

LONGFELLOW MODERNIZATION PROJECT

AT

LONGFELLOW MIDDLE SCHOOL

SITE LEASE

Between

BERKELEY UNIFIED SCHOOL DISTRICT

and

Dated as of December 9, 2021

LONGFELLOW MODERNIZATION PROJECT

SITE LEASE

This SITE LEASE is dated as of _____, 20__, and is by and between the Berkeley Unified School District, a school district duly organized and existing under the laws of the State of California (the “District”) as lessor and _____, a California corporation operating under the laws of the State of California (the “Lessee”).

WHEREAS, the District desires to provide for the construction of certain public improvements at the Longfellow Middle School site (the “Project”); and

WHEREAS, the District’s governing board has determined that it is in the best interests of the District and for the common benefit of the citizens it serves to construct the Project by leasing to the Lessee land and existing buildings at the Longfellow Middle School site at which the public improvements are to be constructed, as more specifically described in Exhibit “A,” (the “Site”), and subleasing from the Lessee the Site and the Project under a Sublease Agreement (the “Sublease”) attached hereto as Exhibit “B” and by this reference incorporated herein; and

WHEREAS, the Lessee has conducted Due Diligence of the Site and the Project to determine the suitability of the site, site conditions, utilities, hazardous substances, and other conditions for the construction of the Project (more fully detailed at Article 5 of the Construction Services Agreement); and

WHEREAS, the District is authorized under Section 17406 of the California Education Code to lease the Site and its governing body has duly authorized the execution of this Site Lease; and

WHEREAS, pursuant to this Site Lease, the District and Lessee have agreed to the terms of the Sublease, which is incorporated and attached hereto as Exhibit “B,” by which the District will sublease the Site and retain beneficial use and occupancy of the Site during which term, improvements will be constructed by Lessee. As the constructed improvements are completed, the District shall receive full beneficial use and occupancy of the constructed improvements upon payment for such improvements by the District to the Lessee. As part of this Site Lease, the District and the Lessee have agreed to terms by which the Lessee will perform construction improvements on the Site during the term of the Sublease according to the terms of the Construction Services Agreement (“CSA”), which is incorporated and attached to the Site Lease as Exhibit “C,” to ensure that the improvements will meet the District’s expectations and comply with applicable law.

NOW THEREFORE, in consideration of the covenants hereinafter set forth, District and Lessee agree as follows:

1. **DEFINITIONS.** Unless the context otherwise requires, the terms defined in this Article shall, for all purposes of this lease, have the meanings as herein specified.
 - A. **“Commencement Date”** shall mean the Project commencement date found in the Notice to Proceed for the Project in accordance with the Construction Services Agreement.
 - B. **“Construction Services Agreement” (CSA)** means the Construction Services Agreement, together with any duly authorized and executed amendments hereto.
 - C. **“Construction Documents”** consist of the Plans and Specifications approved by DSA under Application Number _____, File Number _____, Allowances stipulated in the Contract Documents, and all Addendas, if any, issued prior to the entry into this Agreement. The Construction Documents shall include all Modifications generated after the Effective Date in accordance with the Contract Documents, including, without limitation, a written amendment to the Contract signed by the Contractor and duly executed and approved by the District, a

Change Order, a Construction Change Document, or a written order for a minor change in the Work issued by the Architect.

- D. **“Contract Documents”** means those documents which form the entire Contract by and between District and Contractor. As of the effective date of the Lease and Sublease, the Contract Documents consist of the Lease, the Sublease, any General, Supplementary and other Conditions, the Construction Services Agreement, including all exhibits and attachments hereto, and the Construction Documents. The Contract Documents collectively form the Contract. The Contract represents the entire and integrated Agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a written Modification. The Contract Documents shall be binding solely upon the District and Contractor, do not create a contractual relationship of any kind between the Architect and Contractor, between the District and any Subcontractor or Sub-subcontractor, or between any persons or entities other than the District and the Contractor, and are not intended to and do not create any third party beneficiary. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect’s duties. (See Article 14 of the CSA).
- E. **“Day”** means a calendar day unless specifically designated as a business day.
- F. **“District”** means the Berkeley Unified School District, a school district duly organized and existing under the laws of the State of California.
- G. **“Effective Date”** is the latter of the date upon which the District Board approves the Site Lease and the Sublease and Contractor has executed the Site Lease and Sublease.
- H. **“Lessee”** shall mean _____, and its successors and assigns.
- I. **“Project”** means the improvements and related work to be constructed and installed by the Contractor, as part of this Site Lease and in accordance with the Construction Services Agreement attached hereto as Exhibit “C”.
- J. **“Site”** refers to the grounds of the Project or in some cases may refer to multiple sites as defined in the Contract Documents and such adjacent lands as may be directly affected by the performance of the Work, more particularly described in Exhibit “A” attached hereto.
- K. **“Site Lease” or “Lease”** means this Site Lease together with any duly authorized and executed amendment hereto under which the District leases the Site to the Lessee.
- L. **“Sublease”** means the Sublease attached hereto and incorporated as Exhibit “B”, together with any duly authorized and executed amendment thereto.
- M. **“Sublease Payment”** means any payment required to be made by the District pursuant to Article 7 of the Sublease.
- N. **“Term of this Lease” or “Term”** means the time during which this Lease is in effect, as provided for in Article 3 of this Site Lease.

