

**FACILITIES LEASE**

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

Berkeley High School Capacity & Expansion Project  
1980 Allston Way, Berkeley, CA 94704  
APN: \_\_\_\_\_

**By and between**

Berkeley Unified School District  
1005 Parker Street  
Berkeley, CA 94710

**And**

[Developer]  
[Address]

Dated as of \_\_\_\_\_, 20\_\_

## TABLE OF CONTENTS

	<u>Page</u>
1. Definitions	2
2. Exhibits	3
3. Lease of Project and Site	3
4. Term	4
5. Payment	4
6. Title	5
7. Quiet Enjoyment	5
8. Representations of the District	5
9. Representations of Developer	6
10. Preconstruction Services	7
11. Construction of Project	14
12. Maintenance	16
13. Utilities	16
14. Taxes and Other Impositions	16
15. Insurance	16
16. Indemnification and Defense	23
17. Eminent Domain	24
18. Damage and Destruction	25
19. Abatement	25
20. Access	26
21. Assignment, Subleasing	26
22. Termination, Default And Suspension	27
23. Limitation of District Liability	35
24. Notices	35
25. Binding Effect	35
26. No Additional Waiver Implied by One Waiver	35

27.	Severability	36
28.	Amendments, Changes and Modifications	36
29.	Net-Net-Net Lease	36
30.	Execution in Counterparts	36
31.	Developer and District Representatives	36
32.	Applicable Law	36
33.	Attorney's Fees	36
34.	Captions	36
35.	Prior Agreements	36
36.	Further Assurances	37
37.	Recitals and Exhibits Incorporated	37
38.	Time of the Essence	37
39.	Interpretation	37

**Exhibits A - H**

## **FACILITIES LEASE**

This facilities lease ("Facilities Lease"), dated as of \_\_\_\_\_, 20\_\_ ("Effective Date"), is made and entered into by and between [Name of Developer] ("Developer"), a [California corporation] duly organized and existing under the laws of the State of [California], as sublessor, and Berkeley 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**, the District is authorized under Section 17406 of the Education Code of the State of California to lease a site to a developer and to have that developer develop and construct the project on the site and to lease back to the District the completed project and site; and

**WHEREAS**, on the date hereof, the District has leased to Developer, a parcel of land located at [Address], known as [Name of] School, particularly described in **Exhibit A** and shown on **Exhibit B** attached hereto and incorporated herein by reference ("Site"); and

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

**WHEREAS**, the District desires to provide for the development and construction of certain work to be performed on portions of the Site which will include construction of improvements to be known as the [Name of] Project ("Project"); and

**WHEREAS**, District has retained [Name of Architect] ("Architect") to prepare plans and specifications for the Project ("Plans and Specifications") and to act as the Design Professional in General Responsible Charge for the Project; and

**WHEREAS**, the Governing Board 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 Site to Developer and by simultaneously entering into this Facilities Lease under which the District will lease back the completed Project and site from Developer and if necessary, make Lease Payments; 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; and

**WHEREAS**, this Site Lease and Facilities Lease are awarded based a competitive solicitation process pursuant to Education Code section 17406 and in compliance with the required procedures and guidelines for evaluating the qualifications of proposers adopted and published by the Board to the proposer providing the best value to the school district, taking into consideration the proposer's demonstrated competence and professional qualifications necessary for the satisfactory performance of the services required; and

**WHEREAS**, the selection of Developer was conducted in a fair and impartial manner; and

**WHEREAS**, Developer has reviewed the Lease Documents; and

**WHEREAS**, Developer represents that it has the expertise and experience to perform the services set forth in this Facilities 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 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**, Developer is authorized to lease the Site as lessee and to develop the Project by constructing the Project on the Site and to lease the completed Project and Site back to the District, and has duly authorized the execution and delivery of this Facilities Lease.

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

## **TERMS**

### **1. Definitions**

In addition to the terms and entities defined above or in subsequent provisions, 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 \_\_\_\_\_, a [California corporation], organized and existing under the laws of the State of [California], Contractor's license number \_\_\_\_\_ issued by the State of California, Contractors' State License Board, in accordance with division 3, chapter 9, of the Business and Professions Code, 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 \_\_\_\_\_ 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 ad valorem taxes and assessments, if any, not then delinquent, or which the District may permit to remain unpaid;

**1.6.2** The 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 Site.

## **2. Exhibits**

The following Exhibits are attached to and by reference incorporated and made a part of this Facilities Lease:

**2.1 Exhibit A - Legal Description of the Site:** The description of the real property constituting the Site.

**2.2 Exhibit B - Description of the Project:** The map or diagram depiction of the Project.

**2.3 Exhibit C - Guaranteed Maximum Price and Other Project Cost, Funding, and Payment Provisions:** A detailed description of the Guaranteed Maximum Price and the provisions related to the payment of that amount to Developer, including Attachment 3, the Schedule of Lease Payments and Payoff Dates and Amounts.

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

**2.5 Exhibit D-1 – Special Conditions Provisions:** The provisions describing conditions specific to the Project's construction.

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

**2.7 Exhibit F - Construction Schedule**

**2.8 Exhibit G – Schedule of Values**

**2.9 Exhibit H – Project Labor Agreement**

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

**3.1** Developer hereby leases the completed Project to the District, and the District hereby leases said completed Project and Site from Developer upon the terms and conditions set forth in this Facilities Lease.

**3.2** The leasing by Developer to the District of the completed Project and 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 Site pursuant to the Site Lease throughout the Term thereof and the Term of this Facilities Lease.

**3.3** As to the 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 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.

Unless earlier terminated pursuant to the provisions of the Contract Documents, the Term of this Facilities Lease for the purposes of District's obligations to make Lease Payments shall terminate [one (1) year] thereafter or upon payment of the final lease payment.

4.2 After Developer has completed construction of the Project and the District has accepted the Project, the Parties shall execute the Memorandum of Commencement Date attached hereto as **Exhibit E** to memorialize the commencement date of the Lease Payments and expiration date 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 Lease Payment obligations.

**4.3** 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 Maximum Price and Other Project Cost, Funding, and Payment Provisions indicated in **Exhibit C** ("Guaranteed Maximum Price Provisions"); or

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

**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 completed Project and Site by Developer back to the District and for other good and valuable consideration, the District shall make all necessary payments pursuant to the Guaranteed Maximum Price Provisions indicated in **Exhibit C**.

## **6. Title**

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

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

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

**6.4** If the District exercises its Purchase Option pursuant to the Guaranteed Maximum Price Provisions indicated in **Exhibit C** or if District makes all necessary payments under the Guaranteed Maximum Price 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 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.

## **7. 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 Site as provided herein.

## **8. Representations of the District**

The District represents, covenants and warrants to Developer as follows:

### **8.1 Due Organization and Existence**

The District is a school district, duly organized and existing under the Constitution and laws of the State of California.



## **8.2 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.

## **8.3 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 Site, except Permitted Encumbrances.

## **8.4 Condemnation Proceedings**

**8.4.1** 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.

**8.4.2** 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 this Facilities Lease.

## **9. Representations of Developer**

Developer represents, covenants and warrants to the District as follows:

### **9.1 Due Organization and Existence**

Developer is a [California company] 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.

### **9.2 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.

### **9.3 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 Site, except Permitted Encumbrances.

#### **9.4 No Bankruptcy**

Developer is not now nor has it ever been in bankruptcy or receivership.

#### **9.5 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 Site, and shall not mortgage or encumber the 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.

#### **9.6 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:

**9.6.1** Eighteen (18) months following completion of the Project.

**9.6.2** One (1) year following expiration or earlier termination of the Term.

**9.6.3** 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.

While the lease documents are in effect, Developer shall give District one hundred twenty (120) days written notice prior to dissolving or terminating the legal existence of Developer.

### **10. Preconstruction Services**

#### **10.1 Scope of the Preconstruction Services**

Developer shall perform management and coordination services, plan and specification constructability reviews, provide value-engineering reviews and recommendations and other reviews as necessary to verify that the drawings and specifications are clear and reasonably accurate to minimize the need for changes during the construction phase of the project, including but not limited to the following:

### **10.1.1 General Services**

**10.1.1.1** Developer shall attend meetings between the Architect, the District, District site personnel, and any other applicable consultants of the District as required to discuss the Project, including budget, scope and schedule.

1.1.1.1 Developer shall assist the Architect with making formal presentations to the governing board of District. Such assistance is anticipated to include floor plans and elevations necessary for any architectural presentation.

**10.1.1.2** Developer shall prepare a rough schedule in a format acceptable to District, and update as necessary.

**10.1.1.3** Developer shall prepare and update the components of the Guaranteed Maximum Price and shall be primarily responsible for ensuring that the Project can and is constructed for no more than that amount.

**10.1.1.4** While the Architect is anticipated to provide primary assistance, Developer shall assist District with City land use issues.

**10.1.1.5** Architect shall act as lead and Developer will assist District and Architect with DSA review, input, and timeframe for same.

**10.1.1.6** Architect shall act as lead and Developer will assist with review and comment upon geotechnical / soils investigation and report.

**10.1.1.7** Architect shall act as lead and Developer will assist with review and comment upon survey of the Site for the Project.

**10.1.1.8** When requested, Developer will prepare meeting minutes.

**10.1.1.9** Prepare schedule for preconstruction deliverables, subject to District's approval, and provide preconstruction deliverables within time frames of approved preconstruction schedule.

### **10.1.2 Review of Design Documents.**

**10.1.2.1** Review Project design and budget with District and Architect based on the 100% Construction Documents submitted to DSA to:

**10.1.2.1.1** Provide recommendations on site use and improvements, selection of materials, building systems and equipment and methods of Project delivery;

**10.1.2.1.2** Provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction of

the Project and subparts thereof if requested, and factors relating to cost including, but not limited to, construction costs of alternate designs of materials, preliminary budgets and possible economics that could be achieved through alternate methods or substitutions;

**10.1.2.1.3** Provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction of the Project and subparts thereof if requested, and factors relating to cost including, but not limited to, construction costs of alternate designs of materials, preliminary budgets and possible economics that could be achieved through alternate methods or substitutions;

**10.1.2.1.4** Provide plan review.

**10.1.2.1.5 Value-engineering.** Prepare a value-engineering report for District review and approval that:

**10.1.2.1.5.1** Details areas of cost saving (e.g. construction processes/procedures, specified materials and equipment, and equipment or other aspects of the design documents that can be modified to reduce costs and/or the time for achieving final completion of the Project and/or to extend life-cycle and/or to reduce maintenance/operations costs, without diminution in the quality of materials/equipment/workmanship, scope or intended purposes of the Project);

**10.1.2.1.5.2** Provides detailed estimate for proposed value-engineering items;

**10.1.2.1.5.3** Defines methodology or approaches that maximize value; and

**10.1.2.1.5.4** Identifies design choices that can be more economically delivered.

**10.1.2.1.6 Constructability Review.** Prepare detailed interdisciplinary constructability review within Fourteen (14) days of receipt of the plans from the District that:

**10.1.2.1.6.1** Ensures construction documents are well coordinated and reviewed for errors;

**10.1.2.1.6.2** Identifies to the extent known, construction deficiencies and areas of concern;

**10.1.2.1.6.3** Back-checks design drawings for inclusion of modifications; and

**10.1.2.1.6.4** Provides the District with written confirmation that:

**10.1.2.1.6.4.1** Requirements noted in the design documents prepared for the Project are consistent with and conform to the District's Project requirements and design standards.

**10.1.2.1.6.4.2** Various components have been coordinated and are consistent with each other so as to minimize conflicts within or between components of the design documents.

**10.1.2.2** Confirm Modifications to Design Drawings. If the District accepts Developer's comments, including the value-engineering and/or constructability review comments, review the design documents to confirm that those comments are properly incorporated into the final design documents.

**10.1.2.3** In doing so, it is recognized that Developer is not acting in the capacity of a licensed design professional, and that Developer's examination is made in good faith to facilitate construction and does not create an affirmative responsibility of a design professional to detect errors, omissions or inconsistencies in the Contract Documents or to ascertain compliance with applicable laws, building codes or regulations. However, nothing in this provision shall abrogate Developer's responsibilities for discovering and reporting any error, inconsistency, or omission pursuant to the Contract within the Developer's standard of care including, without limitation, any applicable laws, ordinance, rules, or regulations.

