

OAKLAND UNIFIED SCHOOL DISTRICT  
OFFICE OF THE SUPERINTENDENT  
FEBRUARY 9, 2011

LEGISLATIVE FILE

File ID No. 11-0288  
Introduction Date 2/1/11  
Enactment No. 170175  
Enactment Date 2-9-11  
By ES

**TO: Board of Education**

**FROM: Anthony Smith, Superintendent**  
**Timothy White, Assistant Superintendent for Facilities Planning & Management**

**SUBJECT: APPROVAL, EXECUTION AND DELIVERY OF SITE LEASE AGREEMENT, FACILITIES LEASE AGREEMENT AND OTHER ACTS RELATING TO THE CONSTRUCTION AND MODERNIZATION OF HIGHLAND ELEMENTARY SCHOOL**

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**ACTION REQUESTED:**

Approval by the Board of Education of the Lease Leaseback delivery of the Highland Elementary School Project through the approval of the Site Lease Agreement, Facilities Lease Agreement and related construction documents.

**BACKGROUND:**

California Education Code section 17406 permits the governing board of a school district, without advertising for bids, to lease to any person, firm or corporation any real property owned by the District if the instrument by which such property is leased requires the lessee to construct on the leased premises, or provide for the construction thereon, a building or buildings for the use of the school district, during the term of the lease, and provides that title to the building(s), and underlying real property, shall vest back in the school district at the expiration of the lease. This is known as the Lease-Leaseback method of construction delivery, and is an Office of Public School Construction (OPSC) approved method for the construction and modernization of California public schools.

**CURRENT CONSIDERATIONS:**

The Lease Leaseback Agreements before the Board of Education provide for ADCO / TURNER GROUP / ALTEN JV, a California licensed Joint Venture (Developer), to lease certain District property and construct the improvements to the Highland Elementary School Facility (Project) per the Division of State Architect approved design documents at a predetermined agreed upon price, and lease back the facility to the District. The final Guaranteed Project Cost (GPC), per provisions in the Education Code, will be established at the time the final construction bids have been determined and reviewed by District staff and Facilities Department consulting teams. The District will make tenant improvement payments (TI Payments) to the Developer during the Project's construction phase pursuant to the Facilities Lease, and once the District has made all the TI Payments to satisfy the entire agreed upon GPC, the Site Lease and Facilities Lease shall terminate, and title to the Project shall vest once again with the District, free of any further encumbrances.

**FISCAL IMPACT:**

\$ \_\_\_\_\_; the Final Guaranteed Project Cost; Measure B Capital Funds

**RECOMMENDATION:**

Recommend that the Board of Education approve and execute the *Site Lease Agreement*, *Facilities Lease Agreement*, and authorize the General Counsel to initiate validation proceedings, as appropriate.

**ATTACHMENT:**

SITE LEASE AGREEMENT; FACILITIES LEASE AGREEMENT AND EXHIBITS  
THERE TO; LEASE LEASEBACK CONSTRUCTION DELIVERY METHOD  
OVERVIEW.

## **LEASE LEASEBACK CONSTRUCTION DELIVERY METHOD OVERVIEW**

### **I. Lease Leaseback OVERVIEW**

#### **A. Basic Agreement Structure**

1. School district leases real property to a developer through a site lease for \$1 per year.
2. Developer constructs facility, then leases the facility back to the district through a facility lease. This is the "leaseback" component.
3. Lease payments made by district for construction costs which are usually financed.
4. Title to the property vests in the district as lease payments are made.

#### **B. Historical Background**

1. Enacted at time when there was a shortage of money for school construction. Allows building of schools when districts don't have the money, but have a revenue stream. Authorized even if money for construction is available (i.e. Bond Programs)

#### **C. Statutory Authority**

1. Education Code section 17406 (a):

*"...the governing board of a school district, without advertising for bids, may let, for a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property that belongs to the district if the instrument by which such property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term thereof, and provides that title to that building shall vest in the school district at the expiration of that term. The instrument may provide for the means or methods by which that title shall vest in the school district prior to the expiration of that term, and shall contain such other terms and conditions as the governing board may deem to be in the best interest of the school district."*

#### **D. Recommended Process**

1. Owner selects Architect, through RFP/RFQ, to design project.
2. Architect completes design and gets DSA approval.
3. Owner develops solicitation documents for lease-leaseback contract.
4. Owner selects developer/contractor/construction manager ("Developer") through RFP/RFQ process.

5. Developer bids to trade contractors. Not required to utilize formal public bidding.
6. Owner leases land to Developer (site lease); Developer agrees to construct building(s) and to leaseback the completed building(s) to the District (facilities lease).
7. Construction commences and District can make tenant improvement payments for portion of construction.
8. Developer completes construction of the building(s) and District gets occupancy and is a tenant under the facilities lease.
9. District makes lease payments for period of time and then has the option to make a balloon payment to Developer to buy out the facilities lease.

## **II. VALIDATION PROCEEDING**

- A. Recommended legal proceeding / pre-emptive suit to have a superior court "validate" the contractual relationship and the district board's actions. (California Code of Civil Procedure sec. 860)
- B. Action may be brought to determine the validity of any resolution, ordinance, agreement, or method of financing. (Gov. Code sec. 53982)
- C. Purpose is to ensure that challenges to the project cannot be made after construction commences. Any prospective disgruntled party, like a contractor, union, or taxpayer, can be precluded from seeking an injunction once construction commences.

A validation proceeding (Code Civ. Proc., § 860 et seq.) is a lawsuit filed and prosecuted for the purpose of securing a judgment determining the validity of a particular local governmental decision or act. ( N.T. Hill Inc. v. City of Fresno (1999) 72 Cal.App.4th 977, 991, 85 Cal.Rptr.2d 562.) Generally speaking, statutory validation actions are designed to provide expedient, uniform procedures by which public agencies can obtain binding judgments as to the validity of public financing commitments such as "bonds, warrants, contracts, obligations or evidence of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure." (Gov.Code, § 53511; Friedland v. City of Long Beach (1998) 62 Cal.App.4th 835, 843.

Jurisdiction shall be complete after the date specified in the summons. Any party interested may, not later than the date specified in the summons, appear and contest the legality or validity of the matter sought to be determined.



## **Lease-Leaseback Project Delivery Method**

FACILITIES COMMITTEE MEETING  
FEBRUARY 1, 2011

LOWELL  
HIGHLAND  
DOWNTOWN EDUCATIONAL COMPLEX

## **Lease Leaseback: In Summary**

- The Builder is selected by qualifications, not low bid.
- Builder provides a Guaranteed Maximum Price.
- Traditionally, included a significant financing component.
- Possible legal challenges (but none in recent years, and none ever upheld.)

## History of LLB

- LLB is authorized under Ed. Code 17406.
  - A long-term, revenue-based financing vehicle for projects.
- Growing problems with claims and cost overruns on design-bid-build projects led districts to look for alternatives to the low bid model.
- LLB widely used by Districts /growing in popularity.

## Process Comparison

- Design-Bid-Build:
  - Builder is selected by lowest bid.
  - Design is completed before it is provided to potential builders (bidders).
- Lease Leaseback:
  - Builder is selected based on qualifications.
  - Builder often has early involvement with design.

## LLB Process

- District competitively selects Builder.
- Builder lines up trade contractors and develops Guaranteed Maximum Price. Board awards LLB contract.
- District completes validation action (recommended).
- Builder constructs the project for the negotiated Guaranteed Maximum Price.

## The Lease Contracts

- Site Lease:
  - District leases the site to Builder.
  - Terminates when Facilities Lease terminates.
- Facilities Lease:
  - Builder constructs facility per Plans and Specs.
  - Builder leases the facility back to the District.
  - Builder transfers title of the facility to the District upon final payment.

## Payments

- *During Construction*
  - Traditional structure: financing in place to fund interim payments
  - Option: tenant improvement payments, somewhat analogous to progress payments
- *After Construction*
  - Final lease payment(s)
  - If there is no significant financing, analogous to post-completion final payment(s), including stop notice requirements

## Minimizing Risk

- Recommend a Validation Action once Board approves a LLB contract.
  - Inexpensive
  - Protects schedule
- Strong selection process to get best Builder.
- Closely monitor:
  - Cost vs. estimates
  - Change orders, use of contingency etc.
  - Final cost

## LLB Advantages

- Select Builder by qualifications, not low bid.
- Historically, fewer claims and disputes because Builder has had early involvement in design.
- Guaranteed Maximum Price and schedule control.

## Disadvantages

- Cost of LLB projects may be higher.
- LLB does not bar change orders or claims (although less likely due to Builder's involvement with design), particularly:
  - Unforeseen Site conditions
  - Owner changes ("Scope creep")

**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

Oakland Unified School District  
Department of Facilities Planning and Management  
955 High Street  
Oakland, CA 94601  
Attention: Timothy White,  
Assistant Superintendent

**WITH A COPY TO:**

DOANS/TURNER GROUP/ALTEN, JV  
720 12<sup>th</sup> Street  
Richmond CA 94908  
Attn: Robert Alten

**This document is recorded for the benefit of  
Oakland Unified School District, and  
recording fee(s) are exempt under  
Government Code section 6103.**

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**SITE LEASE**

**For all or a portion of the following Site:**

New Highland Academy  
8521 A Street  
Oakland, CA 94621

**By and between**

Oakland Unified School District  
1025 2<sup>nd</sup> Avenue  
Oakland, CA 94606-2212

**And**

DOANS/TURNER GROUP/ALTEN, JV,  
720 12<sup>th</sup> Street  
Richmond CA 94908

Dated as of \_\_\_\_\_, 2011

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DOANS/TURNER GROUP/ALTEN, JV,  
720 12<sup>th</sup> Street  
Richmond CA 94908

Dated as of 2/10, 2011

## SITE LEASE

This site lease ("Site Lease"), dated as of \_\_\_\_\_, 2011 ("Effective Date"), is made and entered into by and between DOANS/TURNER GROUP/ALTEN, JV ("Developer"), a California company duly organized and existing under the laws of the State of California, as sublessor, and Oakland Unified School District, a school district duly organized and validly existing under the laws of the State of California, as sublessee ("District") (together, the "Parties").

**WHEREAS**, the District currently owns a parcel of land located at 8521 A Street Oakland, CA 94621, as more particularly described in "**Exhibit A**" attached hereto and incorporated herein by this reference ("School Site"); and

**WHEREAS**, the District desires to provide for the construction of certain work to be performed on portions of the School Site. That work will include the construction of new classroom facilities for high school students living in the Oakland Unified School District ("Project"); and

**WHEREAS**, District desires to have the construction of the Project completed and to lease it back, as more particularly described in the facilities lease between the Parties dated as of the Effective Date whereby the Developer agrees to lease the Project Site back to the District and perform the work of the Project ("Facilities Lease"), which Facilities Lease is incorporated herein by this reference; and

**WHEREAS**, the District determines that a portion of the School Site is adequate to accommodate the Project, as more particularly described in **Exhibit "B"** ("Project Site") attached hereto and incorporated herein by this reference; and

**WHEREAS**, the Board of Education of the District ("Board") has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Project Site to Developer and by immediately entering into the Facilities Lease under which District will lease back the Project from Developer; and

**WHEREAS**, the District further determines that it has entered into this Site Lease and the Facilities Lease pursuant to Education Code section 17406 as the best available and most expeditious means for the District to satisfy its substantial need for the facilities to be provided by the Project and to accommodate and educate District students; and

**WHEREAS**, the District is authorized under Education Code section 17406 to lease the Project Site to Developer and to have Developer develop and cause the construction of the Project thereon and lease the Project Site back to the District by means of the Facilities Lease, and the Board has duly authorized the execution and delivery of this Site Lease in order to effectuate the foregoing, based upon a finding that it is in the best interest of the District to do so; and

**WHEREAS**, Developer as lessee is authorized and competent to lease the Project Site from District and to develop and cause the construction of the Project on the Project Site, and has duly authorized the execution and delivery of this Site Lease; and

**WHEREAS**, the Parties have performed all acts, conditions and things required by law to exist, to have happened, and to have been performed prior to and in connection with the execution and entering into this Site Lease, and those conditions precedent do exist, have



happened, and have been performed in regular and due time, form, and manner as required by law, and the Parties hereto are now duly authorized to execute and enter into this Site Lease;

**NOW, THEREFORE**, in consideration of the promises and of the mutual agreements and covenants contained herein, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto do hereby agree as follows:

1. **Definitions.** Unless the context clearly otherwise requires, all words and phrases defined in the Facilities Lease shall have the same meaning in this Site Lease.
2. **Exhibits.** The following Exhibits are attached to and by reference incorporated and made a part of this Site Lease.
  - 2.1. **Exhibit "A":** Description of School Site
  - 2.2. **Exhibit "B":** Description of Project Site
3. **Lease of the Project Site.** The District hereby leases to the Developer, and the Developer hereby leases from the District the Project Site, subject only to Permitted Encumbrances, in accordance with the provisions of this Site Lease, to have and to hold for the term of this Site Lease. This Site Lease shall only take effect if the Facilities Lease is executed by the District and Developer within three (3) days of execution of this Site Lease.
4. **Leaseback of the Project Site.** The Parties agree that the Project Site will be leased back to the District pursuant to the Facilities Lease for the term thereof.
5. **Term.** The term of this Site Lease shall commence as of the Effective Date and shall terminate on the last day of the Term of the Facilities Lease, provided the District has paid to the Developer, or its assignee, all payments which may be due under the Facilities Lease, and provided this Site Lease has not been terminated pursuant to the termination provisions of the Facilities Lease.
6. **Payment.** In consideration for the lease of the Project Site by the District to the Developer and for other good and valuable consideration, the Developer shall pay One Dollar (\$1.00) to the District upon execution of this Site Lease.
7. **Termination**
  - 7.1. **Termination Upon Purchase of Project.** If the District exercises its option to purchase the Project pursuant to the Facilities Lease, then this Site Lease shall terminate concurrently with the District's buy out and termination of the Facilities Lease.
  - 7.2. **Termination Due to Default by Developer.** If Developer defaults pursuant to the provision(s) of the Facilities Lease and the District terminates the Facilities Lease pursuant to the Facilities Lease provision(s) allowing termination, then the Developer shall be deemed to be in default of this Site Lease and this Site Lease shall also terminate at the same time as the Facilities Lease.
  - 7.3. **Termination Due to Default by District.** If District defaults pursuant to the provision(s) of the Facilities Lease, the Developer, or its assignee, will have the right, for

the then remaining term of this Site Lease, to:

7.3.1. Take possession of the Project Site;

7.3.2. If it deems it appropriate, cause appraisal of the Project Site and a study of the then reasonable uses thereof; and

7.3.3. Relet the Project Site.

8. **Title to School Site.** During the term of this Site Lease, the District shall hold fee title to the School Site, including the Project Site, and nothing in this Site Lease or the Facilities Lease shall change, in any way, the District's ownership interest in the School Site.
9. **Improvements.** Title to all improvements made on the Project Site during the term hereof shall be held, vest and transfer pursuant to the terms of the Facilities Lease.
10. **No Merger.** The leaseback of the Project Site by the Developer to the District pursuant to the Facilities Lease shall not effect or result in a merger of the estates of the District in the Project Site, and the Developer shall continue to have a leasehold estate in the Project Site pursuant to this Site Lease throughout the term hereof.
11. **Right of Entry.** The District reserves the right for any of its duly authorized representatives to enter upon the Project Site at any reasonable time to inspect the same, provided the District follows all safety precautions required by the Developer.
12. **Quiet Enjoyment.** Subject to any rights the District may have under the Facilities Lease (in the absence of an Event of Default) to possession and enjoyment of the Project Site, the District hereby covenants and agrees that it will not take any action to prevent the Developer from having quiet and peaceable possession and enjoyment of the Project Site during the term hereof and will, at the request of the Developer, to the extent that it may lawfully do so, join in any legal action in which the Developer asserts its right to such possession and enjoyment.
13. **Waste.** The Developer agrees that at all times that it is in possession of the Project Site, it will not commit, suffer or permit any waste on the Project Site, and that it will not willfully or knowingly use or permit the use of the Project Site for any illegal purpose or act.
14. **Further Assurances and Corrective Instruments.** The Parties shall, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Project Site hereby leased or intended so to be or for carrying out the expressed intention of this Site Lease and the Facilities Lease.
15. **Representations of the District.** The District represents, covenants and warrants to the Developer as follows:
  - 15.1. **Due Organization and Existence.** The District is a school district, duly organized and existing under the Constitution and laws of the State of California.

**15.2. Authorization.** The District has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Site Lease.

**15.3. No Violations.** To the best of the District's actual knowledge, neither the execution and delivery of this Site Lease nor the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Project Site, except Permitted Encumbrances.

**15.4. CEQA Compliance.** The District has complied with all requirements imposed upon it by the California Environmental Quality Act (Public Resource Code Section 21000 *et seq.* ("CEQA")) in connection with the Project, and no further environmental review of the project is necessary pursuant to CEQA before the construction of the Project may commence.

**15.5. No Litigation.** To the best of the District's actual knowledge, there is no pending or, to the knowledge of District, threatened action or proceeding before any court or federal, state, municipal, or other government authority or administrative agency which will materially adversely affect the ability of District to perform its obligations under this Site Lease.

**15.6. Condemnation Proceedings.**

15.6.1. District covenants and agrees, but only to the extent that it may lawfully do so, that so long as this Site Lease remains in effect, the District will not seek to exercise the power of eminent domain with respect to the Project so as to cause a full or partial termination of this Site Lease and the Facilities Lease.

15.6.2. If for any reason the foregoing covenant is determined to be unenforceable or in some way invalid, or if District should fail or refuse to abide by such covenant, then, to the extent they may lawfully do so, the Parties agree that the financial interest of Developer shall be as indicated in the Facilities Lease.

**15.7. Use and Zoning.** To the best of the District's actual knowledge, the Project Site is properly zoned for its intended purpose and the use or activities contemplated by this Site Lease will not conflict with local, state or federal law.

**15.8. Taxes.** To the best of the District's actual knowledge, all taxes and assessments are paid current and such taxes and assessments will continue to be paid to the extent that the District is not exempt.

**15.9. Hazardous Materials.** District is not currently aware of any contamination to the Project Site by Hazardous Materials. If District becomes aware of any act or circumstance which would change or render this representation incorrect, in whole or in part, District will give immediate written notice of such changed fact or circumstance to Developer.

**16. Representations of the Developer.** The Developer represents, covenants and

warrants to the District as follows:

**16.1. Due Organization and Existence.** The Developer is a Joint Venture licensed to provide such services in the state of California, has power to enter into this Site Lease and the Facilities Lease; is possessed of full power to lease, leaseback, and hold real and personal property and has duly authorized the execution and delivery of all of the aforesaid agreements.

**16.2. Authorization.** The Developer has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Site Lease.

**16.3. No Violations.** Neither the execution and delivery of this Site Lease or the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Developer is now a party or by which the Developer is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the Developer, or upon the Project Site, except for Permitted Encumbrances.

**16.4. No Bankruptcy.** Developer is not now nor has it ever been in bankruptcy or receivership.

**16.5. No Litigation.** There is no pending or, to the knowledge of Developer, threatened action or proceeding before any court or administrative agency which will materially adversely affect the ability of Developer to perform its obligations under this Site Lease or the Facilities Lease.

**17. Insurance and Indemnity.** The Developer and the District shall comply with the insurance requirements and the indemnity requirements as indicated in the Facilities Lease.

**18. Assignment and Subleasing.** This Site Lease may be assigned and/or the Project Site subleased, as a whole or in part, by the Developer only upon the prior written consent of the District to such assignment or sublease, which shall not be unreasonably withheld.

**19. Restrictions on District.** The District agrees that it will not mortgage, sell, encumber, assign, transfer or convey the Project Site or any portion thereof during the term of this Site Lease in any way that would interfere with or diminish Developer's interests indicated in this Site Lease.

**20. Liens and Further Encumbrances.** Developer agrees to keep the Project Site and every part thereof free and clear of any and all encumbrances and/or liens, including without limitation, pledges, charges, encumbrances, claims, mechanic liens and/or other liens for or arising out of or in connection with work or labor done, services performed, or materials or appliances used or furnished for or in connection with the Project Site or the Project. Pursuant to the Facilities Lease, Developer further agrees to pay promptly and fully and discharge any and all claims on which any encumbrance and/or lien may or could be based, and to save and hold District free and harmless from any and all such liens, mortgages, and claims of liens and suits or other proceedings pertaining thereto.

This subsection does not apply to Permitted Encumbrances.

- 21. Notices.** All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received five (5) days after deposit in the United States mail in registered or certified form with postage fully prepaid or one (1) business day after deposit with an overnight delivery service with proof of actual delivery:

**If to District:**

Oakland Unified School District  
Department of Facilities Planning and Management  
955 High Street  
Oakland, CA 94601  
Attention: Tadashi Nakadegawa,  
Facilities Director  
Telephone: (510) 879-2962  
Tadashi.nakadegawa@ousd.k12.ca.us

**With a copy to:**

Dannis Woliver Kelley  
71 Stevenson St., 19<sup>th</sup> Floor  
San Francisco, CA 94015  
Attention: Catherine Boskoff  
Telephone: (415) 543-4111  
Facsimile: (415) 543-4384

**If to Developer:**

DOANS/TURNER GROUP/ALTEN, JV  
720 12<sup>th</sup> Street  
Richmond CA 94908  
Attn: Robert Alten  
[balten@altenconstruction.com](mailto:balten@altenconstruction.com)  
Telephone: (510) 234-4200

The Developer and the District, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent.

- 22. Binding Effect.** This Site Lease shall inure to the benefit of and shall be binding upon the Developer and the District and their respective successors and assigns.
- 23. No Additional Waiver Implied by One Waiver.** In the event any agreement contained in this Site Lease should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive future compliance with any term hereof or any other breach hereunder.
- 24. Severability.** In the event any provision of this Site Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof, unless elimination of such invalid provision materially alters the rights and obligations embodied in this Site Lease or the Facilities Lease.
- 25. Amendments, Changes and Modifications.** Except as to the termination rights of both Parties as indicated in the Facilities Lease, this Site Lease may not be amended, changed, modified, altered or terminated without the written agreement of both Parties hereto.

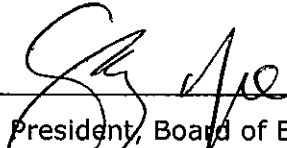
- 26. Obligations Absolute.** The Developer agrees that the obligations of the Developer are absolute and unconditional and not subject to any charges or setoffs against the District whatsoever.
- 27. Execution in Counterparts.** This Site Lease may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same instrument.
- 28. Developer and District Representatives.** Whenever under the provisions of this Site Lease approval by the Developer or the District is required, or the Developer or the District is required to take some action at the request of the other, such approval or such request shall be given for the Developer by the Developer Representative and for the District by the District Representative, and any party hereto shall be authorized to rely upon any such approval or request.
- 29. Applicable Law.** This Site Lease shall be governed by and construed in accordance with the laws of the State of California, and venued in Alameda County, the County within which the School Site is located.
- 30. Attorney's Fees.** If either party brings an action or proceeding involving the School Site or to enforce the terms of this Site Lease or to declare rights hereunder, each party shall bear the cost of its own attorneys' fees.
- 31. Captions.** The captions or headings in this Site Lease are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Site Lease.
- 32. Prior Agreements.** This Site Lease and the corresponding Facilities Lease collectively contain all of the agreements of the Parties hereto with respect to any matter covered or mentioned in this Site Lease and no prior agreements or understanding pertaining to any such matter shall be effective for any purpose.
- 33. Further Assurances.** Parties shall promptly execute and deliver all documents and instruments reasonably requested to give effect to the provisions of this Site Lease.
- 34. Recitals Incorporated.** The Recitals set forth at the beginning of this Site Lease are hereby incorporated into its terms and provisions by this reference.
- 35. Time of the Essence.** Time is of the essence with respect to each of the terms, covenants, and conditions of this Site Lease.
- 36. Force Majeure.** A party shall be excused for damage to the property and from the performance of any obligation imposed in this Site Lease and the exhibits hereto for any period and to the extent that a party is prevented from performing such obligation, in whole or in part, as a result of delays caused by the other party or third parties, a governmental agency or entity, an act of God, war, terrorism, civil disturbance, forces of nature, fire, flood, earthquake, strikes or lockouts, and such non performance or damage to the property will not be a default hereunder or a grounds for termination of this Site Lease.
- 37. Interpretation.** None of the Parties hereto, nor their respective counsel, shall be deemed the drafters of this Site Lease or the Facilities Lease for purposes of construing

the provisions of each. The language in all parts of this Site Lease shall in all cases be construed according to its fair meaning, not strictly for or against any of the Parties hereto.

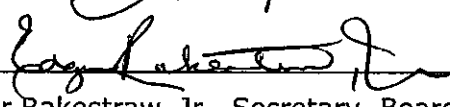
**IN WITNESS WHEREOF**, the Parties have caused this Site Lease to be executed by their respective officers who are duly authorized, as of the Effective Date.

**ACCEPTED AND AGREED** on the date indicated below:

**OAKLAND UNIFIED SCHOOL DISTRICT**

  
\_\_\_\_\_  
Gary Yee, President, Board of Education

2/10/2011  
Date

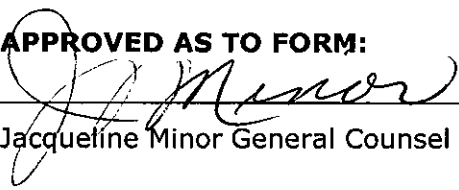
  
\_\_\_\_\_  
Edgar Rakestraw, Jr., Secretary, Board of Education

2/10/2011  
Date


DOANS/TURNER GROUP/ALTEN, JV  
  
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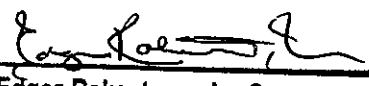
2-9-2011  
Date

By: ROBERT A ALTEN Its: PREES -

**APPROVED AS TO FORM:**  
  
\_\_\_\_\_  
Jacqueline Minor General Counsel

2/8/2011  
Date

File ID Number: 11-0288  
Introduction Date: 2-1-11  
Enactment Number: 11-0175  
Enactment Date: 2-9-11  
By: 

**Certified:**  
  
\_\_\_\_\_  
Edgar Rakestraw, Jr., Secretary  
Board of Education 2/10/11

STATE OF CALIFORNIA )  
COUNTY OF Contra Costa ) ss.