2. **SITE LEASE.**

The District leases to the Lessee, and the Lessee leases from the District, on the terms and conditions set forth herein, the Site situated in the City of Berkeley, County of Alameda, State of California, more specifically described in Exhibit "A" attached hereto, including any improvements now or hereafter affixed thereto.

3. **TERM.**

The Term of this Site Lease shall become effective upon the authorized execution of this Site Lease and upon completion of Lessee's Due Diligence with regard to the Site and issuance of a Notice to Proceed. The Term of this Site Lease shall terminate as of the last day of the Sublease, unless sooner terminated as provided thereby. If on the scheduled date of termination of this Site Lease, Sublease Payments shall have therefore been abated at any time and for any reason, then the term of this Site Lease shall be subject to a Liquidated Damages cost as set forth in Article 3.7 of the Construction Services Agreement and the Site Lease shall be extended until the date upon which all such Sublease Payments shall be fully paid. Without limiting any other term or provision of the Sublease Agreement or Construction Services Agreement between the parties, at the termination of this Site Lease, natural or otherwise, title to the Site, and any improvements constructed thereon by the Lessee, shall vest in the District in accordance with Education Code section 17406.

4. **REPRESENTATIONS, COVENANTS, AND WARRANTIES OF THE DISTRICT.** The District represents, covenants and warrants to the Lessee that:

- A. The District has good and merchantable fee title to the Site and has authority to enter into and perform its obligations under this Site Lease;
- B. There are no liens on the Site other than Permitted Encumbrances;
- C. All taxes, assessments or impositions of any kind with respect to the Site, if applicable, except current taxes, have been paid in full;
- D. The Site is properly zoned (or subject to an exception from zoning) for the intended purpose and utilization of the Site ;
- E. The District is in compliance with all laws, regulations, ordinances and orders of public authorities applicable to the Site;
- F. There is no litigation of any kind currently pending or threatened regarding the Site or the District's use of the Site for the purposes contemplated by this Site Lease;
- G. To the best of the District's knowledge, except for that which shall be disclosed by the District prior to the Project commencement date in the Notice to Proceed:
 - (1) no dangerous, toxic or hazardous pollutants, contaminants, chemicals, waste, materials or substances, as defined in or governed by the provisions of any State or Federal Law relating thereto (hereinafter collectively called "Environmental Regulations", and also including, but not limited to, urea-formaldehyde, polychlorinated biphenyls, asbestos, asbestos containing materials, nuclear fuel or waste, radioactive materials, explosives, carcinogens and petroleum products, or any other waste, material, substance, pollutant or contaminant which would subject the owner of the Site or the Lessee or the Lessee's

subcontractors to any damages, penalties or liabilities under any applicable Environmental Regulation (hereinafter collectively called "Hazardous Substances", are now or have been stored, located, generated, produced, processed, treated, transported, incorporated, discharged, emitted, released, deposited or disposed of in, upon, under, over or from the Site;

- (2) no threat exists of a discharge, release or emission of a Hazardous Substance upon or from the Site into the environment;
- (3) the Site has not been used as or for a mine, a landfill, a dump or other disposal facility, industrial or manufacturing facility, or a gasoline service station;
- (4) no underground storage tank is now located in the Site or has previously been located therein;
- (5) no violation of any Environmental Regulation now exists relating to the Site, no notice of any such violation or any alleged violation thereof has been issued or given by any governmental entity or agency, and there is not now any investigation or report involving the Site by any governmental entity or agency which in any way relates to Hazardous Substances;
- (6) no person, party or private or governmental agency or entity has given any notice of or asserted any claim, cause of action, penalty, cost or demand for payment or compensation, whether or not involving any injury or threatened injury to human health, the environment or natural resources, resulting or allegedly resulting from any activity or event described in (1) above;
- (7) there are not now any actions, suits, proceedings or damage settlements relating in any way to Hazardous Substances, in, upon, under over or from the Site;
- (8) the Site is not listed in the United States Environmental Protection Agency's National Priorities List of Hazardous Waste Sites or any other list of Hazardous Substance sites maintained by any federal, state or local governmental agency; and
- (9) the Site is not subject to any lien or claim for lien or threat of a lien in favor of any governmental entity or agency as a result of any release or threatened release-of any Hazardous Substance.