### **10.1.3 Budget of Project Costs.**

**10.1.3.1** At each stage of plan review indicated above, Developer will update and refine the budget of the Guaranteed Maximum Price based on the most recent set of design documents. Developer shall also advise the District and the Architect if it appears that the total construction costs may exceed the Guaranteed Maximum Price established by the District and shall make recommendations for corrective action. Developer will further provide input to the District and Architect relative to value of construction, means and methods for construction, duration of construction of various building methods and constructability.

**10.1.3.2** In each budget of the Guaranteed Maximum Price, Developer shall include values of scopes of work subdivided into component parts in sufficient detail to serve as the basis for progress payments during construction. This budget of the Guaranteed Maximum Price shall include, at a minimum, the following information divided into at least the following categories for each site:

**10.1.3.2.1** Overhead and profit;

- 10.1.3.2.2** Supervision;
- 10.1.3.2.3** General conditions;
- 10.1.3.2.4** Layout & Mobilization (not more than 1%);
- 10.1.3.2.5 Submittals, samples, shop drawings (not more than 3%);
- 10.1.3.2.6** Bonds and insurance (not more than 2%);
- 10.1.3.2.7** Close-out documentation (not less than 3%);
- 10.1.3.2.8** Demolition;
- 10.1.3.2.9** Installation;
- 10.1.3.2.10** Rough-in;
- 10.1.3.2.11** Finishes;
- 10.1.3.2.12** Testing;
- 10.1.3.2.13** Owner and Maintenance Manuals; and
- 10.1.3.2.14** Punchlist and District acceptance.

#### **10.1.4 Construction Schedule and Phasing Plan**

Developer shall prepare a preconstruction schedule to guide the design team through to bid dates. That schedule shall show the multiple phases and interrelations of design, constructability review, and estimating. Developer shall also prepare a full construction schedule for the Project detailing the construction activities. Developer shall further investigate, recommend and prepare a schedule for the purchase of materials and equipment requiring long lead time procurement, and coordinate the schedule with the early preparation of portions of the Contract Documents by the Architect.

#### **10.1.5 Construction Planning and Bidding**

**10.1.5.1** For all of Developer's activities relating to construction planning and bidding, Developer shall comply with all applicable legal requirements, including but not limited to those set forth in Education Code section 17406.

**10.1.5.2** Consult with District staff in relation to the existing site. Selected developer should make site visits, as needed to review the current site conditions. During this evaluation, Respondent may make recommendations relating to soils investigations and utility locations and capacities, in order to minimize unforeseen conditions.

**10.1.5.3** Attend meetings at the Site with the Architect and the design team as needed.

**10.1.5.4** Provide plan review and constructability services with an emphasis on ensuring that the Project can be completed within the established schedule and within the available budget.

**10.1.5.5** Provide a detailed analysis of all major Project systems with an emphasis on possible value engineering possibilities.

**10.1.5.6** Prepare and distribute specifications and drawings provided by District to facilitate bidding to Developer's subcontractors.

**10.1.5.7** Review the drawings and specifications to eliminate areas of conflict and overlapping in the work to be performed by various subcontractors, and with a view to eliminating change order requests by the Architect or subcontractors.

**10.1.5.8** Conduct pre-bid conferences. Coordinate with District and the Architect in responding to subcontractor questions or providing clarification to all subcontractors.

**10.1.5.9** DSA approved plans shall be utilized to receive subcontractor bids and develop the GMP in accordance with the lease-leaseback agreement forms, including the requirement that Developer engage in competitive bidding for subcontractors for all scopes of work on the Project that constitute more than one half of one percent (0.5%) of the GMP. The District representative shall be present during the receipt of bids from subcontractors.

**10.1.5.10** Each phase GMP shall be presented to the District in the following manner within a three ring binder as well as electronically on an external memory device such as a CD, USB drive, or other comparable device:

**10.1.5.10.1** Cover sheet, signed by Developer indicating the GMP dollar amount with a certification, indicating that the GMP is all inclusive per the plans, specifications and addenda (contract documents). Also include certification stating, "Developer hereby certifies that they have reviewed all subcontractor proposals and whether the subcontractor excluded portions of their scope Developer has included all costs for a complete GMP in accordance with plans, specifications and addenda."

**10.1.5.10.2** A bid tabulation sheet indicating the breakdown by subcontractor/trade along with the appropriate general condition amount, other fees (as submitted with the response to the RFQ/P).

**10.1.5.10.3** Behind the bid tabulation sheet mentioned in subdivision 10.1.5.5.2 above should be a sheet that indicates what is included in the general conditions, which should match what was submitted in the response to the RFQ/P.

**10.1.5.10.4** Copies of all subcontractor bids received divided by trade that corresponds to the final spread sheet with a cover sheet indicating the scope and subcontractors that provided bids as well as those that were asked to bid, but did not submit a proposal. This sheet should have the dollar amounts for each subcontractor that provided a bid with the first column being the proposed subcontractor for that trade.

**10.1.5.10.5** Behind subdivision 10.1.5.5.4 above should be the bids for that trade with the proposed subcontractor bid on top and the other subcontractor bids in descending order based on best value score.

**10.1.5.10.6** The minimum number of bona fide bids from contractors for a specific trade shall be as follows:

**10.1.5.10.6.1** Two (2) bids for subcontracts up to One Hundred Thousand Dollars (\$100,000);

**10.1.5.10.6.2** Three (3) bids for subcontracts over One Hundred Thousand Dollars (\$100,000).

**10.1.5.10.7** If Developer intends to propose to self-perform portion(s) of the construction of the Project, it must receive the District's prior written approval. If approved, Developer must provide its pricing (its bid) to the District twenty-four (24) hours prior to Developer's receipt of Subcontractor bids for those portion(s) of the Work.

**10.1.5.10.7.1** Regardless of the scope of work and not in any way reducing the number of Subcontractor bids based on the other requirements of the Contract Documents, the minimum number of bona fide bids from Subcontractors for scope(s) of Work that Developer is bidding to self-perform shall be Two (2) Bids, not including Developer's pricing/bid.

**10.1.5.11** Produce detailed construction CPM schedules to be incorporated into the Project documents including identification of the Project critical path and agency approvals.

**10.1.5.12** Plan the phases and staging of construction, staging areas, temporary fencing, office trailer placement, access, etc. as required.

**10.1.5.13** Any other services that are reasonable and necessary to control the budget and schedule. List those areas where subconsultants will be required and where the Respondent



has in-house expertise. Provide resumes of persons providing each of these services and for key personnel assigned to the Project.

## **10.2 Schedule**

Preconstruction services outlined above will commence on the date the District issues a Notice to Proceed with Preconstruction Services for the Agreement, and conclude upon approval of the Amendment to the Lease Agreements by District's Board, or termination of this Agreement by either party per the Agreement's terms. Any extension shall be subject to reasonable approval in writing by the Parties.

## **10.3 Ownership of Records**

It is mutually agreed that all materials prepared by Developer under this Agreement shall become the property of the District and Developer shall have no property right therein whatsoever. Developer hereby assigns to District any copyrights associated with the materials prepared pursuant to the Agreement.

## **10.4 Open Book Policy**

There will be an open book policy with Developer and its construction team. District shall have access to all subcontractor bids, value engineering back-up, contingency breakdown & tracking, and Developer fees.

## **10.5 Compensation to Developer for Preconstruction Services**

District agrees to reimburse Developer in the total amount not to exceed [AMOUNT IN WORDS] DOLLARS (\$[AMOUNT IN NUMBERS]), for the performance of services contemplated by this Agreement. Developer shall be paid monthly for the actual fees and allowed costs and expenses for all time and materials required and expended for work requested and specified by the District as completed. Said amount shall be paid within thirty (30) days upon submittal to and verification by the District of a monthly billing statement showing completion of the tasks for that month on a line item basis. In the event Developer and District continue with the lease/leaseback agreements for the development of the Project, this compensation for services rendered will be included as part of the Guaranteed Maximum Price ("GMP") to be paid to Developer by District.

Developer shall be responsible for any and all costs and expenses incurred by Developer, including but not limited to the costs of hiring sub-consultants, contractors and other professionals, review of the Project's Plans and Specifications, review and preparation of necessary documentation relating to the development of the Project, all travel-related expenses, as well as for meetings with District and its representatives, long distance telephone charges, copying expenses, salaries of Developer staff and employees working on the Project, overhead, and any other reasonable expenses incurred by Developer in performance of the services contemplated by this Agreement.

## **10.6 Termination before Construction Phase**

**10.6.1** Before the notice to proceed with the Construction Phase is issued by the District, this Agreement may be terminated at any time without cause by District upon fourteen (14) days written notice to Developer. In the event of

such a termination by District, the District shall pay Developer for all undisputed services performed and expenses incurred per this Agreement, supported by documentary evidence, including, but not limited to, payroll records, invoices from third parties retained by Developer pursuant to this Agreement, and expense reports up until the date of notice of termination plus any sums due Developer for Board-approved extra services. In ascertaining the services actually rendered hereunder up to the date of termination of this Agreement, consideration shall be given to completed work and work in process that would best serve the District if a completed product was presented.

**10.6.2**In the event that the Parties do not reach an agreement on the GMP, this Agreement will be terminated at that time. In the event of such a termination, the District shall pay Developer no more than the not to exceed amount in Section 10.5 above.

## **10.7 Construction Phase**

Developer shall not commence work for which a contractor is required to be licensed in accordance with Article 5 (commencing with Section 7065) of Chapter 9 of Division 3 of the Business and Professions Code and for which Division of the State Architect approval is required can be performed before receipt of the required Division of the State Architect approval.

## **11. Construction of Project**

### **11.1 Construction of Project**

**11.1.1**Developer agrees to cause the Project to be developed, constructed, and installed in accordance with the terms hereof and the Construction Provisions set forth in **Exhibit D**, including those things reasonably inferred from the Contract Documents as being within the scope of the Project and 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 the Contract Time for this Project shall be [days in words] ([days in numbers]) calendar days, commencing with the date upon which the Facilities Lease and the Site Lease are fully executed and delivered to both Parties and ending with completion of the Work which will occur no later than [Date] ("Contract Time"). The Construction Schedule must be approved by the District.

#### **11.1.3 Schedule of Values**

Developer will provide a schedule of values, approved by the District, which will be attached hereto as **Exhibit G** ("Schedule of Values"). The Schedule of Values must be approved by the District.

#### **11.1.4 Liquidated Damages**

Time is of the essence for all work Developer must perform to complete 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 \_\_\_\_\_ Dollars (\$\_\_\_\_\_) 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 Developer under this Facilities Lease. The District's right to assess liquidated damages is as indicated herein and in **Exhibit D**.

11.1.4.3 The time during which the construction of the Project is delayed for cause as hereinafter specified may extend the time of completion for a reasonable time as the District may grant.

#### **11.1.5 Guaranteed Maximum Price**

Developer will cause the Project to be constructed within the GMP as set forth and defined in the GMP provisions 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 or time will be handled as a modification pursuant to the provisions of **Exhibit D**.

#### **11.1.7 Labor Compliance Monitoring and Enforcement by Department of Industrial Relations**

This Project is subject to labor compliance monitoring and enforcement by the Department of Industrial Relations pursuant to Labor Code section 1771.4 and Title 8 of the California Code of Regulations. Developer specifically acknowledges and understands that it shall perform the Work of this Contract while complying with all the applicable provisions of Division 2, Part 7, Chapter 1, of the Labor Code.

## **12. Maintenance**

Following delivery of possession of the Project by Developer to District, the repair, improvement, replacement and maintenance of the Project and the Site shall be at the sole cost and expense and the sole responsibility of the District, subject only to all punch list items and 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, data transmission, 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 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 forty-five (45) days after presentation of proof of payment by Developer.

### **15. Insurance**

#### **15.1 Developer's Insurance**

Developer shall comply with the insurance requirements as indicated here and in **Exhibit D**.

#### **15.1.1 Commercial General Liability and Automobile Liability Insurance**

**15.1.1.1** Developer shall procure and maintain, during the life of the Project, Commercial General Liability Insurance and Automobile Liability Insurance that shall protect Developer, District, its Board Members, employees, agents, Construction Manager(s), Project Manager(s), Project Inspector(s), and Architect(s) from all claims for bodily injury, property damage, personal injury, death, advertising injury, and medical payments arising from, or in connection with, operations under the Project. This coverage shall be provided in a form at least as broad as Insurance Services (ISO) Form CG 00 01 11 88. Developer shall ensure that Products Liability and Completed Operations coverage, Fire Damage Liability coverage, and Automobile Liability coverage including owned, non-owned, and hired automobiles, are included within the above policies and at the required limits, or Developer shall procure and maintain these coverages separately.

