provisions set forth in Section 9 above, Contractor must increase the Payment Bond to equal the revised GMP. The Payment Bond must be executed by an admitted Surety approved to conduct business in the State of California, pursuant to California Code of Civil Procedure Section 995.120. In addition, to the extent required by law, the Payment Bond must be accompanied by a certified copy of the certificate of authority of the insurer issued by the Insurance Commissioner of the State of California, a certificate from the Clerk of the County of Imperial that the certificate of authority of the insurer has not been surrendered, revoked, cancelled, annulled, or suspended, or if it has that it has been renewed, and four copies of the insurer's most recent annual statement and quarterly statement filed with the Department of Insurance of the State of California.
- B. A "Faithful Performance Bond" from a California admitted surety and in the form attached hereto shall be provided by Contractor for the Project within five (5) working days after the District has issued a Notice to Proceed on the Project. The Faithful Performance Bond shall be for One Hundred Percent (100%) of the Final GMP for the Project to guarantee faithful performance of all work, within the time prescribed, in a manner satisfactory to the District, and that all materials and workmanship shall be free from original or developed defects. The Faithful Performance Bond shall be in the form attached hereto and shall be maintained by Contractor in full force and effect until the Project is fully completed and accepted and until all claims for materials and labor are paid, and shall otherwise comply with California law. The Faithful Performance Bond shall name the District

as the entity to which the Principal and Surety, as defined in the Faithful Performance Bond, are bound. The Faithful Performance Bond shall be attached to this Construction Services Agreement as Exhibit D. In the event the GMP is increased in accordance with the provisions set forth in Section 9 above, Contractor must increase the Faithful Performance Bonds to equal the revised GMP. The Performance Bond must be executed by an admitted Surety approved to conduct business in the State of California, pursuant to California Code of Civil Procedure Section 995.120. In addition, to the extent required by law, the Performance Bond must be accompanied by a certified copy of the certificate of authority of the insurer issued by the Insurance Commissioner of the State of California, a certificate from the Clerk of the County of Imperial that the certificate of authority of the insurer has not been surrendered, revoked, cancelled, annulled, or suspended, or if it has that it has been renewed, and four copies of the insurer's most recent annual statement and quarterly statement filed with the Department of Insurance of the State of California.

C. The bonds required by this section shall meet the following criteria:

1. Each bond shall be signed by both Contractor and a notary and the signature of the authorized agent of the surety shall be notarized.
2. Should any bond become insufficient, Contractor shall renew or amend the bond within ten (10) days after receiving notice from the District.
3. Should any surety at any time not be a California admitted surety, notice will be given to the District to that effect. No further payments shall be deemed due or shall be made under this Construction Services Agreement until a new surety shall qualify and be accepted by the District.
4. Changes in the work, or extensions of time, made pursuant to the Construction Services Agreement shall in no way release Contractor or the surety from its obligations. Notice of such changes or extensions shall be waived by the surety.

#### SECTION 21. **TENANT IMPROVEMENT PAYMENTS**

Contractor shall finance the cost of construction of the Project which costs shall not exceed the GMP, except as otherwise provided in this Construction Services Agreement. After the Notice to Proceed has been issued, the District shall pay Contractor monthly Tenant Improvement Payments within 30-days of receipt of verified progress reports from Contractor. As a condition precedent for the release of Tenant Improvement Payments, Contractor shall provide the District with written documentation identifying the amount paid to certified DVBE contractors and suppliers in performance of the Project and provide a copy of the DVBE Certification Letter issued by OSBCR for each DVBE. This documentation will be used by the District to evaluate its success in meeting its DVBE participation goal.

#### SECTION 22. **CORRECTION OF WORK: WARRANTY**

Neither final payment nor any provision in the Contract Documents shall relieve Contractor of responsibility for faulty materials or workmanship incorporated in the Project. Contractor warrants that all work under this Construction Services Agreement will be free of faulty materials or workmanship and hereby agrees, within ten (10) days upon receiving notification from the District, to remedy, repair or replace, without cost to the District, all defects which may appear as a result of faulty materials or workmanship in the Project, at any time, or from time to time, during a period beginning with commencement of the Project and ending one (1) year after the date of Substantial Completion, as defined in Section 10 hereof. The foregoing warranty of Contractor also applies to the remedy, repair or replacement of defects which may appear as a result of faulty designs prepared by Contractor and/or any party retained by, through or under Contractor in connection with the Project, but the foregoing warranty of Contractor does not guarantee against damage to the Project

sustained by use, wear, intentional acts, accidents, or lack of normal maintenance or as a result of changes or additions to the Project made or done by parties not directly responsible to Contractor, except where such changes or additions to the Project are made in accordance with Contractor's directions. No guarantee furnished by a party other than Contractor with respect to equipment manufactured or supplied by such party shall relieve Contractor from the foregoing warranty obligation of Contractor. The warranty period set forth herein above shall not apply to latent defects appearing in the Project, and with respect to such defects, the applicable statute of limitations shall apply. Contractor agrees to provide the District with all equipment and materials warranties provided by manufacturers to the District but has no obligation to assist in processing such warranty claims after said one (1) year warranty period.

**SECTION 23. ASSIGNMENT OF ANTI TRUST CLAIMS**

Contractor offers and agrees to assign to the District all rights, title and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 USC Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchase of goods, services, or materials pursuant to the Construction Services Agreement. This assignment shall become effective at the time the District tenders the final Tenant Improvement Payment to Contractor, without further acknowledgment by the parties.