On Feb. 9, 2011, before me, the undersigned notary public, personally appeared Sh Robert Altan

[  ] personally known to me; OR  
[  ] proved to me on the basis of satisfactory evidence;

to be the person(s) whose whole name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Amy J Hartley  
Signature of Notary





STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF Alameda )

On February 10, 2011, before me, the undersigned notary public, personally appeared Gary Yee; Edgar M. Rakestraw, Jr.

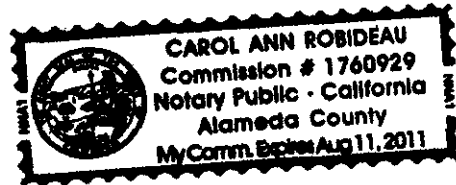
- personally known to me; OR  
 proved to me on the basis of satisfactory evidence;

to be the person(s) whose whole name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Carol Ann Robideau  
Signature of Notary



**EXHIBIT "A"**

**DESCRIPTION OF SCHOOL SITE**

**Attached is the Description for:**

New Highland Academy  
8521 A Street  
Oakland, CA 94621

**EXHIBIT "B"**

**DESCRIPTION OF PROJECT SITE**

**Attached is the Description for portion of the School Site that is subject to this Site Lease and upon which Developer will construct the Project:**

**EXHIBIT "A"**

**DESCRIPTION OF SCHOOL SITE**

**Attached is the Description for:**

New Highland Academy  
8521 A Street  
Oakland, CA 94621

**EXHIBIT "B"**

**DESCRIPTION OF PROJECT SITE**

**Attached is the Description for portion of the School Site that is subject to this Site Lease and upon which Developer will construct the Project:**

**EXHIBIT C**

**GUARANTEED PROJECT COST AND  
OTHER PROJECT COST, FUNDING, AND PAYMENT PROVISIONS**

**1. Site Lease Payments.** As indicated in the Site Lease, Developer shall pay One Dollar (\$1.00) to the District as consideration for the Site Lease.

**2. Guaranteed Project Cost.**

**2.1** Pursuant to the Facilities Lease, Developer will cause the Project to be constructed for the following amounts ("Guaranteed Project Cost"):

**2.1.1 Cost of the Work.** The term Cost of the Work shall mean the costs necessarily incurred in the proper performance of the Work contemplated by the Contract Documents. Such costs shall be at rates not higher than the standard paid at the place of the Project except with the prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 2 and approved by the Owner.

**2.1.1.1 General Conditions.** The monthly rate to be paid to the Developer for General Conditions shall be as set forth in **Attachment 1** hereto. Said rates shall include all costs for labor, equipment and materials for the items identified therein which are necessary for the proper management of the Project, and shall include all costs paid or incurred by the Developer for insurance (except for general liability insurance), permits, taxes, and all contributions, assessments and benefits, holidays, vacations, retirement benefits, incentives to the extent contemplated in Exhibit 1, whether required by law or collective bargaining agreements or otherwise paid or provided by Developer to its employees. The District reserves the right to request changes to the personnel, equipment, or facilities provided as General Conditions as may be necessary or appropriate for the proper management of the Project, in which case, the District shall be entitled to a reduction in the cost of General Conditions based on the rates set forth in **Attachment 1**.

**2.1.1.2 Subcontract Costs.** Payments made by the Developer to Subcontractors (inclusive of the Subcontractor's bonding and insurance costs, which shall be included in the subcontract amount), which payments shall be made in accordance with the requirements of the Contract Documents.

**2.1.1.3 Developer-Performed Work.** Costs incurred by the Developer for self-performed work at the direction of Owner or with the Owner's prior approval, as follows:

**2.1.1.3.1** Actual costs to the Developer of wages of construction workers, excluding all salaried and/or administrative personnel, directly employed by the Developer to perform the construction of the Work at the site.

**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

Oakland Unified School District  
Department of Facilities Planning and Management  
955 High Street  
Oakland, CA 94601  
Attention: Timothy White,  
Assistant Superintendent

**WITH A COPY TO:**

DOANS/TURNER GROUP/ALTEN, JV  
720 12<sup>th</sup> Street  
Richmond CA 94908  
Attn: Robert Alten  
n

**This document is recorded for the benefit of  
Oakland Unified School District, and  
recording fee(s) are exempt under  
Government Code section 6103.**

---

**FACILITIES LEASE**

**For all or a portion of the following Site:**

New Highland Academy  
8521 A Street  
Oakland, CA 94621

**By and between**

Oakland Unified School District  
1025 2<sup>nd</sup> Avenue  
Oakland, CA 94606-2212

**And**

DOANS/TURNER GROUP/ALTEN, JV

Dated as of January \_\_, 2011

**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

Oakland Unified School District  
Department of Facilities Planning and Management  
955 High Street  
Oakland, CA 94601  
Attention: Timothy White,  
Assistant Superintendent

**WITH A COPY TO:**

DOANS/TURNER GROUP/ALTEN, JV  
720 12<sup>th</sup> Street  
Richmond CA 94908  
Attn: Robert Alten

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Oakland Unified School District, and  
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**By and between**

Oakland Unified School District  
1025 2<sup>nd</sup> Avenue  
Oakland, CA 94606-2212

**And**

DOANS/TURNER GROUP/ALTEN, JV

Dated as of 2/10, 2011



## **FACILITIES LEASE**

This facilities lease ("Facilities Lease"), dated as of \_\_\_\_\_, 2011 ("Effective Date"), is made and entered into by and between DOANS/TURNER GROUP/ALTEN, JV ("Developer"), a California company duly organized and existing under the laws of the State of California, as sublessor, and Oakland Unified School District, a school district duly organized and validly existing under the laws of the State of California, as sublessee ("District") (together, the "Parties").

### **RECITALS**

**WHEREAS**, on the date hereof, the District has leased to Developer, a parcel of land particularly described in **Exhibit "A"** ("School Site") attached hereto and incorporated herein by reference, and on which will be located a reconstructed and improved existing high school; and

**WHEREAS**, the District desires to provide for the construction of certain work to be performed on portions of the School Site. That work will include construction of the modernization of existing classrooms at the middle school for middle school students living in the Oakland Unified School District ("Project");

**WHEREAS**, the District has determined that a portion of the School Site is adequate to accommodate the Project, as more particularly described in **Exhibit "B"** ("Project Site") attached hereto and incorporated herein by reference; and

**WHEREAS**, District and Developer have executed a site lease at the same time as this Facilities Lease whereby the District is leasing the Project Site to the Developer ("Site Lease"); and

**WHEREAS**, Developer represents that it has the expertise and experience to perform the services set forth in this Facilities Lease; and

**WHEREAS**, the District is authorized under Section 17406 of the Education Code of the State of California to lease the Project Site to Developer and to have Developer construct the Project on the Project Site and to lease back to the District the Project Site, and has duly authorized the execution and delivery of this Facilities Lease; and

**WHEREAS**, Developer is authorized to lease the Project Site as lessee and to perform the construct the Project and to lease the Project and the Project Site back to the District, and has duly authorized the execution and delivery of this Facilities Lease; and

**WHEREAS**, the Board of Trustees of the District (the "Board") has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Project Site to Developer and by simultaneously entering into this Facilities Lease under which the District will lease back the Project Site and the Project from Developer and if necessary, make Lease Payments; and

**WHEREAS**, the Parties have performed all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into of this Facilities Lease and all those conditions precedent do exist, have happened and have been performed in regular and due time, form and manner

as required by law, and the Parties hereto are now duly authorized to execute and enter into this Facilities Lease; and

**WHEREAS**, the District further acknowledges and agrees that it has entered into the Site Lease and the Facilities Lease pursuant to Education Code Section 17406 as the best available and most expeditious means for the District to satisfy its substantial need for the facilities to be provided by the Project and to accommodate and educate District students and to utilize its facilities proceeds expeditiously.

**NOW, THEREFORE**, in consideration of the above recitals and of the mutual covenants hereinafter contained, the Parties hereto do hereby agree as follows:

1. **Definitions.** In addition to the terms and entities defined above or subsequent provisions defined herein, and unless the context otherwise requires, the terms defined in this section shall, for all purposes of this Facilities Lease, have the meanings herein specified.

1.1 **"Developer"** or **"Lessor"** means Alten, Turner, Doans JV, a Joint Venture, organized and existing under the laws of the State of California, and its successors and assigns.

1.2 **"Developer's Representative"** means the Managing Member of Developer, or any person authorized to act on behalf of Developer under or with respect to this Facilities Lease.

1.3 **"Contract Documents"** are defined in **Exhibit D** to this Facilities Lease.

1.4 **"District"** or **"Lessee"** means the Oakland Unified School District, a school district duly organized and existing under the laws of the State of California.

1.5 **"District Representative"** means the Superintendent of the District, or any other person authorized by the Governing Board of the District to act on behalf of the District under or with respect to this Facilities Lease.

1.6 **"Permitted Encumbrances"** means, as of any particular time:

1.6.1 Liens for general and valorem taxes and assessments, if any, not then delinquent, or which the District may permit to remain unpaid;

1.6.2 The Project Site lease;

1.6.3 This Facilities Lease,

1.6.4 Easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions which exist of record as of the date of this Facilities Lease.

1.6.5 Easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions established following the date of recordation of this Facilities Lease and to which Developer and the District consent in writing which will not impair or impede the operation of the Project Site; and

2. **Exhibits.** The following Exhibits are attached to and by reference incorporated and

made a part of this Facilities Lease:

2.1 **Exhibit A - Description Of The School Site:** The descriptions of the real property constituting the School Site.

2.2 **Exhibit B - Description Of The Project Site:**

2.3 **Exhibit C - Guaranteed Project Cost and Other Project Cost, Funding, and Payment Provisions:** A detailed description of the Guaranteed Project Cost and the provisions related to the payment of that amount to the Developer.

2.4 **Exhibit D - General Construction Provisions:** The provisions generally describing the Project's construction.

2.5 **Exhibit E - Memorandum of Commencement Date:** The Memorandum which will memorialize the commencement and expiration dates of the Term.

2.6 **Exhibit F - Construction Schedule**

2.7 **Exhibit G - Schedule of Values**

### 3. **Lease of Project and Project Site.**

3.1 Developer hereby leases the Project and the Project Site to the District, and the District hereby leases said Project and Project Site from Developer upon the terms and conditions set forth in this Facilities Lease for the purpose of constructing the Project.

3.2 The leasing by Developer to the District of the Project Site shall not affect or result in a merger of the District's leasehold estate pursuant to this Facilities Lease and its fee estate as lessor under the Site Lease. Developer shall continue to have and hold a leasehold estate in the Project Site pursuant to the Site Lease throughout the term thereof and the term of this Facilities Lease.

3.3 As to the Project Site, this Facilities Lease shall be deemed and constitute a sublease.

### 4. **Term.**

4.1 **Facilities Lease is Legally Binding.** This Facilities Lease is legally binding on the Parties upon execution by the Parties and the District Board's approval of this Facilities Lease. The Term of this Facilities Lease for the purposes of District's obligation to make Lease Payments shall commence on the earlier of the following two (2) events ("Commencement Date") and shall terminate six (6) months after the Commencement Date (the "Term"):

4.1.1 The date the District takes beneficial occupancy of the Project; or

4.1.2 The date when Developer delivers possession of the Project to District and when all improvements to be provided by Developer are determined by the District to be completed as set forth in **Exhibit D** to this Facilities Lease.

4.2 **Memorandum of Commencement.** After the District has taken beneficial

occupancy of the Project, the Parties shall execute the Memorandum of Commencement Date attached hereto as **Exhibit E** to memorialize the commencement and expiration dates of the Term. Notwithstanding this Term, the Parties hereby acknowledge that each has obligations, duties, and rights under this Facilities Lease that exist upon execution of this Facilities Lease and prior to the beginning of the Term.

4.3 **Changes to Term.** The Term may be extended or shortened upon the occurrence of the earliest of any of the following events, which shall constitute the end of the Term:

4.3.1 An Event of Default by District as defined herein and Developer's election to terminate this Facilities Lease as permitted herein, or

4.3.2 An Event of Default by Developer as defined herein and District's election to terminate this Facilities Lease as permitted herein, or

4.3.3 Consummation of the District's purchase option pursuant to the Guaranteed Project Cost and Other Project Cost, Funding, and Payment Provisions indicated in **Exhibit C** ("Guaranteed Project Cost Provisions").

4.3.4 A third-party taking of the Project under Eminent Domain, only if the Term is ended as indicated more specifically herein.

4.3.5 Damage or destruction of the Project, only if the Term is ended as indicated more specifically herein.

5. **Payment.** In consideration for the lease of the Project Site by the Developer back to the District and for other good and valuable consideration, the District shall make all necessary payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C**.

6. **Termination; Lease Terminable Only As Set Forth Herein.**

6.1 Except as otherwise expressly provided in this Facilities Lease, this Facilities Lease shall not terminate, nor shall District have any right to terminate this Facilities Lease or be entitled to the abatement of any all necessary payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** or any reduction thereof. The obligations hereunder of District shall not be otherwise affected by reason of any damage to or destruction of all or any part of the Project; the taking of the Project or any portion thereof by condemnation or otherwise; the prohibition, limitation or restriction of District's use of the Project; the interference with such use by any private person or Developer; the District's acquisition of the ownership of the Project (other than pursuant to an express provision of this Facilities Lease); any present or future law to the contrary notwithstanding. It is the intention of the Parties hereto that all necessary payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** shall continue to be payable in all events, and the obligations of the District hereunder shall continue unaffected unless the requirement to pay or perform the same shall be terminated or modified pursuant to an express provision of this Facilities Lease.

6.2 Nothing contained herein shall be deemed a waiver by the District of any rights that it may have to bring a separate action with respect to any Event of Default by Developer hereunder or under any other agreement to recover the costs and expenses associated with that action. The District covenants and agrees that it will remain obligated

under this Facilities Lease in accordance with its terms.

6.3 Following completion of the Project, that the District will not take any action to terminate, rescind or avoid this Facilities Lease, notwithstanding the bankruptcy, insolvency, reorganization, composition, readjustment, liquidation, dissolution, winding-up or other proceeding affecting Developer or any assignee of Developer in any such proceeding, and notwithstanding any action with respect to this Facilities Lease which may be taken by any trustee or receiver of Developer or of any assignee of Developer in any such proceeding or by any court in any such proceeding. Following completion of the Project, except as otherwise expressly provided in this Facilities Lease, District waives all rights now or hereafter conferred by law to quit, terminate or surrender this Facilities Lease or the Project or any part thereof.

6.4 District acknowledges that Developer may assign an interest in some or all of the necessary payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** to a lender in order to obtain financing for the cost of constructing the Project and that the lender may rely on the foregoing covenants and provisions in connection with such financing.

6.5 The District in its sole discretion may terminate for convenience this Facilities Lease upon three (3) days written notice to the Developer. In case of a termination for convenience, the Developer shall have no claims against the District except the actual portion of the Guaranteed Project Cost expended for labor, materials, and services performed that is unpaid and can be documented through timesheets, invoices, receipts, or otherwise.

## 7. **Title.**

7.1 During the Term of this Facilities Lease, the District shall hold fee title to the School Site, including the Project Site, and nothing in this Facilities Lease or the Site Lease shall change, in any way, the District's ownership interest.

7.2 During the Term of this Facilities Lease, Developer shall have a leasehold interest in the Project Site pursuant to the Site Lease.

7.3 During the Term of this Facilities Lease, the Developer shall hold title to the Project improvements provided by Developer which comprise fixtures, repairs, replacements or modifications thereto.

7.4 If the District exercises its Purchase Option pursuant the Guaranteed Project Cost Provisions indicated in Exhibit C or if District makes all necessary payments under the Guaranteed Project Cost Provisions indicated in Exhibit C, all right, title and interest of Developer, its assigns and successors in interest in and to the Project and the Project Site shall be transferred to and vested in the District at the end of the Term. Title shall be transferred to and vested in the District hereunder without the necessity for any further instrument of transfer; provided, however, that Developer agrees to execute any instrument requested by District to memorialize the termination of this Facilities Lease and transfer of title to the Project.

8. **Quiet Enjoyment.** Upon District's possession of the Project, Developer shall thereafter provide the District with quiet use and enjoyment of the Project, and the District

shall during the Term peaceably and quietly have and hold and enjoy the Project, without suit, trouble or hindrance from Developer, except as otherwise may be set forth in this Facilities Lease. Developer will, at the request of the District and at Developer's cost, join in any legal action in which the District asserts its right to such possession and enjoyment to the extent Developer may lawfully do so. Notwithstanding the foregoing, Developer shall have the right to inspect the Project and the Project Site as provided herein.

9. **Representations of the District.** The District represents, covenants and warrants to the Developer as follows:

9.1 **Due Organization and Existence.** The District is a school district, duly organized and existing under the Constitution and laws of the State of California.

9.2 **Authorization.** The District has the full power and authority to enter into, to execute and to deliver this Facilities Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Facilities Lease.

9.3 **No Violations.** Neither the execution and delivery of this Facilities Lease nor the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Project Site, except Permitted Encumbrances

9.4 **CEQA Compliance.** The District has complied with all requirements imposed upon it by the California Environmental Quality Act (Public Resource Code Section 21000 *et seq.* ("CEQA")) in connection with the Project, and no further environmental review of the project is necessary pursuant to CEQA before the construction of the Project may commence.

9.5 **No Litigation.** Except for a validation action related to this transaction that the District may file, there is no pending or, to the knowledge of District, threatened action or proceeding before any court or federal, state, municipal, or other government authority or administrative agency which will materially adversely affect the ability of District to perform its obligations under this Facilities Lease.

9.6 **Condemnation Proceedings.**

9.6.1 District covenants and agrees, but only to the extent that it may lawfully do so, that so long as this Facilities Lease remains in effect, the District will not seek to exercise the power of eminent domain with respect to the Project so as to cause a full or partial termination of this Facilities Lease.

9.6.2 If for any reason the foregoing covenant is determined to be unenforceable or in some way invalid, or if District should fail or refuse to abide by such covenant, then, to the extent it may lawfully do so, District agrees that the financial interest of Developer shall be as indicated in Section 6.1 of this Facilities Lease.

10. **Representations of the Developer.** The Developer represents, covenants and warrants to the District as follows:

10.1 **Due Organization and Existence.** The Developer is a corporation licensed to provide such services in the state of California, duly organized and existing under the laws of the State of California, has the power to enter into this Facilities Lease and the Site Lease; is possessed of full power to lease, lease back, and hold real and personal property and has duly authorized the execution and delivery of all of the aforesaid agreements.

10.2 **Authorization.** Developer has the full power and authority to enter into, to execute and to deliver this Facilities Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Facilities Lease.

10.3 **No Violations.** Neither the execution and delivery of this Facilities Lease and the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which Developer is now a party or by which Developer is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of Developer, or upon the Project Site, except Permitted Encumbrances.

10.4 **No Bankruptcy.** Developer is not now nor has it ever been in bankruptcy or receivership.

10.5 **No Litigation.** There is no pending or, to the knowledge of Developer, threatened action or proceeding before any court or administrative agency which will materially adversely affect the ability of Developer to perform its obligations under this Facilities Lease.

10.6 **No Encumbrances.** Developer shall not pledge any District payments of any kind, related to the Site Lease, this Facilities Lease, or in any way derived from the Project Site, and shall not mortgage or encumber the Project Site, except as may be specifically permitted pursuant to the provisions of this Facilities Lease related to Developer's financing the construction of the project.

10.7 **Continued Existence.** Developer shall not voluntarily commence any act intended to dissolve or terminate the legal existence of Developer, at or before the latest of the following:

10.7.1 Eighteen (18) months following completion of the Project,

10.7.2 After dismissal and final resolution of any and all disputes between the Parties and/or any third-party claims related, in any way, to the Project,

Developer shall give District sixty (60) days written notice prior to dissolving or terminating the legal existence of Developer.

## 11. **Construction Of Project**

### 11.1 **Construction of Project.**

11.1.1 **Performance of Work.** Developer agrees to cause the Project to be constructed in accordance with the terms hereof and the Construction Provisions and the Construction Provisions set forth in **Exhibit D**, including things reasonably inferable from

the Construction Documents as being within the scope of the Project as necessary to produce the stated result even though no mention is made in the Contract Documents.

**11.1.2 Contract Time / Construction Schedule.** It is hereby understood and agreed that assuming the District issues a Notice to Proceed on or before February 1, 2011, the Project shall be completed on or before \_\_\_\_\_. The time period between the Notice to Proceed and Completion shall be the total Contract time ("Contract Time"). The Project shall be performed pursuant to the construction schedule, attached hereto as **Exhibit F** ("Construction Schedule"). The Construction Schedule must be approved by the District prior to execution of this Facilities Lease.

**11.1.3 Schedule of Values.** The Developer has provided a schedule of values which is attached hereto as **Exhibit G** ("Schedule of Values"). The Schedule of must be approved by the District prior to execution of this Facilities Lease.

**11.1.4 Liquidated Damages:** Time is of the essence for all work Developer must perform to complete the Work and to construct the Project. It is hereby understood and agreed that it is and will be difficult and/or impossible to ascertain and determine the actual damage that the District will sustain in the event of and by reason of Developer's delay; therefore, Developer agrees that it shall pay to the District the sum of one thousand five hundred dollars (\$1,500) per day as liquidated damages for each and every day's delay beyond the Contract Time.

**11.1.4.1** It is hereby understood and agreed that this amount is not a penalty.

**11.1.4.2** In the event any portion of the liquidated damages is not paid to the District, the District may deduct that amount from any money due or that may become due the Developer under this Facilities Lease. The District's right to assess liquidated damages is as indicated herein and in the **Exhibit D**.

**11.1.4.3** The time during which the Work is delayed for cause as hereinafter specified may extend the time of completion for a reasonable time as the District may grant. This provision does not exclude the recovery of damages for delay by either party under other provisions in the Facilities Lease

**11.1.5 Guaranteed Project Cost.** Developer will cause the Work to be constructed within the Guaranteed Project Cost as set forth and defined in the Guaranteed Project Cost Provisions indicated in **Exhibit C** and Developer will not seek additional compensation from District in excess of that amount.

**11.1.6 Modifications.** If the DSA requires changes to the Contract Documents submitted by District to Developer, and those changes change the construction costs and/or construction time for the Project, then those changed costs will be handled as a Modification pursuant to the provisions of **Exhibit D**.

**12. Maintenance.** Following delivery of possession of the Project by Developer to District, the repair, improvement, replacement and maintenance of the Project and the Project Site shall be at the sole cost and expense and the sole responsibility of the District, subject only to all warranties against defects in materials and workmanship of Developer as provided in **Exhibit D**. The District shall pay for or otherwise arrange for the payment of the cost of the repair and replacement of the Project resulting from ordinary wear and tear. The



District waives the benefits of subsections 1 and 2 of Section 1932 of the California Civil Code, but such waiver shall not limit any of the rights of the District under the terms of this Facilities Lease.

13. **Utilities.** Following delivery of possession of the Project by Developer to District, the cost and expenses for all utility services, including, but not limited to, electricity, natural gas, telephone, water, sewer, trash removal, cable television, janitorial service, security, heating, water, internet service and all other utilities of any type shall be paid by District.

14. **Taxes and Other Impositions.** All ad valorem real property taxes, special taxes, possessory interest taxes, bonds and special lien assessments or other impositions of any kind with respect to the Project, the Project Site and the improvements thereon, charged to or imposed upon either Developer or the District or their respective interests or estates in the Project, shall at all times be paid by District. In the event any possessory interest tax is levied on Developer, its successors and assigns, by virtue of this Facilities Lease or the Site Lease, District shall pay such possessory interest tax directly, if possible, or shall reimburse Developer, its successors and assigns for the full amount thereof within thirty (30) days after presentation of proof of payment by Developer.

## 15. **Insurance**

15.1 **Developer's Insurance.** The Developer shall comply with the insurance requirements as indicated in **Exhibit D**.

15.1.1 **Commercial General Liability and Automobile Liability Insurance.** Developer shall procure and maintain, during the life of the Project, Commercial General Liability Insurance and Automobile Liability Insurance that shall protect Developer, District, and the State, from all claims for bodily injury, property damage, personal injury, death, advertising injury, and medical payments arising from operations under the Project. Developer shall ensure that Products Liability and Completed Operations coverage, Fire Damage Liability, and Any auto including owned and non-owned, are included within the above policies and at the required limits, or Developer shall procure and maintain these coverages separately.

### 15.1.2 **Umbrella Liability Insurance**

15.1.2.1 Developer may procure and maintain, during the life of the Project, an Umbrella Liability Insurance Policy to meet the policy limit requirements of the required policies if Developer's underlying policy limits are less than required.

15.1.2.2 There shall be no gap between the per occurrence amount of any underlying policy and the start of the coverage under the Umbrella Liability Insurance Policy. Any Umbrella Liability Insurance Policy shall protect Developer, District, and the State, in amounts and including the provisions and requirements for Commercial General Liability and Automobile Liability and Employers' Liability Insurance.

15.1.3 **Subcontractor:** Developer shall require its Subcontractor(s), if any, to procure and maintain Commercial General Liability Insurance, Automobile Liability Insurance, and Umbrella Liability Insurance with minimum limits as appropriate and required by the Developer.

### 15.1.4 **Workers' Compensation and Employers' Liability Insurance**

15.1.4.1 In accordance with provisions of section 3700 of the California Labor Code, the Developer and every Subcontractor shall be required to secure the payment of compensation to its employees.