**15.1.1.2** Developer's deductible or self-insured retention for its Commercial General Liability Insurance policy shall not exceed five thousand dollars (\$5,000) for deductible or twenty-five

thousand dollars (\$25,000) for self-insured retention, respectively, unless approved in writing by District.

**15.1.1.3** All such policies shall be written on an occurrence form.

## **15.1.2 Excess Liability Insurance**

**15.1.2.1** If Developer's underlying policy limits are less than required, subject to 15.1.2.3 below, Developer may procure and maintain, during the life of the Project, an Excess Liability Insurance Policy to meet the policy limit requirements of the required policies in order to satisfy, in aggregate with its underlying policy, the insurance requirements herein.

**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 Excess Liability Insurance Policy. Any Excess Liability Insurance Policy shall protect Developer, District, its Board Members, employees, agents, Construction Manager(s), Project Manager(s), Project Inspector(s), and Architect(s) in amounts and including the provisions as set forth in **Exhibit D** and/or the Supplementary Conditions (if any), and that complies with all requirements for Commercial General Liability and Automobile Liability and Employers' Liability Insurance.

**15.1.2.3** The District, in its sole discretion, may accept the Excess Liability Insurance Policy that brings Developer's primary limits to the minimum requirements herein.

## **15.1.3 Subcontractor**

Developer shall require its Subcontractor(s), if any, to procure and maintain Commercial General Liability Insurance, Automobile Liability Insurance, and Excess Liability Insurance (if Subcontractor elects to satisfy, in part, the insurance required herein by procuring and maintaining an Excess Liability Insurance Policy) with minimum limits at least equal to the amount required of Developer except where smaller minimum limits are permitted as set forth below.

## **15.1.4 Workers' Compensation and Employer's Liability Insurance**

**15.1.4.1** In accordance with provisions of section 3700 of the California Labor Code, 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 Employer's 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 Employer's 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 on 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 Builder's Risk Insurance: Builder's Risk "All Risk" Insurance**

**15.1.5.1** Developer shall procure and maintain, during the life of this Contract, Builder's 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), sprinkler leakage, civil authority, theft, sonic disturbance, earthquake, flood, collapse, wind, rain, dust, fire, war, terrorism, lightning, smoke, and rioting. 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 Pollution Liability Insurance**

**15.1.6.1** Developer shall procure and maintain Pollution Liability Insurance that shall protect Developer, District, Construction Manager(s), Project Inspector(s), and Architect(s) from all claims for bodily injury, property damage, including natural resource damage, cleanup costs, removal, storage, disposal, and/or use of the pollutant arising from operations under this Facilities Lease, and defense, including costs and expenses incurred in the investigation, defense, or settlement of claims. Coverage shall apply to sudden and/or gradual pollution conditions resulting from the escape or release of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids, or gases, natural gas, waste materials, or other irritants, contaminants, or pollutants, including asbestos. This coverage shall be provided in a form at least as broad as Insurance Services Offices, Inc. (ISO) Form CG 2415, or Developer shall procure and maintain these coverages separately.

**15.1.6.2** Developer warrants that any retroactive date applicable to coverage under the policy shall predate the Effective Date of this Facilities Lease and that continuous coverage will be

maintained or an extended reporting or discovery period will be exercised for a period of three (3) years, beginning from the time that the Work under the Contract is completed.

**15.1.6.3** If Developer is responsible for removing any pollutants from a site, then Developer shall ensure that Any Auto, including owned, non-owned, and hired, are included within the above policies and at the required limits, to cover its automobile exposure for transporting the pollutants from the site to an approved disposal site. This coverage shall include the Motor Carrier Act Endorsement, MCS 90.

#### **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 on the Project, until Developer and its Subcontractor(s) have procured all required insurance and Developer has delivered in duplicate to the District complete endorsements (or entire insurance policies) and certificates indicating the required coverages have been obtained, and the District has approved these documents.

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

**15.1.7.2.1** A clause stating the following, or other language acceptable to the District:

“This policy shall not be canceled and the coverage amounts shall not be reduced until notice has been mailed to District, Architect, and Construction Manager stating date of cancellation by the insurance carrier. Date of cancellation 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 notice will be sent, and length of notice period.

**15.1.7.3** All endorsements, certificates and insurance policies shall state that District, its Board Members, employees and agents, Construction Manager(s), Project Manager(s), Inspector(s) and Architect(s) are named additional insureds under all policies except Workers’ Compensation Insurance and Employers’ Liability Insurance.

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

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

**15.1.7.4** Developer's insurance limit shall apply separately to each insured against whom a claim is made or suit is brought.

**15.1.7.5** No policy shall be amended, canceled, or modified, and the coverage amounts shall not be reduced, until Developer or Developer's broker has provided written notice to District, Architect, and Construction Manager stating date of the amendment, modification, cancellation or reduction, and a description of the change. Date of amendment, modification, cancellation or reduction may not be less than thirty (30) days after date of mailing notice.

**15.1.7.6** Insurance written on a "claims made" basis shall be retroactive to a date that coincides with or precedes Developer's commencement of Work, including subsequent policies purchased as renewals or replacements. Said policy is to be renewed by Developer and all Subcontractors for a period of five (5) years following completion of the Work or termination of this Facilities Lease. Such insurance must have the same coverage and limits as the policy that was in effect during the term of this Facilities Lease, and will cover Developer and all Subcontractors for all claims made.

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

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

**15.1.7.9** All policies shall be written on an occurrence form.

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

**15.1.7.11** The insurance requirements set forth herein shall in no way limit Developer's liability arising out of or relating to the performance of the Work or related activities.

**15.1.7.12** Failure of Developer and/or its Subcontractor(s) to comply with the insurance requirements herein shall be deemed a material breach of the Facilities Lease and constitute a Default by Developer pursuant to this Facilities Lease.



**15.1.8 Insurance Policy Limits**

The limits of insurance shall not be less than the following amounts:

COMMERCIAL GENERAL LIABILITY	Product Liability and Completed Operations, Fire Damage Liability – Split Limit	\$5,000,000 per occurrence; \$10,000,000 in aggregate
AUTOMOBILE LIABILITY - ANY AUTO	Combined Single Limit	\$1,000,000
WORKERS' COMPENSATION		Statutory limits pursuant to State law
EMPLOYER'S LIABILITY		\$1,000,000
BUILDER'S RISK (COURSE OF CONSTRUCTION)		Issued for the value and scope of Work indicated herein.
POLLUTION LIABILITY		\$1,000,000 per claim; \$2,000,000 aggregate

If Developer normally carries insurance in an amount greater than the minimum amounts required by District, that greater amount shall become the minimum required amount of insurance for purposes of the Contract. Therefore, Developer hereby acknowledges and agrees that all insurance carried by it shall be deemed liability coverage for all actions it performs in connection with the Contract.

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The limits of insurance for those subcontractors whose subcontract does not exceed One Million Dollars (\$1,000,000) shall not be less than the following amounts:

COMMERCIAL GENERAL LIABILITY	Product Liability and Completed Operations, Fire Damage Liability – Split Limit	\$2,000,000 per occurrence; \$4,000,000 in aggregate
AUTOMOBILE LIABILITY - ANY AUTO	Combined Single Limit	\$1,000,000
WORKERS' COMPENSATION		Statutory limits pursuant to State law
EMPLOYER'S LIABILITY		\$1,000,000

Notwithstanding anything in this Facilities Lease to the contrary, the above insurance requirements may be modified as appropriate for subcontractors, with District's prior written approval.

## **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, for the benefit of District and Developer, as their interests may appear, maintain 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.

### **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 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 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 and Defense**

**16.1** To the fullest extent permitted by California law, Developer shall indemnify, keep and hold harmless the District, the Architect(s) and Construction Manager(s), their respective consultants, separate contractors, board members, officers, representatives, agents, and employees, in both individual and official capacities ("Indemnitees"), against all suits, claims, injury, damages, losses, and expenses ("Claims"), including but not limited to attorney's fees and costs, caused by, arising out of, resulting from, or incidental to, in whole or in part, the performance of the Work under this Contract by Developer or its Subcontractors, vendors and/or suppliers. However, Developer's indemnification and hold harmless obligation shall be reduced by the proportion of the Indemnitees' and/or Architect's liability to the extent the Claim(s) is/are caused wholly by the active negligence or willful misconduct of the Indemnitees, and/or defects in design furnished by the Architect, as found by a court or arbitrator of competent jurisdiction. This indemnification and hold harmless obligation of Developer shall not be construed to negate, abridge, or otherwise reduce any right or obligation of indemnity that would otherwise exist or arise as to any Indemnitee or other person described herein. This indemnification and hold harmless obligation includes, but is not limited to, any failure or alleged failure by Developer to comply with any law and/or provision of the Contract Documents in strict accordance with their terms, and without limitation, any failure or alleged failure of Developers obligations regarding any stop payment notice actions or liens, including Civil Wage and Penalty Assessments and/or Orders by the DIR.

**16.2** To the furthest extent permitted by California law, Developer shall also defend Indemnitees, at its own expense, including but not limited to attorneys' fees and costs, against all Claims caused by, arising out of, resulting from, or incidental to, in whole or in part, the performance of the Work under this Facilities Lease by Developer, its Subcontractors, vendors, or suppliers. However, without impacting Developer's obligation to provide an immediate and ongoing defense of Indemnitees, Developer's defense obligation shall be reduced by the proportion of the Indemnitees' and/or Architect's liability to the extent caused by the sole negligence, active negligence, or willful misconduct of the Indemnitees, and/or defects in design furnished by the Architect, as found by a court or arbitrator of competent jurisdiction. The District shall have the right to accept or reject any legal representation that Developer proposes to defend the Indemnitees. If any Indemnitee provides its own defense due to failure to timely respond to tender of defense, rejection of tender of defense, or conflict of interest of proposed counsel, Developer shall reimburse such Indemnitee for any expenditures. Developer's defense obligation shall not be construed to negate, abridge, or otherwise reduce any right or obligation of defense that would otherwise exist as to any Indemnitee or other person described herein. Developer's defense obligation includes, but is not limited to, any failure or alleged failure by Developer to comply with any provision of law, any failure or alleged failure to timely and properly fulfill all of its obligations under the Contract Documents in strict accordance with their terms, and without limitation, any failure or alleged failure of Developer's obligations regarding any stop payment notice actions or liens, including Civil Wage and Penalty Assessments and/or Orders by the DIR. Developer shall give prompt notice to the District in the event of any Claim(s).

**16.3** Without limitation of the provisions herein, if Developer's obligation to indemnify and hold harmless the Indemnitees or its obligation to defend Indemnitees as provided herein shall be determined to be void or unenforceable, in whole or in part, it is the intention of the Parties that these circumstances shall not otherwise affect the validity or enforceability of Developer's agreement to indemnify, defend, and hold harmless the rest of the Indemnitees, as provided herein. Further, Developer shall be and remain fully liable on its agreements and obligations herein to the fullest extent permitted by law.

**16.4** Pursuant to Public Contract Code section 9201, the District shall provide timely notification to Developer of the receipt of any third-party Claim relating to this Contract. The District shall be entitled to recover its reasonable costs incurred in providing said notification.

**16.5** In any and all Claims against any of the Indemnitees by any employee of Developer, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, 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 Developer or any Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**16.6** The District may retain so much of the moneys due to Developer as shall be considered necessary, until disposition of any such Claims or until the District, Architect(s) and Construction Manager(s) have received written agreement from Developer that Developer will unconditionally defend the District, the Architect(s)

and Construction Manager(s), their respective officers, agents and employees, and pay any damages due by reason of settlement or judgment.

**16.7** Developer's defense and indemnification obligations hereunder shall survive the completion of Work, including the warranty/guarantee period, and/or the termination of the Contract.

## **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 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 GMP provisions indicated in **Exhibit C** that are then due or past due together with all remaining and succeeding principal payments pursuant to the GMP provisions indicated in **Exhibit C** for the remainder of the original Term. For example, if all of the Project and the Site is taken at the end of the third year of the Term, Developer shall be entitled to receive from the eminent domain award the sum of all principal payments pursuant to the GMP provisions indicated in **Exhibit C** that would have been owing for the fourth year through the end of the Term had there been no taking.

**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 Site is taken permanently under the power of eminent domain and 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 Site is taken permanently, or if all of the Project and the 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 GMP 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 GMP provisions indicated in **Exhibit C**.