**SECTION 24. PROTECTION OF PERSONS AND PROPERTY**

- A.
  - 1. By execution of this Construction Services Agreement, Contractor acknowledges that Contractor, its employees and subcontractors are required to comply with the fingerprinting requirements set forth in Education Code Section 45125.1. However, in lieu of complying with Section 45125.1, Contractor may comply with the provisions of Education Code Section 45125.2 which requires that Contractor, at its own expense: (1) install a physical barrier to limit contact with students by Contractor, Contractor's employees and subcontractors; or (2) provide for the continuous supervision and monitoring of Contractor, Contractor's employees and subcontractors by an employee of Contractor who has received fingerprint clearance from the California Department of Justice; or (3) provide for the surveillance of Contractor, Contractor's employees and subcontractors by a District employee.
  - 2. In the event the District determines, based on the totality of the circumstances, that Contractor, Contractor's employees and subcontractors will have only limited contact with pupils, Contractor shall, at its own expense be subject to the following preventative measures: (1) Contractor, Contractor's employees and subcontractors shall check in with the school office each day immediately upon arriving at the Site; (2) Contractor, Contractor's employees and subcontractors shall inform school office staff of their proposed activities and location at the Site; (3) Once at such location Contractor and/or Contractor's employees and subcontractors shall not change locations without contacting the school office; (4) Contractor, Contractor's employees and subcontractors shall not use student restroom facilities; and (5) If Contractor, Contractor's employees and subcontractors find themselves alone with a student, Contractor, Contractor's employees and subcontractors shall immediately contact the school office and request that a member of the school staff be assigned to the work location.
- B. Prior to, and as a condition to commencement of Contractors performance under this Construction Services Agreement, Contractor shall complete the Fingerprint Certification attached to hereto as Exhibit E, and by this reference incorporated herein.
- C. Contractor shall at all times enforce orderly and disciplined conduct among those performing work on the Project and shall not employ on the work any unfit person not skilled in the task assigned to him, except as provided in Section 17 hereof.

- D. Contractor, in performing the work, shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury, or loss. Contractor shall erect and maintain, as required by existing conditions and progress of the Project, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, and shall promulgate safety regulations and notify owners and users of adjacent utilities. Contractor shall designate a responsible member of Contractor's organization employed at a Site of the Project whose duty shall be the prevention of accidents. Such person shall be Contractor's superintendent unless otherwise designated in writing by Contractor to the District.
- E. In any emergency affecting the safety of persons or property, Contractor shall act at its discretion to prevent threatened damage, injury, or loss. Any additional compensation or extension of time claimed by Contractor on account of such emergency shall be determined by mutual agreement between the District and Contractor.

SECTION 25. **INSPECTION OF WORK**

- A. The District shall hire its own DSA Inspector as required by law. The District, District's representatives, and the DSA shall at all times have access to the work whether it is in preparation or progress, and Contractor shall provide proper facilities for such access and for inspection.
- B. If the specifications, the District's timely instructions, the DSA, or any public authority shall require a Site or the Project to be specially tested or approved, Contractor shall give the District forty-eight (48) hour notice of its readiness for inspection and, if the inspection is to be performed by a party other than the District, of the date fixed for such inspection. Inspections by the District shall be promptly made, and, where practicable, shall be at the source of supply. If any work required to be inspected by the specifications, the District's timely instruction or by a public authority should be covered up without the approval or consent of the District, it must, if required by the District, be uncovered for examination at Contractor's expense.
- C. Re-examination of questioned work may be ordered by the District and if so ordered, such work shall be uncovered by Contractor. If such work is found to be in accordance with the Contract Documents, the District shall pay the cost of re-examination and replacement. If such work is not in accordance with the Contract Documents, Contractor shall pay such costs, unless Contractor can demonstrate to the reasonable satisfaction of the District that the defects in such work were caused by persons or entities other than Contractor or any of its subcontractors or employees.

SECTION 26. **SUPERVISION**

- A. Pursuant to Section 12 hereof, Contractor shall maintain on-site a competent project superintendent and necessary assistants during the work. The project superintendent shall represent Contractor and all directions given to the project superintendent shall be deemed to have been given to Contractor. Important directions shall be confirmed in writing to Contractor, and other direction shall be so confirmed to Contractor upon the written request of Contractor, in accordance with Section 44 hereof and the address listed therein.
- B. Contractor shall give efficient supervision to the work, using its skill and attention and shall cause working drawings and specifications to be prepared and submitted to the District. Following agreement by Contractor and the District with respect to said working drawings and specifications, it shall be Contractor's responsibility to perform the work described in said working drawings and specifications in substantial compliance with the Construction Documents. Notwithstanding the foregoing, Contractor may from time to time make Minor and Insignificant changes in said working drawings and specifications and perform the construction in accordance with such changed drawings and specifications without the consent of the District, provided that any such work performed by Contractor in accordance with such changed drawings and specifications shall be consistent with that specifically required to be performed by Contractor under the Construction Documents. For

purposes of this Section, the term “Minor and Insignificant” shall mean changes which result in no change in quality, aesthetics or integrity of the original specifications of the Project. All changes, including Minor and Insignificant changes to the extent possible, should be placed on the agenda for regularly scheduled construction meetings between Contractor and the District to ensure that the District is aware of such changes. The District agrees to promptly respond to Contractor’s requests for information and approvals; and if it fails to do so, Construction Services Agreement completion dates will be extended.

**SECTION 27. SEPARATE CONTRACTS**

- A. The District reserves the right to let other contracts in connection with the construction of portions of the Project which are not being performed by Contractor hereunder. Any such contracts entered into by the District, and the work they provide for shall in no event interfere with the activities of Contractor on the Project, but if they do, the District shall be liable to Contractor for its damages in connection with such interference. Contractor shall afford other contractors reasonable opportunity for the introduction and storage of their materials and the execution of their work and shall properly connect and coordinate the Project with the work of such Contractors.
- B. If the proper execution of any part of Contractor’s work on the Project depends upon the work of any such Contractors, Contractor shall inspect and promptly report to the District any patent defects or other problems it identifies in such work that render it unsuitable for such proper execution and results. Contractor is only required to inspect the work of such other Contractors prior to commencing its own further work in connection with or in relation to that other work. Further, Contractor is only expected to identify patent defects or other problems, and is not required to do any destructive testing or to monitor the progress of such work by other Contractors prior to its completion. In no event shall the work of such other Contractors be covered by the warranty given by Contractor to the District, nor shall Contractor be required to provide insurance for such work.

**SECTION 28. USE OF PREMISES**

Contractor shall confine operations at the Site to areas permitted by law, ordinances, permits and the Construction Documents and shall not unreasonably encumber the Site or existing facilities on the Site with any materials or equipment. Contractor shall not load or permit any part of the work to be loaded with a weight so as to endanger the safety of persons or property at the Site.

**SECTION 29. CLEANING UP**

Contractor shall at all times keep the Site of the Construction free from accumulations of waste material or rubbish caused by the performance of the Construction by Contractor, and at the completion of the Construction, Contractor shall remove from the Site of the Construction all such waste material and rubbish and all tools, scaffolding and surplus materials belonging to Contractor and/or Contractor’s subcontractors, laborers or materialmen, it being specifically understood that at the close of construction and prior to turning over the premises to the District for beneficial use and occupancy, Contractor shall leave the Site “broom clean,” or its equivalent, unless more exactly specified.