H. To the extent permitted by law, the District shall not abandon the Site for the use for which it is currently required by the District and further, shall not seek to substitute or acquire property to be used as a substitute for the uses for which the Site and Project are to be maintained under the Site Lease.

I. The term "Permitted Encumbrances" as used herein shall mean, as of any particular time:

- (1) liens for general ad valorem taxes and assessments, if any, not then delinquent;
- (2) this Site Lease; the Sublease; any right or claim of any mechanic, laborer, material man, supplier, or vendor, if applicable, not filed or perfected in the manner prescribed by law; 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 Site Lease and which will not materially impair the use of the Site;

- (3) easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions, or restrictions established following the date of recordation of this Site Lease and to which the Lessee and the District consent in writing which will not impair or impede the operation of the Site.

5. **REPRESENTATIONS AND WARRANTIES OF THE LESSEE. THE LESSEE REPRESENTS** and warrants to the District that:

- A. The Lessee is duly organized in the State of California, and in good standing under the laws of the State of California, with full corporate power and authority to lease and own real and personal property;
- B. The Lessee has full power, authority and legal right to enter into and perform its obligations under this Site Lease, and the execution, delivery and performance of this Site Lease has been duly authorized by all necessary corporate actions on the part of the Lessee and does not require any further approvals or consents;
- C. Execution, delivery and performance of this Site Lease does not and will not result in any breach of or constitute a default under any indenture, mortgage, contract, agreement or instrument to which the Lessee is a party or by which it or its property is bound;
- D. There is no pending or, to the best knowledge of the Lessee, threatened action or proceeding before any court or administrative agency which will materially adversely affect the ability of the Lessee to perform its obligations under this Site Lease; and

6. **RENTAL.**

The Lessee shall pay to the District as and for advance rental hereunder \$1.00 per year or part thereof, or the aggregate sum of \$1.00, on or before the date of commencement of the Term of this Site Lease. The Lessee shall have no obligation to make rental payments hereunder in the event the Commencement Date of this Site Lease does not occur as a result of the District's inability to issue a Notice to Proceed for the Project pursuant to the provisions of the Construction Services Agreement.

7. **PURPOSE.**

The Lessee shall use the Site solely for the purpose of constructing the Project thereon and for subleasing the Site and the Project to the District; provided, that upon the occurrence of an Event of Default by the District under the Sublease, the Lessee may exercise the remedies provided for in the Construction Services Agreement or the Sublease.

8. **TERMINATION. THE LESSEE AGREES, UPON TERMINATION OF THIS SITE LEASE OR THE END OF THE** Term of this Site Lease:

- A. To quit and surrender the Site in the same good order and condition as it was in at the time of commencement of the Term hereunder, reasonable wear and tear excepted;
- B. To release and reconvey to the District any liens and encumbrances created or caused by the Lessee; and
- C. That any permanent improvements and structures existing upon the Site at the time of the termination of this Site Lease shall remain thereon and title thereto shall vest in the District.

Notwithstanding the District's foregoing rights in the event of termination, the Lessee shall retain the right to full compensation for all services rendered prior to the termination, including all rights they have under the Construction Services Agreement and the Sublease as well as all recourse provided by California law including common law, for the value of the work performed on the Site and/or the Project.

In the event the Construction Services Agreement is terminated pursuant to the provisions therein, this Site Lease shall immediately terminate.

9. **QUIET ENJOYMENT.**

Subject to the terms of the Sublease attached hereto as Exhibit "B", the District covenants and agrees that it will not take any action to prevent the Lessee's quiet enjoyment of the Site during the Term hereof; and, that in the event District's fee title to the Site is ever challenged so as to interfere with the Lessee's right to occupy, use and enjoy the Site, the District will use all governmental powers at its disposal, including the power of eminent domain, to obtain unencumbered fee title to the Site and to defend the Lessee's right to occupy, use, and enjoy the Site. The District, however, retains the right, throughout the Site Lease Term, to use the Site for District purposes, pursuant to the terms of the Sublease.

10. **NO LIENS.**

The District shall not mortgage, sell, assign, transfer or convey the Site or any part thereof to any person during the Term of this Site Lease, without the written consent of the Lessee. Nothing herein shall preclude the District from granting utility easements across the Site to facilitate the use and operation of the Project for which it is intended.

11. **RIGHT OF ENTRY.**

The District reserves the right for any of its duly authorized representatives to use the Project during the Term of this Site Lease or Sublease and enter upon the Site at any reasonable time to inspect the same or to make any repairs, improvements or changes necessary for the preservation thereof, but in doing so shall not interfere with the Lessee's operations on the Project.