15.1.4.2 Developer shall procure and maintain, during the life of the Project, Workers' Compensation Insurance and Employers' Liability Insurance for all of its employees engaged in work under the Project, on/or at the Site of the Project. This coverage shall cover, at a minimum, medical and surgical treatment, disability benefits, rehabilitation therapy, and survivors' death benefits. Developer shall require its Subcontractor(s), if any, to procure and maintain Workers' Compensation Insurance and Employers' Liability Insurance for all employees of Subcontractor(s). Any class of employee or employees not covered by a Subcontractor's insurance shall be covered by Developer's insurance. If any class of employee or employees engaged in Work under the Project, on or at the Site of the Project, is not protected under the Workers' Compensation Insurance, Developer shall provide, or shall cause a Subcontractor to provide, adequate insurance coverage for the protection of any employee(s) not otherwise protected before any of those employee(s) commence work.

**15.1.5 Developer's Risk Insurance: Developer's Risk "All Risk" Insurance.** Developer shall procure and maintain, during the life of the Project, Developer's Builders Risk (Course of Construction), or similar first party property coverage acceptable to the District, issued on a replacement cost value basis. The cost shall be consistent with the total replacement cost of all insurable Work of the Project included within the Contract Documents. Coverage is to insure against all risks of accidental physical loss and shall include without limitation the perils of vandalism and/or malicious mischief (both without any limitation regarding vacancy or occupancy), civil authority, earthquake, flood, collapse, wind, fire, lightning, and smoke. Coverage shall include debris removal, demolition, increased costs due to enforcement of all applicable ordinances and/or laws in the repair and replacement of damaged and undamaged portions of the property, and reasonable costs for the Architect's and engineering services and expenses required as a result of any insured loss upon the Work and Project, including completed Work and Work in progress, to the full insurable value thereof.

**15.1.6 Waivers of Subrogation.** The District and Developer waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) District's separate contractors, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 15.1.5 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by either party. The District or Developer, as appropriate, shall require of the District's separate contractors, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

**15.1.7 Proof of Carriage of Insurance and Other Requirements: Endorsements and Certificates**

15.1.7.1 Developer shall not commence Work nor shall it allow any Subcontractor to commence Work under the Project, until Developer and its Subcontractor(s) have procured all required insurance and Developer has delivered in duplicate to the District all insurance certificates indicating the required coverages have been obtained, and the District has approved these documents. If the District requests copies of Developer's insurance policies and/or endorsements from Developer, Developer shall provide them within fourteen (14) days.

15.1.7.2 Endorsements, certificates, and insurance policies shall include the following:

15.1.7.2.1 A clause stating:

"This policy shall not be amended, canceled or modified and the coverage amounts shall not be reduced until notice has been mailed to the District and Construction Manager stating date of amendment, modification, cancellation or reduction. Date of amendment, modification, cancellation or reduction may not be less than thirty (30) days after date of mailing notice."

15.1.7.2.2 Language stating in particular those insured, extent of insurance, location and operation to which insurance applies, expiration date, to whom cancellation and reduction notice will be sent, and length of notice period.

15.1.7.3 All endorsements, certificates and insurance policies shall state that District, its trustees, employees and agents, and the State of California, are named additional insureds under all policies except Workers' Compensation Insurance and Employers' Liability Insurance.

15.1.7.4 Developer's and Subcontractors' insurance policy(s) shall be primary and non-contributory to any insurance or self-insurance maintained by District, its trustees, employees and/or agents, the State of California, Construction Manager(s), Project Manager(s), Inspector(s), and/or Architect(s).

15.1.7.5 All endorsements shall waive any right to subrogation against any of the named additional insureds.

15.1.7.6 All policies shall be written on an occurrence form.

15.1.7.7 All of Developer's insurance shall be with insurance companies with an A.M. Best rating of no less than **A: XI**.

15.1.8 **Insurance Policy Limits**. The limits of insurance shall not be less than the following amounts:

<b>Commercial General Liability</b>	Combined Limit	Single	\$4,000,000
	Product Liability and Completed Operations		\$2,000,000

<b>Automobile Liability – Any Auto</b>	Combined Single Limit	\$2,000,000
<b>Workers Compensation</b>		Statutory limits pursuant to State law
<b>Employers' Liability</b>		\$4,000,000
<b>Developers (Course Construction) Risk of</b>		Issued for the value and scope of Work indicated herein.
<b>Umbrella Policy</b>		\$6,000,000
<b>Professional Liability</b>		Not Applicable

**15.2 District's Insurance.**

**15.2.1 Rental Interruption Insurance.** District shall at all times from and after District's acceptance of the Project, carry and maintain in force for the benefit of District and Developer, as their interests may appear, rental interruption insurance to cover loss, total or partial, of the use of the Project due to damage or destruction, in an amount at least equal to the maximum estimated Lease Payments payable under this Facilities Lease during the current or any future twenty-four (24) month period. This insurance may be maintained as part of or in conjunction with any other insurance coverage carried by the District, and such insurance may be maintained in whole or in part in the form of participation by the District in a joint powers agency or other program providing pooled insurance. This insurance may not be maintained in the form of self-insurance. The proceeds of this insurance shall be paid to the Developer.

**15.2.2 Property Insurance.** District shall at all times from and after District's acceptance of the Project, carry and maintain in force a policy of property insurance for 100% of the insurable replacement value with no coinsurance penalty, on the Project Site and the Project, together with all improvements thereon, under a standard "all risk" contract insuring against loss or damage. Developer shall be named as additional insureds or co-insureds thereon by way of endorsement. District shall not be relieved from the obligation of supplying any additional funds for replacement of the Project and the improvements thereon in the event of destruction or damage where insurance does not cover replacement costs. District shall have the right to procure the required insurance through a joint powers agency or to self-insure against such losses or portion thereof as is deemed prudent by District.

**15.2.3 Commercial General Liability Insurance.** District shall at all times from and after District's acceptance of the Project, carry and maintain in force a policy of commercial general liability insurance policy of \$1,000,000. Developer shall be named as additional insureds or co-insureds thereon by way of endorsement. District shall have the right to procure the required insurance through a joint powers agency or to self-insure against such losses or portion thereof as is deemed prudent by District.

**16. Indemnification.**

**16.1 Developers Indemnity Obligation.**

16.1.1 The Developer shall indemnify, defend with legal counsel reasonably acceptable to the District, keep and hold harmless the District, and their respective board members, officers, representatives, and employees, in both individual and official capacities

("Indemnitees"), against all suits, claims, damages, losses, and expenses, caused by, arising out of, resulting from, or incidental to, the performance of the Work under this Contract by the Developer or its Subcontractors to the full extent allowed by the laws of the State of California, and not to any extent that would render these provisions void or unenforceable, including, without limitation, any such suit, claim, damage, loss, or expense attributable to, without limitation, bodily injury, sickness, disease, death, alleged patent violation or copyright infringement, or to injury to or destruction of tangible property (including damage to the Work itself not covered by Developer's and/or District's insurance policy(s) and including the loss of use resulting therefrom), except to the extent caused by the negligence or willful misconduct of the Indemnitees. This agreement and obligation of the Developer shall not be construed to negate, abridge, or otherwise reduce any right or obligation of indemnity that would otherwise exist as to any party or person described herein. This indemnification, defense, and hold harmless obligation includes any failure or alleged failure by Developer to comply with any provision of law or the Contract Documents, including, without limitation, any stop notice actions, or liens by the California Department of Labor Standards Enforcement.

16.1.2 The Developer shall give prompt notice to the District in the event of any injury (including death), loss, or damage included herein. Without limitation of the provisions herein, if the Developer's agreement to indemnify, defend, and hold harmless the Indemnitees as provided herein against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of any of the Indemnitees shall to any extent be or be determined to be void or unenforceable, it is the intention of the parties that these circumstances shall not otherwise affect the validity or enforceability of the Developer's agreement to indemnify, defend, and hold harmless the rest of the Indemnitees, as provided herein, and in the case of any such suits, claims, damages, losses, or expenses caused in part by the default, negligence, or act or omission of the Developer, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, and in part by any of the Indemnitees, the Developer shall be and remain fully liable on its agreements and obligations herein to the full extent permitted by law.

16.1.3 In any and all claims against any of the Indemnitees by any employee of the Developer, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the Developer's indemnification obligation herein shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Developer or any Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**16.2 District's Indemnity Obligation.** District shall indemnify, defend and hold harmless Developer and Developer's officers, directors, shareholders, partners, members, agents and employees from and against any claims, damages, costs, expenses, judgments or liabilities connected with this Facilities Lease, including, without limitation claims, damages, expenses, or liabilities for loss or damage to any property or for death or injury to any person or persons, only to the extent that those claims, damages, expenses, judgments or liabilities arise from the negligence or willful acts or omissions of District, its officers, agents or employees at the Project.

16.3 In the event hazardous materials are discovered to be existing at the project beyond those indicated in the Work, the District shall indemnify and hold harmless the Developer from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area, provided that such claim, damage, loss or expense is attributable to bodily injury,

sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

17. **Eminent Domain.**

17.1 **Total Taking After Project Delivery.** If, following delivery of possession of the Project by Developer to District, all of the Project and the Project Site is taken permanently under the power of eminent domain, the Term shall cease as of the day possession shall be so taken.

17.1.1 The financial interest of Developer shall be limited to the amount of principal payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** that are then due or past due together with all remaining and succeeding principal payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** for the remainder of the original Term.

17.1.2 The balance of the award, if any, shall be paid to the District.

17.2 **Total Taking Prior to Project Delivery.** If all of the Project and the Project Site is taken permanently under the power of eminent domain and the Developer is still performing the work of the Project and has not yet delivered possession of the Project to District, the Term shall cease as of the day possession shall be so taken. The financial interest of Developer shall be the amount Developer has expended to date for work performed on the Project, subject to documentation reasonably satisfactory to the District.

17.3 **Partial Taking.** If, following delivery of possession of the Project by Developer to District, less than all of the Project and the Project Site is taken permanently, or if all of the Project and the Project Site or any part thereof is taken temporarily, under the power of eminent domain:

17.3.1 This Facilities Lease shall continue in full force and effect and shall not be terminated by virtue of that partial taking and the Parties waive the benefit of any law to the contrary, and

17.3.2 There shall be a partial abatement of any principal payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** as a result of the application of the net proceeds of any eminent domain award to the prepayment of those payments hereunder. The Parties agree to negotiate, in good faith, for an equitable split of the net proceeds of any eminent domain award and a corresponding reduction in the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C**, and

18. **Damage and Destruction.** If, following delivery of possession of the Project by Developer to District, the Project is totally or partially destroyed due to fire, acts of vandalism, flood, storm, earthquake, Acts of God, or other casualty beyond the control of either party hereto, the Term shall end and District shall still no longer be required to make any payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** that are then due or past due or any remaining and succeeding principal payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** for the remainder of the original Term. The Developer shall still be due any funds, payments, or disbursements from the District's rental interruption insurance to pay for the amounts that would otherwise have been due and owing from the District under **Exhibit C**.

19. **Abatement.**

19.1 If, after the Parties have executed the Memorandum of Commencement Date attached hereto as **Exhibit E**, the Project becomes destroyed or damaged beyond repair, the District may determine its use of the Project abated. Thereafter, the District shall have no obligation to make, not shall the Developer have the right to demand, the Lease Payments as indicated in the Guaranteed Project Cost Provisions indicated in **Exhibit C** to this Facilities Lease. The Term shall cease at that time.

19.2 The Parties hereby agree that the net proceeds of the District's rental interruption insurance that the District must maintain during the Term, as required herein, shall constitute a special fund for the payment of the Lease Payments indicated in the Guaranteed Project Cost Provisions indicated in **Exhibit C**.

19.3 The District shall as soon as practicable after such event, apply the net proceeds of its insurance policy intended to cover that loss ("Net Proceeds"), either to:

19.3.1 Repair the Project to full use;

19.3.2 Replace the Project, at the District's sole cost and expense, with property of equal or greater value to the Project immediately prior to the time of the destruction or damage, with that replacement, once completed, shall be substituted in this Facilities Lease by appropriate endorsement; or

19.3.3 Exercise the District's purchase option as indicated in the Guaranteed Project Cost Provisions indicated in **Exhibit C** to this Facilities Lease.

19.4 The District shall notify the Developer of which course of action it desires to take within thirty (30) days after the occurrence of the destruction or damage. The Net Proceeds of all insurance payable with respect to the Project shall be available to the District and shall be used to discharge the District's obligations under this Section.

20. **Access**

20.1 **By Developer.** Developer shall have the right at all reasonable times to enter upon the Project Site to construct the Project pursuant to this Facilities Lease. Following the acceptance of the Project by District, Developer may enter the Project at reasonable times with advance notice and arrangement with District for purposes of making any repairs required to be made by Developer.

20.2 **By District.** The District shall have the right to enter upon the Project Site at all times. District shall comply with all safety precautions and procedures required by Developer.

## 21. **Assignment, Subleasing**

21.1 **Assignment and Subleasing by the District.** Any assignment or sublease by District shall be subject to all of the following conditions:

21.1.1 This Facilities Lease and the obligation of the District to make the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** shall remain obligations of the District; and

21.1.2 The District shall, within thirty (30) days after the delivery thereof, furnish or cause to be furnished to Developer a true and complete copy of any assignment or sublease; and

21.2 **Assignment by Developer.** Developer may assign its right, title and interest in this Facilities Lease, in whole or in part to one or more assignees, only after the written consent of District, which District will not unreasonably withhold. No assignment shall be effective against the District unless and until the District has consented in writing. Notwithstanding anything to contrary contained in this Facilities Lease, no consent from the District shall be required in connection with any assignment by Developer to a lender for purposes of financing the Project as long as there are not additional costs to the District.

## 22. **Events Of Default of District**

22.1 **Events of Default by District Defined.** The following shall be "Events of Default" of the District under this Facilities Lease. The terms "Event of Default" and "Default" shall mean, whenever they are used as to the District in the Site Lease or this Facilities Lease, shall only be one or more of the following events:

22.1.1 Failure by the District to pay payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C**, and the continuation of such failure for a period of forty-five (45) days.

22.1.2 Failure by the District to perform any material covenant, condition or agreement in this Facilities Lease and that failure continues for a period of forty-five (45) days after Developer provides District with written notice specifying that failure and requesting that the failure be remedied; provided, however, if the failure stated in the notice cannot be corrected within the applicable period, Developer shall not unreasonably withhold its consent to an extension of such time if corrective action is instituted by the District within the applicable period and diligently pursued until the default is corrected.

22.2 **Remedies on District's Default.** If there has been an Event of Default on the District's part, the Developer may exercise any and all remedies available pursuant to law or granted pursuant to this Facilities Lease; provided, however, there shall be no right under any circumstances to accelerate any of the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** or otherwise declare those payments not then past due to be immediately due and payable.

22.2.1 Developer may rescind its leaseback of the Project Site to the District under this Facilities Lease and re-rent the Project Site to another lessee for the remaining



Term for no less than the fair market value for leasing the Project Site, which shall be:

22.2.1.1 An amount determined by a mutually-agreed upon appraiser, or

22.2.1.2 If an appraiser cannot be agreed to, an amount equal to the mean between a District appraisal and a Developer appraisal for the Project Site, both prepared by an MAI-certified appraiser.

22.2.2 District's obligation to make the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** shall be:

22.2.2.1 Increased by the amount of costs, expenses, and damages incurred by the Developer in re-renting the Project Site, and

22.2.2.2 Decreased by the amount of rent Developer receives in reletting the Project Site.

22.2.3 The District agrees that the terms of this Facilities Lease constitute full and sufficient notice of the right of Developer to re-rent the Project Site in the Event of Default without effecting a surrender of this Facilities Lease, and further agrees that no acts of Developer in performing a re-renting as permitted herein shall constitute a surrender or termination of this Facilities Lease, but that, on the contrary, in the event of an Event of Default by the District the right to re-rent the Project Site shall vest in Developer as indicated herein.

22.3 **District's Continuing Obligation.** Unless there has been damage, destruction, a Taking, or the Developer is in Default as indicated herein, the District shall continue to remain liable for the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** and those amounts shall be payable to Developer at the time and in the manner as therein provided.

22.4 **No Remedy Exclusive.** No remedy herein conferred upon or reserved to Developer is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Facilities Lease or now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle Developer to exercise any remedy reserved to it in this Article 9, it shall not be necessary to give any notice, other than such notice as may be required in this Article or by law.

## 23. **Events Of Default of Developer**

23.1 **Events of Default by Developer Defined.** The following shall be "Events of Default" of the Developer under this Facilities Lease. The terms "Event of Default" and "Default" shall mean, whenever they are used as to the Developer in the Site Lease or this Facilities Lease, shall only be one or more of the following events:

23.1.1 Developer unreasonably refuses or fails to prosecute the work on the Project with such reasonable diligence as will accomplish its completion within the time specified or any extension thereof, or unreasonably fails to complete said work within that time;

23.1.2 Prior to completion of Project, Developer is adjudged a bankrupt, or files for bankruptcy, 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;

23.1.3 Developer persistently disregards applicable law as indicated in **Exhibit D**, or otherwise be in violation of **Exhibit D**.

23.1.4 Failure by the Developer to perform any material covenant, condition or agreement in this Facilities Lease and that failure continues for a period of forty-five (45) days after District provides Developer with written notice specifying that failure and requesting that the failure be remedied; provided, however, if the failure stated in the notice cannot be corrected within the applicable period, District shall not unreasonably withhold its consent to an extension of such time if corrective action is instituted by the Developer within the applicable period and diligently pursued until the default is corrected.

23.2 **Remedies on Developer's Default.** If there has been an Event of Default on the Developer's part, the District may, without prejudice to any other right or remedy, terminate the Site Lease and Facilities Lease.

23.2.1 If District terminates the Site Lease and the Facilities Lease pursuant to this section, the Project Site and any improvements built upon the Project Site shall vest in District upon termination of the Site Lease and Facilities Lease, and District shall thereafter be required to pay only the principal amounts then due and owing pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C**, less any damages incurred by District due to Developer's Default.

23.2.2 The District shall retain all rights it possesses as indicated in **Exhibit D** including, without limitation,

23.2.2.1 The right to assess liquidated damages due because of any project delay;

23.2.2.2 All rights the District holds to demand performance pursuant to the Developer's required performance bond;

24. **Notices.** All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received as indicated below and to the parties indicated below:

24.1 If notice is given by personal delivery thereof, it shall be considered delivered on the day of delivery.

24.2 If notice is given by overnight delivery service, it shall be considered delivered on (1) day after date deposited, as indicated by the delivery service.

24.3 If notice is given by depositing same in United States mail, enclosed in a sealed envelope, it shall be considered delivered three (3) days after date deposited, as indicated by the postmarked date.

24.4 If notice is given by registered or certified mail with postage prepaid, return receipt requested, it shall be considered delivered on the day the notice is signed for:

**If to District:**

Oakland Unified School District  
Department of Facilities Planning and Management  
955 High Street  
Oakland, CA 94601  
Attention: Tadashi Nakadegawa,  
Facilities Director  
Telephone: (510) 879-2962  
Tadashi.nakadegawa@ousd.k12.ca.us  
**With a copy to:**

Dannis Woliver Kelley  
71 Stevenson St., 19<sup>th</sup> Floor  
San Francisco, CA 94015  
Attention: Catherine Boskoff  
Telephone: (415) 543-4111  
Facsimile: (415) 543-4384

**If to Developer:**

DOANS/TURNER GROUP/ALTEN, JV  
720 12<sup>th</sup> Street  
Richmond CA 94908  
Attn: Robert Alten  
[balten@altenconstruction.com](mailto:balten@altenconstruction.com)  
Telephone: (510) 234-4200

The Developer and the District, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent.

25. **Binding Effect.** This Facilities Lease shall inure to the benefit of and shall be binding upon Developer and the District and their respective successors, transferees and assigns.

26. **No Additional Waiver Implied by One Waiver.** In the event any agreement contained in this Facilities Lease should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

27. **Severability.** In the event any provision of this Facilities Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof, unless elimination of such invalid provision materially alters the rights and obligations embodied in this Facilities Lease or the Site Lease.

28. **Amendments, Changes and Modifications.** Except as to the termination rights of both Parties as indicated herein, this Facilities Lease may not be amended, changed, modified, altered or terminated without the written agreement of both Parties hereto.

29. **Net-Net-Net Lease.** This Facilities Lease shall be deemed and construed to be a "net-net-net lease" and the District hereby agrees that all payments it makes pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** shall be an absolute net return to Developer, free and clear of any expenses, charges or set-offs.

30. **Execution in Counterparts.** This Facilities Lease may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

31. **Developer and District Representatives.** Whenever under the provisions of this Facilities Lease the approval of Developer or the District is required, or Developer or the District is required to take some action at the request of the other, such approval or such request shall be given for Developer by Developer's Representative and for the District by the District's Representative, and any party hereto shall be authorized to rely upon any such approval or request.

32. **Applicable Law.** This Facilities Lease shall be governed by and construed in accordance with the laws of the State of California, and venued in Alameda County, the County within which the School Site is located.

33. **Attorney's Fees.** If either party brings an action or proceeding involving the Property or to enforce the terms of this Facilities Lease or to declare rights hereunder, each party shall bear the cost of its own attorneys' fees.

34. **Captions.** The captions or headings in this Facilities Lease are for convenience only and in no way define, limit or describe the scope or intent of any provisions or Sections of this Facilities Lease.

35. **Prior Agreements.** This Facilities Lease and the corresponding Site Lease collectively contain all of the agreements of the Parties hereto with respect to any matter covered or mentioned in this Facilities Lease and no prior agreements or understanding pertaining to any such matter shall be effective for any purpose.

36. **Further Assurances.** Parties shall promptly execute and deliver all documents and instruments reasonably requested to give effect to the provisions of this Facilities Lease.

37. **Recitals Incorporated.** The Recitals set forth at the beginning of this Facilities Lease are hereby incorporated into its terms and provisions by this reference.

38. **Time of the Essence.** Time is of the essence with respect to each of the terms, covenants, and conditions of this Facilities Lease.

39. **Force Majeure.** A party shall be excused for damage to the property and from the performance of any obligation imposed in this Facilities Lease and the exhibits hereto for any period and to the extent that a party is prevented from performing such obligation, in whole or in part, as a result of delays caused by the other party or third parties, a governmental agency or entity, an act of God, war, terrorism, civil disturbance, forces of nature, fire, flood, earthquake, strikes or lockouts, and such non performance or damage

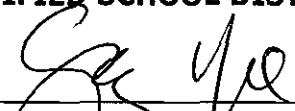
to the property will not be a default hereunder or a grounds for termination of this Facilities Lease.

40. **Interpretation.** None of the Parties hereto, nor their respective counsel, shall be deemed the drafters of this Facilities Lease for purposes of construing the provisions thereof. The language in all parts of this Facilities Lease shall in all cases be construed according to its fair meaning, not strictly for or against any of the Parties hereto.

**IN WITNESS WHEREOF**, the Parties have caused this Facilities Lease to be executed by their respective officers who are duly authorized, as of the Effective Date.

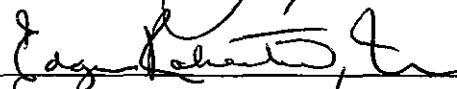
**ACCEPTED AND AGREED** on the date indicated below:

**OAKLAND UNIFIED SCHOOL DISTRICT**

  
\_\_\_\_\_  
Gary Yee, President, Board of Education

2-10-11


Date

  
\_\_\_\_\_  
Edgar Rakestraw, Jr., Secretary, Board of Education

2/10/11

Date

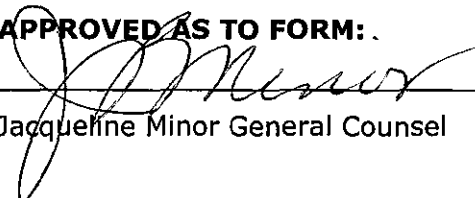
**DOANS/TURNER/GROUP/ALTEN, JV**

  
\_\_\_\_\_  
By: ROBERT A ALTEN Its: Pres.

2-8-2011

Date

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Jacqueline Minor General Counsel

2-8-2011

Date

File ID Number: 11-0288

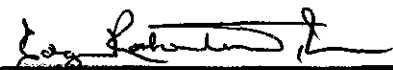
Introduction Date: 2-1-11

Enactment Number: 11-0175

Enactment Date: 2-9-11

By: 

**Certified:**

  
\_\_\_\_\_  
Edgar Rakestraw, Jr., Secretary  
Board of Education 2/10/11

STATE OF CALIFORNIA

COUNTY OF Contra Costa ) ss.

On Feb. 9, 2011, before me, the undersigned notary public, personally appeared Robert Altan

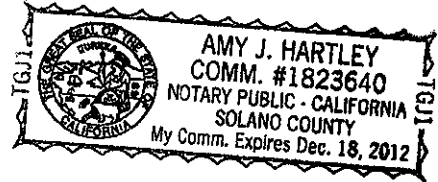
- personally known to me; OR
- proved to me on the basis of satisfactory evidence;

to be the person(s) whose whole name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Amy J. Hartley  
Signature of Notary



STATE OF CALIFORNIA )  
COUNTY OF Alameda ) ss.

On February 10, 2011, before me, the undersigned notary public, personally appeared Gary Yee; Edgar M. Rakestraw, Jr.

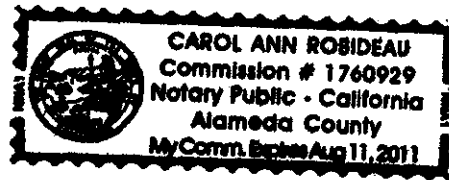
- [  ] personally known to me; OR  
[  ] proved to me on the basis of satisfactory evidence;

to be the person(s) whose whole name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Carol Ann Robideau  
Signature of Notary



**EXHIBIT "A"**

**DESCRIPTION OF SCHOOL SITE**

**Attached is the Description for:**

New Highland Academy  
8521 A Street  
Oakland, CA 94621



**EXHIBIT "B"**

**DESCRIPTION OF PROJECT SITE**

**Attached is the Description for portion of the School Site upon which Developer will construct the Project.**

**EXHIBIT C**

**GUARANTEED PROJECT COST AND  
OTHER PROJECT COST, FUNDING, AND PAYMENT PROVISIONS**

**Attached are the terms and provisions related to Site Lease payments, the Facilities Lease, The Guaranteed Project Cost, and other related cost, funding, and payment provisions.**

**EXHIBIT D**

**GENERAL CONSTRUCTION PROVISIONS**

**Attached is a copy of the General Construction Provisions of the Facilities Lease**

**"EXHIBIT "D"  
TO  
FACILITIES LEASE  
CONSTRUCTION PROVISIONS  
FOR THE FOLLOWING PROJECT:  
New Highland Academy  
8521 A Street  
Oakland, CA 94621**

**By and between**

Oakland Unified School District  
1025 2<sup>nd</sup> Avenue  
Oakland, CA 94606-2212

**And**

DOANS/TURNER GROUP/ALTEN, JV  
720 12<sup>th</sup> Street  
Richmond CA 94908  
Attn: Robert Alten

Dated as of January \_\_, 2011

**EXHIBIT E**

**MEMORANDUM OF COMMENCEMENT DATE**

This MEMORANDUM OF COMMENCEMENT DATE is dated \_\_\_\_\_, and is made by and between DOANS/TURNER GROUP/ALTEN JV ("Developer"), as Lessor, and the Oakland Unified School District ("District"), as Lessee.