**SECTION 30. SITE REPRESENTATIONS**

The District warrants and represents that the District has, and will continue to retain at all times during the course of construction, legal title to the Site and that said Site is properly permitted so as to permit the construction and use of said Site. The District further warrants and represents that title to said land is free of any easements, conditions, limitation, special permits, variances, agreements or restrictions which would prevent, limit, or otherwise restrict the construction or use of said facility. Reference is made to the fact that the District has provided information on the Site to Contractor. Such information shall not relieve Contractor of its responsibility; and the interpretation

of such data regarding the Site, as disclosed by any borings or other preliminary investigations, is not warranted or guaranteed, either expressly or implicitly, by the District. Contractor shall be responsible for having ascertained pertinent local conditions such as location, accessibility and general character of the Site and for having satisfied himself as to the conditions under which the work is to be performed. No claim for any allowances because of Contractor's error or negligence in acquainting himself with the conditions at the Site will be recognized.

**SECTION 31. TRENCH SHORING**

- A. **Trenches Five Feet or More in Depth.** Contractor shall submit to the District, in advance of excavation, a detailed plan showing the design of shoring, bracing, sloping or other provisions to be made for worker protection from the hazard of caving ground during the excavation of any trench or trenches five feet or more in depth. Contractor shall also submit a copy of its annual trench/excavation permit approved by CAL-OSHA. The plan shall be prepared by a registered civil or structural engineer. As part of the plan, a note shall be included stating that the registered civil or structural engineer certifies that the plan complies with CAL-OSHA Construction Safety Orders, or stating that the registered civil or structural engineer certifies that the plan is not less effective than the shoring, bracing, sloping, or other provisions of the Safety Orders.
1. All shoring submittal shall include surcharge loads from adjacent embankments, construction loads and spoil bank. Submittal shall indicate minimum horizontal distance from top of trench to edge of all surcharge loads for all cases of shoring and side slopes.
  2. Nothing in this Section shall relieve Contractor of the full responsibility for providing shoring, bracing sloping, or other provisions adequate for worker protection. If such plan varies from the shoring system standards established by the Construction Safety Orders, the plan shall be prepared by a registered civil or structural engineer and shall be approved by CAL-OSHA. No excavation of such trench or trenches shall be commenced until said plan has been accepted by the District or the person to whom authority to accept has been delegated by the District.

**SECTION 32. HAZARDOUS WASTE AND UNKNOWN PHYSICAL CONDITIONS**

- A. Contractor shall promptly, and before the following conditions are disturbed, notify the District, in writing, of any:
1. Material that Contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, which is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.
  2. Subsurface or latent physical conditions at the Site differing from those indicated, including geological, soils, and or water table issues which impede construction or increase Construction Costs.
  3. Unknown physical conditions at the Site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Construction Services Agreement.
- B. The District shall promptly investigate the conditions, and if it finds that the conditions to materially so differ, and cause a decrease or increase in Contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the Construction Services Agreement. If asbestos-related work or hazardous substance removal is discovered which is not disclosed in the Construction Documents, such work shall be performed pursuant to a contract separate from any other work to be performed as required by Section 25914.2 of the Health and Safety Code, as may from time to time be amended.



- C. In the event that a dispute arises between the District and Contractor whether the conditions set forth in Paragraph A above materially differ, or involve hazardous waste, or cause a decrease or increase in Contractor's cost of, or time required for, performance of any part of the work, Contractor shall not be excused from any scheduled completion date provided for by this Construction Services Agreement but shall proceed with all work to be performed under the Construction Services Agreement. Contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.
- D. The Provisions of Section 32.A.–C., above, shall also apply to this Construction Services Agreement if this Construction Services Agreement involves digging trenches or other excavations that extend deeper than four feet below the surface.

SECTION 33. **INSURANCE**

A. **Contractor's Insurance Requirements**

Contractor shall purchase and maintain, during the performance of all work under this Construction Services Agreement insurance in the amounts as specified below in this Construction Services Agreement.

1. Commercial General Liability

- a. Coverage for Commercial General Liability insurance shall be at least as broad as the following:
  - i. Insurance Services Office Commercial General Liability coverage (Occurrence Form CG 0001)
  - ii. Commercial General Liability Insurance must include coverage for the following:
    - (a) Bodily Injury and Property Damage
    - (b) Personal Injury/Advertising Injury
    - (c) Premises/Operations Liability
    - (d) Products/Completed Operations Liability
    - (e) Aggregate Limits that Apply per Project
    - (f) Explosion, Collapse and Underground (XCU) exclusion deleted
    - (g) Contractual Liability with respect to this Contract
    - (h) Broad Form Property Damage
    - (i) Independent Contractors Coverage
- b. All such policies shall name San Mateo Union High School District, the Board and each member of the Board, its officers, employees, agents and volunteers as Additional Insureds under the policy.

- c. The general liability program may utilize either deductibles or provide coverage excess of a self-insured retention, subject to written approval by the District.

2. **Automobile Liability**

- a. At all times during the performance of the work under this Construction Services Agreement Contractor shall maintain Automobile Liability Insurance for bodily injury and property damage including coverage for owned, non-owned and hired vehicles, in a form and with insurance companies acceptable to the San Mateo Union High School District, in the amount specified below in this Construction Services Agreement.
- b. Coverage for automobile liability insurance shall be at least as broad as Insurance Services Office Form Number CA 0001 (ed. 6/92) covering automobile liability, Code 1 (any auto).
- c. The automobile liability program may utilize deductibles, but not a self-insured retention, subject to written approval by the San Mateo Union High School District.
- d. All such policies shall name the San Mateo Union High School District, the Board and each member of the Board, its officers, employees, agents and volunteers as Additional Insureds under the policies.

3. **Excess Liability (Umbrella)**

- a. At all times during the performance of the work under this Construction Services Agreement, Contractor shall maintain excess liability insurance in a form that follows the liability insurance provided in Sections 1. and 2, above.
- b. All such policies shall name the San Mateo Union High School District, the Board and each member of the Board, its officers, employees, agents and volunteers as Additional Insureds under the policies.