## **18. Damage and Destruction**

If, following delivery of possession of all or a portion 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 no longer be required to make any payments required pursuant to the GMP provisions indicated in **Exhibit C** that are then due or past due or any remaining and succeeding principal payments pursuant to the GMP provisions indicated in **Exhibit C** for the remainder of the original Term.

## **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, nor shall Developer have the right to demand, the Lease Payments as indicated in the GMP 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 GMP 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, and that replacement, once completed, shall be substituted in this Facilities Lease by appropriate endorsement; or

**19.3.3** Exercise the District's purchase option to **Exhibit D to the Facilities Lease** as indicated in the GMP provisions indicated in **Exhibit C** to this Facilities Lease.

**19.4** The District shall notify 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 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 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 GMP 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.

### **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 the 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. Termination, Default And Suspension**

### **22.1 Termination; Lease Terminable Only As Set Forth Herein**

22.1.1 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 necessary payments pursuant to the GMP provisions 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 contractor; 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 GMP 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.

22.1.2 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.

22.1.3 Following completion of the Project, 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.

22.1.4 District acknowledges that Developer may assign an interest in some or all of the necessary payments pursuant to the GMP 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.

## **22.2 District's Request for Assurances**

If District at any time reasonably believes Developer is or may be in default under this Contract, District may in its sole discretion notify Developer of this fact and request written assurances from Developer of performance of Work and a written plan from Developer to remedy any potential default under the terms of this Contract that the District may advise Developer of in writing. Developer shall, within ten (10) calendar days of District's request, deliver a written cure plan that meets the District's requirements in its request for assurances. Developer's failure to provide such written assurances of performance and the required written plan, within ten (10) calendar days of request, will constitute a material breach of this Contract sufficient to justify termination for cause.

## **22.3 District's Right to Terminate Developer for Cause**

### **22.3.1 Grounds for Termination**

The District, in its sole discretion, without prejudice to any other right or remedy, may terminate the Site Lease and Facilities Lease and/or terminate Developer's right to perform the work of the Facilities Lease based upon any of the following:

**22.3.1.1** Developer refuses or fails to execute the Work or any separable part thereof; or

**22.3.1.2** Developer fails to complete said Work within the time specified or any extension thereof; or

**22.3.1.3** Developer persistently fails or refuses to perform Work or provide material of sufficient quality as to be in compliance with the Facilities Lease; or

**22.3.1.4** Prior to completion of the Project, Developer is adjudged a bankrupt, files a petition for relief as a debtor, or a petition is filed against Developer without its consent, and the petition not dismissed within sixty (60) days; or

**22.3.1.5** Prior to the completion of the Project, Developer makes a general assignment for the benefit of its creditors, or a receiver is appointed on account of its insolvency; or

**22.3.1.6** Developer persistently or repeatedly refuses and/or fails, except in cases for which extension of time is provided, to supply enough properly skilled workers or proper materials to complete the Work in the time specified; or

**22.3.1.7** Developer fails to make prompt payment to Subcontractors, or for material, or for labor; or

**22.3.1.8** Developer persistently disregards laws, or ordinances, or instructions of District as indicated in **Exhibit D**, or otherwise in violation of **Exhibit D**; or

**22.3.1.9** Developer fails to supply labor, including that of Subcontractors, that is sufficient to prosecute the Work or that can work in harmony with all other elements of labor employed or to be employed on the Work; or

**22.3.1.10** Developer or its Subcontractor(s) is/are otherwise in breach, default, or in substantial violation of any provision of this Facilities Lease, including but not limited to a lapse in licensing or registration.

## **22.3.2 Notification of Termination**

**22.3.2.1** Upon the occurrence at District's sole determination of any of the above conditions, or upon Developer's failure to perform any material covenant, condition or agreement in this Facilities Lease, District may, without prejudice to any other right or remedy, serve written notice upon Developer and its Surety of District's termination of this Facilities Lease and/or Developer's right to perform the Work of this Facilities Lease. This notice will contain the reasons for termination.

**22.3.2.2** Unless, within fifteen (15) days after the service of the notice, any and all condition(s) shall cease, and any and all violation(s) shall cease, or arrangement satisfactory to District for the correction of the condition(s) and/or violation(s) be made, this



Facilities Lease and the Site Lease shall cease and terminate; provided, however, if the failure stated in the notice cannot be corrected within fifteen (15) days after the service of notice, District may consent to an extension of time, provided Developer instituted and diligently pursued corrective action within the applicable fifteen (15)-day period and until the violation is corrected. Upon District determination, Developer shall not be entitled to receive any further payment until the entire Work is finished.

**22.3.2.3** Upon Termination, District may immediately serve written notice of tender upon Surety whereby Surety shall have the right to take over and perform this Facilities Lease only if Surety:

**22.3.2.3.1** Within three (3) days after service upon it of the notice of tender, gives District written notice of Surety's intention to take over and perform this Facilities Lease; and

**22.3.2.3.2** Commences performance of this Facilities Lease within three (3) days from date of serving of its notice to District.

**22.3.2.4** Surety shall not utilize Developer in completing the Project if the District notifies Surety of the District's objection to Developer's further participation in the completion of the Project. Surety expressly agrees that any developer which Surety proposes to fulfill Surety's obligations is subject to District's approval.

**22.3.2.5** If Surety fails to notify District or begin performance as indicated herein, District may take over the Work and execute the Work to completion by any method it may deem advisable at the expense of Developer and/or its Surety. Developer and its Surety shall be liable to District for any excess cost or other damages the District incurs thereby. Time is of the essence in this Facilities Lease. If the District takes over the Work as herein provided, District may, without liability for so doing, take possession of and utilize in completing the Work all materials, appliances, plan, and other property belonging to Developer as may be on the Site of the Work, in bonded storage, or previously paid for.

### **22.3.3 Effect of Termination**

**22.3.3.1** If District terminates the Site Lease and the Facilities Lease pursuant to this section, the Site and any improvements built upon the 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 GMP provisions indicated in **Exhibit C**, less any damages incurred by District due to Developer's default, acts, or omissions.

**22.3.3.2** The District shall retain all rights it possesses pursuant to this Facilities Lease including, without limitation.

**22.3.3.2.1** The right to assess liquidated damages due because of any project delay; and

**22.3.3.2.2** All rights the District holds to demand performance pursuant to Developer's required performance bond.

**22.3.3.3** Developer shall, only if ordered to do so by the District, immediately remove from the Site all or any materials and personal property belonging to Developer that have not been incorporated in the construction of the Work, or which are not in place in the Work. The District retains the right, but not the obligation, to keep and use any materials and personal property belonging to Developer that have not been incorporated in the construction of the Work, or which are not in place in the Work. Developer and its Surety shall be liable upon the performance bond for all damages caused the District by reason of Developer's failure to complete the Work under this Facilities Lease.

**22.3.3.4** In the event that the District shall perform any portion of, or the whole of the Work, pursuant to the provisions of the General Conditions, the District shall not be liable nor account to Developer in any way for the time within which, or the manner in which, the Work is performed by the District or for any changes the District may make in the Work or for the money expended by the District in satisfying claims and/or suits and/or other obligations in connection with the Work.

**22.3.3.5** In the event termination for cause is determined to have not been for cause, the termination shall be deemed to have been a termination for convenience effective as of the same date as the purported termination for cause.

**22.3.3.6** In the event that the Site Lease and Facilities Lease are terminated for any reason, no allowances or compensation will be granted for the loss of any anticipated profit by Developer or any impact or impairment of Developer's bonding capacity.

**22.3.3.7** If the expense to the District to finish the Work exceeds the unpaid Guaranteed Maximum Price, Developer and Surety shall pay difference to District within twenty-one (21) days of District's request. District may apply any amounts otherwise due to Developer to this difference.

**22.3.3.8** The District shall have the right (but shall have no obligation) to assume and/or assign to a replacement contractor or construction manager, or other third party who is qualified and has sufficient resources to complete the Work, the rights of Developer under its subcontracts with any or all Subcontractors. In the event of an assumption or assignment by the District, no Subcontractor

shall have any claim against the District or third party for Work performed by Subcontractor or other matters arising prior to termination of the Facilities Lease. The District or any third party, as the case may be, shall be liable only for obligations to the Subcontractor arising after assumption or assignment. Should the District so elect, Developer shall execute and deliver all documents and take all steps, including the legal assignment of its contractual rights, as the District may require, for the purpose of fully vesting in the District the rights and benefits of its Subcontractors under Subcontracts or other obligations or commitments. Developer must include this assignment provision in all of its Facilities Leases with its Subcontractors.

**22.3.3.9** All payments due Developer hereunder shall be subject to a right of offset by the District for expenses, damages, losses, costs, claims, or reimbursements suffered by, or due to, the District as a result of any default, acts, or omissions of Developer.

**22.3.3.10** The foregoing provisions are in addition to and not in limitation of any other rights or remedies available to District.

## **22.4 Termination of Developer for Convenience**

**22.4.1** District in its sole discretion may terminate the Facilities Lease in whole or in part upon three (3) days written notice to Developer.

**22.4.2** Upon notice, Developer shall:

**22.4.2.1** Cease operations as directed by the District in the notice;

**22.4.2.2** Take necessary actions for the protection and preservation of the Work as soon as possible; and

**22.4.2.3** Terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

**22.4.3** Within 30 days of the notice, Developer shall submit to the District a payment application for the actual cost for labor, materials, and services performed, including all Developer's and Subcontractor(s)' mobilization and/or demobilization costs, that is unpaid. Developer shall have no claims against the District except for the actual cost for labor, materials, and services performed that adequately documented through timesheets, invoices, receipts, or otherwise. District shall pay all undisputed invoice(s) for work performed until the notice of termination.

**22.4.4** If Developer objects to the termination for convenience, the District retains the right to all the options available to the District under a termination for cause.

## **22.5 Developer Remedies Upon District Default**

### **22.5.1 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,” whenever they are used as to the District in the Site Lease or this Facilities Lease, shall only mean one or more of the following events:

**22.5.1.1** Failure by the District to pay payments required pursuant to the GMP provisions in **Exhibit C**, and the continuation of this failure for a period of forty-five (45) days.

**22.5.1.2** 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 withhold its consent to an extension of time if corrective action is instituted by the District within the applicable period and diligently pursued until the default is corrected.

## **22.5.2 Remedies on District’s Default**

If there has been an Event of Default on the District’s part, Developer may exercise any and all remedies 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 GMP provisions in **Exhibit C** or otherwise declare those payments not then past due to be immediately due and payable.

**22.5.2.1** Developer may rescind its leaseback of the Project to the District under this Facilities Lease and re-rent the Project and Site to another lessee for the remaining Term for no less than the fair market value for leasing the Project and Site, which shall be:

**22.5.2.1.1** An amount determined by a mutually-agreed upon appraiser; or

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

**22.5.2.2** District’s obligation to make the payments required pursuant to the GMP provisions indicated in **Exhibit C** shall be:

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

**22.5.2.2.2** Decreased by the amount of rent Developer receives in re-letting the Project and Site.

**22.5.2.3** District agrees that the terms of this Facilities Lease constitute full and sufficient notice of the right of Developer to re-rent the Project and Site in the Event of Default without effecting a surrender of this Facilities Lease, and further agrees that no acts of Developer in 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 and Site shall vest in Developer as indicated herein.

### **22.5.3 District's Continuing Obligation**

Unless there has been damage, destruction, a Taking, or Developer has acted, failed to act, or is in default as indicated above providing District with the right to terminate for cause, the District shall continue to remain liable for the payments required pursuant to the GMP provisions in **Exhibit C** and those amounts shall be payable to Developer at the time and in the manner therein provided.

### **22.5.4 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, it shall not be necessary to give any notice, other than such notice as may be required in this Article or by law.

## **22.6 Emergency Termination Pursuant to Public Contracts Act of 1949**

**22.6.1** This Facilities Lease 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.

### **22.6.1.1** 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.

### **22.6.1.2** 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.

**22.6.2** Compensation to 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 may control. The District, at its sole discretion, may adopt the Schedule of Values Price as the value of the work done or any portion thereof.

## **22.7 Suspension of Work**

**22.7.1** District in its sole discretion may suspend, delay or interrupt the Work in whole or in part for such period of time as the District may determine upon three (3) days written notice to Developer.