1. Developer and District have previously entered into a Facilities Lease dated as of \_\_\_\_\_, 2011, (the "Lease") for the leasing by Developer to District of the Project Site and Project in the City of Oakland, California, referenced in the Lease.

2. District hereby confirms the following:

A. That all construction of the Project required to be performed pursuant to the Facilities Lease has been completed by Developer in all respects;

B. That District has accepted and entered into possession of the Project and now occupies same; and

C. That the term of the Facilities Lease commenced on \_\_\_\_\_ 201\_, and will expire at 11:59 P.M. on \_\_\_\_\_, 20\_\_\_\_\_.

**THIS MEMORANDUM OF COMMENCEMENT DATE IS ACCEPTED AND AGREED** on the date indicated below:

Dated: \_\_\_\_\_, 20\_\_

Dated: \_\_\_\_\_, 20\_\_

**Oakland Unified School District**

**DOANS/TURNER GROUP/ALTEN, JV**

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

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

Print Name: Timothy White

Print Name: \_\_\_\_\_

Assistant Superintendant for  
Facilities Planning and Management

Print Title: \_\_\_\_\_

**EXHIBIT F**

**CONSTRUCTION SCHEDULE**

**Attached is a detailed Project Construction Schedule with duration no longer than the Contract Time, and with specific milestones that Developer shall meet.**

**EXHIBIT G**

**SCHEDULE OF VALUES**

**Attached is a detailed Schedule of Values that complies with the requirements of the Construction Provisions (Exhibit "D") and that has been approved by the District.**

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1. **CONTRACT TERMS AND DEFINITIONS**

1.1 **Definitions**

**Wherever used in the Contract Documents, the following terms shall have the meanings indicated, which shall be applicable to both the singular and plural thereof:**

1.1.1 **Adverse Weather:** Shall be only weather that satisfies all of the following conditions: (1) unusually severe precipitation, sleet, snow, hail, heat, or cold conditions in excess of the norm for the location and time of year it occurred, (2) unanticipated, and (3) at the Project.

1.1.2 **Approval, Approved, and/or Accepted:** Refer to written authorization, unless stated otherwise.

1.1.3 **Architect:** The individual, partnership, corporation, joint venture, or any combination thereof, named as Architect, who will have the rights and authority assigned to the Architect in the Contract Documents. The term Architect means the District's Architect on this Project or the Architect's authorized representative.

1.1.4 **As-Built Drawings:** Unless otherwise defined in the special conditions, reproducible blue line prints of drawings to be prepared on a monthly basis pursuant to the Contract Documents, that reflect changes made during the performance of the Work, recording differences between the original design of the Work and the Work as constructed since the preceding monthly submittal.

1.1.5 **Change Order:** A written order to the Developer authorizing an addition to, deletion from, or revision in the Work, and/or authorizing an adjustment in the Contract Price or Contract Time.

1.1.6 **Claim:** A Dispute that remains unresolved at the conclusion of the all the applicable Dispute Resolution requirements provided herein.

1.1.7 **Construction Manager:** The Director of Construction or its authorized representative, named as such by the District.

1.1.8 **Construction Schedule:** The progress schedule of construction of the Project as provided by Developer and reviewed by District.

1.1.9 **Contract Documents:** The Contract Documents consist exclusively of the documents evidencing the agreement of the District and Developer. The Contract Documents consist of the following documents:

- 1.1.9.1 Site Lease
- 1.1.9.2 Facilities Lease
- 1.1.9.3 Non-collusion Affidavit
- 1.1.9.4 Performance Bond
- 1.1.9.5 Payment Bond (Developer's Labor & Material Bond)

- 1.1.9.6 These Construction Provisions
- 1.1.9.7 Labor Compliance Program Information and Forms (if applicable)
- 1.1.9.8 Hazardous Materials Procedures and Requirements
- 1.1.9.9 Workers' Compensation Certification
- 1.1.9.10 Prevailing Wage Certification
- 1.1.9.11 Disabled Veterans Business Enterprise Participation Certification
- 1.1.9.12 Drug-Free Workplace Certification
- 1.1.9.13 Criminal Background Investigation/Fingerprinting Certification
- 1.1.9.14 Hazardous Materials Certification
- 1.1.9.15 Lead-Based Paint Certification
- 1.1.9.16 Imported Materials Certification
- 1.1.9.17 Tobacco-Free Environment Certification
- 1.1.9.18 Roofing Project Certification (if applicable)
- 1.1.9.19 All Plans, Technical Specifications, and Drawings
- 1.1.9.20 Any and all addenda to any of the above documents
- 1.1.9.21 Any and all change orders or written modifications to the above documents if approved in writing by the District

1.1.10 **Contract Time:** The time period stated in the Facilities Lease for the completion of the Work.

1.1.11 **Daily Job Report(s):** Daily Project reports prepared by the Developer's employee(s) who are present on Site, which shall include the information required herein.

1.1.12 **Day(s):** Unless otherwise designated, day(s) means calendar day(s).

1.1.13 **Developer:** The person or persons identified in the Facilities Lease as contracting to perform the Work to be done under the Contract Documents, or the legal representative of such a person or persons.

1.1.14 **Dispute:** A separate demand by Developer for a time extension; payment of money or damages arising from Work done by or on behalf of the Developer pursuant to the Contract and payment of which is not otherwise expressly provided for or Developer is not otherwise entitled to; or an amount of payment disputed by the District.

1.1.15 **District:** The public agency or the school district for which the Work is performed. The governing board of the District or its designees will act for the District in all matters pertaining to the Contract Documents. The District may, at any time:

1.1.16 Direct the Developer to communicate with or provide notice to the Construction Manager or the Architect on matters for which the Contract Documents indicate the Developer will communicate with or provide notice to the District; and/or

1.1.17 Direct the Construction Manager or the Architect to communicate with or direct the Developer on matters for which the Contract Documents indicate the District will communicate with or direct the Developer.

1.1.18 **Drawings:** (or "Plans") The graphic and pictorial portions of the Contract Documents showing the design, location, scope and dimensions of the Work, generally including plans, elevations, sections, details, schedules, sequence of operation, and diagrams.

1.1.19 **DSA:** Division of the State Architect.

1.1.20 **Guaranteed Maximum Price:** The total monies payable to the Developer under the terms and conditions of the Contract Documents.

1.1.21 **Labor Compliance Program:** (or "LCP") If this Project is funded at least in part with State bond funds for which a labor compliance program is required, and the District manages its own State-approved labor compliance program, then the LCP is the program and related documents and practices necessary for the program by which the District and/or its designee will ensure that the Developer and all Subcontractors pay prevailing wages to all workers on the Project.

1.1.22 **Material Safety Data Sheets:** (or "MSDS") A form with data regarding the properties for potentially harmful substances handled in the workplace.

1.1.23 **Municipal Separate Storm Sewer System:** (or "MS4") A system of conveyances used to collect and/or convey storm water, including, without limitation, catch basins, curbs, gutters, ditches, man-made channels, and storm drains.

1.1.24 **Product(s):** New material, machinery, components, equipment, fixtures and systems forming the Work, including existing materials or components required and approved by the District for reuse.

1.1.25 **Product Data:** Illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by the Developer to illustrate a material, product, or system for some portion of the Work.

1.1.26 **Project:** The planned undertaking as provided for in the Contract Documents.

1.1.27 **Project Inspector (or "Inspector"):** The individual(s) retained by the District in accordance with title 24 of the California Code of Regulations to monitor and inspect the Project.



1.1.28 **Program Manager:** The individual, partnership, corporation, joint venture, or any combination thereof, or its authorized representative, named as such by the District. If no Program Manager is designated for the Project that is the subject of the Contract Documents, then all references to Project Manager herein shall be read to refer to District.

1.1.29 **Provide:** Shall include "provide complete in place," that is, "furnish and install," and "provide complete and functioning as intended in place" unless specifically stated otherwise.

1.1.30 **Safety Orders:** Written and/or verbal orders for construction issued by the California Division of Industrial Safety ("CalOSHA") or by the United States Occupational Safety and Health Administration ("OSHA").

1.1.31 **Safety Plan:** Developer's safety plan specifically adapted for the Project. Developer's Safety Plan shall comply with all provisions regarding Project safety, including all applicable provisions in these Construction Provisions.

1.1.32 **Samples:** Physical examples that illustrate materials, products, equipment, finishes, colors, or workmanship and that, when approved in accordance with the Contract Documents, establish standards by which portions of the Work will be judged.

1.1.33 **Shop Drawings:** All drawings, prints, diagrams, illustrations, brochures, schedules, and other data that are prepared by the Developer, a subcontractor, manufacturer, supplier, or distributor, that illustrate how specific portions of the Work shall be fabricated or installed.

1.1.34 **Site:** The Project site as shown on the Drawings.

1.1.35 **Specifications:** That portion of the Contract Documents, Division 1 through Division 17, and all technical sections, and addenda to all of these, if any, consisting of written descriptions and requirements of a technical nature of materials, equipment, construction methods and systems, standards, and workmanship.

1.1.36 **State:** The State of California.

1.1.37 **Storm Water Pollution Prevention Plan:** (or "SWPPP") A document which identifies sources and activities at a particular facility that may contribute pollutants to storm water and contains specific control measures and time frames to prevent or treat such pollutants.

1.1.38 **Subcontractor:** A contractor and/or supplier who is under contract with the Developer or with any other subcontractor, regardless of tier, to perform a portion of the Work of the Project.

1.1.39 **Submittal Schedule:** The schedule of submittals as provided by Developer and reviewed by District.

1.1.40 **Surety:** The person, firm, or corporation that executes as surety the Developer's Performance Bond and Payment Bond, and must be a California admitted surety insurer as defined in the Code of Civil Procedure section 995.120.

1.1.41 **Work:** All labor, materials, equipment, components, appliances, supervision, coordination, and services required by, or reasonably inferred from, the Contract Documents, that are necessary for the construction and completion of the Project.

## 1.2 **Laws Concerning the Contract Documents**

The Contract Documents are subject to all provisions of the Constitution and laws of California governing, controlling, or affecting District, or the property, funds, operations, or powers of District, and such provisions are by this reference made a part hereof. Any provision required by law to be included in the Contract Documents shall be deemed to be inserted.

## 1.3 **No Oral Agreements**

No oral agreement or conversation with any officer, agent, or employee of District, either before or after execution of Contract Documents, shall affect or modify any of the terms or obligations contained in any of the Contract Documents.

## 1.4 **No Assignment**

Except as specifically permitted in the Facilities Lease, Developer shall not assign the Contract Documents or any part thereof including, without limitation, any services or money to become due hereunder without the prior written consent of the District. Assignment without District's prior written consent shall be null and void. Any assignment of money due or to be come due under the Contract Documents shall be subject to a prior lien for services rendered or material supplied for performance of Work called for under the Contract Documents in favor of all persons, firms, or corporations rendering services or supplying material to the extent that claims are filed pursuant to the Civil Code, Code of Civil Procedure, Government Code, Labor Code, and/or Public Contract Code, and shall also be subject to deductions for liquidated damages or withholding of payments as determined by District in accordance with the Contract Documents. Developer shall not assign or transfer in any manner to a Subcontractor or supplier the right to prosecute or maintain an action against the District.

## 1.5 **Notice and Service Thereof**

1.5.1 Any notice from one party to the other or otherwise under the Contract Documents shall be in writing and shall be dated and signed by the party giving notice or by a duly authorized representative of that party. Any notice shall not be effective for any purpose whatsoever unless served in one of the following manners:

1.5.1.1 If notice is given by personal delivery thereof, it shall be considered delivered on the day of delivery.

1.5.1.2 If notice is given by overnight delivery service, it shall be considered delivered on (1) day after date deposited, as indicated by the delivery service.

1.5.1.3 If notice is given by depositing same in United States mail, enclosed in a sealed envelope, it shall be considered delivered three (3) days after date deposited, as indicated by the postmarked date.

1.5.1.4 If notice is given by registered or certified mail with postage prepaid, return receipt requested, it shall be considered delivered on the day the notice is signed for.

#### 1.6 **No Waiver**

The failure of District in any one or more instances to insist upon strict performance of any of the terms of the Contract Documents or to exercise any option herein conferred shall not be construed as a waiver or relinquishment to any extent of the right to assert or rely upon any such terms or option on any future occasion. No action or failure to act by the District, Architect, or Construction Manager shall constitute a waiver of any right or duty afforded the District under the Contract Documents, nor shall any action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

#### 1.7 **Substitutions For Specified Items**

Developer shall not substitute any items identified in the Contract Documents without prior written approval of the District.

#### 1.8 **Materials and Work**

1.8.1 Except as otherwise specifically stated in the Contract Documents, Developer shall provide and pay for all materials, labor, tools, equipment, transportation, supervision, temporary constructions of every nature, and all other services, management, and facilities of every nature whatsoever necessary to execute and complete the Contract Documents within the Contract Time.

1.8.2 Unless otherwise specified, all materials shall be new and the best of their respective kinds and grades as noted or specified, and workmanship shall be of high quality.

1.8.3 Materials shall be furnished in ample quantities and at such times as to insure uninterrupted progress of Work and shall be stored properly and protected as required.

1.8.4 For all materials and equipment specified or indicated in the Drawings and Specifications, the Developer shall provide all labor, materials, equipment, and services necessary for complete assemblies and complete working systems, functioning as intended. Incidental items not indicated on Drawings, nor mentioned in the Specifications, that can legitimately and reasonably be inferred to belong to the Work described, or be necessary in

good practice to provide a complete assembly or system, shall be furnished as though itemized here in every detail. In all instances, material and equipment shall be installed in strict accordance with each manufacturer's most recent published recommendations and specifications.

1.8.5 Developer shall, after award of the Project by District and after relevant submittals have been approved, place orders for materials and/or equipment as specified so that delivery of same may be made without delays to the Work. Developer shall, upon demand from District, present documentary evidence showing that orders have been placed.

1.8.6 District reserves the right but has no obligation, for any neglect in complying with the above instructions, to place orders for such materials and/or equipment as it may deem advisable in order that the Work may be completed at the date specified in the Facilities Lease, and all expenses incidental to the procuring of said materials and/or equipment shall be paid for by Developer or withheld from payment(s) to Developer.

1.8.7 Developer warrants good title to all material, supplies, and equipment installed or incorporated in Work and agrees upon completion of all Work to deliver the Site to District, together with all improvements and appurtenances constructed or placed thereon by it, and free from any claims, liens, or charges. Developer further agrees that neither it nor any person, firm, or corporation furnishing any materials or labor for any work covered by the Contract Documents shall have any right to lien any portion of the Premises or any improvement or appurtenance thereon, except that Developer may install metering devices or other equipment of utility companies or of political subdivision, title to which is commonly retained by utility company or political subdivision. In the event of installation of any such metering device or equipment, Developer shall advise District as to owner thereof.

1.8.8 Nothing contained in this Article, however, shall defeat or impair the rights of persons furnishing materials or labor under any bond given by Developer for their protection or any rights under any law permitting such protection or any rights under any law permitting such persons to look to funds due Developer in hands of District (e.g., Stop Notices), and this provision shall be inserted in all subcontracts and material contracts and notice of its provisions shall be given to all persons furnishing material for work when no formal contract is entered into for such material.

1.8.9 Title to new materials and/or equipment for the Work of the Contract Documents and attendant liability for its protection and safety shall remain with Developer until incorporated in the Work of the Contract Documents and accepted by District. No part of any materials and/or equipment shall be removed from its place of storage except for immediate installation in the Work of the Contract Documents. Developer shall keep an accurate inventory of all materials and/or equipment in a manner satisfactory to District or its authorized representative and shall, at the District's request, forward it to the District.

2. **[RESERVED]**

3. **ARCHITECT**

3.1 The Architect shall represent the District during the Project and will observe the progress and quality of the Work on behalf of the District. Architect shall have the authority to act on behalf of District to the extent expressly provided in the Contract Documents and to the extent determined by District. Architect shall have authority to reject materials, workmanship, and/or the Work whenever rejection may be necessary, in Architect's reasonable opinion, to insure the proper execution of the Contract Documents.

3.2 Architect shall, with the District and on behalf of the District, determine the amount, quality, acceptability, and fitness of all parts of the Work, and interpret the Specifications, Drawings, and shall, with the District, interpret all other Contract Documents.

3.3 Architect shall have all authority and responsibility established by law, including title 24 of the California Code of Regulations.

3.4 Developer shall provide District and the Construction Manager with a copy of all written communication between Developer and Architect at the same time as that communication is made to Architect, including, without limitation, all RFIs, correspondence, submittals, claims, and change order requests.

4. **CONSTRUCTION MANAGER**

4.1 If a construction manager is used on this Project ("Construction Manager" or "CM"), the Construction Manager will provide administration of the Contract Documents on the District's behalf. After execution of the Contract Documents, all correspondence and/or instructions from Developer and/or District shall be forwarded through the Construction Manager. The Construction Manager will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences, or procedures or for safety precautions in connection with the Work, which shall all remain the Developer's responsibility.

4.2 The Construction Manager, however, will have authority to reject materials and/or workmanship not conforming to the Contract Documents, as determined by the District, the Architect, and/or the Project Inspector. The Construction Manager shall also have the authority to require special inspection or testing of any portion of the Work, whether it has been fabricated, installed, or fully completed. Any decision made by the Construction Manager in good faith, shall not give rise to any duty or responsibility of the Construction Manager to the Developer, any Subcontractor, their agents, employees, or other persons performing any of the Work. The Construction Manager shall have free access to any or all parts of Work at any time.

4.3 If the District does not use a Construction Manager on this Project, all references to Construction Manager or CM shall be read as District.

4.4 It is agreed that the Construction Manager shall have final say where there is a difference in opinion between the Architect, Construction Manager and Project Inspector and the Developer may rely on any final decision made by the Construction Manager.

## 5. **INSPECTOR, INSPECTIONS, AND TESTS**

### 5.1 **Project Inspector**

5.1.1 One or more Project Inspector(s), including special Project Inspector(s), as required, will be assigned to the Work by District, in accordance with requirements of title 24, part 1, of the California Code of Regulations, to enforce the building code and monitor compliance with Plans and Specifications for the Project previously approved by the DSA. Duties of Project Inspector(s) are specifically defined in section 4-342 of said part 1 of title 24.

5.1.2 No Work shall be carried on except with the knowledge and under the inspection of the Project Inspector(s). The Project Inspector(s) shall have free access to any or all parts of Work at any time. Developer shall furnish Project Inspector(s) reasonable opportunities for obtaining such information as may be necessary to keep Project Inspector(s) fully informed respecting progress and manner of work and character of materials. Inspection of Work shall not relieve Developer from an obligation to fulfill the Contract Documents. Project Inspector(s) and the DSA are authorized to stop work whenever the Developer and/or its Subcontractor(s) are not complying with the Contract Documents. Any work stoppage by the Project Inspector(s) and/or DSA shall be without liability to the District. Developer shall instruct its Subcontractors and employees accordingly.

5.1.3 If Developer and/or any Subcontractor requests that the Project Inspector(s) perform any inspection off-site, this shall only be done if it is allowable pursuant to applicable regulations and DSA, if the Project Inspector(s) agree to do so.

### 5.2 **Tests and Inspections**

5.2.1 Tests and Inspections shall comply with title 24, part 1, California Code of Regulations, group 1, article 5, section 4-335, and with the provisions of the Specifications.

5.2.2 The District will select an independent testing laboratory to conduct the tests. Selection of the materials required to be tested shall be by the laboratory or the District's representative and not by the Developer. The Developer shall notify the District's representative a sufficient time in advance of its readiness for required observation or inspection.

5.2.3 The Developer shall notify the District's representative a sufficient time in advance of the manufacture of material to be supplied under the Contract Documents that must by terms of the Contract Documents be tested, in order that the District may arrange for the testing of same at the source of supply. This notice shall be, at a minimum, seventy-two (72) hours prior to the manufacture of the material that needs to be tested.

5.2.4 Any material shipped by the Developer from the source of supply prior to having satisfactorily passed such testing and inspection or prior to the

receipt of notice from said representative that such testing and inspection will not be required, shall not be incorporated into and/or onto the Project.

5.2.5 The District will select and pay testing laboratory costs for all tests and inspections. Costs of tests of any materials found to be not in compliance with the Contract Documents shall be paid for by the District and reimbursed by the Developer or deducted from the Guaranteed Maximum Price.

### 5.3 **Costs for After Hours and/or Off Site Inspections**

If the Developer performs Work outside the Inspector's regular working hours, costs of any inspections required outside regular working hours shall be borne by the Developer and may be invoiced to the Developer by the District or the District may deduct those expenses from the next Tenant Improvement Payment.

## 6. **DEVELOPER**

Developer shall construct the Work for the Guaranteed Maximum Price including any adjustment(s) to the Guaranteed Maximum Price pursuant to provisions herein regarding changes to the Guaranteed Maximum Price. Except as otherwise noted, Developer shall provide and pay for all labor, materials, equipment, permits, fees, licenses, facilities, transportation, taxes, and services necessary for the proper execution and completion of the Work, except as indicated herein.

### 6.1 **Status of Developer**

6.1.1 Developer is and shall at all times be deemed to be an independent contractor and shall be wholly responsible for the manner in which it and its Subcontractors perform the services required of it by the Contract Documents. Nothing herein contained shall be construed as creating the relationship of employer and employee, or principal and agent, between the District, or any of the District's employees or agents, and Developer or any of Developer's Subcontractors, agents or employees. Developer assumes exclusively the responsibility for the acts of its employees as they relate to the services to be provided during the course and scope of their employment. Developer, its Subcontractors, agents, and its employees shall not be entitled to any rights or privileges of District employees. District shall be permitted to monitor the Developer's activities to determine compliance with the terms of the Contract Documents.

6.1.2 As required by law, Developer and all Subcontractors shall be properly licensed and regulated by the Contractors State License Board, 3132 Bradshaw Road, Post Office Box 2600, Sacramento, California 98826, <http://www.cslb.ca.gov>.

### 6.2 **Developer's Supervision**

6.2.1 During progress of the Work, Developer shall keep on the Premises, and at all other locations where any Work related to the Contract Documents is being performed, a competent project manager and construction superintendent who are employees of the Developer, to whom the District

does not object and at least one of whom shall be fluent in English, written and verbal.

6.2.2 The project manager and construction superintendent shall both speak fluently the predominant language of the Developer's employees.

6.2.3 Before commencing the Work herein, Developer shall give written notice to District of the name of its project manager and construction superintendent. Neither the Developer's project manager nor construction superintendent shall be changed except with prior written notice to District, unless the Developer's project manager and/or construction superintendent proves to be unsatisfactory to Developer, District, any of the District's employees, agents, the Construction Manager, or the Architect, in which case, Developer shall notify District in writing. The Developer's project manager and construction superintendent shall each represent Developer, and all directions given to Developer's project manager and/or construction superintendent shall be as binding as if given to Developer.

6.2.4 Developer shall give efficient supervision to Work, using its best skill and attention. Developer shall carefully study and compare all Contract Documents, Drawings, Specifications, and other instructions and shall at once report to District, Construction Manager, and Architect any error, inconsistency, or omission that Developer or its employees and Subcontractors may discover, in writing, with a copy to District's Project Inspector(s). This obligation is for the purpose of facilitating the construction of the Project and it is recognized that Developer's review is made in the Developer's capacity as a general contractor and not as a licensed design professional.

### 6.3 **Duty to Provide Fit Workers**

6.3.1 Developer and Subcontractor(s) shall at all times enforce strict discipline and good order among their employees and shall not employ any unfit person or anyone not skilled in work assigned to that person. It shall be the responsibility of Developer to ensure compliance with this requirement. District may require Developer to permanently remove unfit persons from Project Site.

6.3.2 Any person in the employ of Developer or Subcontractor(s) whom District may deem incompetent or unfit shall be excluded from working on the Project and shall not again be employed on the Project except with the prior written consent of District.

6.3.3 The Developer shall furnish labor that can work in harmony with all other elements of labor employed or to be employed in the Work.

6.3.4 If Developer intends to make any change in the name or legal nature of the Developer's entity, Developer must first notify the District. The District shall determine if Developer's intended change is permissible while performing the Contract Documents.



#### **6.4 Purchase of Materials and Equipment**

The Developer is required to order, obtain, and store materials and equipment sufficiently in advance of its Work at no additional cost from District to assure that there will be no delays.

#### **6.5 Documents On Work**

6.5.1 Developer shall at all times keep on the Work Site, or at another location as the District may authorize in writing, one legible copy of all Contract Documents, including Addenda and Change Orders, and titles 19 and 24 of the California Code of Regulations, the specified edition(s) of the Uniform Building Code, all approved Drawings, Plans, Schedules, and Specifications, and all codes and documents referred to in the Specifications, and made part thereof. These documents shall be kept in good order and available to District, Construction Manager, Architect, Architect's representatives, the Project Inspector(s), and all authorities having jurisdiction. Developer shall be acquainted with and comply with the provisions of these titles as they relate to this Project. (See particularly the duties of Developer, title 24, part 1, California Code of Regulations, section 4-343.) Developer shall also be acquainted with and comply with all California Code of Regulations provisions relating to conditions on this Project, particularly titles 8 and 17. Developer shall coordinate with Architect and Construction Manager and shall submit its verified report(s) according to the requirements of title 24.