4. **Workers' Compensation/Employer's Liability**

- a. At all times during the performance of the work under this Construction Services Agreement Contractor shall maintain Workers' Compensation in compliance with applicable statutory requirements and Employer's Liability Coverage in amounts not less than the limits specified below in this Construction Services Agreement.
- b. Such insurance shall include an insurer's Waiver of Subrogation in favor of the San Mateo Union High School District and will be in a form and with insurance companies acceptable to the San Mateo Union High School District.
- c. If insurance is maintained, the workers' compensation and employer's liability program may utilize either deductibles or provide coverage excess of a self-insured retention, subject to written approval by the San Mateo Union High School District.
- d. Before beginning work, Contractor shall furnish to the District satisfactory proof that he/she has taken out for the period covered by the work under this Construction Services Agreement full compensation insurance for all persons employed directly by him/her or through subcontractors in carrying out the work contemplated under this Construction Services Agreement all in accordance with

the "Workers' Compensation and Insurance Act," Division IV of the Labor Code of the State of California and any acts amendatory thereof.

- e. Contractor shall sign a Certificate Regarding Workers' Compensation Insurance which is attached to this Construction Services Agreement as Exhibit F incorporated herein by this reference.

5. **Builder's Risk "All Risk" Insurance**

- a. At all times during the performance of the work, Contractor shall maintain builder's risk insurance on an "all risk" (excluding coverage for earthquake and flood peril) completed value basis upon the entire project which is the subject of the Construction Services Agreement. Coverage shall include completed work as well as work in progress. Such insurance shall include the San Mateo Union High School District as Loss Payee.
- b. Such insurance may have a deductible clause but not to exceed the smaller of: five percent (5%) of the total amount of the Contract; or \$10,000.00 for all risks, except flood.
- c. Such policies shall name the San Mateo Union High School District as Additional Insured.
- d. The making of Tenant Improvement Payments to Contractor shall not be construed as creating an insurable risk interest by or for the District or be construed as relieving Contractor or his subcontractors of responsibility for loss from any direct physical loss, damage, or destruction occurring prior to final acceptance of the work by the District.
- e. The insurer shall waive all rights of subrogation against the San Mateo Union High School District and shall provide the District with a Certificate of Insurance for Builder's Risk insurance coverage and evidence of waiver of rights of subrogation against the San Mateo Union High School District.

B. **Minimum Policy Limits Required**

The following insurance limits are required for the Contract:

	<u>Combined Single Limit</u>
Commercial General Liability	\$1,000,000 per occurrence/\$2,000,000 aggregate for bodily injury, personal injury and property damage
Automobile Liability	\$1,000,000 per occurrence for bodily injury and property damage
Excess Liability	\$4,000,000 per occurrence/\$4,000,000 aggregate for bodily injury, personal injury and property damage
Builder's Risk	Completed value or replacement cost

C. **Evidence Required**

- 1. Prior to execution of the Construction Services Agreement, Contractor shall file with the District evidence of insurance from an insurer or insurers certifying to the coverage of all

insurance required herein. Such evidence shall include original copies of the ISO CG 2010 (or insurer's equivalent) signed by the insurer's representative and Certificate of Insurance (ACORD Form 25-S or equivalent). All evidence of insurance shall be certified by a properly authorized officer, agent or qualified representative of the insurer and shall certify the names of the insured, any additional primary insureds, where appropriate, the type and amount of the insurance, the location and operations to which the insurance applies, and the expiration date of such insurance.

**D. Policy Provisions Required**

1. All policies shall contain a provision for 30 days advance written notice by the insurer(s) to the District of any cancellation. Statements that the carrier "will endeavor" and "that failure to mail such notice shall impose no obligation and liability upon the company, its agents or representatives," will not be acceptable on certificates.
2. All policies shall contain a provision stating that Contractor's policies are primary insurance and that the insurance of the San Mateo Union High School District or any named insureds shall not be called upon to contribute to any loss.

**E. Qualifying Insurers**

1. All policies required shall be issued by acceptable insurance companies, as determined by the San Mateo Union High School District, which satisfy the following minimum requirements:
  - a. Insurance carriers shall be qualified to do business in California and maintain an agent for process within the state. Such insurance carrier shall have not less than an "A" policyholder's rating and a financial rating of not less than "Class X" according to the latest Best Key Rating Guide.

**F. Additional Insurance Provisions**

1. The foregoing requirements as to the types and limits of insurance coverage to be maintained by Contractor and any approval of said insurance by the District, is not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Contractor pursuant to this Construction Services Agreement including but not limited to, the provisions concerning indemnification.
2. If at any time during the life of the Construction Services Agreement Contractor fails to maintain in full force any insurance required by the Construction Services Agreement, including required limits, the District may acquire the necessary insurance for Contractor and deduct the cost thereof from the appropriate Tenant Improvement Payments due Contractor, or Lease Prepayments made by the District.
3. Contractor shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. Contractor shall make certain that any and all subcontractors hired by Contractor are insured in accordance with this Construction Services Agreement. If any subcontractor's coverage does not comply with the foregoing provisions, Contractor shall indemnify and hold the District harmless from any damage, loss, cost, or expense, including attorneys' fees, incurred by the District as a result thereof.
4. If coverage is written on a "claims made" basis, the Certificate of Insurance shall clearly so state. In addition to the coverage requirements specified above, such policy shall provide that:

- a. The policy retroactive date coincides with or precedes Contractor's commencement of work under this Construction Services Agreement (including subsequent policies purchased as renewals or replacements).
- b. Contractor will make every effort to maintain similar insurance during the required extended period of coverage following expiration of this Construction Services Agreement, including the requirement of adding all additional insureds.
- c. If insurance is terminated for any reason, Contractor shall purchase an extended reporting provision of at least two years to report claims arising in connection with the Construction Services Agreement.
- d. The policy allows for reporting of circumstances or incidents that might give rise to future claims.
- e. The District may require Contractor to provide complete copies of all insurance policies in effect for the duration of the Project.
- f. Neither the District nor the Board, nor any member of the Board, nor any of the directors, officers, employees, agents or volunteers shall be personally responsible for any liability arising under or by virtue of the Construction Services Agreement.

SECTION 34. **HOLD HARMLESS**

The District, its Board and each member of the Board, its officers, employees and agents shall not be liable for, and Contractor shall defend, indemnify and hold harmless the District, its Board and each member of the Board, its officers, employees and agents (excluding the Architect, engineer and inspector) from and against any and all claims, demands, liability, judgments, awards, fines, mechanics' liens or other liens, labor disputes, losses, damages, injuries to property or persons (including death), expenses, charges or costs of any kind or character, including attorneys' fees and court costs (herein collectively referred to as "Claims"), which arise out of or are in any way connected to the work covered by this Construction Services Agreement arising either directly or indirectly from any act, error, omission or negligence of Contractor or its contractors, subcontractors, consultants, architects, engineers, licensees, agents, servants or employees. However, Contractor shall have no obligation to defend or indemnify the District from a Claim if it is determined by a court of competent jurisdiction that such Claim was caused by the active negligence, sole negligence, or willful misconduct of the District or its agents or employees.