**22.7.1.1** An adjustment may be made for changes in the cost of performance of the Work caused by any suspension, delay or interruption. No adjustment shall be made to the extent:

**22.7.1.1.1** That performance is, was or would have been so suspended, delayed or interrupted by another cause for which Developer is responsible; or

**22.7.1.1.2** That an equitable adjustment is made or denied under another provision of the Site Lease or the Facilities Lease; or

**22.7.1.1.3** That the suspension of Work was the direct or indirect result of Developer's failure to perform any of its obligations hereunder.

**22.7.1.1.4** The delay could not have been avoided or mitigated by Developer's reasonable diligence.

**22.7.1.2** Any adjustments in cost of performance may have a fixed or percentage fee as provided in the section on Format for Proposed Change Order in **Exhibit D**. This amount shall be full compensation for all Developer's and its Subcontractor(s)' changes in the cost of performance of the Facilities Lease caused by any such suspension, delay or interruption.

## **23. Limitation of District Liability**

District's financial obligations under this Contract shall be limited to the payment of the compensation provided in this Contract. Notwithstanding any other provision of this Contract, in no event shall District be liable, regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but

not limited to, lost profits or revenue, lost bonding capacity, arising out of or in connection with this Contract for the services performed in connection with this Contract.

**24. 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:**

Berkeley Unified School District  
15 Parker Street  
Berkeley, CA 94710  
ATTN: [Name, Title]

**If to Developer:**

[Developer]  
[Address]  
Attn: [Name, Title]

**With a copy to:**

Dannis Woliver Kelley  
750 B Street, Suite 2600  
San Diego, CA 92101  
ATTN: [Name]

Developer and 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 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, that holding shall not invalidate or render unenforceable any other provision hereof, unless elimination of the 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 GMP provisions 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 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, the approval or 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 the County within which the 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 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 and Exhibits Incorporated**

The Recitals set forth at the beginning of this Facilities Lease and the attached Exhibits 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. 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:

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

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

Berkeley Unified School District

[Developer]

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

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

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

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

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

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

**EXHIBIT A**

**LEGAL DESCRIPTION OF SITE**

**Attached is the Legal Description for:**

[Name of] Project

[Address]

APN: \_\_\_\_\_

**<INSERT>**

**EXHIBIT B**

**DESCRIPTION OF PROJECT**

**Attached is a map or diagram of the Site that is subject to this Facilities Lease and upon which Developer will construct the Project.**

**<INSERT>**

**EXHIBIT C**

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

Attached are the terms and provisions related to Site Lease payments, the Facilities Lease, the Guaranteed Maximum Price and other related cost, funding, and payment provisions.

**EXHIBIT D**

**GENERAL CONSTRUCTION PROVISIONS**

Attached are the general construction terms and conditions for the Project.

**EXHIBIT D-1**

**SPECIAL CONDITIONS**

Attached are the special terms and conditions for the Project.

**EXHIBIT E**

**MEMORANDUM OF COMMENCEMENT DATE**

This MEMORANDUM OF COMMENCEMENT DATE is dated \_\_\_\_\_, 20\_\_, and is made by and between \_\_\_\_\_ ("Developer"), as Lessor, and the Berkeley Unified School District ("District"), as Lessee.

1. Developer and District have previously entered into a Facilities Lease dated as of \_\_\_\_\_, 20\_\_, (the "Lease") for the leasing by Developer to District of the completed Project in [City], 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 for the Lease Payments under the Facilities Lease commenced on \_\_\_\_\_, 20\_\_ 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\_\_

Berkeley Unified School District

[Developer]

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

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

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

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

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

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

**EXHIBIT F**

**CONSTRUCTION SCHEDULE**

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

[To Be Attached.]



**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.

[To Be Attached.]

**EXHIBIT H**

**PROJECT LABOR AGREEMENT**

**Attached is the Project Labor Agreement applicable to this Project.**

## **BERKELEY UNIFIED SCHOOL DISTRICT PROJECT LABOR AGREEMENT**

The purpose of this Agreement is to promote efficiency of construction operations during the Berkeley Unified School District Measure I New Construction and Modernization Projects (“Projects”) as defined herein, and to provide for peaceful settlement of labor disputes and grievances without strikes or lockouts, thereby promoting the public interest in assuring the timely and economical completion of the Projects, while also helping to increase training and employment opportunities for the District’s students in the construction trades through apprenticeship and pre-apprentice programs as the students graduate from the District’s schools.

WHEREAS, the timely and successful completion of the Projects is of the utmost importance to the Berkeley Unified School District (“District”) to meet the educational needs of the District’s students and to avoid increased costs resulting from delays in construction; and

WHEREAS, large numbers of workers of various skills will be required in the performance of the construction work, including those to be represented by the unions affiliated with the Building and Construction Trades Council of Alameda County (“Unions”) and any other labor organization which is signatory to this Agreement employed by contractors and subcontractors who are signatory to this Agreement; and

WHEREAS, it is recognized that on projects of this magnitude with multiple contractors and bargaining units on the job site at the same time over an extended period of time, the potential for work disruption is substantial without an overriding commitment to maintain continuity of work; and

WHEREAS, the interests of the general public, the District, the Unions and Contractor/Employer(s) would be best served if the construction work proceeded in an orderly manner without disruption because of strikes, sympathy strikes, work stoppages, picketing, lockouts, slowdowns or other interferences with work; and

WHEREAS, the Contractor/Employers and the Unions desire to mutually establish and stabilize wages, hours and working conditions for the workers employed on the Projects by the Contractor/Employer(s), and further, to encourage close cooperation among the Contractor/Employer(s) and the Union(s) to the end that a satisfactory, continuous and harmonious relationship will exist among the parties to this Agreement; and

WHEREAS, the Agreement is not intended to replace, interfere, abrogate, diminish or modify existing local or national collective bargaining agreements in effect during the duration of the Projects, insofar as a legally binding agreement exists between the Contractor/Employer(s) and the affected Union(s) except to the extent that the provisions of this Agreement are inconsistent with said collective bargaining agreements, in which event, the provisions of this Agreement shall prevail; and

WHEREAS, the contracts for construction work on the Projects will be awarded in accordance with the applicable provisions of the Public Contract Code, Education Code and other applicable California law; and

WHEREAS, all of the funding for the construction of the Projects will come from Measure I, passed by the Berkeley residents, and paid for by the Measure I special tax on

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 1 of 22

the properties owned by Berkeley residents, in contrast to typical California school projects, which are funded through a balance of local and State funds; and

WHEREAS, the District has the absolute right to select the lowest responsive and responsible bidder for the award of the construction contracts on the Projects, or to reject all bid proposals, or to use other legal project delivery methodologies; and

WHEREAS, the District places high priority upon the development of comprehensive programs for the recruitment, training and employment of local area residents and has identified the need to prepare its students for lifelong careers and continuing education, recognizing the ability of local apprenticeship programs to provide meaningful and sustainable careers in the building and construction industry; and

WHEREAS, the parties signatory to this Agreement pledge their full good faith and trust to work towards a mutually satisfactory completion of the Projects;

NOW, THEREFORE, IT IS AGREED BETWEEN AND AMONG THE PARTIES HERETO, AS FOLLOWS:

## **ARTICLE 1. DEFINITIONS**

1.1     “Agreement” means Project Labor Agreement.

1.2     “District” means the Berkeley Unified School District, its employees, agents, and administrative staff under its Superintendent.

1.3     “Contractor/Employer(s)” means any individual, firm, partnership or corporation, or combination thereof, including joint ventures, which is an independent business enterprise and enters into a contract with the District not excluded in this Agreement or any of its contractors or subcontractors of any tier, with respect to the construction of any part of the Projects under contract terms and conditions approved by the District and which incorporate the Agreement.

1.4     “Construction Contracts” means the public works contracts not excluded in this Agreement which will be signed by the District and which are necessary to complete the Projects.

1.5 "Projects" is defined to include all phases of the construction of new facilities and upgrading and repair to all existing facilities covered in construction contracts executed by the District and that are covered by this Agreement in Section 2.2.

1.6 "Union" or "Unions" means the Building and Construction Trades Council of Alameda County, AFL-CIO ("Council") and any other labor organization signatory to this Agreement, acting in their own behalf and on behalf of their respective affiliates and member organizations whose names are subscribed hereto and who have through their officers executed this Agreement ("Signatory Unions").

1.7 "Project Manager" means the person(s) or business entity(ies) designated by the District to oversee all phases of construction on the Projects and to oversee the

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 2 of 22

implementation of this Agreement and who works under the guidance of the District's Authorized Representative.

1.8 "Chief Facilities Officer" means the Chief Facilities Officer for the Berkeley Unified School District.

1.9 "Master Agreement" means the Master Collective Bargaining Agreement of each craft Union signatory hereto.

1.10 "Berkeley Resident" for purposes of this Agreement means any individual who at any time during the Projects' construction can certify through a utility bill, or other similar means acceptable to the parties to this Agreement, that the individual resided within either the boundaries of the Berkeley Unified School District or the Berkeley City Limits both on the date of such certification and the effective date of this Agreement.

1.11 "District Graduate" is a person who has graduated from the Berkeley Unified School District.

1.12 "First Period Apprentice" is a first period apprentice who is enrolled in a State of California approved apprenticeship program that is a joint labor-management apprentice program.

1.13 "General Contractor" means the entity with overall project schedule responsibility, such as a General Contractor, Construction Manager, Lease-Leaseback partner, Prime Contractor, etc.

1.14 "Allocated" regarding project funding means the point in time in which a project is defined enough to where a preliminary budget is created and established in the Measure I program budget tracking system managed by the Program Manager.

**ARTICLE 2.**  
**SCOPE OF AGREEMENT**

2.1 Parties: The Agreement shall apply and is limited to all Contractors/Employer(s) performing construction contracts on the Projects, the District and the Building and Construction Trades Council of Alameda County, AFL-CIO (“Council”) and any other labor organization signatory to this Agreement, acting in their own behalf and on behalf of their respective affiliates and member organizations whose names are subscribed hereto and who have through their officers executed this Agreement (“Signatory Unions”). It is agreed that liability under this Agreement is several and not joint.

2.2 Project Description:

2.2.1 The District will apply the Agreement as a contract specification to the award of construction contracts identified by the District for the Project, which are those construction contracts funded in whole or in part by Measure I General Obligation

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 3 of 22

bonds, and which were let for bid, or for which RFQ’s or RFP’s were issued, after the date of this Agreement. Construction projects include those that provide for the construction of new facilities, the demolition of facilities or the renovation of current facilities.

2.2.2 Exempt Work. However, the Parties acknowledge that the District may utilize five percent (5%) of Measure I proceeds under a special program to be established by the District and the City of Berkeley to facilitate a transition for emerging Berkeley businesses to succeed in performing work under the Project and to assist the District in making a transition to utilization of the Agreement (“Exempt Work”). The District will ensure that no more than ten percent (10%) of the work of any craft be executed under the Exempt Work, and the Unions agree that they will not undertake any strike or work stoppage against a contractor performing work at a District site under this provision. Either Party to the agreement can call to meet and confer regarding the implementation of this section 2.2.2.

2.3 Project Labor Disputes: All project labor disputes involving the application or interpretation of a Master Agreement to which a signatory Contractor/Employer(s) and a signatory Union are parties shall be resolved pursuant to the resolution procedures of the Master Agreement. All disputes relating to the interpretation or application of the Project Stabilization Agreement shall be subject to resolution by the Joint Administrative Committee and the grievance arbitration procedure set forth in Article 13.

## 2.4 Covered Work:

2.4.1 This Agreement covers, without limitation, all on-site construction, demolition, alteration, painting or repair of buildings, structures, landscaping, temporary fencing and other works and related activities for the Projects that is within the craft jurisdiction of one of the Unions and that is part of the Projects, including, without limitation, pipelines, site preparation, construction survey work, demolition of existing structures and all construction, demolition or improvements required to be performed as a condition of approval by any public agency. This scope of work includes all soils and materials testing and inspection where such testing and inspection is a classification in which a prevailing wage determination has been published.

2.4.2 This Agreement shall apply to any start-up, calibration, performance testing, repair, maintenance, operational revisions to systems and/or subsystems performed after Completion unless it is performed by District Employees.