#### **6.5.2 Daily Job Reports.**

6.5.2.1 Developer shall maintain, at a minimum, at least one (1) set of Daily Job Reports on the Project. These must be prepared by the Developer's employee(s) who are present on Site, and must include, at a minimum, the following information:

6.5.2.1.1 A brief description of all Work performed on that day.

6.5.2.1.2 A summary of all other pertinent events and/or occurrences on that day.

6.5.2.1.3 The weather conditions on that day.

6.5.2.1.4 A list of all Subcontractor(s) working on that day,

6.5.2.1.5 A list of each Developer employee working on that day and the total hours worked for each employee.

6.5.2.1.6 A complete list of all equipment on Site that day, whether in use or not.

6.5.2.1.7 A complete list of all materials, supplies, and equipment delivered on that day.

6.5.2.1.8 A complete list of all inspections and tests performed on that day.

6.5.2.2 Each day Developer shall provide a copy of the previous day's Daily Job Report to the District or the District's Construction Manager.

## **6.6 Preservation of Records**

The District shall have the right to examine and audit all "Daily Job Reports" or other Project records of Developer's project manager(s), project superintendent(s), and/or project foreperson(s), all certified payroll records and/or related documents including, without limitation, payroll, payment, timekeeping and tracking documents; and as it pertains to change orders, all books, estimates, records, contracts, documents, cost data, subcontract job cost reports, and other data of the Developer, any Subcontractor, and/or supplier, including computations and projections related to estimating, negotiating, pricing, or performing the Work or modification, in order to evaluate the accuracy, completeness, and currency of the cost, manpower, coordination, supervision, or pricing data at no additional cost to the District. These documents may be duplicative and/or be in addition to any documents held in escrow by the District. The Developer shall make available at its office at all reasonable times the materials described in this paragraph for the examination, audit, or reproduction until three (3) years after final payment under the Contract Documents. Notwithstanding the provisions above, Developer shall provide any records requested by any governmental agency, if available, after the time set forth above. District agrees that it will not furnish any of the records defined hereunder to any third party other than as required by law.

## **6.7 Integration of Work**

6.7.1 Developer shall do all cutting, fitting, patching, and preparation of Work as required to make its several parts come together properly, to fit it to receive or be received by work of other contractors, and to coordinate tolerances to various pieces of work, showing upon, or reasonably implied by, the Drawings and Specifications for the completed structure, and shall conform them as District and/or Architect may direct.

6.7.2 All cost caused by defective or ill-timed Work shall be borne by Developer, inclusive of repair work.

6.7.3 Developer shall not endanger any work performed by it or anyone else by cutting, excavating, or otherwise altering work and shall not cut or alter work of any other contractor except with consent of District.

## **6.8 Obtaining of Permits and Licenses**

Developer shall secure and pay for any permits, licenses, and certificates necessary for prosecution of Work before the date of the commencement of the Work or before the permits, licenses, and certificates are legally required to continue the Work without interruption. The Developer shall obtain and pay, only when legally required, for all licenses, permits, inspections, and inspection certificates required to be obtained from or issued by any authority having jurisdiction over any part of the Work included in the Contract Documents. All final permits, licenses, and certificates shall be delivered to District before demand is made for final payment. The costs associated with said permits, licenses and certificates shall be direct reimbursement items and are not subject to any markup.

## 6.9 Work to Comply With Applicable Laws and Regulations

6.9.1 Developer shall give all notices and comply with the following specific laws, ordinances, rules, and regulations and all other applicable laws, ordinances, rules, and regulations bearing on conduct of Work as indicated and specified, including but not limited to the appropriate statutes and administrative code sections. If Developer observes that Drawings and Specifications are at variance therewith, or should Developer become aware of the development of conditions not covered by Contract Documents that will result in finished Work being at variance therewith, Developer shall promptly notify District in writing and any changes deemed necessary by District shall be made as provided in the Contract Documents for changes in Work.

6.9.1.1 National Electrical Safety Code, U. S. Department of Commerce

6.9.1.2 National Board of Fire Underwriters' Regulations

6.9.1.3 Uniform Building Code, latest addition, and the California Code of Regulations, title 24, including the California Green Building Standards Code, effective 01/01/2011, and other amendments

6.9.1.4 Manual of Accident Prevention in Construction, latest edition, published by A.G.C. of America

6.9.1.5 Industrial Accident Commission's Safety Orders, State of California

6.9.1.6 Regulations of the State Fire Marshall (title 19, California Code of Regulations) and Pertinent Local Fire Safety Codes

6.9.1.7 Americans with Disabilities Act

6.9.1.8 Education Code of the State of California

6.9.1.9 Government Code of the State of California

6.9.1.10 Labor Code of the State of California, division 2, part 7, Public Works and Public Agencies

6.9.1.11 Public Contract Code of the State of California

6.9.1.12 California Art Preservation Act

6.9.1.13 U. S. Copyright Act

6.9.1.14 U. S. Visual Artists Rights Act

6.9.2 Developer shall comply with all applicable mitigation measures, if any, adopted by any public agency with respect to this Project pursuant to the California Environmental Quality Act (Public Resources Code section 21000 et seq.). The District has complied with all requirements imposed upon it by the California Environmental Quality Act (Public Resource Code Section 21000 et seq. ("CEQA")) in connection with the Project, and no further environmental review of the Project is necessary pursuant to CEQA before the construction of the Project may commence.

6.9.3 If Developer performs any Work that it knew, or through exercise of reasonable care should have known, to be contrary to any applicable laws, ordinance, rules, or regulations, Developer shall bear all costs arising therefrom.

6.9.4 Where Specifications or Drawings state that materials, processes, or procedures must be approved by the DSA, State Fire Marshall, or other body

or agency, Developer shall use its best efforts to satisfy the requirements of such bodies or agencies.

**6.10 Safety/Protection of Persons and Property**

6.10.1 The Developer will be solely and completely responsible for conditions of the Work Site, including safety of all persons and property during performance of the Work. This requirement will apply continuously and not be limited to normal working hours.

6.10.2 The wearing of hard hats will be mandatory at all times for all personnel on Site. Developer shall supply sufficient hard hats to properly equip all employees and visitors.

6.10.3 Any construction review of the Developer's performance is not intended to include review of the adequacy of the Developer's safety measures in, on, or near the Work Site.

6.10.4 Implementation and maintenance of safety programs shall be the sole responsibility of the Developer.

6.10.5 The Developer shall furnish to the District a copy of the Developer's safety plan within the time frame indicated in the Contract Documents and specifically adapted for the Project.

6.10.6 Developer shall be responsible for all damages to persons or property that occur as a result of its fault or negligence in connection with the prosecution of the Contract Documents and shall take all necessary measures and be responsible for the proper care and completion and final acceptance by District. All Work shall be solely at Developer's risk with the exception of damage to the Work caused by "acts of God" as defined in Public Contract Code section 7105.

6.10.7 Developer shall take, and require Subcontractors to take, all necessary precautions for safety of workers on the Project and shall comply with all applicable federal, state, local, and other safety laws, standards, orders, rules, regulations, and building codes to prevent accidents or injury to persons on, about, or adjacent to premises where Work is being performed and to provide a safe and healthful place of employment. Developer shall furnish, erect, and properly maintain at all times, all necessary safety devices, safeguards, construction canopies, signs, nets, barriers, lights, and watchmen for protection of workers and the public and shall post danger signs warning against hazards created by such features in the course of construction.

6.10.8 Hazards Control – Developer shall store volatile wastes in approved containers and remove them from the Site as necessary by law. .

6.10.9 Developer shall designate a responsible member of its organization on the Project, whose duty shall be to post information regarding protection and obligations of workers and other notices required under occupational safety and health laws, to comply with reporting and other occupational safety requirements, and to protect the life, safety, and health of workers.

Name and position of person so designated shall be reported to District by Developer.

6.10.10 Developer shall correct any violations of safety laws, rules, orders, standards, or regulations. Upon the issuance of a citation or notice of violation by the Division of Occupational Safety and Health, Developer shall correct such violation promptly.

6.10.11 Developer shall comply with any District storm water requirements that are approved by the District and applicable to the Project, at no additional cost to the District.

6.10.12 In an emergency affecting safety of life or of work or of adjoining property, Developer, without special instruction or authorization, shall act, at its discretion, to prevent such threatened loss or injury. Any compensation claimed by Developer on account of emergency work shall be determined by agreement. All salvage materials will become the property of the Developer and shall be removed from the Site unless otherwise called for in the Contract Documents. However, the District reserves the right to designate certain items of value that shall be turned over to the District unless otherwise directed by District.

6.10.13 All connections to public utilities and/or existing on-site services shall be made and maintained in such a manner as to not interfere with the continuing use of same by the District during the entire progress of the Work.

6.10.14 Developer shall provide such heat, covering, and enclosures as are necessary to protect all Work, materials, equipment, appliances, and tools against damage by weather conditions, such as extreme heat, cold, rain, snow, dry winds, flooding, or dampness.

6.10.15 The Developer shall protect and preserve the Work from all damage or accident, providing any temporary roofs, window and door coverings, boxings, or other construction as required by the Architect. The Developer shall be responsible for existing structures, walks, roads, trees, landscaping, and/or improvements in working areas; and shall provide adequate protection therefor. If temporary removal is necessary of any of the above items, or damage occurs due to the Work, the Developer shall replace same at his expense with same kind, quality, and size of Work or item damaged. This shall include any adjoining property of the District and others.

6.10.16 Developer shall take adequate precautions to protect existing roads, sidewalks, curbs, pavements, utilities, adjoining property, and structures (including, without limitation, protection from settlement or loss of lateral support), and to avoid damage thereto, and repair any damage thereto caused by construction operations.

6.10.17 Developer shall confine apparatus, the storage of materials, and the operations of workers to limits indicated by law, ordinances, permits, or directions of Architect, and shall not interfere with the Work or unreasonably encumber Premises or overload any structure with materials. Developer shall enforce all instructions of District and Architect regarding signs, advertising,

fires, and smoking, and require that all workers comply with all regulations while on Project Site.

6.10.18 Developer, Developer's employees, Subcontractors, Subcontractors' employees, or any person associated with the Work shall conduct themselves in a manner appropriate for a school site. No verbal or physical contact with neighbors, students, and faculty, profanity, or inappropriate attire or behavior will be permitted. District may require Developer to permanently remove non-complying persons from Project Site.

6.10.19 Developer shall take care to prevent disturbing or covering any survey markers, monuments, or other devices marking property boundaries or corners. If such markers are disturbed, Developer shall have a civil engineer, registered as a professional engineer in California, replace them at no cost to District.

6.10.20 In the event that the Developer enters into any agreement with owners of any adjacent property to enter upon the adjacent property for the purpose of performing the Work, Developer shall fully indemnify, defend, and hold harmless each person, entity, firm, or agency that owns or has any interest in adjacent property. The form and content of the agreement of indemnification shall be approved by the District prior to the commencement of any Work on or about the adjacent property. The Developer shall also indemnify the District as provided in the indemnification provision herein. These provisions shall be in addition to any other requirements of the owners of the adjacent property.

6.11 **General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities ("General Permit")**

6.11.1 Developer acknowledges that all California school districts are now or will soon be obligated to develop and implement the following storm water requirements, without limitation:

6.11.1.1 A Municipal Separate Storm Sewer System (MS4). An MS4 is a system of conveyances used to collect and/or convey storm water, including, without limitation, catch basins, curbs, gutters, ditches, man-made channels, and storm drains.

6.11.1.2 A Storm Water Pollution Prevention Plan (SWPPP) that contains specific best management practices (BMPs) and establishes numeric effluent limitations at:

6.11.1.2.1 Sites where the District engages in maintenance (e.g., fueling, cleaning, repairing) of transportation activities.

6.11.1.2.2 Construction sites where:

6.11.1.2.2.1 One (1) or more acres of soil will be disturbed, or

6.11.1.2.2.1.1 The Project is part of a larger common plan of development that disturbs more than one (1) acre of soil.

6.11.2 Developer shall comply with any District storm water requirements that are approved by the District and applicable to the Project, at no additional cost to the District.

#### 6.12 **Working Evenings and Weekends**

Developer may be required to work evenings and/or weekends at no additional cost to the District. Developer shall give the District notice prior to performing any evening and/or weekend work. Developer shall perform all evening and/or weekend work in compliance with all applicable rules, regulations, laws, and local ordinances including, without limitation, all noise and light limitations. Developer shall reimburse the District for any Inspector charges necessitated by the Developer's evening and/or weekend work.

#### 6.13 **Cleaning Up**

6.13.1 The Developer shall provide all services, labor, materials, and equipment necessary for protecting the Work, all school occupants, furnishings, equipment, and building structure from damage until its completion and final acceptance by District. Dust barriers shall be provided to isolate dust and dirt from construction operations. At completion of the Work and portions thereof, Developer shall clean to the original state any areas beyond the Work area that become dust laden as a result of the Work. The Developer must erect the necessary warning signs and barricades to ensure the safety of all school occupants. The Developer at all times must maintain good housekeeping practices to reduce the risk of fire damage and must make a fire extinguisher, fire blanket, and/or fire watch, as applicable, available at each location where cutting, braising, soldering, and/or welding is being performed or where there is an increased risk of fire.

6.13.2 Developer at all times shall keep Premises free from debris such as waste, rubbish, and excess materials and equipment caused by the Work. Developer shall not leave debris under, in, or about the Premises, but shall promptly remove same from the Premises on a daily basis. If Developer fails to clean up, District may do so and the cost thereof shall be charged to Developer. If the Contract Documents call for Work on an existing facility, Developer shall also perform specific clean-up on or about the Premises upon request by the District as it deems necessary for the continuing education process. Developer shall comply with all related provisions of the Specifications.

6.13.3 If the Construction Manager, Architect, or District observes the accumulation of trash and debris, the District will give the Developer a 24-hour written notice to mitigate the condition.

6.13.4 Should the Developer fail to perform the required clean-up, or should the clean-up be deemed unsatisfactory by the District, the District will then perform the clean-up. All cost associated with the clean-up work (including

all travel, payroll burden, and costs for supervision) will be deducted from the Guaranteed Maximum Price, or District may withhold those amounts from payment(s) to Developer.

7. **SUBCONTRACTORS**

7.1 Developer shall provide the District with information for all of Developer's Subcontracts and Subcontractors.

7.2 No contractual relationship exists between the District and any Subcontractor, supplier, or sub-subcontractor by reason of the Contract Documents.

7.3 Developer agrees to bind every Subcontractor by terms of the Contract Documents as far as those terms are applicable to Subcontractor's work including, without limitation, all labor, wage & hour, apprentice and related provisions and requirements. If Developer shall subcontract any part of the Work called for by the Contract Documents, Developer shall be as fully responsible to District for acts and omissions of any Subcontractor and of persons either directly or indirectly employed by any Subcontractor, as it is for acts and omissions of persons directly employed by Developer. The divisions or sections of the Specifications are not intended to control the Developer in dividing the Work among Subcontractors or limit the work performed by any trade.

7.4 District's consent to, or approval of, or failure to object to, any Subcontractor under the Contract Documents shall not in any way relieve Developer of any obligations under the Contract Documents and no such consent shall be deemed to waive any provisions of the Contract Documents.

7.5 Developer is directed to familiarize itself with sections 1720 through 1861 of the Labor Code of the State of California, as regards the payment of prevailing wages and related issues, and to comply with all applicable requirements therein all including, without limitation, section 1775 and the Developer's and Subcontractors' obligations and liability for violations of prevailing wage law and other applicable laws.

7.6 The Developer shall be responsible for the coordination of the trades, Subcontractors, sub-subcontractors, and material or equipment suppliers working on the Project.

7.7 Developer is solely responsible for settling any differences between the Developer and its Subcontractor(s) or between Subcontractors.

7.8 Developer must include in all of its subcontracts the assignment provisions as indicated in the Termination section of these Construction Provisions.

8. **OTHER CONTRACTS/CONTRACTORS**



8.1 District reserves the right to let other contracts, and/or to perform work with its own forces, in connection with the Project. Developer shall afford other contractors reasonable opportunity for introduction and storage of their materials and execution of their work and shall properly coordinate and connect Developer's Work with the work of other contractors.

8.2 Developer shall protect the work of any other contractor that Developer encounters while working on the Project.

8.3 If any part of Developer's Work depends for proper execution or results upon work of District or any other contractor, the Developer shall visually inspect, and with reasonable effort, physically inspect all accessible portions of District's or any other contractors work and promptly report to the District in writing before proceeding with its Work any defects in District's or any other contractor's work that render Developer's Work unsuitable for proper execution and results. Developer shall be held accountable for damages to District for District's or any other contractor's work that Developer failed to inspect or should have inspected. Developer's failure to inspect and report shall constitute Developer's acceptance of all District's or any other contractor's work as fit and proper for reception of Developer's Work, except as to defects that may develop in District's or any other contractor's work after execution of Developer's Work.

8.4 To ensure proper execution of its subsequent work, Developer shall measure and inspect work already in place and shall at once report to the District in writing any discrepancy between that executed work and the Contract Documents.

8.5 Developer shall ascertain to its own satisfaction the scope of the Project and nature of District's or any other contracts that have been or may be awarded by District in prosecution of the Project to the end that Developer may perform under the Contract Documents in light of the other contracts, if any.

8.6 Nothing herein contained shall be interpreted as granting to Developer exclusive occupancy of the Site, the Premises, or of the Project. Developer shall not cause any unnecessary hindrance or delay to the use and/or school operation(s) of the Premises and/or to District or any other contractor working on the Project. If simultaneous execution of any contract or school operation is likely to cause interference with performance of Developer's obligations under the Contract Documents, Developer shall coordinate with those contractor(s), person(s), and/or entity(s) and shall notify the District of the resolution and District shall not cause any unnecessary hindrance or delay to the Developer or any other contractor working on the Project.

## 9. **DRAWINGS AND SPECIFICATIONS**

9.1 A complete list of all Drawings that form a part of the Contract Documents are to be found as an index on the Drawings themselves, and/or may be provided to the Developer and/or in the Table of Contents.

9.2 Materials or Work described in words that so applied have a well known technical or trade meaning shall be deemed to refer to recognized standards, unless noted otherwise.

### 9.3 Trade Name or Trade Term.

It is not the intention of the Contract Documents to go into detailed descriptions of any materials and/or methods commonly known to the trade under "trade name" or "trade term." The mere mention or notation of "trade name" or "trade term" shall be considered a sufficient notice to Developer that it will be required to complete the work so named, complete, finished, and operable, with all its appurtenances, according to the best practices of the trade.

9.4 The naming of any material and/or equipment shall mean furnishing and installing of same, including all incidental and accessory items thereto and/or labor therefor, as per best practices of the trade(s) involved, unless specifically noted otherwise.

9.5 Contract Documents are complementary, and what is called for by one shall be binding as if called for by all. As such, Drawings and Specifications are intended to be fully cooperative and to agree. However, if Developer observes that Drawings and Specifications are in conflict, Developer shall promptly notify District and Architect in writing, and any necessary changes shall be made as provided in the Contract Documents.

9.6 Should any question arise concerning the intent or meaning of the Contract Documents, including the Plans and Specifications, the question shall be submitted to the District for interpretation. If a conflict exists in the Contract Documents, these Construction Provisions shall control over the Facilities Lease, which shall control over the Site Lease, which shall control over Division 1 Documents, which shall control over Division 2 through Division 49 documents, which shall control over figured dimensions, which shall control over large-scale drawings, which shall control over small-scale drawings. In no case shall a document calling for lower quality and/or quantity material or workmanship control. However, in the case of discrepancy or ambiguity solely between and among the Drawings and Specifications, the discrepancy or ambiguity shall be resolved in favor of the interpretation that will provide District with the functionally complete and operable Project described in the Drawings and Specifications. In case of ambiguity, conflict, or lack of information, District will furnish clarifications with reasonable promptness.

9.7 Drawings and Specifications are intended to comply with all laws, ordinances, rules, and regulations of constituted authorities having jurisdiction, and where referred to in the Contract Documents, the laws, ordinances, rules, and regulations shall be considered as a part of the Contract Documents within the limits specified.

### 9.8 Ownership of Drawings

All copies of Plans, Drawings, Designs, Specifications, and copies of other incidental architectural and engineering work, or copies of other Contract Documents furnished by District, are the property of District. They are not to be used by Developer in other work and, with the exception of signed sets of Contract Documents, are to be returned to District on request at completion of Work, or may be used by District as it may require without any additional costs to District. Neither the Developer nor any Subcontractor, or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications, and other documents prepared by the Architect. District hereby grants the Developer, Subcontractors, sub-subcontractors, and

material or equipment suppliers a limited license to use applicable portions of the Drawings prepared for the Project in the execution of their Work under the Contract Documents.

## 10. **DEVELOPER'S SUBMITTALS AND SCHEDULES**

### 10.1 **Construction Schedule**

**10.1.1** The Developer shall comply with the construction schedule attached to the Facilities Lease as **Exhibit F** ("Construction Schedule"). **[To be attached when available.]**

10.1.1 Developer must provide all schedules both in hard copy and electronically, in a format (e.g. Primavera) approved in advance by the District.

10.1.2 The District will review the schedules submitted and the Developer shall consider changes and corrections in the schedules as requested by the District.

### 10.2 **Schedule of Values**

The Developer shall provide a schedule of values for all of the Work, which includes quantities and prices of items aggregating the Guaranteed Maximum Price and subdivided into component parts as per specifications. The Schedule of Values shall not be modified or amended by the Developer without the prior consent and approval of the District, which may be granted or withheld in the sole discretion of the District. The District shall have the right at any time to revise the schedule of values if, in the District's sole opinion, the schedule of values does not accurately reflect the value of the Work performed.

**10.3 Safety Plan.** Developer's Safety Plan specifically adapted for the Project. Developer's Safety Plan shall comply with the following requirements:

10.3.1 All applicable requirements of California Division of Industrial Safety ("CalOSHA") and/or of the United States Occupational Safety and Health Administration ("OSHA").

10.3.2 All provisions regarding Project safety, including all applicable provisions in these Construction Provisions.

10.3.3 Developer's Safety Plan shall be in English and in the language(s) of the Developer's and its Subcontractors' employees.

**10.4 Complete Subcontractor List.** The name, address, telephone number, facsimile number, California State Contractors License number, classification, and monetary value of all Subcontracts for parties furnishing labor, material, or equipment for completion of the Project.

### 10.5 **Monthly Progress Schedule(s)**

10.5.1 Upon request by the District, Developer shall provide Monthly Progress Schedule(s) to the District. A Monthly Progress Schedule shall update the approved Construction Schedule or the last Monthly Progress Schedule, showing all work completed and to be completed. The monthly Progress Schedule shall be sent within the timeframe requested by the District and shall be in a format acceptable to the District and contain a written narrative of the progress of work that month and any changes, delays, or events that may affect the work. The process for District approval of the Monthly Progress Schedule shall be the same as the process for approval of the Construction Schedule.

10.5.2 Developer shall also submit Monthly Progress Schedule(s) with all payment applications.

#### **10.6 Material Safety Data Sheets (MSDS)**

Developer is required to ensure Material Safety Data Sheets are available in a readily accessible place at the Work Site for any material requiring a Material Safety Data Sheet per the Federal "Hazard Communication" standard, or employees right to know law. The Developer is also required to ensure proper labeling on substance brought onto the job site and that any person working with the material or within the general area of the material is informed of the hazards of the substance and follows proper handling and protection procedures. Two additional copies of the Material Safety Data Sheets shall also be submitted directly to the District.

### **11. SITE ACCESS, CONDITIONS, AND REQUIREMENTS**

#### **11.1 Site Investigation**

Developer has made a careful investigation of the Site and is familiar with the requirements of the Contract Documents and has accepted the readily observable, existing conditions of the Site.

#### **11.2 Soils Investigation Report**

11.2.1 When a soils investigation report obtained from test holes at Site is available, that report shall be made available to the Developer.

#### **11.3 Layout and Field Engineering**

11.3.1 The Developer shall be responsible for having ascertained pertinent local conditions such as location, accessibility, and general character of the Site and for having satisfied itself as to the conditions under which the Work is to be performed. District shall not be liable for any claim for allowances because of Developer's error or negligence in acquainting itself with the conditions at the Site.

11.3.2 Developer shall protect and preserve established benchmarks and monuments and shall make no changes in locations without the prior written approval of District. Developer shall replace any benchmarks or monuments

that are lost or destroyed subsequent to proper notification of District and with District's approval.

#### **11.4 Regional Notification Center**

The Developer, except in an emergency, shall contact the appropriate regional notification center at least two (2) days prior to commencing any excavation if the excavation will be conducted in an area or in a private easement that is known, or reasonably should be known, to contain subsurface installations other than the underground facilities owned or operated by the District, and obtain an inquiry identification number from that notification center. No excavation shall be commenced and/or carried out by the Developer unless an inquiry identification number has been assigned to the Developer or any Subcontractor and the Developer has given the District the identification number. Any damages arising from Developer's failure to make appropriate notification shall be at the sole risk and expense of the Developer. Any delays caused by failure to make appropriate notification shall be at the sole risk of the Developer and shall not be considered for an extension of the Contract Time.

#### **11.5 Existing Utility Lines**

11.5.1 Pursuant to Government Code section 4215, District assumes the responsibility for removal, relocation, and protection of main or trunk utility lines and facilities located on the construction Site at the time of commencement of construction under the Contract Documents with respect to any such utility facilities that are not identified in the Plans and Specifications. Developer shall not be assessed for liquidated damages for delay in completion of the Project caused by failure of District or the owner of a utility to provide for removal or relocation of such utility facilities.

11.5.2 Locations of existing utilities provided by District shall not be considered exact, but approximate within reasonable margin and shall not relieve Developer of responsibilities to exercise reasonable care nor costs of repair due to Developer's failure to do so. District shall compensate Developer for the costs of locating, repairing damage not due to the failure of Developer to exercise reasonable care, and removing or relocating such utility facilities not indicated in the Plans and Specifications with reasonable accuracy, and for equipment necessarily idle during such work.