SECTION 35. **RESOLUTION OF AGREEMENT CLAIMS**

- A. For purposes of this section, the term "Claim" has the meaning as set forth in Public Contract Code section 20104(b)(2), as that section may be amended from time to time. Section 20104(b) (2) currently defines "claim" to mean a separate demand by Contractor for: (a) time extension; (b) payment of money or damages arising from work done by or on behalf of Contractor pursuant to the Construction Services Agreement and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to; or (c) an amount the payment of which is disputed by the District.
- B. Notwithstanding any other provision herein, all claims that are equal to or less than Three Hundred Seventy-five Thousand Dollars (\$375,000) shall be resolved pursuant to Public Contract Code section 20104 *et seq.*, as may be amended from time to time, and which provisions are incorporated herein by reference.

- C. For claims not addressed in Section 35.A. and B. above, the dispute review process set forth in this subsection C. shall apply
1. The dispute review process set forth in this Section 35 shall be administered by the JAMS and governed by their rules in effect at the time of filing, or by any other neutral organization agreed to by the parties (hereinafter called “Administrator”).
  2. If a dispute arises out of, or relates to this Construction Services Agreement or the breach thereof, and if said dispute cannot be settled through normal contract negotiations, the parties agree to first endeavor to settle the dispute using mediation.
  3. The costs for all mediation, including the Administrative fees and mediator compensation, will be shared equally by all parties. Fees shall be jointly negotiated by all parties directly with the Administrator. The shared costs are estimated at \$1,500.00 or less for claims up to \$60,000.00 and \$3,000.00 or less for claims over \$60,000.00. If all parties agree, then the mediation costs may increase as required for resolution of the dispute. The expenses of witnesses for any party shall be paid by the party producing such witnesses.
  4. A single mediator, acceptable to all parties, shall be used to mediate the dispute. The mediator will be knowledgeable in construction aspects and will be selected from lists furnished by the Administrator. The initial mediation session shall commence within thirty (30) days of filing, unless otherwise agreed by the parties, or at the direction of the mediator.
  5. Mediation hearings will be conducted in an informal manner and discovery will not be allowed unless agreed by all parties. All discussions, statements, or admissions will be confidential to the proceedings and will not be used for any other purpose as it relates to the party’s legal position.
  6. Spokespersons shall be limited to the District, Contractor, Subcontractor, and Supplier personnel and their consultants. Contractor, Subcontractor and Supplier may have an attorney present and shall advise the other parties no less than five (5) business days before the mediation so that the other parties may also have their attorneys present.
  7. Any resultant agreements from mediation shall be documented in writing, and may be used as the basis for a change order or other directive as appropriate. All mediation results and documentation shall be non-binding and inadmissible for any purpose in any legal proceedings, in accordance with Evidence Code Section 1152, unless such admission is otherwise agreed in writing by all parties. Mediators shall not be subject to any subpoena or liability and their actions shall not be subject to discovery.
  8. If mediation is unsuccessful, the parties thereafter may, but are not required to, agree to submit the matter to the Administrator for binding arbitration. If the parties so agree to arbitrate, the following provision shall govern such arbitration, unless the parties otherwise agree in writing. The parties agree that the matter shall be submitted to one (1) arbitrator, unless they agree in writing to three (3) arbitrators. A judgment of a court having competent jurisdiction may be entered upon the award, and such judgment shall be enforceable as a final judgment to the fullest extent under the law. The parties agree to split evenly all arbitration and arbitrator(s)’ fees and expenses, subject to readjustment by the arbitrator as part of any award. The arbitration shall be subject to, and proceed in accordance with California Code of Civil Procedure, Sections 1280 through 1294.4. If the parties do not agree to submit to binding arbitration, neither party is prevented from pursuing other legal remedies.

SECTION 36. **SUBSTITUTION OF SECURITY**

In accordance with Public Contract Code section 22300, the District will permit the substitution of securities for any moneys withheld by the District to ensure performance under the Construction Services Agreement. At the request and expense of Contractors, securities equivalent to the amount withheld shall be deposited with the District, or with a state or federally chartered bank as the escrow agent, who shall then pay such moneys to Contractor. Upon satisfactory completion of the Construction Services Agreement the securities shall be returned to Contractor.

SECTION 37. **TITLE TO WORK**

Title to all work completed and in the course of construction paid for by the District and title to all materials on account of which payment has been made by the District to Contractor shall vest in the District pursuant to the applicable provisions of the Lease.

SECTION 38. **CONTRACT DOCUMENTS AND INTERPRETATIONS**

- A. The Contract Documents shall be executed, and/or initialed as appropriate, in duplicate by the District and Contractor. The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. The intention of the Contract Documents is to include all labor, services and materials reasonably necessary for the proper execution of the work.
- B. It is not intended that work and/or services not covered under any heading, section, branch, class or trade of the specifications shall be supplied, unless it is required elsewhere in the Contract Documents or is reasonably inferable therefrom as being necessary to produce the intended results, in which case such work and/or services shall be supplied by Contractor. Words which have well-known technical or trade meanings are used herein in accordance with such recognized meanings. Mutual agreement shall be reached with respect to words which do not have a well-known technical or trade meaning and the definition of which come into question.
- C. Drawings and specifications are intended to be fully cooperative and to agree. All drawing and specification changes shall be dated and sequentially recorded. All modifications to drawings and specifications shall be interpreted in conformity with the Contract Documents, which shall govern, unless otherwise specified.