2.4.3 The Projects include work necessary for the Projects and/or in temporary yards or areas adjacent to and dedicated to the Projects, and at any batch plant(s) constructed or used solely to supply materials to the Projects, when those sites are dedicated exclusively to the Projects. This Agreement covers all on-site fabrication work over which the District, Contractor(s) or subcontractor(s) possess the right of control (including work done for the Projects in any temporary yard or area established for the Projects.) Additionally, it is agreed hereby that any off-site work, including

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 4 of 22

fabrication necessary for the Projects defined herein, that are covered by a current Schedule A Agreement or local addenda to a National Agreement of the applicable Union(s) that is in effect as of the execution date of this Agreement.

2.4.4 The furnishing of supplies, equipment or materials which are stockpiled for later use shall in no case be considered subcontracting. Construction trucking work, such as the delivery of ready-mix, asphalt, aggregate, sand or other fill material which are directly incorporated into the construction process as well as the off-hauling of debris and excess fill material and/or mud, shall be covered by the terms and conditions of this Agreement, to the fullest extent provided by law and by prevailing wage determinations of the California Department of Industrial Relations. Employers, including brokers, of persons providing construction trucking work shall provide certified payroll records to the District within ten (10) days of written request or as required by bid specifications.

2.4.5 The on-site installation or application of all items shall be performed by the craft having jurisdiction over such work as set forth under the provisions of this Agreement; provided, however, it is recognized that installation of specialty items which may be furnished by the owner of the Project or a Contractor shall be performed by construction persons employed under this Agreement who may be

directed by other personnel in a supervisory role; provided, however, in limited circumstances requiring special knowledge of the particular item(s), may be performed by construction persons of the vendor or other companies where necessary to protect a manufacturer's warranty. The issue of whether it is necessary to use construction persons of the vendor or other companies to protect the manufacturer's warranty shall be subject to the grievance and arbitration clause of this Agreement.

2.5 Work covered by the Project Stabilization Agreement within the craft jurisdiction of the Elevator Constructors will be performed under the terms of the National Agreement of the International Union of Elevator Constructors, except that Articles 4, 13, and 14 of the Project Labor Agreement shall prevail and be applied to such work.

2.6 Exclusions. The following shall be excluded from the scope of this Agreement.

2.6.1 Work that has been historically performed by public utilities is not intended to be covered by this Agreement even if such work is funded all or in part by local bond funds.

2.6.2 The award of construction contracts funded in whole by Measure AA General Obligation bonds, or funded in whole by any currently existing General Obligation bonds other than those for Measure I.

2.6.3 The Exempt Work identified in section 2.2.2 of this Agreement.

2.6.4 Work, independent of job-site construction work contracts, performed by the District related to the purchase or lease of specialized equipment and

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 5 of 22

work performed by manufacturers' representatives, office equipment vendors, or District personnel.

2.6.5 All off-site manufacture, warehousing and handling of materials, equipment or machinery except when covered by prefabrication provisions included in a Schedule A agreement on the effective date of this Agreement.

2.6.6 All employees of the design team or other consultants to the District not performing craft or manual labor within the scope of this Agreement.

2.6.7 Off-site maintenance of leased equipment and onsite supervision of such work.



2.6.8 The Agreement shall not apply to a Contractor/Employer's

executives, managerial employees, engineering employees and supervisors (except those covered by existing building and construction trades collective bargaining agreements), and office and clerical employees.

2.6.9 The District shall not be required to comply with this Agreement for any work performed with its own forces as permitted by the Public Contract Code and Education Code.

**ARTICLE 3.  
EFFECT OF AGREEMENT**

3.1 By executing the Agreement, the Unions and the District agree to be bound by each and all of the provisions of the Agreement.

3.2 By accepting the award of a Construction Contract for the Projects, whether as contractor or subcontractor, the Contractor/Employer agrees to be bound by each and every provision of the Agreement and agrees that it will evidence its acceptance prior to the commencement of work by executing the Letter of Assent in the form attached hereto as Addendum A.

3.3 At the time that any Contractor/Employer enters into a subcontract with any subcontractor providing for the performance of the Construction Contract, the Contractor/Employer(s) shall provide a copy of this Agreement, as it may from time to time be modified, to said subcontractor and shall require the subcontractor as a part of accepting an award of a construction subcontract to agree in writing to be bound by each and every provision of this Agreement prior to the commencement of work. This Agreement shall only be binding on the signatory parties hereto and shall not apply to the parents, affiliates, subsidiaries, or other ventures of any such party.

**ARTICLE 4.  
WORK STOPPAGES, STRIKES, SYMPATHY STRIKES AND LOCKOUTS**

4.1 The Unions, District and Contractor/Employers covered by the Agreement agree that for the duration of the Projects:

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 6 of 22

4.1.1 There shall be no strikes, sympathy strikes, work stoppages, picketing, hand billing or otherwise advising the public that a labor dispute exists, or slowdowns of any kind, for any reason, by the Unions or employees employed on the Projects, at the job site of the Projects or at any other facility of District because of a dispute on the Projects. Disputes arising between the Unions and Contractor/Employers on other District projects are not governed by the terms of the Agreement or this Article.

4.1.2 As to employees employed on the Projects, there shall be no lockout of any kind by a Contractor/Employer covered by the Agreement.

4.1.3 If a master collective bargaining agreement between a Contractor/Employer and the Union expires before the Contractor/Employer completes the performance of the Construction Contract and the Union or Contractor/Employer gives notice of demands for a new or modified master collective bargaining agreement, the Union agrees that it will not strike the Contractor/Employer on said contract for work covered under this Agreement and the Union and the Contractor/Employer agree that the expired master collective bargaining agreement shall continue in full force and effect for work covered under this Agreement until a new or modified master collective bargaining agreement is reached between the Union and Contractor/Employer. If the new or modified master collective bargaining agreement reached between the Union and Contractor/Employer provides that any terms of the master collective bargaining agreement shall be retroactive, the Contractor/Employer agrees to comply with any retroactive terms of the new or modified master collective bargaining agreement which are applicable to employees who were employed on the projects during the interim with retroactive payment due within seven (7) days of the effective date of the modified Master Agreement.

4.2 In the case of nonpayment of wages and trust fund contributions on the Projects, the Union shall give the District and the Contractor/Employer(s) 5 business day notice of the intent when nonpayment of trust funds has occurred and three (3) business days notice when nonpayment of wages has occurred or when paychecks being tendered to a financial institution normally recognized to honor such paychecks will not honor such paycheck as a result of insufficient funds, of the intent to withhold labor from the Contractor/Employer(s)' or their subcontractor's workforce, during which time the Contractor/Employer shall have the opportunity to correct the default. In this instance, a Union's withholding of labor (but not picketing) from an Contractor/Employer who has failed to pay his/its fringe benefit contributions or failed to meet his/its weekly payroll shall not be considered a violation of this Article.

4.3 Any party to this Agreement shall institute the following procedure, prior to invoking any other action at law or equity, when a breach of this Article is alleged to have occurred:

4.3.1 A party invoking this procedure shall notify, by email, facsimile or telephone, the party alleged to be in violation, the District representative, and the Building and Construction Trades Council of Alameda County and the involved local Union if a Union is alleged to be in violation.

4.3.2 Upon receipt of said notice, the recipient party shall notify William Riker, as the designated arbitrator, or, Jerrilou Cossack, as the designated alternate arbitrator under this procedure. In the event that the designated arbitrator is unavailable at any time, the designated alternate arbitrator will be contacted. If neither is available, then a selection shall be made from the list of arbitrators in Article 13.2. The designated arbitrator named above or his/her alternate will designate a place for, schedule and will convene a hearing within twenty-four (24) hours if it is contended that the violation still exists. It is further understood, that the Joint Administrative Subcommittee (defined in Article 13.2), shall review the designated arbitrators named above, prior to the award of the first construction contract, and thereafter annually. The purpose of this review is to either confirm or re-designate the arbitrators from the list of arbitrators in Article 13.2.

4.3.3 The Arbitrator shall notify the parties by facsimile or telephone of the place and time for the hearing. Said hearing shall be completed in one session, which, with appropriate recesses at the arbitrator's discretion, shall not exceed twenty-four (24) hours unless otherwise agreed upon by all parties. A failure of any party to attend said hearings shall not delay the hearing of evidence or the issuance of any award by the arbitrator. The sole issue at the hearing shall be whether or not a violation of Article 4, Section 4.1 of the Agreement has occurred. The Arbitrator shall retain jurisdiction to determine compliance with this Article and to establish the appropriate sum of damages, which shall not be less than one thousand dollars (\$1,000.00) or more than fifteen thousand dollars (\$15,000.00) for each shift.

4.3.4 The award shall be issued in writing within three (3) hours after the close of the hearing, and may be issued without a written opinion. If any party desires a written opinion, one shall be issued within fifteen (15) days, but its issuance shall not delay compliance with or enforcement of the award. The arbitrator may order cessation of the violation of this Article and other appropriate relief and such award shall be served on all parties by hand or registered mail upon issuance.

4.3.5 Such award may be enforced by any Court of competent jurisdiction upon the filing of this Agreement and all other relevant documents referred to above in the following manner. Written notice of the filing of such enforcement proceedings shall be given to the other party. In the proceeding to obtain a temporary order enforcing the arbitrator's award as issued under Section 4.2(4) of this Article, all parties waive the right to a hearing and agree that such proceedings may be ex parte. Such agreement does not waive any party's right to participate in a hearing for a final order or enforcement. The Court's order or orders enforcing the arbitrator's award shall be served on all parties by hand or delivered by certified mail.

4.3.6 Any rights created by statute or law governing arbitration proceedings inconsistent with the above procedure or which interfere with compliance are waived by the parties.

4.3.7 The fees and expenses of the arbitrator shall be divided equally between the parties.

4.3.8 If, after final order by any Court of competent jurisdiction, the offending party continues to breach the terms of Article 4 of this Agreement, the non-offending party shall have the option to recover monetary damages associated with the breaching party's failure to comply with the Agreement and court order, including but not limited to delay damages and escalation costs.

#### **ARTICLE 5. PRECONSTRUCTION CONFERENCE**

5.1 A pre-construction conference shall be held prior to the commencement of the Construction Contract. Such conference shall be attended by a representative each from the participating Contractor/Employer(s), including all subcontractors, Union(s) and the Project Manager. All efforts will be made to hold the pre-job conference in sufficient time to ensure all parties the ability to properly raise and resolve any issue that may arise out of such meeting, with a goal that such conferences will be held at least 7 days before the work commences. All meetings shall be held either at the District's offices at 1720 Oregon Street, Berkeley, CA or at the offices of the Building Trades Council of Alameda County, 8400 Enterprise Way, Oakland, CA 94621.

#### **ARTICLE 6. NO DISCRIMINATION**

6.1 The Contractor/Employer(s) and Union(s) agree not to engage in any form of discrimination on the ground or because of race, color, creed, national origin, ancestry, age, sex, sexual orientation, disability or Acquired Immune Deficiency Syndrome or AIDS Related Condition (AIDS/ARC), or any other basis made illegal by law against any employee, or applicant for employment, on the Projects.

#### **ARTICLE 7. UNION SECURITY**

7.1 The Contractor/Employer(s) recognize the Union(s) as the sole bargaining representative of all craft employees working within the scope of this Agreement.

7.2 No employee covered by this Agreement can be required to join any Union as a condition of being first employed on Projects. Each employee covered by this Agreement shall be subject to the Union's valid Union security provisions contained in the Schedule A of the craft in which he is employed; provided however, that "core workforce" employees as defined in Article 8.1 and employees employed pursuant to Article 8.6 may, at their option, refrain from joining a Union as may otherwise be

required by such Union security provision; provided however, that such employees shall nevertheless be required, for the period during which they are performing work under the Agreement, to pay such monthly dues, service dues, "working dues" or administrative dues as are uniformly required of employees working under this Agreement and subject to the full Union security provisions of the applicable Schedule A.

7.3 All employees who are employed by the Contractor/Employer(s) on the Projects shall, as a condition of employment, on or before the eighth (8th) day of

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 9 of 22

consecutive or cumulative employment on a Construction Contract subject to this Agreement, be responsible for the payment of the applicable monthly working dues and any associated fees uniformly required for union membership in the local union which is signatory to this Agreement. Further, there is nothing in this Agreement that would prevent non -union employees from joining the local union.

7.4 Authorized representatives of the Union(s) shall have access to the Projects whenever work covered by this Agreement is being, has been or will be performed on the Projects.