11.5.3 No provision herein shall be construed to preclude assessment against Developer for any other delays in completion of the Work. Nothing in this Article shall be deemed to require District to indicate the presence of existing service laterals, appurtenances, or other utility lines, within the exception of main or trunk utility lines. Whenever the presence of these utilities on the Site of the construction Project can be inferred from the presence of other visible facilities, such as buildings, meter junction boxes, on or adjacent to the Site of the construction.

11.5.4 If Developer, while performing Work under the Contract Documents, discovers utility facilities not identified by District in Plans and Specifications, Developer shall immediately notify the District and the utility in writing. In the event Developer fails to immediately provide notice and subsequently

causes damage to the utility facilities, the cost of repair for damage to above-mentioned visible facilities shall be borne by the Developer.

**11.6 Notification**

Developer understands, acknowledges and agrees that the purpose for prompt notification to the District pursuant to these provisions is to allow the District to investigate the condition(s) so that the District shall have the opportunity to decide how the District desires to proceed as a result of the condition(s). Accordingly, failure of Developer to promptly notify the District in writing, pursuant to these provisions, shall constitute Developer's waiver of any claim for damages or delay incurred as a result of the condition(s).

**11.7 Hazardous Materials**

Developer shall comply with all provisions and requirements of the Contract Documents related to hazardous materials including, without limitation, Hazardous Materials Procedures and Requirements.

**11.8 No Signs**

Neither the Developer nor any other person or entity shall display any signs not required by law or the Contract Documents at the Site, fences trailers, offices, or elsewhere on the Site without specific prior written approval of the District.

**12. TRENCHES**

**12.1 Trenches Greater Than Five Feet**

Pursuant to Labor Code section 6705, if the Guaranteed Maximum Price exceeds \$25,000 and involves the excavation of any trench or trenches five (5) feet or more in depth, the Developer shall, in advance of excavation, promptly submit to the District and/or a registered civil or structural engineer employed by the District or Architect, a detailed plan showing the design of shoring for protection from the hazard of caving ground during the excavation of such trench or trenches.

**12.2 Excavation Safety**

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, but in no case shall such plan be less effective than that required by the Construction Safety Orders. No excavation of such trench or trenches shall be commenced until said plan has been accepted by the District or by the person to whom authority to accept has been delegated by the District.

**12.3 No Tort Liability of District**

Pursuant to Labor Code section 6705, nothing in this Article shall impose tort liability upon the District or any of its employees.

**12.4 No Excavation Without Permits**

The Developer shall not commence any excavation Work until it has secured all necessary permits including the required CAL OSHA excavation/shoring permit. Any permits shall be prominently displayed on the Site prior to the commencement of any excavation.

#### **12.5 Discovery of Hazardous Waste and/or Unusual Conditions**

12.5.1 Pursuant to Public Contract Code section 7104, if the Work involves digging trenches or other excavations that extend deeper than four feet below the Surface, the Developer shall promptly, and before the following conditions are disturbed, notify the District, in writing, of any:

12.5.1.1 Material that the Developer believes may be material that is hazardous waste, as defined in section 25117 of the Health and Safety Code, is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

12.5.1.2 Subsurface or latent physical conditions at the Site differing from those indicated.

12.5.1.3 Unknown physical conditions at the Project 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 Contract Documents.

12.5.2 The District shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the Developer's cost of, or the time required for, performance of any part of the Work, shall issue a Change Order under the procedures described herein.

12.5.3 In the event that a dispute arises between District and the Developer whether the conditions materially differ or cause a decrease or increase in the Developer's cost of, or time required for, performance of any part of the Work, the Developer shall not be excused from any scheduled completion date provided for by the Contract Documents, but shall proceed with all work to be performed under the Contract Documents. The Developer shall retain any and all rights provided either by the Contract Documents or by law that pertain to the resolution of disputes and protests.

### **13. INSURANCE AND BONDS**

13.1 **Developer's Insurance.** The Developer shall comply with the insurance requirements as indicated in the Facilities Lease.

#### **13.2 Contract Security - Bonds**

13.2.1 Developer shall furnish two surety bonds issued by a California admitted surety insurer as follows:

13.2.1.1 **Performance Bond:** A bond in an amount at least equal to one hundred percent (100%) of Guaranteed Maximum Price as security for faithful performance of the Contract Documents.

13.2.1.2 **Payment Bond:** A bond in an amount at least equal to one hundred percent (100%) of the Guaranteed Maximum Price as security for payment of persons performing labor and/or furnishing materials in connection with this Agreement.

13.2.1.3 **Developer has submitted forms of bonds to Lessor acceptable in form to Lessor.**

13.2.2 Cost of bonds shall be included in the Guaranteed Maximum Price.

13.2.3 All bonds related to this Project shall be in the forms set forth in these Lease Documents and shall comply with all requirements of the Lease Documents, including, without limitation, the bond forms.

14. **WARRANTY/GUARANTEE/INDEMNITY**

14.1 **Warranty/Guarantee**

14.1.1 The Developer shall obtain and preserve for the benefit of the District, manufacturer's warranties on materials, fixtures, and equipment incorporated into the Work.

In addition to guarantees required elsewhere, Developer shall, and hereby does guarantee and warrant all Work furnished on the job against all defects for a period of **ONE (1)** year after the date of completion as defined in Public Contract Code section 7107, subdivision (c). If any work is not in compliance with the Drawings and Specifications, Developer shall repair or replace any and all of that Work, together with any other Work that may be displaced in so doing, that may prove defective in workmanship and/or materials within a **ONE (1)** year period from date of completion as defined above without expense whatsoever to District. In the event of failure of Developer and/or Surety to commence and pursue with diligence said replacements or repairs within ten (10) days after being notified in writing, Developer and Surety hereby acknowledge and agree that District is authorized to proceed to have defects repaired and made good at expense of Developer and/or Surety who hereby agree to pay costs and charges therefore immediately on demand.



14.1.2 If any work is not in compliance with the Drawings and Specifications and if in the opinion of District said defective work creates a dangerous condition or requires immediate correction or attention to prevent further loss to District or to prevent interruption of operations of District, District will attempt to give the notice required above. If Developer or Surety cannot be contacted or neither complies with District's request for correction within a reasonable time as determined by District, District may, notwithstanding the above provision, proceed to make any and all corrections and/or provide attentions the District believes are necessary. The costs of correction or attention shall be charged against Developer and Surety of the guarantees provided in this Article or elsewhere in this Agreement.

14.1.3 The above provisions do not in any way limit the guarantees on any items for which a longer guarantee is specified or on any items for which a manufacturer gives a guarantee for a longer period. Developer shall furnish to District all appropriate guarantee or warranty certificates as indicated in the Specifications or upon request by District.

14.1.4 Nothing herein shall limit any other rights or remedies available to District.

14.2 **Indemnity** Developer shall indemnify the District as indicated in the Facilities Lease.

15. **TIME**

15.1 **Computation of Time / Adverse Weather**

15.1.1 The Developer will only be allowed a time extension for Adverse Weather conditions if requested by Developer and only if all of the following conditions are met:

15.1.1.1 The weather conditions constitute Adverse Weather, as defined herein;

15.1.1.2 Developer can verify that the Adverse Weather caused delays in excess of five hours of the indicated labor required to complete the scheduled tasks of Work on the day affected by the Adverse Weather;

15.1.1.3 The Developer's crew is dismissed as a result of the Adverse Weather; and

15.1.1.4 The number of days of delay for the month exceed the following parameters:

January	[6]	July	[0]
February	[5]	August	[0]
March	[5]	September	[1]
April	[4]	October	[1]
May	[1]	November	[3]

June	[0]	December	[5]
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15.1.2 A day-for-day extension will only be allowed for those days in excess of those indicated herein.

15.1.3 The Contract Time has been determined with consideration given to the average climate weather conditions prevailing in the County in which the Project is located.

**15.2 Hours of Work**

15.2.1 Sufficient Forces

Developer and Subcontractors shall continuously furnish sufficient forces to ensure the prosecution of the Work in accordance with the Construction Schedule.

15.2.2 Performance During Working Hours

Work shall be performed during regular working hours as permitted by the appropriate governmental agency except that in the event of an emergency, or when required to complete the Work in accordance with job progress, Work may be performed outside of regular working hours with the advance written consent of the District and approval of any required governmental agencies.

**15.3 Progress and Completion**

15.3.1 Time of the Essence

Time limits stated in the Contract Documents are of the essence to the Contract Documents. By executing the Facilities Lease, the Developer confirms that the Contract Time is a reasonable period for performing the Work.

15.3.2 No Commencement Without Insurance

The Developer shall not commence operations on the Project or elsewhere prior to the effective date of insurance and bonds. The date of commencement of the Work shall not be changed by the effective date of such insurance. If Developer commences Work without insurance and bonds, all Work is performed at Developer's peril and shall not be compensable until and unless Developer secures bonds and insurance pursuant to the terms of the Contract Documents and subject to District claim for damages.

**15.4 Schedule**

Developer shall provide to District, Construction Manager, and Architect a schedule in conformance with the Contract Documents and as required in these Construction Provisions.

### 15.5 **Expeditious Completion**

The Developer shall proceed expeditiously with adequate forces and shall achieve Completion within the Contract Time.

## 16. **EXTENSIONS OF TIME – LIQUIDATED DAMAGES**

### 16.1 **Liquidated Damages**

Developer and District hereby agree that the exact amount of damages for failure to complete the Work within the time specified is extremely difficult or impossible to determine. If the Work is not completed within the time specified in the Contract Documents, it is understood that the District will suffer damage. It being impractical and unfeasible to determine the amount of actual damage, it is agreed the Developer shall pay to District as fixed and liquidated damages, and not as a penalty, the amount set forth in the Facilities Lease for each calendar day of delay in completion. Developer and its Surety shall be liable for the amount thereof pursuant to Government Code section 53069.85.

### 16.2 **Excusable Delay**

16.2.1 Developer shall not be charged for liquidated damages because of any delays in completion of Work which are not the fault of Developer or its Subcontractors, including acts of God as defined in Public Contract Code section 7105, acts of enemy, epidemics, and quarantine restrictions, as well as events covered by property or other insurance required in the Facilities Lease. Developer shall, within five (5) calendar days of beginning of any delay, notify District in writing of causes of delay including documentation and facts explaining the delay. District shall review the facts and extent of any delay and shall grant extension(s) of time for completing Work when, in its judgment, the findings of fact justify an extension. Extension(s) of time shall apply only to that portion of Work affected by delay, and shall not apply to other portions of Work not so affected. An extension of time may only be granted if Developer has timely submitted the Construction Schedule as required herein.

16.2.2 Developer shall notify the District pursuant to the claims provisions in these Construction Provisions of any anticipated delay and its cause. Following submission of a claim, the District may determine whether the delay is to be considered avoidable or unavoidable, how long it continues, and to what extent the prosecution and completion of the Work might be delayed thereby.

16.2.3 In the event the Developer requests an extension of Contract Time for unavoidable delay, such request shall be submitted in accordance with the provisions in the Contract Documents governing changes in Work. When requesting time, requests must be submitted with full justification and documentation. If the Developer fails to submit justification, it waives its right to a time extension at a later date. Such justification must be based on the official Construction Schedule as updated at the time of occurrence of the delay or execution of Work related to any changes to the Scope of Work. Any

claim for delay must include the following information as support, without limitation:

16.2.3.1 The duration of the activity relating to the changes in the Work and the resources (manpower, equipment, material, etc.) required to perform the activities within the stated duration.

16.2.3.2 Specific logical ties to the Contract Schedule for the proposed changes and/or delay showing the activity/activities in the Construction Schedule that are affected by the change and/or delay. (A portion of any delay of seven (7) days or more must be provided.)

16.2.3.3 A recovery schedule must be submitted.

**16.3 No Additional Compensation for Delays Within Developer's Control**

16.3.1 Developer is aware that governmental agencies, including, without limitation, the Division of the State Architect, the Department of General Services, gas companies, electrical utility companies, water districts, and other agencies may have to approve Developer-prepared drawings or approve a proposed installation. Accordingly, Developer has included in the Guaranteed Maximum Price, time for possible review of its drawings and for reasonable delays and damages that may be caused by such agencies. Thus, Developer is not entitled to make a claim for damages for delays arising from the review of Developer's drawings.

16.3.2 Developer shall only be entitled to compensation for delay when all of the following conditions are met:

16.3.2.1 The District is responsible for the delay;

16.3.2.2 The delay is unreasonable under the circumstances involved;

16.3.2.3 The delay was not within the contemplation of District and Developer; and

16.3.2.4 Developer complies with the claims procedure of the Contract Documents.

**16.4 Float or Slack in the Schedule**

Float or slack is the amount of time between the early start date and the late start date, or the early finish date and the late finish date, of any of the activities in the schedule. Float or slack is not for the exclusive use of or benefit of either the District or the Developer.

17. **CHANGES IN THE WORK**

17.1 **No Changes Without Authorization**

17.1.1 There shall be no change whatsoever in the Drawings, Specifications, or in the Work without an executed Change Order authorized by the District as herein provided. District shall not be liable for the cost of any extra work or any substitutions, changes, additions, omissions, or deviations from the Drawings and Specifications unless the District's governing board has authorized the same and the cost thereof has been approved in writing by Change Order. No extension of time for performance of the Work shall be allowed hereunder unless a request for such extension is made at the time changes in the Work are ordered, and such time duly adjusted and approved in writing in the Change Order. The provisions of the Contract Documents shall apply to all such changes, additions, and omissions with the same effect as if originally embodied in the Drawings and Specifications.

17.1.2 Developer shall perform immediately all work that has been authorized by a fully executed Change Order. Developer shall be fully responsible for any and all delays and/or expenses caused by Developer's failure to expeditiously perform this Work.

17.1.3 Should any Change Order result in an increase in the Guaranteed Maximum Price, the cost of that Change Order shall be agreed to, in writing, in advance by Developer and District and be subject to the monetary limitations set forth in Public Contract Code section 20118.4. In the event that Developer proceeds with any change in Work without a Change Order executed by the District, Developer waives any claim of additional compensation or time for that additional work.

17.1.4 Developer understands, acknowledges, and agrees that the reason for District authorization is so that District may have an opportunity to analyze the Work and decide whether the District shall proceed with the Change Order or alter the Project so that a change in Work becomes unnecessary.

17.2 **Architect Authority**

The Architect will have authority to order minor changes in the Work not involving any adjustment in the Guaranteed Maximum Price, or an extension of the Contract Time, or a change that is inconsistent with the intent of the Contract Documents. These changes shall be effected by written Change Order or by Architect's response(s) to RFI(s).

17.3 **Change Orders**

17.3.1 A Change Order is a written instrument prepared and issued by the District and/or the Architect and signed by the District (as authorized by the District's Board of Education), the Developer, the Architect, and approved by the Project Inspector (if necessary) and DSA (if necessary), stating their agreement regarding all of the following:

17.3.1.1 A description of a change in the Work;

17.3.1.2 The amount of the adjustment in the Guaranteed Maximum Price, if any; and

17.3.1.3 The extent of the adjustment in the Contract Time, if any.

17.3.2 Changes in Guaranteed Maximum Price

A Change Order Request ("COR") shall include breakdowns pursuant to the revisions herein to validate any change in Guaranteed Maximum Price.

17.3.3 Unknown and/or Unforeseen Conditions

If Developer submits a COR requesting an increase in Guaranteed Maximum Price and/or Contract Time that is based at least partially on Developer's assertion that Developer has encountered unknown and/or unforeseen condition(s) on the Project, then Developer shall base the COR on provable information that, and to the District's satisfaction, demonstrates that the unknown and/or unforeseen condition(s) were actually unknown and/or unforeseen and that the condition(s) were reasonably unknown and/or unforeseen. If not, the District shall deny the COR and the Developer shall complete the Project without any increase in Guaranteed Maximum Price and/or Contract Time based on that COR.

17.4 **Format for Change Order Request**

The following format shall be used as applicable by the District and the Developer to communicate proposed additions and deductions to the Contract Documents, supported by attached documentation.

	<b><u>SUBCONTRACTOR PERFORMED WORK</u></b>	ADD	DEDUCT
(a)	<b>Material</b> (attach itemized quantity and unit cost plus sales tax)		
(b)	<b>Add Labor</b> (attach itemized hours and rates, fully encumbered)		
(c)	<b>Add Equipment</b> (attach suppliers' invoice)		
(d)	<b>Subtotal</b>		
(e)	<b>Add Subcontractor's overhead and profit</b> , not to exceed ten percent (10%) of <b>item (d)</b>		
(f)	<b>Subtotal</b>		
(g)	<b>Add Developer's overhead and profit</b> , not to exceed four and one-half percent (4.5%) of <b>Item (f)</b>		
(h)	<b>Subtotal</b>		
(i)	<b>Add Bond and Insurance</b> , at Developer's Cost		
(j)	<b>TOTAL</b>		

<b>(k)</b>	<b>Time</b>	<b>_____ Days</b>
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<b>DEVELOPER PERFORMED WORK</b>		ADD	DEDUCT
(a)	<b>Material</b> (attach itemized quantity and unit cost plus sales tax)		
(b)	<b>Add Labor</b> (attach itemized hours and rates, fully encumbered)		
(c)	<b>Add Equipment</b> (attach suppliers' invoice)		
(d)	<b>Subtotal</b>		
(e)	<b>Add Developer's overhead and profit</b> , not to exceed fourteen and one-half percent (14.5%) of <b>item (d)</b> .		
(f)	<b>Subtotal</b>		
(g)	<b>Add Bond and Insurance</b> , at Developer's Cost		
(h)	<b>TOTAL</b>		
(i)	<b>Time</b>		<b>_____ Days</b>

**17.5 Change Order Certification**

17.5.1 All Change Orders and CORs must include the following certification by the Developer:

"The undersigned Developer approves the foregoing as to the changes, if any, and the Guaranteed Maximum Price specified for each item and as to the extension of time allowed, if any, for completion of the entire Work as stated herein, and agrees to furnish all labor, materials, and service, and perform all work necessary to complete any additional work specified for the consideration stated herein. Submission of sums which have no basis in fact or which Developer knows are false are at the sole risk of Developer and may be a violation of the False Claims Act set forth under Government Code section 12650 et seq. and U.S. Criminal Code, 18 U.S.C. § 1001. It is understood that the changes herein to the Contract Documents shall only be effective when approved by the governing board of the District."

It is expressly understood that the value of the extra Work or changes expressly includes any and all of the Developer's costs and expenses, both direct and indirect, resulting from additional time required on the Project or resulting from delay to the Project. Any costs, expenses, damages, or time extensions not included are deemed waived.

**17.6 Determination of Change Order Cost**

17.6.1 The amount of the increase or decrease in the Guaranteed Maximum Price from a Change Order, if any, shall be determined in one or more of the following ways as applicable to a specific situation and at the District's discretion:

17.6.1.1 District acceptance of a COR;

17.6.1.2 By amounts contained in Developer's schedule of values, if applicable;

17.6.1.3 By agreement between District and Developer.

**17.7 Deductive Change Orders**

All deductive Change Order(s) must be prepared pursuant to the provisions herein.

**17.8 Discounts, Rebates, and Refunds**

For purposes of determining the cost, if any, of any change, addition, or omission to the Work hereunder, all trade discounts, rebates, refunds, and all returns from the sale of surplus materials and equipment shall accrue and be credited to the Developer, and the Developer shall make provisions so that such discounts, rebates, refunds, and returns may be secured, and the amount thereof shall be allowed as a reduction of the Developer's cost in determining the actual cost of construction for purposes of any change, addition, or omission in the Work as provided herein.



**17.9 Construction Change Directives**

17.9.1 A Construction Change Directive is a written order prepared and issued by the District, the Construction Manager, and/or the Architect and signed by the District and the Architect, directing a change in the Work. The District may as provided by law, by Construction Change Directive and without invalidating the Contract, order changes in the Work consisting of additions, deletions, or other revisions. If all or a portion of the Project is being funded by funds requiring approval by the State Allocation Board (SAB), these revisions may be subject to compensation once approval of same is received and funded by the SAB, and funds are released by the Office of Public School Construction (OPSC). Any dispute as to the sum of the Construction Change Directive or timing of payment shall be resolved pursuant to the Payment and Claims and Disputes provisions herein.

17.9.2 The District may issue a Construction Change Directive in the absence of agreement on the terms of a Change Order.

**17.10 Force Account Directives**

17.10.1 When work, for which a definite price has not been agreed upon in advance, is to be paid for on a force account basis, all direct costs necessarily incurred and paid by the Developer for labor, material, and equipment used in the performance of that Work, shall be subject to the approval of the District and compensation will be determined as set forth herein.

17.10.2 The District will issue a Force Account Directive to proceed with the Work on a force account basis, and a not-to-exceed budget will be established by the District.

17.10.3 All requirements regarding direct cost for labor, labor burden, material, equipment, and markups on direct costs for overhead and profit described in this section shall apply to Force Account Directives. However, the District will only pay for actual costs verified in the field by the District or its authorized representative(s) on a daily basis.

17.10.4 The Developer shall be responsible for all cost related to the administration of Force Account Directive. The markup for overhead and profit for Contractor modifications shall be full compensation to the Developer to administer Force Account Directive.

17.10.5 The Developer shall notify the District or its authorized representative(s) at least twenty-four (24) hours prior to proceeding with any of the force account work. Furthermore, the Developer shall notify the District when it has consumed eighty percent (80%) of the budget, and shall not exceed the budget unless specifically authorized in writing by the District. The Developer will not be compensated for force account work in the event that the Developer fails to timely notify the District regarding the commencement of force account work, or exceeding the force account budget.

17.10.6 The Developer shall diligently proceed with the work, and on a daily basis, submit a daily force account report on a form supplied by the District no later than 5:00 p.m. each day. The report shall contain a detailed itemization of the daily labor, material, and equipment used on the force account work only. The names of the individuals performing the force account work shall be included on the daily force account reports. The type and model of equipment shall be identified and listed. The District will review the information contained in the reports, and sign the reports no later than the next work day, and return a copy of the report to the Developer for their records. The District will not sign, nor will the Developer receive compensation for work the District cannot verify. The Developer will provide a weekly force account summary indicating the status of each Force Account Directive in terms of percent complete of the not-to-exceed budget and the estimated percent complete of the work

17.10.7 In the event the Developer and the District reach a written agreement on a set cost for the work while the work is proceeding based on a Force Account Directive, the Developer's signed daily force account reports shall be discontinued and all previously signed reports shall be invalid.

#### **17.11 Accounting Records**

With respect to portions of the Work performed by Change Orders, the Developer shall keep and maintain cost-accounting records satisfactory to the District, which shall be available to the District on the same terms as any other books and records the Developer is required to maintain under the Contract Documents.

#### **17.12 Notice Required**

If the Developer desires to make a claim for an increase in the Guaranteed Maximum Price, or any extension in the Contract Time for completion, it shall notify the District pursuant to the provisions herein. No claim shall be considered unless made in accordance with this subparagraph. Developer shall proceed to execute the Work even though the adjustment may not have been agreed upon. Any change in the Guaranteed Maximum Price or extension of the Contract Time resulting from such claim shall be authorized by a Change Order.

#### **17.13 Applicability to Subcontractors**

Any requirements under this Article shall be equally applicable to Change Orders issued to Subcontractors by the Developer to the extent as required by the Contract Documents.

#### **17.14 Alteration to Change Order Language**

Developer shall not alter Change Orders or reserve time in Change Orders. Developer shall execute finalized Change Orders and proceed under the provisions herein with proper notice.

**17.15 Failure of Developer to Execute Change Order**

Developer shall be in default of the Contract Documents if Developer fails to execute a Change Order when the Developer agrees with the addition and/or deletion of the Work in that Change Order.

**18. REQUESTS FOR INFORMATION**

18.1 Any Request for Information shall reference all applicable Contract Document(s), including Specification section(s), detail(s), page number(s), drawing number(s), and sheet number(s), etc. The Developer shall make suggestions and interpretations of the issue raised by each Request for Information. A Request for Information cannot modify the Guaranteed Maximum Price, Contract Time, or the Contract Documents.

18.2 The Developer may be responsible for any costs incurred for professional services that District may deduct from any amounts owing to the Developer, if a Request for Information requests an interpretation or decision of a matter where the information sought is equally available to the party making the request. District may deduct from and/or invoice Developer for professional services arising herein.

**19. PAYMENTS**

**19.1 Guaranteed Maximum Price**

As compensation for Developer's construction of the Project, the District shall pay Developer pursuant to the terms of **Exhibit "C"** to the Facilities Lease.

**19.2 Applications for Tenant Improvement Payments**

**19.2.1 Procedure for Applications for Tenant Improvement Payments**

19.2.1.1 Not before the fifth (5<sup>th</sup>) day of each calendar month during the progress of the Work, Developer shall submit to the District and the Architect an itemized Application for Payment for operations completed in accordance with the Schedule of Values. Such application shall be on a form approved by the District and shall be notarized, if required, and supported by the following or each portion thereof unless waived by the District in writing:

19.2.1.1.1 The amount paid to the date of the Application for Payment to the Developer, to all its Subcontractors, and all others furnishing labor, material, or equipment under the Contract Documents;

19.2.1.1.2 The amount being requested under the Application for Payment by the Developer on its own behalf and separately stating the amount requested on behalf of each of the Subcontractors and all others furnishing labor, material, and equipment under the Contract Documents;

19.2.1.1.3 The balance that will be due to each of such entities after said payment is made;

19.2.1.1.4 A certification that the As-Built Drawings and annotated Specifications are current;

19.2.1.1.5 Itemized breakdown of work done for the purpose of requesting partial payment;

19.2.1.1.6 An updated and acceptable construction schedule in conformance with the provisions herein;

19.2.1.1.7 The additions to and subtractions from the Guaranteed Maximum Price and Contract Time;

19.2.1.1.8 Material invoices, evidence of equipment purchases, rentals, and other support and details of cost as the District may require from time to time;

19.2.1.1.9 The percentage of completion of the Developer's Work by line item;

19.2.1.1.10 Schedule of Values updated from the preceding Application for Payment;

19.2.1.1.11 A duly completed and executed conditional waiver and release upon Tenant Improvement Payment compliant with Civil Code section 3262 from the Developer and each subcontractor of any tier and supplier to be paid from the current Tenant Improvement Payment;

19.2.1.1.12 A duly completed and executed unconditional waiver and release upon Tenant Improvement Payment compliant with Civil Code section 3262 from the Developer and each subcontractor of any tier and supplier that was paid from the previous Tenant Improvement Payment; and

19.2.1.1.13 A certification by the Developer of the following:

The Developer warrants title to all Work performed as of the date of this payment application. The Developer further warrants that all Work performed as of the date of this payment application is free and clear of liens, claims, security interests, or encumbrances in favor of the Developer, Subcontractors, material and equipment suppliers, workers, or other persons or entities making a claim by reason of having provided labor, materials, and equipment relating to the Work, except those of which the District has been informed.