SECTION 39. **COMPLIANCE WITH STATE STORM WATER PERMIT FOR CONSTRUCTION**

- A. If applicable, Contractor shall be required to comply with all conditions of the State Water Resources Control Board (State Water Board) National Pollutant Discharge Elimination System General Permit for Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity (the "Permit") for all construction activity which results in the disturbance of in excess of five acres of total land area or which is part of a larger common area of development or sale. The District shall be responsible for filing the Notice of Intent and for obtaining the Permit. A copy of the permit and supporting rules and orders by the State Water Resources Control Board is on file with the District. The District shall provide a draft of the Storm Water Pollution Prevention Program (SWPPP) for the Project to Contractor as soon as practicable after execution of this Construction Services Agreement. It shall be Contractor's responsibility to evaluate the cost of compliance with the SWPPP in bidding on this Construction Services Agreement. Contractor shall comply with all requirements of the State Water Resources Control Board. Contractor shall include all costs of compliance with specified requirements in the Contract Price.
- B. Contractor shall be responsible for implementing and complying with the provisions of the Permit and the SWPPP, including the standard provisions, monitoring and reporting requirements as

required by Permit. Contractor shall provide copies of all reports and monitoring information to the District and Architect.

- C. Contractor shall comply with the lawful requirements of any applicable municipality, the County, drainage district, and other local agencies regarding discharges of storm water to separate storm drain system or other watercourses under their jurisdiction, including applicable requirements in municipal storm water management programs.
- D. Failure to comply with the Permit is in violation of federal and state law. Contractor hereby agrees to indemnify and hold harmless the District, its Board members, officers, agents, employees and authorized volunteers from and against any and all claims, demands, losses or liabilities of any kind or nature which the District, its Board members, officers, agents, employees and authorized volunteers may sustain or incur for noncompliance with the Permit arising out of or in connection with the Project, except for liability resulting from the sole established negligence, willful misconduct or active negligence of the District, its Board members, officers, agents, employees or authorized volunteers. The District may seek damages from Contractor for delay in completing the Construction Services Agreement in accordance with Section 10 hereof, caused by Contractor's failure to comply with Permit.

SECTION 40. **EQUAL OPPORTUNITY CLAUSE**

- A. Contractor herein agrees not to discriminate in its recruiting, hiring, promotion, demotion or termination practices on the basis of race, religious creed, color, national origin, ancestry, sex, age or physical handicap in the performance of this Construction Services Agreement and to comply with the provisions of the following laws:
  - 1. California Fair Employment and Housing Act (Gov. Code 12900 *et seq.*, prohibiting discrimination in employment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex, and prohibiting harassment of an employee or applicant because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age);
  - 2. Federal Civil Rights Act of 1964 (42 USC 2000e *et seq.*, prohibiting discrimination in employment on the basis of race, color, national origin, religion, or sex); Title I of the Americans With Disabilities Act of 1990 (42 USC 12101 *et seq.*, prohibiting discrimination against qualified individuals with a disability in hiring and employment practices);
  - 3. The Age Discrimination in Employment Act (29 USC 621 *et seq.*, prohibiting age discrimination in employment against individuals who are at least forty years of age);
  - 4. California Labor Code section 1102.1 (prohibiting discrimination in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation); and
  - 5. Any other laws or regulations prohibiting discrimination as may be applicable to Contractor.

SECTION 41. **COMPLIANCE WITH DTSC GUIDELINES/IMPORTED SOILS**

If the Project requires the use of imported soils, Contractor shall be responsible to use and shall certify that the imported material it uses is free of any hazardous and/or toxic substance or material of any nature or type as defined in accordance with California Law and the California Health and Safety Code. The District reserves the right to reject any imported material that has come from agricultural or commercial land uses. Contractor must notify the District of the source of material



and comply with the \_\_\_\_\_ Regional Water Quality Control Board Resolution 95-63 and when applicable, with the guidelines of the Department of Toxic Substances Control (DTSC).

SECTION 42. **NO ASBESTOS**

- A. Contractor shall execute and submit an "Asbestos-Free Materials Certification." Contractor, further, is aware of the following:
1. Should asbestos containing materials be installed by Contractor in violation of this certification, or if removal of asbestos containing materials is part of the Project, decontaminations and removals will be performed in accordance with the requirements of all applicable laws and will meet the following criteria:
    - a. Decontamination and removal of work found to contain asbestos or work installed with asbestos containing equipment shall be done only under the supervision of a qualified consultant, knowledgeable in the field of asbestos abatement and accredited by the Environmental Protection Agency (EPA).
    - b. The asbestos removal contractor shall be an EPA accredited contractor qualified in the removal of asbestos and shall be chosen and approved by the asbestos consultant who shall have sole discretion and final determination in this matter.
    - c. The asbestos consultant shall be chosen and approved by the District which shall have sole discretion and final determination in this matter.
    - d. The work will not be accepted until asbestos contamination is reduced to levels deemed acceptable by the asbestos consultant.
- B. If removal of asbestos containing materials is part of the Project, the cost of all asbestos removal, including the cost of the asbestos removal contractor, shall be borne by the Contractor. District shall be responsible for the cost of the asbestos consultant, and analytical and laboratory fees.
- C. Hold Harmless: Interface of work for the Project with work containing asbestos shall be executed by Contractor at his/her risk and at his/her discretion with full knowledge of the currently accepted standards, hazards, risks and liabilities associated with asbestos work and asbestos containing products. By execution of the Construction Services Agreement Contractor acknowledges the above and agrees to the fullest extent permitted by law to hold harmless the District, its Board and each member of the Board, its officers, employees, agents, representatives, including its architect and assigns, for all asbestos liability which may be associated with this work. Contractor further agrees to instruct his/her employees with respect to the above-mentioned standards, hazards, risk and liabilities.

SECTION 43. **AGREEMENT MODIFICATIONS**

No waiver, alteration or modification of any of the provisions of this Construction Services Agreement shall be binding upon either the District or Contractor unless the same shall be in writing and signed by both the District and Contractor.

SECTION 44. **NOTICES**

- A. All communications in writing between the District and Contractor, including without limitation, applications for payment, shall be deemed to have been received by the addressee if delivered to the person for whom they are intended or if sent by registered mail, return receipt requested, or by telex, telegram, or fax followed by regular mail, addressed as follows:

**If to Contractor:**

[INSERT CONTACT PERSON]

[INSERT NAME OF CONTRACTOR]

\_\_\_\_\_, CA 92127

**If to the District:**

Elizabeth McManus

San Mateo Union High School District

650 N. Delaware Street

San Mateo, CA 94401

**With a Copy to:**

Sean B. Absher

Stradling Yocca Carlson & Rauth

44 Montgomery Street, Suite 4200

San Francisco, CA 94104

- B. For the purpose of directions, representative from Contractor shall be \_\_\_\_\_, and the District's representative shall be \_\_\_\_\_ and in his absence \_\_\_\_\_; unless otherwise specified in writing.