## **ARTICLE 8. REFERRAL**

8.1 The Union(s) shall be the primary source of all craft labor employed on the Projects. However, in the event that a Contractor/Employer has his/her own Core workforce, the Contractor/Employer(s) may request by name, and the local shall honor, referral of persons who demonstrate the following qualifications:

8.1.1 possess any license required by state or federal law for the Project work to be performed;

8.1.2 have worked a total of at least one thousand (1,000) hours in the construction craft during the prior three (3) years;

8.1.3 were on the Contractor/Employer(s)' active payroll for at least sixty (60) out of the one hundred (100) calendar days prior to the contract award;

8.1.4 have the ability to perform safely the basic functions of the applicable trade; and

8.1.5 are a resident of the Green Corridor.

8.2 The Union will refer to such Contractor/Employer(s) one journeyman employee from the hiring hall out-of-work list for the affected trade or craft, and will then refer one of such Contractor/Employer(s)' "core" employees as a journeyman and shall repeat the process, one and one, until such Contractor/Employer(s) crew requirements are met or until such Contractor has hired five (5) "core" employees, whichever occurs first. Thereafter, all additional employees in the affected trade or craft shall be hired exclusively from the hiring hall out-of-work list(s). For the duration of the Contractor/Employer(s)' work the ratio shall be maintained and when the Contractor/Employer(s)' workforce is reduced, employees shall be reduced in the same ratio of core employees to hiring hall referrals as was applied in the initial hiring. Contractor/Employer(s) signatory to a Local, Regional, and/or National collective bargaining agreements with Union(s) signatory hereto shall be bound to use the hiring hall provisions contained in the Master Agreement of the affected Union(s), and nothing in the referral provisions of this Agreement shall be construed to supersede the local hiring hall provisions of the Master Agreement(s) as they relate to such Contractor/Employer(s), except the provisions limiting the number of core employees

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 10 of 22

and the provisions regarding the use of Berkeley Residents as core employees.

8.3 Contractor/Employer(s) shall be bound by and utilize the registration facilities and referral systems established or authorized by the signatory Unions when such procedures are not in violation of Federal law.

8.4 In the event that referral facilities maintained by the Union(s) are unable to fill the requisition of a Contractor/Employer(s) for employees within a forty-eight (48) hour period, weekends and holidays excluded, after such requisition is made by the Contractor/Employer(s), the Contractor/Employer(s) shall be free to obtain work persons from any source. The Contractor/Employer(s) shall immediately notify the appropriate Union of the identity, including name, address, telephone number and social security number, of any such person(s) hired from an alternative source.

8.5 Unions will exert their utmost efforts to recruit sufficient numbers of skilled craft persons to fulfill the requirements of the Contractor/Employer(s), and document such efforts as required.

8.6 Subject to the limitation of applicable law, the parties to this Agreement support the development of increased numbers of skilled construction workers from the residents of the City of Berkeley, to meet the needs of the Projects and the requirements of the industry generally. Toward that end, the Unions agree to encourage the referral and utilization, to the extent permitted by law and the hiring hall procedures of the Unions, of qualified Berkeley Residents, as journeymen and apprentices on the Projects

and entrance into such apprenticeship and training programs as may be operated by the signatory Unions consistent with the applicable Apprenticeship Program's State-approved Standards.

**ARTICLE 9.  
BENEFITS**

9.1 All Contractor/Employer(s) agree to pay contributions to the established vacation, pension or other form of deferred compensation plan, apprenticeship, and health benefit funds for each hour worked on the Projects in the amounts designated in the Master Agreements of the appropriate local. The Contractor/Employer(s) shall not be required to pay contributions to any other trust funds or in amounts that are not contained in the published prevailing wage determination to satisfy their obligation under this Article except that Contractor/Employer(s) who are signatory to collective bargaining agreements with the respective trades shall continue to pay all trust fund contributions as outlined in such collective bargaining agreements.

9.2 By signing this Agreement, the Contractor/Employer(s) adopt and agree to be bound by the written terms of the legally established trust agreements, as described in 9.1, specifying the detailed basis on which payments are to be made into, and benefits paid out of, such trust funds.

9.3 Wages, Hours, Terms and Conditions of Employment: The wages, hours and other terms and conditions of employment on the Projects shall be governed by the

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 11 of 22

Master Agreement of the respective crafts, copies of which shall be on file with the District, to the extent such Master Agreement is not inconsistent with this Agreement. Where a subject is covered by the Master Agreement and not covered in this Agreement, the Master Collective Bargaining Agreement will prevail. When a subject is covered by both the Master Collective Bargaining Agreement and this Agreement, to the extent there is any inconsistency, this Agreement will prevail.

**ARTICLE 10.  
EMPLOYEE GRIEVANCE PROCEDURE**

10.1 All disputes involving discipline and/or discharge of employees working on the projects shall be resolved through the grievance and arbitration provision contained in the Master Agreement for the craft of the affected employee. No employee working on the Projects shall be disciplined or dismissed without just cause.

**ARTICLE 11.  
COMPLIANCE**

11.1 It shall be the responsibility of the Contractor/Employer(s) and Unions to investigate and monitor compliance with the provisions of the Agreement contained in Article 9. Nothing in this Agreement shall be construed to interfere with or supersede the usual and customary legal remedies available to the Unions and/or employee benefit trust funds to collect delinquent trust fund contributions from Employers on the Projects. The District shall monitor and enforce compliance with the prevailing wage requirements of the State and Contractor/Employer(s)' compliance with this Project Stabilization Agreement.

**ARTICLE 12.  
JOINT ADMINISTRATIVE COMMITTEE**

12.1 The parties to this Agreement shall establish a nine (6) person Joint Administrative Committee. This Committee shall be comprised of three (3) representatives selected by the District and three (3) representatives selected by the Unions. Each representative shall designate an alternate who shall serve in his or her absence for any purpose contemplated by this Agreement.

12.2 The Joint Administrative Committee shall meet as requested by the Parties to review the implementation of the Agreement and the progress of the Projects. Any question regarding the meaning, interpretation, or application of the provisions of this Agreement shall be referred directly to the Joint Administrative Committee for review and recommendation.

**ARTICLE 13.  
GRIEVANCE ARBITRATION PROCEDURE**

13.1 The parties understand and agree that in the event any dispute arises out of the meaning, interpretation or application of the provisions of this Agreement, the same shall be settled by means of the procedures set out herein. No grievance shall be recognized unless the grieving party (Local Union or District Council on its own behalf,

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 12 of 22

or on behalf of an employee whom it represents, or a Contractor/Employer on its own behalf) provides notice in writing to the signatory party with whom it has a dispute within ten (10) business days after becoming aware of the dispute but in no event more than thirty (30) business days after it reasonably should have become aware of the event giving rise to the dispute. The time limits in Section 13.1 may be extended by mutual agreement (oral or written) of the parties.

13.2 Grievances shall be settled according to the following procedures:



- Step 1: Within five (5) business days after the receipt of the written notice of the grievance, the Business Representative of the involved Local Union or District Council, or his/her designee, and the representative of the involved Contractor/Employer shall confer and attempt to resolve the grievance.
- Step 2: In the event that the representatives are unable to resolve the dispute within the five (5) business days after its referral to Step 1, either involved party may submit it within three (3) business days to the Joint Administrative Subcommittee (consisting of one District and one Union representative of the Joint Administrative Committee), which shall meet within five (5) business days after such referral (or such longer time as is mutually agreed upon by all representatives on the Joint Administrative Committee), to confer in an attempt to resolve the grievance. If the dispute is not resolved within such time five (5) business days after its referral or such longer time as mutually agreed upon, it may be referred within five (5) business days by either party to Step 3.
- Step 3: Within five (5) business days after referral of a dispute to Step 3, the parties shall choose a mutually agreed upon arbitrator for final and binding arbitration. If the parties cannot mutually agree on the selection of an arbitrator, the arbitrator shall be selected by the alternate striking method from the following list: Jerrilou Cossack, Thomas Angelo, William Riker, Larry Kay, and Robert Clark. The order of striking names from the list of arbitrators shall be determined by a coin toss, the winner of which shall decide whether they wish to strike first or second. Such striking shall take place within three (3) days. If a party does not respond within three (3) days, this means any Arbitrator from the list is acceptable. The decision of the Arbitrator shall be binding on all parties. The Arbitrator shall have no authority to change, amend, add to or detract from any of the provisions of the Agreement. The expense of the Arbitrator shall be borne equally by both parties. The Arbitrator shall arrange for a hearing on the earliest available date from the date of his/her selection. A decision shall be given to the parties within five (5) calendar days after completion of the hearing unless such time is extended by mutual agreement. A written opinion may be requested by a party from the presiding Arbitrator. The time limits specified in any step of the Grievance Procedure set forth in Section 13.2

may be extended by mutual agreement of the parties initiated by the written request of one party to the other, at the appropriate step of the Grievance Procedure. However, failure to process a grievance, or failure to respond in writing within the time limits provided above, without a request for an extension of time, shall be deemed a waiver of such grievance without prejudice, or without precedent to the processing of and/or resolution of like or similar grievances or disputes. In order to encourage the resolution of disputes and grievances at Steps 1 and 2 of this Grievance Procedure, the parties agree that such settlements shall not be precedent setting.

#### **ARTICLE 14. JURISDICTIONAL DISPUTES**

14.1 The assignment of Covered Work will be solely the responsibility of the Employer performing the work involved; and such work assignments will be in accordance with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the “Plan”) or any successor Plan.

14.2 All jurisdictional disputes on this Project between or among the Building and Construction Trades Unions and the Employers, parties to this Agreement, shall be settled and adjusted according to the present Plan established by the Building and Construction Trades Department, or any other plan or method of procedure that may be adopted in the future by the Building and Construction Trades Department. Decisions rendered shall be final, binding and conclusive on the Employer and Union parties to this Agreement.

14.3 For the convenience of the parties, and in recognition of the expense of travel between Northern California and Washington, D.C., at the request of any party to a jurisdictional dispute under this Agreement, an Arbitrator shall be chosen by the procedures specified in Article 5, Section 5, of the Plan from a list composed of John Kagel, Thomas Angelo, Robert Hirsch and Thomas Pagan and the Arbitrator’s hearing on the dispute shall be held at the applicable Building and Construction Trades Council. All other procedures shall be as specified in the Plan.

14.4 All jurisdictional disputes shall be resolved without the occurrence of any strike, work stoppage, or slow-down of any nature, and the Employer’s assignment shall be adhered to until the dispute is resolved. Individuals violating this Section shall be subject to immediate discharge.

14.5 Each Employer shall conduct a Pre-Job Conference with the Council prior to commencing Covered Work. The Primary Employer and the Owner will be advised in advance of all such conferences and may participate if they wish. Pre-job conferences for different Employers may be held together.

**ARTICLE 15.  
MANAGEMENT RIGHTS**

15.1 The Contractor/Employer(s) shall retain full and exclusive authority for the management of their operations, including the right to direct their work force in their sole discretion. No rules, customs or practices shall be permitted or observed which limit or restrict production, or limit or restrict the working efforts of employees except that lawful manning provisions in the Master Agreement shall be recognized.

**ARTICLE 16.  
SAVINGS CLAUSE**

16.1 The parties agree that in the event any article, provision, clause, sentence or word of the Agreement is determined to be illegal or void as being in contravention of any applicable law, by a court of competent jurisdiction, the remainder of the Agreement shall remain in full force and effect. The parties further agree that if any article, provision, clause, sentence or word of the Agreement is determined to be illegal or void, by a court of competent jurisdiction, the parties shall substitute, by mutual agreement, in its place and stead, an article, provision, clause, sentence or word which will meet the objections to its validity and which will be in accordance with the intent and purpose of the article, provision, clause, sentence or word in question.

The parties also agree that in the event that a decision of a court of competent jurisdiction materially alters the terms of the Agreement such that the intent of the parties is defeated, then the entire Agreement shall be null and void.

If a court of competent jurisdiction determines that all or part of the Agreement is invalid and/or enjoins the District from complying with all or part of its provisions and the District accordingly determines that the Agreement will not be required as part of an award to a Contractor/Employer, the unions will no longer be bound by the provisions of Article 4.

**ARTICLE 17.  
TERM**

17.1 The Agreement shall be included as a condition of the award of all construction contracts for the Projects.

17.2 The Agreement shall continue in full force and effective until the completion of the Projects. However, upon the fifth anniversary of the execution of the Agreement, the District shall have the unilateral right to terminate the Agreement without

cause therefore. However, if the District does not exercise its right to terminate the Agreement within thirty (30) days of the fifth anniversary of the execution of the Agreement, then, the Agreement shall continue in full force for an additional five- year term, at which time the District will again be afforded the unilateral right to terminate the Agreement without cause, to be exercised under the same conditions as the initial right to terminate.