12. **ASSIGNMENT AND SUBLEASING.**

The Lessee will not assign or otherwise dispose of or encumber the Site or this Site Lease without the written consent of the District.

13. **NO WASTE.**

The Lessee agrees that at all times that it is in possession of the Site it will not commit suffer or permit any waste on the Site, and it will not willfully or knowingly use or permit the use of the Site for any illegal act or purpose.

14. **DEFAULT.**

In the event the Lessee shall be in default in the performance of any obligation on its part to be performed under the terms of the Construction Services Agreement and this Site Lease, which default continues for thirty (30) days following notice and demand for correction thereof to the

Lessee, the District may exercise any and all remedies granted by law, except that no merger of this Site Lease and of the Sublease shall be deemed to occur as a result thereof.

15. **TITLE.**

During the Term of this Site Lease, the District shall hold title to the Site and obtain title to the Project from the Lessee, including any and all additions which comprise improvements, fixtures, repairs, replacements or modifications, as such improvements are built and paid for pursuant to the Construction Services Agreement with full title vesting in the District to all improvements upon the end of the Term of this Site Lease.

16. **TAXES.**

The terms of this Site Lease may result in the creation of a possessory interest. If such a possessory interest is vested in a private party to this document, the private party may be subjected to the payment of personal property taxes levied on such interest. Pursuant to Section 107.6 of the California Revenue and Taxation Code, District hereby notifies Lessee that: (i) the property interest obtained by Lessee pursuant to the Site Lease may be subject to property taxation; and (ii) Lessee may be subject to the payment of property taxes levied on the property interest obtained by Lessee.

17. **EMINENT DOMAIN.**

In the event the whole or any part of the Site or the improvements thereon, including but not limited to the Project, is taken by eminent domain, the financial interest of the Lessee shall be recognized and is hereby determined to be the amount of all Sublease Payments and Retention Payment, as applicable, then due or past due, less any allowed withholdings or offsets, and unearned interest as of the date the Lessee receives payment in full. The balance of the award in such eminent domain action, if any, shall be paid to the District.

18. **LIQUIDATED DAMAGES.**

Pursuant to Lessee's Due Diligence, as further described in Article 5 of the Construction Services Agreement, Lessee has determined the Term of this Site Lease which shall extend at least until the Punch List is completed under Article 13 of the Construction Services Agreement. Pursuant to the Construction Services Agreement, Liquidated Damages shall apply if the Contract Time is exceeded.

19. **PARTIAL INVALIDITY.**

If any one or more of the terms, covenants or conditions of this Site Lease shall to any extent be declared invalid, unenforceable, void or voidable for any reason whatsoever by a court of competent jurisdiction, the finding or order or decree of which becomes final, none of the remaining terms, provisions, covenants and conditions of this Site Lease shall be affected thereby, and each provision of this Site Lease shall be valid and enforceable to the fullest extent permitted by law.

20. **NOTICES.**

Any notices or filings required to be given or made under this Site Lease shall be served, given or made in writing upon the District or the Lessee, as the case may be, by personal delivery or registered mail to the respective addresses given below. Any change in the addresses noted

shall not be binding upon the other party unless preceded by no less than thirty (30) days prior written notice. Any such notices shall be deemed to have been received by the addressee if delivered to the person for whom they are intended or if sent by registered mail, return receipt requested, or by email, or fax followed by regular mail, addressed as follows:

If to Lessee: _____

If to District: BERKELEY UNIFIED SCHOOL DISTRICT

21. **BINDING EFFECT.**

This Site Lease shall inure to the benefit of and shall be binding upon the District, the Lessee and its respective successors in interest and assigns.

22. **AMENDMENTS AND MODIFICATIONS.**

This Site Lease shall not be effectively amended, changed, modified, altered or terminated without the written agreement of the District and the Lessee.

23. **EXECUTION IN COUNTERPARTS.**

This Site Lease may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

24. **LAWS, VENUE AND ATTORNEYS' FEES.**

The terms and provisions of this Site Lease shall be construed in accordance with the laws of the State of California. If any action is brought in a court of law to enforce any term of this Site Lease, the action shall be brought in a state court situated in the County of Alameda, State of California, unless a court finds jurisdiction or venue is only proper in a federal court, or a court outside this county. In the event of any such litigation between the parties, the parties shall pay for their respective costs incurred, including attorneys' fees.

25. **INTEGRATION/MODIFICATION.**

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

26. **HEADINGS.**

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.

27. **TIME.**

Time is of the essence in this Site Lease and each and all of its provisions.

IN WITNESS WHEREOF, the parties hereto have executed this Site Lease by their authorized officers as of the day and year first written above.

DISTRICT

LESSEE

BERKELEY UNIFIED SCHOOL DISTRICT

BY: _____
Superintendent

BY: _____
President