SECTION 45. **THIRD-PARTY CLAIMS**

Pursuant to Public Contract Code section 9201, the District shall provide Contractor with timely notification of the receipt of any third-party claim, relating to the Contract. The District is entitled to recover its reasonable costs incurred in providing such notification.

SECTION 46. **ASSIGNMENT**

Neither party to this Construction Services Agreement shall assign this Construction Services Agreement or sublet it as a whole without the written consent of the other, nor shall Contractor assign any monies due or to become due to it hereunder without the prior written consent of the District.

SECTION 47. **HEADINGS**

The headings herein contained are inserted only as a matter of convenience and reference and are not meant to define, limit or describe the scope or intent of the Contract Documents or in any way to affect the terms and provisions set forth herein.

SECTION 48. **INTEGRATION/MODIFICATION**

This Construction Services Agreement represents the entire understanding of the District and Contractor as to those matters contained herein, and supersedes and cancels any prior oral or written understanding, promises or representations with respect to those matters covered herein, and it shall not be amended, altered or changed except by a written agreement signed by the parties hereto.

SECTION 49. **APPLICABLE LAW**

The terms and provisions of this Construction Services Agreement shall be construed in accordance with the laws of the State of California. If any action is brought in a court of law to enforce any term of this Construction Services Agreement the action shall be brought in a state court situated in the County of San Mateo, State of California, unless a court finds jurisdiction or venue is only proper in a federal court, or a court outside this county. In the event of any such litigation between the

parties, the prevailing party shall be entitled to recover all reasonable costs incurred, including reasonable attorneys' fees, as determined by the courts or arbitrator(s).

SECTION 50. **SUCCESSION OF RIGHTS AND OBLIGATIONS**

All rights and obligations under this Construction Services Agreement shall inure to and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have, by their duly authorized representatives, executed this Construction Services Agreement, in duplicate, as of the day and year first above written.

CONTRACTOR:

DISTRICT:

**[Insert]**

**SAN MATEO UNION HIGH SCHOOL DISTRICT**

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

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

Its: \_\_\_\_\_

Its: \_\_\_\_\_

## **EXHIBIT A**

### **Scope of Work**

#### **A. Scope of Work**

The scope of work will include demolition of existing concrete building and site improvements. Rough grading including any required import or export of soils. Site utilities including storm drain, sanitary sewer, fire water and domestic water. Electrical main service in conjunction with PG&E. Underground conduits for AT&T and CATV. Cast-in-Drilled Hole Pilings. Footings and Grade Beams including rebar. This Increment 1 Site Development work is in preparation of the installation of modular classroom buildings at the Site.

#### **B. Project Schedule**

The District expects construction to commence in July 1, 2019. The anticipated completion date for the Project is March 6, 2020.

#### **C. Intentionally Omitted**

#### **D. Construction Services**

The Contractor shall perform all work and obligations described in this Section and the LLB Contract Documents, including the following construction services:

Demolition of existing concrete building and site improvements. Rough grading including any required import or export of soils. Site utilities including storm drain, sanitary sewer, fire water and domestic water. Electrical main service in conjunction with PG&E. Underground conduits for AT&T and CATV. Cast-in-Drilled Hole Pilings. Footings and Grade Beams including rebar. This Increment 1 Site Development work is in preparation of the installation of modular classroom buildings at the Site.

#### **E. Subcontractors**

All subcontractors not identified in the original proposal and who will perform more than 0.5% of the price allocable to pre-construction and construction work must be selected by a competitive bidding process or best value process as described in Education Code section 17406(a)(4). Contractor shall establish reasonable qualification criteria and standards for subcontractors and shall provide public notice of availability of work to be subcontracted in accordance with the publication date applicable to the District's competitive bidding process, including a fixed date and time on which qualifications statements, bids, or proposals will be due.

All electrical, mechanical and plumbing contractors shall be prequalified pursuant to Education Code section 17406 subsection (a)(2)(C), and Public Contract Code section 20111.6 subsections (b) through (m), prior to Contractor's submission of its proposal. It is mandatory that all General Contractors (GCs) and Mechanical, Electrical, and Plumbing (MEP) Subcontractors hold the following license classifications: C-4, C-7, C-10, C-16, C-20, C-34, C-36, C-38, C-42, C-43 and/or C-46.

All subcontractors shall be afforded the protections of the Subletting and Subcontracting Fair Practices Act (commencing with Public Contract Code section 4100).

**EXHIBIT B**

**[Reserved]**

**EXHIBIT C**

**Payment Bond**

KNOW ALL MEN BY THESE PRESENTS: That

WHEREAS, the \_\_\_\_\_ District (hereinafter designated as "Public Entity"), by action taken or a resolution passed, \_\_\_\_\_, 20\_\_, has awarded to \_\_\_\_\_, hereinafter designated as the "Principal," a contract for the work described as follows: \_\_\_\_\_ (the "Project"); and

WHEREAS, said Principal is required by Chapter 5 (commencing at Section 3225) and Chapter 7 (commencing at Section 3247), Title 15, Part 4, Division 3 of the California Civil Code to furnish a bond in connection with said contract;

NOW THEREFORE, we, the Principal and \_\_\_\_\_, as Surety, are held and firmly bound unto the Public Entity in the penal sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) lawful money of the United States of America, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that if said Principal, his or its subcontractors, heirs, executors, administrators, successors or assigns, shall fail to pay (1) any of the persons named in Section 3181 of the California Civil Code, (2) amounts due under the Unemployment Insurance Code with respect to work or labor performed under the contract, or (3) for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of Contractor and his subcontractors pursuant to Section 13020 of the Unemployment Insurance Code, with respect to such work and labor the surety or sureties will pay for the same, in an amount not exceeding the sum hereinabove specified, and also, in case suit is brought upon this bond, all litigation expenses incurred by the Public Entity in such suit, including reasonable attorneys' fees, court costs, expert witness fees and investigation expenses.

This bond shall inure to the benefit of any of the persons named in Section 3181 of the California Civil Code so as to give a right of action to such persons or their assigns in any suit brought upon this bond.