Berkeley Unified School District                      5.1-CF  
Project Labor Agreement  
Page 15 of 22

**ARTICLE 18.**  
**LOCAL BERKELEY HIRE REQUIREMENTS**

18.1 The Parties agree to a goal that Berkeley Residents, and especially District Graduates, will perform a minimum of 30% of the hours worked, on a craft by craft basis on the Projects. In the event that no Berkeley residents or District Graduates are available to fulfill the 30% local hire requirement, the next tier of residents will come from the Green Corridor. This includes the cities of Albany, Alameda, Berkeley, El Cerrito, Emeryville, Richmond, Oakland, and San Leandro. The Contractor/Employer(s) shall make good faith efforts to reach this goal through the utilization of the Unions' hiring hall procedures. The Unions shall make good faith efforts in their recruiting and training of District Graduate and Berkeley Resident workers and in their hiring hall procedures to facilitate this 30% goal on the Projects.

18.2 Should any of the contractors performing work on the Projects fail to meet this 30% goal and fail to demonstrate "good faith" efforts to do so, through a specific submittal process to be included in their contractual requirements, the contract's 10% retention will be held until such time that this failure is remedied. Acceptable remedies to correct continued failure may include, but not be limited to the following remedies, as determined by the Joint Administrative Committee (as established in Section 12):

18.2.1 Classification as a non-qualified bidder on future District projects;

18.2.2 Commitment, with documentation, to employ District Graduates, Berkeley residents or Green corridor Residents on non-District projects for a determined number of work hours; and

18.2.3 Bringing in District Graduates and Berkeley residents as new apprentices and continuing their employment for up to 12 months.

18.3 A Contractor/Employer(s) who has employed a District Graduate for up to six months preceding the start of the District project for a minimum of at least 100 hours per month and has the ability to perform safely the basic functions of the applicable trade

may receive credit for 50% of these hours towards the 30% goal. A Contractor/Employer may also receive credit for 50% of the documented hours performed by District Graduates or Berkeley Residents on the Contractor's non-District projects, when such hours are concurrent with the Contractor's work on the Projects.

18.4 The maximum total combined credit that can be applied for in 18.3 is half of the 30%.

18.5 The contractors may use District student intern's hours for credit towards the local hiring goals. Internships for credit may be up to three (3) interns per year at up to 3000 hours per year per intern.

18.6 Should any Contractor/Employer performing work on the Projects exceed the 30% local hire goal as set forth in this Agreement, they shall be acknowledged at the appropriate public, televised school board meeting for their efforts at the completion of

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 16 of 22

their contract scope.

18.7 Apprenticeship Provision:

18.7.1 The Prime Contractor and their sub-contractors will be required to hire 1 District Graduate, Berkeley Resident or Berkeley Student as a first period apprentice for every 5 million dollars of total construction cost. There can be no more than 2 entry-level apprentices credited for each craft, and the general contractor will be able to include entry-level apprentices hired by their subcontractor to meet this requirement. The District will refer names of former students or recent graduates to the Union and Contractors and the Unions will agree to cooperate with the Contractor in furnishing apprentices as requested and the hiring of the apprentices will be in accordance to the Apprenticeship provisions listed in the Master Agreements, and the apprentices shall be properly supervised and paid in accordance with provisions contained within the Master Agreements. The failure of the District to refer names and/or the Union to provide those apprentices upon request will relieve the Prime contractor of this District Graduate/Berkeley Resident/Student first period apprentice hiring responsibility.

18.7.2 The General Contractor , or subcontractor who hires such Berkeley Resident/Student First Period Apprentices shall be credited with two work hours towards the 30% local work hours, for each hour worked by the first period Berkeley Resident/Student apprentices.

18.7.3 The intent of this provision is to work the new apprentices to the full extent permissible by state law and the Master Agreements. Failure of the General Contractor and their subcontractors to maintain qualified apprentices on the job will be subject to Division of Apprenticeship Standards penalties, and further penalties as determined by the Joint Administrative Committee.

18.8 Career Technical Education Program. Both the District and the Building Trades agree that an active school to career program in the trades can be a benefit to many Berkeley students. The Building Trades and the District agree to collaborate in the development and implementation of a Construction Career Technical Education program.

The Building Trades agree to support the District's programs by doing the following:

1. Assisting the Green Academy by:
  - a. Providing speakers at least twice a year,
  - b. Escorting field trips to existing apprenticeship centers at least three times a year, per the school's schedule,
  - c. Mentoring students. Identify at least five individuals who will serve as mentors,

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 17 of 22

- d. Internships for students. The Unions will explore providing internships. The Unions will assist the program in identifying willing contractors and suppliers to provide additional internships.
2. Actively participate in the District's CTE Advisory Committee which may meet as frequently as once per month.
3. Career Fairs. Agree to actively participate with multiple trade booths in two career fairs per year.
4. Actively participate in helping to create and provide hands-on training for, pre-apprenticeship programs set up by the District for adult school and b-tech students. Such participation may begin slowly, but it is envisioned that the trades will spend no less than 100 hours per year in assisting this program.
5. Assist in exploring the feasibility of the District students participating in local pre-apprenticeship programs, such as the Cypress-Mandela program. Support

the District efforts with this program if a mutual agreement with such a program can be worked out.

The parties agree to meet around the implementation of the program at the discretion of the District.

**ARTICLE 19.**  
**MISCELLANEOUS PROVISIONS**

19.1 Integration. This Agreement is intended by the parties as the final expression of their agreement with respect to such terms as are included herein and as the complete and exclusive statement of its terms and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, nor explained or supplemented by evidence of consistent additional terms.

19.2 No Representations or Warranties. Each of the parties acknowledges no one has made any promise, representation or warranty whatsoever, express or implied, written or oral, not contained herein to induce them to execute this Agreement, and that this Agreement is not executed in reliance upon any such promise, representation or warranty.

19.3 Modification. Each of the parties acknowledges and agrees that this Agreement may be amended only by a writing signed by all of the parties.

19.4 Interpretation. Each of the parties acknowledges and agrees that this Agreement is an accord and satisfaction to be construed as whole according to its fair meaning and not in favor of nor against any of the parties as draftsman or otherwise.

19.5 Forum. Any action or proceeding seeking any relief under or with respect to this Agreement shall be brought solely in the Superior Court of the State of California for the County of Alameda in accordance with the procedures set forth in this Agreement.

Berkeley Unified School District            5.1-CF  
Project Labor Agreement  
Page 18 of 22

19.6 Choice of Law. This Agreement shall be governed by and interpreted under the laws of the State of California and the Federal laws of the United States of America as applicable to instruments, persons, transactions and subject matter which have legal contacts and relationships exclusively within the State of California.

19.7 No Attorneys Fees. No party shall be entitled to recover an award of attorneys fees or costs with respect to any action or proceeding seeking relief under this Agreement.

19.8 Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original of the Agreement. Facsimile signature pages transmitted to other parties to this Agreement shall be deemed equivalent to original signatures on counterparts.

19.9 Warranty of Authority. Each of the persons signing this Agreement represents and warrants that such person has been duly authorized to sign this Agreement on behalf of the party indicated, and each of the parties by signing this Agreement warrants and represents that such party is legally authorized and entitled to enter into this Agreement.

19.10 Ratification by Governing Board. This Agreement shall not be binding on the District until it is ratified by the Governing Board at a publicly noticed Governing Board meeting.

Berkeley Unified School District

By: \_\_\_\_\_  
Date: \_\_\_\_\_  
John T. Selawsky, Clerk

Building and Construction Trades Council of Alameda  
County, AFL-CIO (Council)

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Andreas Ferreira Cluver  
Secretary-Treasurer

Asbestos Workers, Local 16      Boilermakers, Local 549

By: \_\_\_\_\_ Steve Steele

By: \_\_\_\_\_ Dale Bilyeu

Bricklayers & Allied Craftsmen, Local 3      Roofers and Waterproofers, Local 81

By: \_\_\_\_\_ Tom Spear

By: \_\_\_\_\_ Doug Ziegler

Berkeley Unified School District      5.1-CF  
Project Labor Agreement      Page 19 of 22

District Council of Plasterers and  
Cement Masons of Northern California

Cement Masons, Local 300



By: \_\_\_\_\_ Mike Moylan

By: \_\_\_\_\_ Mike Moylan

Plasterers, Local 66      Electrical Workers, Local 595

By: \_\_\_\_\_ Chester Murphy, Jr.

United Association of Steamfitters, Pipefitters, Plumbers & Gasfitters, Local 342

By: \_\_\_\_\_ Victor Uno

Laborers District Council on behalf of, Hod Carriers, Local 166, Laborers, Local 67, Laborers, Local 304

By: \_\_\_\_\_ Jay Williams

By: \_\_\_\_\_ Oscar de la Torre

Hod Carriers, Local 166      Laborers, Local 67

By: \_\_\_\_\_ Sam Robinson

By: \_\_\_\_\_ Victor Para

Laborers, Local 304      Operating Engineers, Local 3

By: \_\_\_\_\_ Fernando Estrada

By: \_\_\_\_\_ Russ Burns

District Council Ironworkers of the State of California and Vicinity

Ironworkers, Local 378

By: \_\_\_\_\_ Joe Standley

By: \_\_\_\_\_ Jeff Mcuen

Sheet Metal Workers, Local 104      Sign Display & Allied Crafts, Local 510

By: \_\_\_\_\_ Bruce Word

By: \_\_\_\_\_ Joseph Toback

Berkeley Unified School District  
Project Labor Agreement

5.1-CF

Page 20 of 22

Sprinkler Fitters, Local 483    Teamsters, Local 853

By: \_\_\_\_\_ Stan Smith, Jr.

By: \_\_\_\_\_ Rome Aloice

Elevator Constructors, Local 8    United Association of Journeyman &  
Apprentices of the Pipe Fitting Industry,  
Underground Utility / Landscape, Local  
355

By: \_\_\_\_\_ Pat McGarvey

By: \_\_\_\_\_ Dennis Soares

District Council 16, Painters & Allied Trades on behalf of Auto & Marine Painters, Local 1176,  
Carpet & Linoleum Layers, Local 12, Glaziers, Architectural  
Metal & Glassworkers, Local 169, Painters & Tapers, Local 3

Northern California Regional Council of Carpenters on behalf of, Carpenters, Local 713, Carpenters,  
Local 2236, Lathers, Local 68L, Pile Drivers, Local 34, Millwrights, Local 102

By: \_\_\_\_\_ Doug Christopher

By: \_\_\_\_\_ Robert Alvarado

Berkeley Unified School District  
Project Labor Agreement

5.1-CF

Page 21 of 22

Addendum A: Agreed To Letter of Assent

[Addressee]  
[Address]  
[City and State]

Re: Berkeley Unified School District Measure I New Construction and Modernization  
Projects, Project Stabilization Agreement.

Letter of Assent for \_\_\_\_\_

\_\_\_\_\_

(Projects Name)

Dear Mr. /Ms. \_\_\_\_\_:

The undersigned party confirms that it agrees to be a party to and bound by the Berkeley Unified School District Measure I New Construction and Modernization Projects, Project Stabilization Agreement as such Agreement may, from time to time, be amended by the parties or interpreted pursuant to its terms.

By executing this Letter of Assent, the undersigned party subscribes to, adopts and agrees to be bound by the written terms of the legally established trust agreements specifying the detailed basis upon which contributions are to be made into, and benefits made out of, such trust funds and ratifies and accepts the trustees appointed by the parties to such trust funds.

Such obligation to be a party to and bound by this Agreement shall extend to all work covered by said Agreement undertaken by the undersigned party on the Berkeley Unified School District Measure I New Construction and Modernization Projects. The undersigned party shall require all of its subcontractors, of whatever tier, to become similarly bound for all their work within the scope of this Agreement by signing an identical Letter of Assent.

This letter shall constitute a subscription agreement, to the extent of the terms of the letter.

CONTRACTOR/SUBCONTRACTOR:

Project Contract Number:

California State License Number: \_\_\_\_\_ or Motor Carrier (CA) Permit Number

Name and Signature of Authorized Person: \_\_\_\_\_

\_\_\_\_\_

(Print Name)

\_\_\_\_\_

(Title)

---

(Signature)

(Date)

Berkeley Unified School District  
Project Labor Agreement

5.1-CF  
Page 22 of 22