19.2.1.1.14 All remaining certified payroll record ("CPR(s)") for each journeyman, apprentice, worker, or other employee employed by the Developer and/or each Subcontractor in

connection with the Work for the period of the Application for Payment. As indicated herein, the District shall not make any payment to Developer until:

19.2.1.1.14.1 Developer and/or its Subcontractor(s) provide CPRs acceptable to the District for all weeks any journeyman, apprentice, worker or other employee was employed in connection with the Work directly to the Labor Commissioner weekly or to the District if the Project is not subject to State labor compliance, and within ten (10) days of any request by the District or the Labor Commissioner in accordance with section 16461 of Title 8 of the California Code of Regulations, and

19.2.1.1.14.2 The District is given sufficient time to review and/or audit the CPRs to determine their acceptability. Any delay in Developer and/or its Subcontractor(s) providing CPRs to the District in a timely manner will directly delay the District's review and/or audit of the CPRs and Developer's payment.

#### 19.2.2 Prerequisites for Tenant Improvement Payments

19.2.2.1 **First Payment Request:** The following items, if applicable, must be completed before the District will accept and/or process the Developer's first payment request:

19.2.2.1.1 Installation of field office;

19.2.2.1.2 Installation of temporary facilities and fencing;

19.2.2.1.3 Schedule of unit prices, if applicable;

19.2.2.1.4 Initial progress report.

19.2.2.1.5 List of Subcontractors, with names, license numbers, telephone numbers, and Scope of Work;

19.2.2.1.6 All bonds and insurance endorsements; and

19.2.2.1.7 Resumes of Developer's project manager, and if applicable, job site secretary, record documents recorder, and job site superintendent.

19.2.3 No Waiver of Criteria. Any payments made to Developer where criteria set forth herein have not been met shall not constitute a waiver of said criteria by District. Instead, such payment shall be construed as a good faith effort by District to resolve differences so Developer may pay its Subcontractors and suppliers. Developer agrees that failure to submit such items may constitute a breach of contract by Developer and may subject Developer to termination.

19.2.4 In an effort to assist emerging subcontractors to Developer with more frequent progress payment intervals, at the Developer's written request, and for good cause shown, the District shall provide for more frequent payment applications across the Board or for selected scopes of work, no more frequent than twice per month. Further, in agreeing to make such more rapid pay procedures, Developer and District may agree that the criteria and documentation detail beyond the actual certified payment request, can be submitted monthly rather than twice per month, as a streamlining and lean construction administration.

### 19.3 **District's Approval of Application for Payment**

19.3.1 Upon receipt of an Application for Payment, The District shall act in accordance with both of the following:

19.3.2 Each Application for Payment shall be reviewed by the District as soon as practicable after receipt for the purpose of determining that the Application for Payment is a proper Application for Payment.

19.3.3 Any Application for Payment determined not to be a proper Application for Payment suitable for payment shall be returned to the Developer as soon as practicable, but not later than seven (7) days, after receipt. An Application for Payment returned pursuant to this paragraph shall be accompanied by a document setting forth in writing the reasons why the Application for Payment is not proper. The number of days available to the District to make a payment without incurring interest pursuant to this section shall be reduced by the number of days by which the District exceeds this seven-day return requirement.

19.3.4 An Application for Payment shall be considered properly executed if funds are available for payment of the Application for Payment, and payment is not delayed due to an audit inquiry by the financial officer of the District.

19.3.5 The District's review of the Developer's Application for Payment will be based on the District's and the Architect's observations at the Site and the data comprising the Application for Payment that the Work has progressed to the point indicated and that, to the best of the District's and the Architect's knowledge, information, and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to:

19.3.6 Observation of the Work for general conformance with the Contract Documents,

19.3.7 Results of subsequent tests and inspections,

19.3.8 Minor deviations from the Contract Documents correctable prior to completion, and

19.3.9 Specific qualifications expressed by the Architect.

19.3.10 District's approval of the certified Application for Payment shall be based on Developer complying with all requirements for a fully complete and valid certified Application for Payment.

19.3.11 **Payments to Developer**

19.3.11.1 Within thirty (30) days after approval of the Application for Payment, Developer shall be paid a sum equal to ninety percent (90%) of the value of the Work performed (as verified by Architect and Inspector and certified by Developer) up to the last day of the previous month, less the aggregate of previous payments and amount to be withheld. The value of the Work completed shall be Developer's best estimate. No inaccuracy or error in said estimate shall operate to release the Developer, or any Surety upon any bond, from damages arising from such Work, or from the District's right to enforce each and every provision of the Contract Documents, and the District shall have the right subsequently to correct any error made in any estimate for payment.

19.3.11.2 The Developer may not be entitled to have payment requests processed, or may be entitled to have only partial payment made for Work performed, so long as any lawful or proper direction given by the District concerning the Work, or any portion thereof, remains incomplete.

19.3.11.3 If the District fails to make any Tenant Improvement Payment within thirty (30) days after receipt of an undisputed and properly submitted Application for Payment from the Developer, the District shall pay interest to the Developer equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure.

19.3.12 **No Waiver**

No payment by District hereunder shall be interpreted so as to imply that District has inspected, approved, or accepted any part of the Work. Notwithstanding any payment, the District may enforce each and every provision of the Contract Documents. The District may correct or require correction of any error subsequent to any payment

19.3.13 **Warranty of Title**

19.3.13.1 If a lien or a claim based on a stop notice of any nature should at any time be filed against the Work or any District property, by any entity that has supplied material or services at the request of the Developer, Developer and Developer's Surety shall promptly, on demand by District and at Developer's and Surety's own expense, take any and all action necessary to cause any such lien or a claim based on a stop notice to be released or discharged immediately therefrom.

19.3.13.2 If the Developer fails to furnish to the District within ten (10) calendar days after demand by the District satisfactory evidence that a lien or a claim based on a stop notice has been released, discharged, or secured, the District may discharge such indebtedness and deduct the amount required therefor, together with any and all losses, costs, damages, and attorney's fees and expenses incurred or suffered by District from any sum payable to Developer under the Contract.

19.4 **Decisions to Withhold Payment**

19.4.1 Reasons to Withhold Payment

The District may withhold payment in whole, or in part, to the extent reasonably necessary to protect the District if, in the District's opinion, the representations to the District required herein cannot be made. The District may withhold payment, in whole, or in part, to such extent as may be necessary to protect the District from loss because of, but not limited to:

19.4.1.1 Failure to commence and diligently pursue remediation of Defective Work within **SEVENTY- TWO (72)** hours of written notice to Developer;

19.4.1.2 Stop Notices or other liens served upon the District as a result of the Contract Documents;

19.4.1.3 Liquidated damages assessed against the Developer;

19.4.1.4 The cost of completion of the Contract Documents if there exists reasonable doubt that the Work can be completed for the unpaid balance of the Guaranteed Maximum Price or by the Contract Time;

19.4.1.5 Damage to the District or other contractor(s);



19.4.1.6 Unsatisfactory prosecution of the Work by the Developer;

19.4.1.7 Failure to store and properly secure materials;

19.4.1.8 Failure of the Developer to submit, on a timely basis, proper, sufficient, and acceptable documentation required by the Contract Documents, including, without limitation, a Construction Schedule, Schedule of Submittals, Schedule of Values, Monthly Progress Schedules, Shop Drawings, Product Data and samples, Proposed product lists, executed Change Orders, and/or verified reports;

19.4.1.9 Failure of the Developer to maintain As-Built Drawings;

19.4.1.10 Erroneous estimates by the Developer of the value of the Work performed, or other false statements in an Application for Payment;

19.4.1.11 Unauthorized deviations from the Contract Documents;

19.4.1.12 Failure of the Developer to prosecute the Work in a timely manner in compliance with the Construction Schedule, established progress schedules, and/or completion dates;

19.4.1.13 If the District has an LCP in force on this Project, the failure to provide certified payroll records as required by the LCP, by State labor compliance, by these Contract Documents or by written request for each journeyman, apprentice, worker, or other employee employed by the Developer and/or by each Subcontractor in connection with the Work for the period of the Application for Payment or if payroll records are delinquent or inadequate;

19.4.1.14 Failure to properly pay prevailing wages as required in Labor Code section 1720 et seq., failure to comply with any other Labor Code requirements, and/or failure to comply with the District's LCP, if one is in force on this Project, or labor compliance monitoring and enforcement;

19.4.1.15 Failure to comply with any applicable federal requirements regarding minimum wages, withholding, payrolls and basic records, apprentice and trainee employment requirements, equal employment opportunity requirements, Copeland Act requirements, Davis-Bacon Act and related requirements, Contract Work Hours and Safety Standards Act requirements;

19.4.1.16 Failure to properly maintain or clean up the Site;

19.4.1.17 Payments due to the District or a third party to indemnify, defend, or hold harmless the District;

19.4.1.18 Failure to perform any implementation and/or monitoring required by the General Permit, including without limitation any SWPPP

for the Project and/or the imposition of any penalties or fines therefore whether imposed on the District or Contractor

19.4.1.19 Any payments due to the District, including but not limited to payments for failed tests, utilities changes, or permits;;

19.4.1.20 Failure to pay any royalty, license or similar fees;

19.4.1.21 Failure to pay Subcontractor(s) or supplier(s) as required by law and by the Contract Documents; and

19.4.1.22 Developer is otherwise in breach, default, or in substantial violation of any provision of the Contract Documents.

#### 19.4.2 Reallocation of Withheld Amounts

19.4.2.1 District may, in its discretion, apply any withheld amount to pay outstanding claims or obligations as defined herein. In so doing, District shall make such payments on behalf of Developer. If any payment is so made by District, then that amount shall be considered a payment made under the Contract Documents by District to Developer and District shall not be liable to Developer for any payment made in good faith. These payments may be made without prior judicial determination of claim or obligation. District will render Developer an accounting of funds disbursed on behalf of Developer.

19.4.2.2 If Developer defaults or neglects to carry out the Work in accordance with the Contract Documents or fails to perform any provision thereof, District may, after **SEVENTY-TWO (72)** hours written notice to the Developer and opportunity to commence and pursue cure of default, to the Developer and, without prejudice to any other remedy, make good such deficiencies. The District shall adjust the total Guaranteed Maximum Price by reducing the amount thereof by the cost of making good such deficiencies. If District deems it inexpedient to correct Work that is damaged, defective, or not done in accordance with the provisions of the Contract Documents, an equitable reduction in the Guaranteed Maximum Price (of at least one hundred twenty-five percent (125%) of the estimated reasonable value of the nonconforming Work) shall be made therefor.

#### 19.4.2.3 Payment After Cure

When Developer removes the grounds for declining approval, payment shall be made for amounts withheld because of them. No interest shall be paid on any retainage or amounts withheld due to the failure of the Developer to perform in accordance with the terms and conditions of the Contract Documents.

### 19.5 **Subcontractor Payments**

#### 19.5.1 Payments to Subcontractors

No later than ten (10) days after receipt, or pursuant to Business and Professions Code section 7108.5 and Public Contract Code section 7107, the Developer shall pay to each Subcontractor, out of the amount paid to the Developer on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled. The Developer shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its Sub-subcontractors in a similar manner.

#### 19.5.2 No Obligation of District for Subcontractor Payment

The District shall have no obligation to pay, or to see to the payment of, money to a Subcontractor except as may otherwise be required by law.

#### 19.5.3 Joint Checks

District shall have the right in its sole discretion, if necessary for the protection of the District, to issue joint checks made payable to the Developer and Subcontractors and material or equipment suppliers. The joint check payees shall be responsible for the allocation and disbursement of funds included as part of any such joint payment. In no event shall any joint check payment be construed to create any contract between the District and a Subcontractor of any tier, any obligation from the District to such Subcontractor, or rights in such Subcontractor against the District.

## 20. **COMPLETION OF THE WORK**

### 20.1 **Completion**

20.1.1 District will accept completion of Project and have the Notice of Completion recorded when the entire Work shall have been completed to the satisfaction of District.

20.1.2 The Work may only be accepted as complete by action of the governing board of the District.

20.1.3 District, at its sole option, may accept completion of Project and have the Notice of Completion recorded when the entire Work shall have been completed to the satisfaction of District, except for minor corrective items, as distinguished from incomplete items. If Developer fails to complete all minor corrective items within thirty (30) days after the date of the District's acceptance of completion, District shall withhold from the final payment one hundred fifty percent (150%) of an estimate of the amount sufficient to complete the corrective items, as determined by District, until the item(s) are completed.

20.1.4 At the end of the thirty-five (35) day period, if there are any items remaining to be corrected, District may elect to proceed as provided herein related to adjustments to Guaranteed Maximum Price, and/or District's right to perform the Work of the Developer.

### 20.2 **Close-Out Procedures**

#### 20.2.1 Punch List

The Developer shall notify the Architect when Developer considers the Work complete. Upon notification, Architect will prepare a list of minor items to be completed or corrected ("Punch List"). The Developer and/or its Subcontractors shall proceed promptly to complete and correct items on the Punch List. Failure to include an item on Punch List does not alter the responsibility of the Developer to complete all Work in accordance with the Contract Documents.

#### 20.2.2 Close-Out Requirements

#### 20.2.3 Utility Connections

Buildings shall be connected to water, gas, sewer, and electric services, complete and ready for use. Service connections shall be made and existing services reconnected.

#### 20.2.4 As-Built Drawings

20.2.4.1 Developer shall provide exact "as-built" of the Work upon completion of the Project as indicated in the Lease Documents ("As-Built Drawings").

20.2.4.2 Developer is liable and responsible for any and all inaccuracies in As-Built Drawings, even if inaccuracies become evident at a future date.

20.2.4.3 Upon completion of the Work and as a condition precedent to approval of final payment, Developer shall obtain the Inspector's approval of the corrected prints.

20.2.5 Maintenance Manuals: Developer shall prepare all operation and maintenance manuals and date as indicated in the Specifications.

### 20.3 **Final Inspection**

20.3.1 Developer shall comply with Punch List procedures as provided herein, and maintain the presence of its District-approved project superintendent and project manager until the Punch List is complete to ensure proper and timely completion of the Punch List. Under no circumstances shall Developer demobilize its forces prior to completion of the Punch List. Upon receipt of Developer's written notice that all of the Punch List items have been fully completed and the Work is ready for final inspection and acceptance, Architect and Project Inspector will inspect the Work and shall submit to Developer and District a final inspection report noting the Work, if any, required in order to complete in accordance with the Lease Documents. Absent unusual circumstances, this report shall consist of the Punch List items not yet satisfactorily completed.

20.3.2 Upon Developer's completion of all items on the Punch List and any other uncompleted portions of the Work, the Developer shall notify the District and Architect, who shall again inspect such Work. If the Architect

finds the Work complete and acceptable under the Contract Documents, the Architect will notify Developer, who shall then jointly submit to the Architect and the District its final Application for Payment.

### 20.3.3 Final Inspection Requirements

20.3.3.1 Before calling for final inspection, Developer shall determine that the following have been performed:

20.3.3.1.1 The Work has been completed.

20.3.3.1.2 All life safety items are completed and in working order.

20.3.3.1.3 Mechanical and electrical Work are complete and tested, fixtures are in place, connected, and ready for tryout.

20.3.3.1.4 Electrical circuits scheduled in panels and disconnect switches labeled.

20.3.3.1.5 Painting and special finishes complete.

20.3.3.1.6 Doors complete with hardware, cleaned of protective film, relieved of sticking or binding, and in working order.

20.3.3.1.7 Tops and bottoms of doors sealed.

20.3.3.1.8 Floors waxed and polished as specified.

20.3.3.1.9 Broken glass replaced and glass cleaned.

20.3.3.1.10 Grounds cleared of Developer's equipment, raked clean of debris, and trash removed from Site.

20.3.3.1.11 Work cleaned, free of stains, scratches, and other foreign matter, of damaged and broken material replaced.

20.3.3.1.12 Finished and decorative work shall have marks, dirt, and superfluous labels removed.

20.3.3.1.13 Final cleanup, as provided herein.

### 20.4 Costs of Multiple Inspections

Any unreasonable requests of the District to make a final inspection shall be considered an additional service of District, Architect, Construction Manager, and/or Project Inspector, and all subsequent costs will be invoiced to Developer and if funds are available, withheld from remaining payments.

## 20.5 **Partial Occupancy or Use Prior to Completion**

### 20.5.1 District's Rights to Occupancy

The District may occupy or use any completed or partially completed portion of the Work upon District's acceptance of that completed or partially completed portion of the Work. Neither the District's Final Acceptance, the making of Final Payment, any provision in Contract Documents, nor the use or occupancy of the Work, in whole or in part, by District shall constitute acceptance of Work not in accordance with the Contract Documents nor relieve the Developer or the Developer's Performance Bond Surety from liability with respect to any warranties or responsibility for faulty or defective Work or materials, equipment and workmanship incorporated therein. The District and the Developer shall agree in writing to the responsibilities assigned to each of them for payments, security, maintenance, heat, utilities, damage to the Work, insurance, the period for correction of the Work, and the commencement of warranties required by the Contract Documents. Any dispute as to responsibilities shall be resolved pursuant to the Claims and Disputes provisions herein, with the added provision that during the dispute process, the District shall have the right to occupy or use any portion of the Work that it needs or desires to use.

### 20.5.2 Inspection Prior to Occupancy or Use

Immediately prior to partial occupancy or use, the District, the Developer, and the Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

### 20.5.3 No Waiver

Unless otherwise agreed upon, partial or entire occupancy or use of a portion or portions of the Work shall not constitute beneficial occupancy or acceptance of the Work not complying with the requirements of the Contract Documents.

## 21. **FINAL PAYMENT**

### 21.1 **Final Payment**

Upon receipt and approval of a valid and final Application for Payment, the Architect will issue a final Certificate of Payment. The District shall thereupon jointly inspect the Work and either accept the Work as complete or notify the Architect and the Developer in writing of reasons why the Work is not complete. Upon acceptance of the Work of the Developer as fully complete (that, absent unusual circumstances, will occur when the Punch List items have been satisfactorily completed), the District shall record a Notice of Completion with the County Recorder, and the Developer shall, upon receipt of final payment from the District, pay the amount due Subcontractors.

21.2 **Prerequisites for Final Payment** The following conditions must be fulfilled prior to Final Payment:

21.2.1 A full and final waiver or release of all Stop Notices in connection with the Work shall be submitted by Developer, including a release of Stop Notice in recordable form, together with (to the extent permitted by law) a copy of the full and final release of all Stop Notice rights or a Stop Notice Release Bond.

21.2.2 A duly completed and executed conditional waiver and release upon final payment compliant with Civil Code section 3262 from the Developer and each subcontractor of any tier and supplier to be paid from the current Tenant Improvement Payment;

21.2.3 A duly completed and executed unconditional waiver and release upon progress payment compliant with Civil Code section 3262 from the Developer and each subcontractor of any tier and supplier that was paid from the previous Tenant Improvement Payment; and

21.2.4 The Developer shall have made all corrections to the Work that are required to remedy any defects therein, to obtain compliance with the Contract Documents or any requirements of applicable codes and ordinances, or to fulfill any of the orders or directions of District required under the Contract Documents.

21.2.5 Each Subcontractor shall have delivered to the Developer all written guarantees, warranties, applications, and bonds required by the Contract Documents for its portion of the Work.

21.2.6 Developer must have completed all requirements set forth under "Close Out Procedures," including, without limitation, an approved set of complete As-Built Drawings.

21.2.7 Architect shall have issued its written approval that final payment can be made.

21.2.8 The Developer shall have delivered to the District all manuals and materials required by the Contract Documents.

21.2.9 The Developer shall have completed final clean up as provided herein.

21.2.10 After approval by the District of the Architect's Certificate of Payment,

21.2.11 After the satisfaction of the conditions set forth herein, and

21.2.12 After thirty-five (35) days after the recording of the Notice of Completion by District.

21.2.13 No interest shall be paid on any amounts withheld due to a failure of the Developer to perform, in accordance with the terms and conditions of the Contract Documents.

## 22. **UNCOVERING OF WORK**

If a portion of the Work is covered without Inspector or Architect approval or not in compliance with the Contract Documents, it must, if required in writing by the District, the

Project Inspector, or the Architect, be uncovered for the Project Inspector's or the Architect's observation and be replaced at the Developer's expense without change in the Guaranteed Maximum Price or Contract Time.

23. **NONCONFORMING WORK AND CORRECTION OF WORK**

23.1 **Nonconforming Work**

23.1.1 Developer shall promptly remove from Premises all Work identified by District as failing to conform to the Contract Documents whether incorporated or not. Developer shall promptly replace and re-execute its own Work to comply with the Contract Documents without additional expense to the District and shall bear the expense of making good all work of other contractors destroyed or damaged by any removal or replacement pursuant hereto and/or any delays to the District or other contractors caused thereby.

23.1.2 If Developer does not commence to remove Work that District has identified as failing to conform to the Contract Documents within a reasonable time, not to exceed **SEVENTY-TWO (72)** hours after written notice and complete removal of work within a reasonable time, District may remove it and may store any material at Developer's expense. If Developer does not pay expense(s) of that removal within ten (10) days' time thereafter, District may, upon ten (10) days' written notice, sell any material at auction or at private sale and shall deduct all costs and expenses incurred by the District and/or District may withhold those amounts from payment(s) to Developer.

23.2 **Correction of Work**

23.2.1 **Correction of Rejected Work**

Pursuant to the notice provisions herein, the Developer shall promptly correct the Work rejected by the District, the Architect, or the Project Inspector as failing to conform to the requirements of the Contract Documents, whether observed before or after Completion and whether or not fabricated, installed, or completed. The Developer shall bear costs of correcting the rejected Work, including additional testing, inspections, and compensation for the Inspector's or the Architect's services and expenses made necessary thereby.

23.2.2 **One-Year Warranty Corrections**

If, within one (1) year after the date of Completion of the Work or a designated portion thereof, or after the date for commencement of warranties established hereunder, or by the terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Developer shall correct it promptly after receipt of written notice from the District to do so. This period of one (1) year shall be extended with respect to portions of the Work first performed after Completion by the period of time between Completion and the actual performance of the Work. This obligation hereunder shall survive acceptance of the Work under the Contract Documents and termination of the Contract Documents. The District shall give such notice promptly after discovery of the condition.



### **23.3 District's Right to Perform Work**

23.3.1 If the Developer should neglect to prosecute the Work properly or fail to perform any provisions of the Contract Documents, the District, after providing **SEVENTY-TWO (72)** hours written notice and an opportunity to cure the failure, to the Developer, may, without prejudice to any other remedy it may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the Developer.

23.3.2 If it is found at any time, before or after completion of the Work, that Developer has varied from the Drawings and/or Specifications, including, but not limited to, variation in material, quality, form, or finish, or in the amount or value of the materials and labor used, District may require at its option:

23.3.2.1 That all such improper Work be removed, remade or replaced, and all work disturbed by these changes be made good by Developer at no additional cost to the District;

23.3.2.2 That the District deduct from any amount due Developer the sum of money equivalent to the difference in value between the work performed and that called for by the Drawings and Specifications; or

23.3.2.3 That the District exercise any other remedy it may have at law or under the Contract Documents, including but not limited to the District hiring its own forces or another contractor to replace the Developer's nonconforming Work, in which case the District shall either issue a deductive Change Order or invoice the Developer for the cost of that work. Developer shall pay any invoices within thirty (30) days of receipt of same or District may withhold those amounts from payment(s) to Developer.

## **24. TERMINATION AND SUSPENSION**

The Parties' rights to terminate the Project are as indicated in the Facilities Lease. In the event of a termination of the Facilities Lease and notwithstanding any other provision in the Contract Documents, the Surety shall remain liable to all obligees under the Payment Bond and to the District under the Performance Bond for any claim related to the Project.

### **24.1 Emergency Termination of Public Contracts Act of 1949**

24.1.1 In addition to the Parties' right to termination under the Facilities Lease, the Contract Documents is subject to termination as provided by sections 4410 and 4411 of the Government Code of the State of California, being a portion of the Emergency Termination of Public Contracts Act of 1949.

24.1.1.1 Section 4410 of the Government Code states:

In the event a national emergency occurs, and public work, being performed by contract, is stopped, directly or indirectly, because of the freezing or diversion of materials, equipment or labor, as the result of

an order or a proclamation of the President of the United States, or of an order of any federal authority, and the circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work, then the public agency and the contractor may, by written agreement, terminate said contract.

24.1.1.2 Section 4411 of the Government Code states:

Such an agreement shall include the terms and conditions of the termination of the contract and provision for the payment of compensation or money, if any, which either party shall pay to the other or any other person, under the facts and circumstances in the case.

24.1.2 Compensation to the Developer shall be determined at the sole discretion of District on the basis of the reasonable value of the Work done, including preparatory work. As an exception to the foregoing and at the District's discretion, in the case of any fully completed separate item or portion of the Work for which there is a separate previously submitted unit price or item on the accepted schedule of values, that price shall control. The District, at its sole discretion, may adopt the Guaranteed Maximum Price as the reasonable value of the work done or any portion thereof.

25. **CLAIMS AND DISPUTES**

25.1 **Performance During Dispute or Claim Process**

Developer shall continue to perform its Work under the Contract and shall not cause a delay of the Work during any dispute, claim, negotiation, mediation, or arbitration proceeding, except by written agreement by the District.