It is further stipulated and agreed that the Surety on this bond shall not be exonerated or released from the obligation of this bond by any change, extension of time for performance, addition, alteration or modification in, to, or of any contract, plans, specifications, or agreement pertaining or relating to any scheme or work of improvement hereinabove described, nor by any fraud practiced by any person other than the claimant seeking to recover on the bond and that this bond be construed most strongly against the Surety and in favor of all persons for whose benefit such bond is given, and under no circumstances shall Surety be released from liability to those for whose benefit such bond has been given, by reason of any breach of contract between the owner or Public Entity and original contractor or on the part of any obligee named in such bond, but the sole conditions of recovery shall be that claimant is a person described in Section 3110 or 3112 of the California Civil Code, and has not been paid the full amount of his claim and that Surety does hereby waive notice of any such change, extension of time, addition, alteration or modification herein mentioned.

IN WITNESS WHEREOF, this instrument has been duly executed by the Principal and Surety above named, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Principal \_\_\_\_\_

By

[Attach required acknowledgments]

Surety \_\_\_\_\_

By Attorney-in-Fact

**EXHIBIT D**

**Performance Bond**

KNOW ALL MEN BY THESE PRESENTS: That

WHEREAS, the \_\_\_\_\_ School District by action taken or a resolution passed \_\_\_\_\_, 20\_\_, has awarded to \_\_\_\_\_ (Contractor), hereinafter designated as the "Principal," a contract for the work described as follows: \_\_\_\_\_ (the "Project"); and

WHEREAS, said Principal is required under the terms of said contract to furnish a bond for the faithful performance of said contract to the \_\_\_\_\_ School District (referred to herein as the "Public Entity");

NOW THEREFORE, we, the Principal and \_\_\_\_\_, as Surety, are held and firmly bound unto the Public Entity in the penal sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) lawful money of the United States America, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the above bounded Principal, his or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by and well and truly keep and perform, the covenants, conditions, and agreements in the said contract and any alteration thereof made as therein provided, on his or their part, to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the Public Entity, its officers and agents, as therein stipulated, then this obligation shall become null and void, otherwise, it shall be and remain in full force and virtue.

And the said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the contract or to the work to be performed thereunder, or the specifications accompanying the same, shall in anywise affect its obligation on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the contract, or to the work, or to the specifications.

In the event suit is brought upon this bond by the District and judgment is recovered, the Surety shall pay all litigation expenses incurred by the District in such suit, including attorneys' fees, court costs, expert witness fees and investigation expenses.

IN WITNESS WHEREOF, this instrument has been duly executed by the Principal and Surety above named, on the day of \_\_\_\_\_, 20\_\_.

Principal \_\_\_\_\_

[Attach required acknowledgments]

By

Surety \_\_\_\_\_

By Attorney-in-fact



**EXHIBIT E**

**Contractor Fingerprinting Requirements**

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**CONTRACTOR CERTIFICATION**

With respect to the Contract dated \_\_\_\_\_, 20\_\_, by and between the \_\_\_\_\_ School District (“District”) and \_\_\_\_\_ (“Contractor”), Contractor hereby certifies to the District’s governing board that it has completed the criminal background check requirements of Education Code section 45125.1 and that none of its employees that may come in contact with the District’s pupils have been convicted of a violent felony listed in Penal Code section 667.5(c) or a serious felony listed in Penal Code section 1192.7(c).

Contractor’s Representative: \_\_\_\_\_

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

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**CONTRACTOR EXEMPTION**

Pursuant to Education Code sections 45125.1 and 45125.2, the \_\_\_\_\_ School District (“District”) has determined that \_\_\_\_\_ (“Contractor”) is exempt from the criminal background check certification requirements for the contract dated \_\_\_\_\_, 20\_\_, by and between the District and Contractor (“Contract”) because:

- ☐ Contractor’s employees will have limited contact with District students during the course of the Contract;
- ☐ Emergency or exceptional circumstances exist; or
- ☐ With respect to Contractors constructing, reconstructing, rehabilitating or repairing a school facility, as provided in Section 45125.2, Contractor has agreed to ensure the safety of pupils at the school facility by the following method(s) specified in Section 45125.2:

School District Official: \_\_\_\_\_

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

**EXHIBIT E (CONT'D)**

**Subcontractor Fingerprinting Requirements**

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**SUBCONTRACTOR'S CERTIFICATION**

The \_\_\_\_\_ School District ("District") entered into a contract for services with \_\_\_\_\_ ("Contractor") on or about \_\_\_\_\_, 20\_\_ ("Contract"). This certification is submitted by \_\_\_\_\_, a subcontractor to Contractor for purposes of that Contract ("Subcontractor"). Subcontractor hereby certifies to the District's governing board that it has completed the criminal background check requirements of Education Code section 45125.1 and that none of its employees that may come in contact with District pupils have been convicted of a violent felony listed in Penal Code section 667.5(c) or a serious felony listed in Penal Code section 1192.7(c).

Subcontractor's Representative: \_\_\_\_\_

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

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**SUBCONTRACTOR'S EXEMPTION**

The \_\_\_\_\_ School District ("District") entered into a contract for services with \_\_\_\_\_ ("Contractor") on or about \_\_\_\_\_, 20\_\_ ("Contract"). Pursuant to Education Code sections 45125.1 and 45125.2, the District has determined that \_\_\_\_\_, a subcontractor to Contractor for purposes of that Contract ("Subcontractor"), is exempt from the criminal background check certification requirements for the Contract because:

- ☐ The Subcontractor's employees will have limited contact with District students during the course of the Contract;
- ☐ Emergency or exceptional circumstances exist; or

With respect to Contractors constructing, reconstructing, rehabilitating or repairing a school facility, as provided in Section 45125.2, Contractor and/or Subcontractor have agreed to ensure the safety of pupils at the school facility by the following method(s) specified in Section 45125.2: \_\_\_\_\_.

School District Official: \_\_\_\_\_

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

**EXHIBIT F**

**Contractor's Certificate Regarding Workers' Compensation**

Labor Code section 3700 in relevant part provides:

Every employer except the State shall secure the payment of compensation in one or more of the following ways:

- (a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this State.
- (b) By securing from the Director of Industrial Relations a certificate of consent to self-insure, either as an individual employee or as one employer in a group of employers, which may be given upon furnishing proof satisfactory to the Director of Industrial Relations of ability to self-insure and to pay any compensation that may become due to his employees.

I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this Construction Services Agreement.

Contractor \_\_\_\_\_  
Title \_\_\_\_\_  
Date \_\_\_\_\_

(In accordance with article 5 (commencing at section 1860), chapter 1, part 7, division 2 of the Labor Code, the above certificate must be signed and filed with the awarding body prior to performing any work under this Construction Services Agreement.

**ATTACHMENT 1**

**General Conditions**