25.2 **Definition of Dispute**

The term "Dispute" means a separate demand by the Developer for:

25.2.1 A time extension;

25.2.2 Payment of money or damages arising from Work done by or on behalf of the Developer pursuant to the Contract and payment of which is not otherwise expressly provided for or Developer is not otherwise entitled to; or

25.2.3 An amount of payment disputed by the District.

25.3 **Dispute Presentation**

25.3.1 If Developer intends to apply for an increase in the Contract Price or Contract Time for any reason including, without limitation, the acts of District or its agents, Developer shall, within ten (10) days after the event giving rise to the Dispute, give notice of the Dispute in writing and submit to the District a written statement of the damage sustained or time requested. On or before twenty (20) days after Developer's written Notice of Dispute, Developer shall file with the District an itemized statement of the details and amounts of its

Dispute for any increase in the Contract Price of Contract Time. Otherwise, Developer shall have waived and relinquished its dispute against the District and Developer's claims for compensation or an extension of time shall be forfeited and invalidated. Developer shall not be entitled to consideration for payment or time on account.

25.3.2 The Notice of Dispute shall identify:

25.3.2.1 The issues, events, conditions, circumstances and/or causes giving rise to the dispute;

25.3.2.2 The pertinent dates and/or durations and actual and/or anticipated effects on the Contract Price, Contract Schedule milestones and/or Contract Time adjustments; and

25.3.2.3 The line-item costs for labor, material, and/or equipment, if applicable.

25.3.3 The Notice of Dispute shall include the following certification by the Developer:

25.3.3.1 The undersigned Developer certifies under penalty of perjury that the attached dispute is made in good faith; that the supporting data is accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the adjustment for which Developer believes the District is liable; and that I am duly authorized to certify the dispute on behalf of the Developer.

25.3.3.2 Furthermore, Developer understands that the value of the attached dispute expressly includes any and all of the Developer's costs and expenses, direct and indirect, resulting from the Work performed on the Project, additional time required on the Project and/or resulting from delay to the Project. Any costs, expenses, damages, or time extensions not included are deemed waived.

25.3.4 If a Dispute, or any portion thereof, remains unresolved upon satisfaction of all applicable Dispute Resolution requirements, the Developer shall comply with all claim resolution requirements as provided in Public Contract Code 20104.

25.3.5 Developer shall bind its Subcontractors to the provisions of this section and will hold the District harmless against disputes by Subcontractors.

#### 25.4 **Dispute Resolution**

25.4.1 Developer shall file with the District the Notice of Dispute, including the documents necessary to substantiate it, on or before the day of submitting the application for final payment.

25.4.2 District shall respond in writing within forty-five (45) days of receipt of the Dispute or may request in writing within thirty (30) days of receipt of

the Dispute any additional documentation supporting the Dispute or relating to defenses or claims District may have against the Developer.

25.4.2.1 If additional information is required, it shall be requested and provided by mutual agreement of the parties.

25.4.2.2 District's written response to the documented Dispute shall be submitted to the Developer within fifteen (15) days after receipt of the further documentation or within a period of time no greater than that taken by the Developer to produce the additional information, whichever is greater.

25.4.3 If Developer disputes the District's written response, Developer may file a claim pursuant to the Claim Resolution requirements provided herein.

## 25.5 **Definition of Claim**

25.5.1 The term "Claim" means a dispute that remains unresolved at the conclusion of the Dispute Resolution requirements as provided herein.

## 25.6 **Claim Presentations**

25.6.1 Developer must timely submit the Notice of Claim and all documents necessary to substantiate any Claim. Otherwise, Developer shall have waived and relinquished its Claim against the District and Developer's Claims for compensation or an extension of time shall be forfeited and invalidated, and Contractor shall not be entitled to consideration for payment or time on account of the instant matter. No Claim shall be presented prior to Project completion. Any statute that might otherwise govern the presentation of an unresolved Dispute, including but not limited to Government Code section 900 i. and Public Contract Code section 20104 et seq. shall be tolled for all purposes during the course of construction on the Project.

25.6.1.1 All Claims shall include the following certification by the Developer:

25.6.1.1.1 The undersigned Developer certifies under penalty of perjury that the attached claim is made in good faith; that the supporting data is accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the adjustment for which Developer believes the District is liable; and that I am duly authorized to certify the claim on behalf of the Developer.

25.6.1.1.2 Furthermore, Developer understands that the value of the attached claim expressly includes any and all of the Developer's costs and expenses, direct and indirect, resulting from the Work performed on the Project, additional time required on the Project and/or resulting from delay to the Project. Any costs, expenses, damages, or time extensions not included are deemed waived.

25.6.2 The attention of the Developer is drawn to Government Code section 12650, et seq. regarding penalties for false claims.

25.6.3 If a Claim, or any portion thereof, remains in dispute upon satisfaction of all applicable Dispute and Claim Resolution requirements, the Developer shall comply with all claims presentation requirements as provided in Chapter 1 (commencing with section 900) and Chapter 2 (commencing with section 910) of Part 3 of Division 3.6 of Title 1 of Government Code as a condition precedent to the Developer's right to bring a civil action against the District. For purposes of those provisions, the running of the time within which a Dispute or Claim must be presented to the District shall be tolled from the time the Developer submits its written Dispute or Claim until the time the Dispute or Claim is denied, including any time utilized by any applicable meet and confer process.

25.6.4 The Developer shall bind all its Subcontractors to the provisions of this section and will hold the District harmless against claims by Subcontractors.

## 25.7 **Claim Resolution**

25.7.1 In the event of a disagreement between the parties as to performance of the Work, the interpretation of this Contract, or payment or nonpayment for Work performed or not performed, the parties shall, after the conclusion of the Dispute Resolution requirements, attempt to resolve the Claim by those procedures set forth herein.

### 25.7.2 Claims of \$375,000 or Less

25.7.2.1 For all Claims of three hundred seventy-five thousand dollars (\$375,000) or less which arise between Contractor and District, the procedure set forth in Public Contract Code section 20104 et seq. shall apply:

25.7.2.1.1 Developer shall file with the District any written Claim, including the documents necessary to substantiate it, upon the application for final payment.

25.7.2.1.2 For claims of less than fifty thousand dollars (\$50,000), the District shall respond in writing within forty-five (45) days of receipt of the Claim or may request in writing within thirty (30) days of receipt of the Claim any additional documentation supporting the claim or relating to defenses or claims the District may have against the Developer.

25.7.2.1.3 If additional information is required, it shall be requested and provided by mutual agreement of the parties.

25.7.2.1.4 District's written response to the documented Claim shall be submitted to the Developer within fifteen (15) days after receipt of the further documentation or within a period of

time no greater than that taken by the Developer to produce the additional information, whichever is greater.

25.7.2.2 For claims of over fifty thousand dollars (\$50,000) and less than or equal to three hundred seventy-five thousand dollars (\$375,000), the District shall respond in writing to all written Claims within sixty (60) days of receipt of the claim, or may request, in writing, within thirty (30) days of receipt of the Claim any additional documentation supporting the Claim or relating to defenses or claims the District may have against the Developer.

25.7.2.2.1 If additional information is required, it shall be requested and provided upon mutual agreement of the District and the Developer.

25.7.2.2.2 The District's written response to the claim, as further documented, shall be submitted to the Developer within thirty (30) days after receipt of the further documentation, or within a period of time no greater than that taken by the Developer to produce the additional information or requested documentation, whichever is greater.

25.7.2.3 If Developer disputes the District's written response, or the District fails to respond within the time prescribed, Developer may so notify the District, in writing, either within fifteen (15) days of receipt of the District's response or within fifteen (15) days of the District's failure to respond within the time prescribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon a demand, the District shall schedule a meet and confer conference within thirty (30) days for settlement of the dispute.

25.7.2.4 Following the meet and confer conference, if the claim or any portion of it remains in dispute, the Developer may file a claim as provided in Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code. For purposes of those provisions the running of the time within which a claim must be filed shall be tolled from the time the Developer submits its written Claim until the time the Claim is denied, including any period of time utilized by the meet and confer process.

25.7.2.5 For any civil action filed to resolve claims filed pursuant to this section, within sixty (60) days, but no earlier than thirty (30) days, following the filing of responsive pleadings, the court shall submit the matter to nonbinding mediation unless waived by mutual stipulation of both parties. The mediation process shall provide for the selection within fifteen (15) days by both parties of a disinterested third person as mediator, shall be commenced within thirty (30) days of the submittal, and shall be concluded within fifteen (15) days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court or by stipulation of

both parties. If the parties fail to select a mediator within the 15-day period, any party may petition the court to appoint the mediator.

25.7.2.6 If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of the Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1141.11 of that code. The Civil Discovery Act of 1986, (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration.

25.7.2.7 The District shall not fail to pay money as to any portion of a Claim which is undisputed except as otherwise provided in the Contract Documents. In any suit filed pursuant to this section, the District shall pay interest at the legal rate on any arbitration award or judgment. Interest shall begin to accrue on the date the suit is filed in a court of law.

#### 25.7.3 Claims Over \$375,000

25.7.3.1 For all Claims of over three hundred seventy-five thousand dollars (\$375,000) which arise between a Developer and the District, the following procedure shall apply:

25.7.3.1.1 The parties agree to first endeavor to settle the dispute in an amicable manner by mediation before having recourse to a judicial forum. The Claim shall be identified in writing to the District within thirty (30) days from the date of Developer's application for final payment of all Contract balances not in dispute and shall be mediated within one hundred and twenty (120) days from the submission of the Claim to the District. For purposes of filing a Claim to mediation, the running of the time within which mediation must be filed shall be tolled from the time the Developer submits its written Claim until the time the Claim is denied. Mediator fees and administrative costs of the mediation shall be shared equally by the parties.

25.7.3.1.2 District may assert any counter-claims it has for damages against Developer, including, but not limited to, defective Work, delay damages, and liquidated damages.

25.7.4 Developer shall bind its Subcontractors to the provisions of this section and will hold the District harmless against disputes by Subcontractors.

#### 25.8 **Dispute and Claim Resolution Non-Applicability**

25.8.1 The procedures for dispute and claim resolutions set forth in Article 25 shall not apply to the following:

25.8.1.1 Personal injury, wrongful death or property damage claims;

25.8.1.2 Latent defect or breach of warranty or guarantee to repair;

25.8.1.3 Stop notices;

25.8.1.4 District's rights set forth in the Article on Suspension and Termination;

25.8.1.5 Disputes arising out of the LCP or State labor compliance, if applicable; or

25.8.1.6 District rights and obligations as a public entity set forth in applicable statutes; provided, however, that penalties imposed against a public entity by statutes, including, but not limited to, Public Contract Code sections 20104.50 and 7107, shall be subject to the Dispute and Claim Resolution requirements provided in this Article.

25.8.1.7 Developer's costs incurred in seeking relief under this Article are not recoverable from the District.

26. **STATE LABOR, WAGE & HOUR, APPRENTICE, AND RELATED PROVISIONS**

26.1 **[RESERVED]**

26.2 **Wage Rates, Travel, and Subsistence**

26.2.1 Pursuant to the provisions of article 2 (commencing at section 1770), chapter 1, part 7, division 2, of the Labor Code of California, the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which this public work is to be performed for each craft, classification, or type of worker needed to execute the Contract Documents are on file at the District's principal office and copies will be made available to any interested party on request. Developer shall obtain and post a copy of these wage rates at the job site.

26.2.2 Holiday and overtime work, when permitted by law, shall be paid for at a rate of at least one and one-half times the above specified rate of per diem wages, unless otherwise specified. The holidays upon which those rates shall be paid need not be specified by the District, but shall be all holidays recognized in the applicable collective bargaining agreement. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code.

26.2.3 Developer shall pay and shall cause to be paid each worker engaged in Work on the Project not less than the general prevailing rate of per diem wages determined by the Director of the Department of Industrial Relations ("DIR") ("Director"), regardless of any contractual relationship which may be alleged to exist between Developer or any Subcontractor and such workers.



26.2.4 If prior to execution of the Facilities Lease, the Director determines that there has been a change in any prevailing rate of per diem wages in the locality in which the Work under the Contract Documents is to be performed, such change shall not alter the wage rates in the Contract Documents subsequently awarded.

26.2.5 Pursuant to Labor Code section 1775, Developer shall, as a penalty to District, forfeit the statutory amount (believed by the District to be currently fifty dollars (\$50)) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates, determined by the District and/or the Director, for the work or craft in which that worker is employed for any public work done under Contract Documents by Developer or by any Subcontractor under it. The difference between such prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate, shall be paid to each worker by Developer.

26.2.6 Any worker employed to perform Work on the Project, which Work is not covered by any classification listed in the general prevailing wage rate of per diem wages determined by the Director, shall be paid not less than the minimum rate of wages specified therein for the classification which most nearly corresponds to Work to be performed by him, and such minimum wage rate shall be retroactive to time of initial employment of such person in such classification.

26.2.7 Pursuant to Labor Code section 1773.1, per diem wages are deemed to include employer payments for health and welfare, pension, vacation, travel time, subsistence pay, and apprenticeship or other training programs authorized by section 3093, and similar purposes.

26.2.8 Developer shall post at appropriate conspicuous points on the Site of Project, a schedule showing all determined minimum wage rates and all authorized deductions, if any, from unpaid wages actually earned. In addition, Developer shall post a sign-in log for all workers and visitors to the Site, a list of all subcontractors of any tier on the Site, and the required Equal Employment Opportunity poster(s).

### 26.3 **Hours of Work**

26.3.1 As provided in article 3 (commencing at section 1810), chapter 1, part 7, division 2, of the Labor Code, eight (8) hours of labor shall constitute a legal days work. The time of service of any worker employed at any time by Developer or by any Subcontractor on any subcontract under the Contract Documents upon the Work or upon any part of the Work contemplated by the Contract Documents shall be limited and restricted by Developer to eight (8) hours per day, and forty (40) hours during any one week, except as hereinafter provided. Notwithstanding the provisions hereinabove set forth, Work performed by employees of Developer in excess of eight (8) hours per day and forty (40) hours during any one week, shall be permitted upon this public work upon compensation for all hours worked in excess of eight (8) hours per day at not less than one and one-half times the basic rate of pay.

26.3.2 Developer shall keep and shall cause each Subcontractor to keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each worker employed by Developer in connection with the Work or any part of the Work contemplated by the Contract Documents. The record shall be kept open at all reasonable hours to the inspection of District and to the Division of Labor Standards Enforcement of the DIR.

26.3.3 Pursuant to Labor Code section 1813, Developer shall as a penalty to the District forfeit the statutory amount (believed by the District to be currently twenty-five dollars (\$25)) for each worker employed in the execution of the Contract Documents by Developer or by any Subcontractor 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 one calendar week in violation of the provisions of article 3 (commencing at section 1810), chapter 1, part 7, division 2, of the Labor Code.

26.3.4 Any Work necessary to be performed after regular working hours, or on Sundays or other holidays shall be performed without additional expense to the District.

#### 26.4 **Payroll Records**

26.4.1 Developer shall prepare and provide to the District, and shall cause each Subcontractor performing any portion of the Work under this Contract to prepare and provide to the District, an accurate and complete certified payroll record ("CPR"), showing the name, address, social security number, work classification, straight time, and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the Developer and/or each Subcontractor in connection with the Work.

26.4.2 The CPRs enumerated hereunder shall be certified and shall be provided to the District on a weekly basis. The CPRs from the Developer and each Subcontractor for each week shall be provided on or before Wednesday of the week following the week covered by the CPRs. District shall not make any payment to Developer until:

26.4.2.1 The Developer and/or its Subcontractor(s) provide CPRs acceptable to the District; and

26.4.2.2 The District is given sufficient time to review and/or audit the CPRs to determine their acceptability. Any delay in Developer and/or its Subcontractor(s) providing CPRs to the District in a timely manner will directly delay the CMU's review and/or audit of the CPRs and Developer's payment.

26.4.3 All CPRs shall be available for inspection at all reasonable hours at the principal office of Developer on the following basis:

26.4.3.1 A certified copy of an employee's CPR shall be made available for inspection or furnished to the employee or his/her authorized representative on request.

26.4.3.2 CPRs shall be made available for inspection or furnished upon request to a representative of District, Division of Labor Standards Enforcement, Division of Apprenticeship Standards, and/or the Department of Industrial Relations.

26.4.3.3 CPRs shall be made available upon request by the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the District, Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested CPRs have not been provided pursuant to the provisions herein, the requesting party shall, prior to being provided the records reimburse the costs of preparation by Developer, Subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of Developer.

26.4.4 The form of certification for the CPRs shall be as follows:

I, \_\_\_\_\_ (Name-Print), the undersigned, am the \_\_\_\_\_ (Position in business) with the authority to act for and on behalf of \_\_\_\_\_ (Name of business and/or Developer), certify under penalty of perjury that the records or copies thereof submitted and consisting of \_\_\_\_\_ (Description, number of pages) are the originals or true, full, and correct copies of the originals which depict the payroll record(s) of actual disbursements by way of cash, check, or whatever form to the individual or individual named, and (b) we have complied with the requirements of sections 1771, 1811, and 1815 for any work performed by our employees on the Project.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_  
(Section 16401 of the California Code of Regulations)

26.4.5 Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by District, Division of Apprenticeship Standards, or 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 Developer awarded the Project under the Contract Documents or performing under the Contract Documents shall not be marked or obliterated.

26.4.6 Developer shall inform District of the location of the records enumerated hereunder, including the street address, city, and county, and shall, within five (5) working days, provide a notice of change of location and address.

26.4.7 In the event of noncompliance with the requirements of this section, Developer shall have ten (10) days in which to comply subsequent to receipt of written notice specifying in what respects Developer must comply with this

section. Should noncompliance still be evident after the ten (10) day period, Developer shall, as a penalty to District, forfeit twenty-five dollars (\$25) for each calendar day, or portion thereof, for each , until strict compliance is effectuated. Upon the request of Division of Apprenticeship Standards or Division of Labor Standards Enforcement, these penalties shall be withheld from Tenant Improvement Payments then due.

26.5 **[RESERVED]**

26.6 **Apprentices**

26.6.1 Developer acknowledges and agrees that, if the Contract Documents involve a dollar amount greater than or a number of working days greater than that specified in Labor Code section 1777.5, then the Contract Documents are governed by the provisions of Labor Code Section 1777.5 and 29 CFR part 5. It shall be the responsibility of Developer to ensure compliance with this Article and with Labor Code section 1777.5 for all apprenticeship occupations.

26.6.2 Apprentices of any crafts or trades may be employed and, when required by Labor Code section 1777.5, shall be employed provided they are properly registered in full compliance with the provisions of the Labor Code.

26.6.3 Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he/she is employed, and shall be employed only at the work of the craft or trade to which she/he is registered.

26.6.4 Only apprentices, as defined in section 3077 of the Labor Code, who are in training under apprenticeship standards and written apprentice agreements under chapter 4 (commencing at section 3070), division 3, of the Labor Code, are eligible to be employed. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he/she is training.

26.6.5 Pursuant to Labor Code section 1777.5, if that section applies to the Contract Documents as indicated above, Developer and any Subcontractors employing workers in any apprenticeable craft or trade in performing any Work under the Contract Documents shall apply to the applicable joint apprenticeship committee for a certificate approving the Developer or Subcontractor under the applicable apprenticeship standards and fixing the ratio of apprentices to journeymen employed in performing the Work.

26.6.6 Pursuant to Labor Code section 1777.5, if that section applies to the Contract Documents as indicated above, Developer and any Subcontractor may be required to make contributions to the apprenticeship program.

26.6.7 If Developer or Subcontractor willfully fails to comply with Labor Code section 1777.5, then, upon a determination of noncompliance by the Administrator of Apprenticeship, it shall:

26.6.7.1 Be denied the right to bid on any subsequent project for one (1) year from the date of such determination;

26.6.7.2 Forfeit as a penalty to District the full amount as stated in Labor Code section 1777.7. Interpretation and enforcement of these provisions shall be in accordance with the rules and procedures of the California Apprenticeship Council and under the authority of the Chief of the Division of Apprenticeship Standards.

26.6.7.3 Developer and all Subcontractors shall comply with Labor Code section 1777.6, which section forbids certain discriminatory practices in the employment of apprentices.

26.6.7.4 Developer shall become fully acquainted with the law regarding apprentices prior to commencement of the Work. Special attention is directed to sections 1777.5, 1777.6, and 1777.7 of the Labor Code, and title 8, California Code of Regulations, section 200 et seq. Questions may be directed to the State Division of Apprenticeship Standards, 455 Golden Gate Avenue, San Francisco, California 94102.

## 26.7 **Non-Discrimination**

26.7.1 Developer herein agrees not to discriminate in its recruiting, hiring, promotion, demotion, or termination practices on the basis of race, religious creed, national origin, ancestry, sex, sexual orientation, age, or physical handicap in the performance under the Contract Documents and to comply with the provisions of the California Fair Employment and Housing Act as set forth in part 2.8 of division 3 of the California Government Code, commencing at section 12900; the Federal Civil Rights Act of 1964, as set forth in Public Law 88-352, and all amendments thereto; Executive Order 11246, and all administrative rules and regulations found to be applicable to Developer and Subcontractor.

26.7.2 Special requirements for Federally Assisted Construction Contracts: During the performance of the requirement of the Contract Documents, Developer agrees to incorporate in all subcontracts the provisions set forth in Chapter 60-1.4(b) of Title 41 published in Volume 33 No. 104 of the Federal Register dated May 28, 1968.

## 26.8 **Labor First Aid**

Developer shall maintain emergency first aid treatment for Developer's laborers and mechanics on the Project which complies with the Federal Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.) and the California Occupational Safety and Health Act of 1973 (8 Cal. Code of Regs., §1 et seq.).

## 27. **[RESERVED]**

28. **MISCELLANEOUS**

28.1 **Assignment of Antitrust Actions**

Although this project may not have been formally bid, the following provisions may apply:

28.1.1 Section 7103.5(b) of the Public Contract Code states:

In entering into a public works contract or subcontract to supply goods, services, or materials pursuant to a public works contract, the Developer or Subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. 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 purchases of goods, made and become effective at the time the awarding body tenders final payment to the Developer, without further acknowledgment by the parties.

28.1.2 Section 4552 of the Government Code states:

In submitting a bid to a public purchasing body, the bidder offers and agrees that if the bid is accepted, it will assign to the purchasing body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. 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 purchases of goods, materials, or services by the bidder for sale to the purchasing body pursuant to the bid. Such assignment shall be made and become effective at the time the purchasing body tenders final payment to the bidder.

28.1.3 Section 4553 of the Government Code states:

If an awarding body or public purchasing body receives, either through judgment or settlement, a monetary recovery for a cause of action assigned under this chapter, the assignor shall be entitled to receive reimbursement for actual legal costs incurred and may, upon demand, recover from the public body any portion of the recovery, including treble damages, attributable to overcharges that were paid by the assignor but were not paid by the public body as part of the bid price, less the expenses incurred in obtaining that portion of the recovery.

28.1.4 Section 4554 of the Government Code states:

Upon demand in writing by the assignor, the assignee shall, within one year from such demand, reassign the cause of action assigned under this part if the assignor has been or may have been injured by the violation of law for which the cause of action arose and (a) the assignee has not been injured thereby, or (b) the assignee declines to file a court action for the cause of action.

28.1.5 Under this Article, "public purchasing body" is District and "bidder" is Developer.

**28.2 Excise Taxes**

If, under Federal Excise Tax Law, any transaction hereunder constitutes a sale on which a Federal Excise Tax is imposed and the sale is exempt from such Federal Excise Tax because it is a sale to a State or Local Government for its exclusive use, District, upon request, will execute documents necessary to show (1) that District is a political subdivision of the State for the purposes of such exemption, and (2) that the sale is for the exclusive use of District. No Federal Excise Tax for such materials shall be included in any Guaranteed Maximum Price.

**28.3 Taxes**

Guaranteed Maximum Price is to include any and all applicable sales taxes or other taxes that may be due in accordance with section 7051 of the Revenue and Taxation Code; Regulation 1521 of the State Board of Equalization or any other tax code that may be applicable.

**28.4 Shipments**

All shipments must be F.O.B. destination to Site or approved sites, as indicated in the Contract Documents. There must be no charge for containers, packing, unpacking, drayage, or insurance. The total Guaranteed Maximum Price shall be all inclusive (including sales tax) and no additional costs of any type will be considered.

END OF DOCUMENT

**EXHIBIT E**

**MEMORANDUM OF COMMENCEMENT DATE**

This MEMORANDUM OF COMMENCEMENT DATE is dated \_\_\_\_\_, and is made by and between DOANS/TURNER GROUP/ALTEN JV ("Developer"), as Lessor, and the Oakland Unified School District ("District"), as Lessee.

1. Developer and District have previously entered into a Facilities Lease dated as of \_\_\_\_\_, 2011, (the "Lease") for the leasing by Developer to District of the Project Site and Project in the City of Oakland, California, referenced in the Lease.

2. District hereby confirms the following:

A. That all construction of the Project required to be performed pursuant to the Facilities Lease has been completed by Developer in all respects;

B. That District has accepted and entered into possession of the Project and now occupies same; and

C. That the term of the Facilities Lease commenced on \_\_\_\_\_ 201\_, and will expire at 11:59 P.M. on \_\_\_\_\_, 20\_\_\_\_\_.

**THIS MEMORANDUM OF COMMENCEMENT DATE IS ACCEPTED AND AGREED** on the date indicated below:

Dated: \_\_\_\_\_, 20\_\_

Dated: \_\_\_\_\_, 20\_\_

**Oakland Unified School District**

**DOANS/TURNER GROUP/ALTEN, JV**

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

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

Print Name: Timothy White

Print Name: \_\_\_\_\_

Assistant Superintendent for  
Facilities Planning and Management

Print Title: \_\_\_\_\_



**EXHIBIT F**

**CONSTRUCTION SCHEDULE**

**Attached is a detailed Project Construction Schedule with duration no longer than the Contract Time, and with specific milestones that Developer shall meet.**

**EXHIBIT G**

**SCHEDULE OF VALUES**

**Attached is a detailed Schedule of Values that complies with the requirements of the Construction Provisions (Exhibit "D") and that has been approved by the District.**