

COMPREHENSIVE EDUCATION FACILITIES AGREEMENT – CORRECTED VERSION

THIS COMPREHENSIVE EDUCATION FACILITIES AGREEMENT (“Agreement”) is made and entered into as of this 29th day of November, 2011, by and between the Wise County School Board (“Owner”); and S.B. Ballard Construction Company, a Virginia corporation, authorized to do business in Virginia (“Developer”).

Recitals:

R-1. The Owner owns certain tracts or parcels of land (“Land”) located in the County of Wise, Virginia. The final location of the sites are a parcel of property numbered 021173 on TM# 063-000-000-008A , known as the Union High School site and a parcel of property numbered 035572 on TM#38(A3)(10)-29, known as the Central High School site (“Sites”).

R-2. The Land constitutes the sites intended by Owner to be used for the purpose of constructing as two separate projects and operating two new prototypical high schools located on the sites, hereinafter referred as the “Projects”;

R-3. Owner is a "public entity" as defined in the Virginia Public Private Education Facilities and Infrastructure Act of 2002, Va. Code 56-575.1, et seq. (“PPEA”);

R-4. On May 12, 2008, Owner adopted and made publicly available guidelines (the Guidelines) sufficient to enable it to comply with the PPEA; the Guidelines were later revised by Owner in September 2008;

R-5. Owner issued a PPEA Request for Proposals for Design and Construction of New High Schools, dated June 19, 2011, to enter into a public-private partnership for the Projects;

R-6. Owner determined to proceed with this PPEA procurement using “competitive negotiation” as described in Article IV.B. of the Guidelines;

R-7. Owner engaged the services of qualified professionals, not otherwise employed by Owner, to provide independent analysis of the proposals received;

R-8. Following negotiations, Developer was determined to have submitted the best proposal for the Projects;

R-9. The County of Wise and Owner have determined that the Projects serve the public purpose of the PPEA since there is a public need for the Projects due to the volume of school enrollment; the estimated cost of the Projects is reasonable in relation to similar projects; and Developer’s plans, as contained in the prior submissions, testimony and in this Agreement, will result in the timely design and construction of the Projects;

R-10. Owner and the Board of Supervisors of the County of Wise (the “County”) have approved entry into this Agreement; and

R-11. Owner and Developer wish to enter into this Comprehensive Education Facilities Agreement (“Agreement”) pursuant to the PPEA for the Projects.

NOW, THEREFORE, for and in consideration of the premises and mutual covenants hereinafter contained, incorporating the above recitals as part of this Agreement, and subject to the conditions therein set forth, the parties thereby covenant, agree, and bind themselves as follows:

ARTICLE 1 **DEFINITIONS**

For all purposes in this Agreement, the following terms shall have the meanings stated in this Article 1, except as otherwise expressly provided or unless the context otherwise requires:

1.1 Allowances as Set Forth as Exhibit I

.1 Allowances shall cover the cost to the Developer of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

.2 Developer's costs for unloading and handling at the site, labor, installation costs, overhead profit and other expenses contemplated for stated allowance amounts shall be included in the allowances.

.3 Whenever costs are more than or less than allowances, the GMP shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances and (2) changes in Developer's costs.

1.2 Architect means Developer's design professional Person responsible for the architectural and engineering design of the Projects.

1.3 “As-Built” shall mean the same as record drawings.

1.4 Authorized Representative means any person(s) at the time designated as such in writing by either party and furnished to the other party, which designation authorizes the designee(s) to act for and bind the designating party with respect to matters covered in this Agreement. In the case of Developer, such designation shall be signed by either the President or a Vice President of Developer. In the case of Owner, the initial Authorized Representative will be Owner's Representative. At any time, either party may designate any other person(s) as its Authorized Representative(s) by delivering to the other party a written designation. Such designation shall remain effective until a new written instrument is filed with or actual notice is given to the other party that such designation has been revoked.

1.5 Beneficial Occupancy shall mean the point at which time the Owner occupies any part of the facility after coordination with Developer.

1.6 Budget means the amount the Owner has established for the Projects which is all inclusive of Developer Fee, Developer's costs, all construction costs and Owner costs as set forth in Section 5.4.1.

- 1.7 **Change** means any addition to, deletion from or modification of the Projects or the Services that is made in accordance with the provisions of this Agreement made by written change order signed by Developer and Owner.
- 1.8 **Claim** shall mean a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Agreement. The term “Claim” also includes other disputes and matters in question between the Owner and Developer arising out of or relating to the Agreement as set forth in Section 17.3.1.
- 1.9 **Codes and Standards** means all local, state and federal regulations, codes, laws, or requirements applicable to the Projects, including, without limitation, the Commonwealth of Virginia Uniform Building Code as adopted by the County of Wise.
- 1.10 **Conceptual Proposal** shall mean the Proposal submitted by the Developer dated August 11, 2011 in response to the RFP.
- 1.11 **Construction Account** means the account to be used for the purpose of funding the Projects.
- 1.12 **Contingency** shall mean the amount appropriate for the status of design and construction of the Projects as shown in Exhibit D which shall be included in the GMP and AGMP for exclusive use by the Developer to provide funds for Developer’s use to compensate it for unforeseen events in preparation of the GMP in performance of this Agreement, including design errors, as set forth in Section 5.2.5.
- 1.13 **Contract Documents** means this Agreement, and all Exhibits, all of which documents are incorporated hereto by reference and become a part hereof including, but not limited to, all documents prepared by the Developer including, but not limited to, the Drawings and Specifications for execution of the Work required by this Agreement.
- 1.14 **Detailed Proposal** shall mean the Proposal submitted by the Developer to the Owner dated September 23, 2011 in response to the RFP.
- 1.15 **Drawings** shall mean the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work generally including plans, elevations, sections, details, schedules and diagrams.
- 1.16 **Draw Schedule** means the estimated monthly cash requirements of the Projects (Exhibit E) subject to periodic updates.
- 1.17 **Effective Date** means the date specified as such in Section 2.1 hereof.
- 1.18 **Event of Default** means any of the events or circumstances described in Section 18.2.
- 1.19 **Developer’s Fee** means the amount payable to Developer in addition to Reimbursable Costs as further defined in Section 5.3.

- 1.20 **Final Completion** means that construction of the Projects, including satisfaction of the Punch List items, is complete in accordance with the Contract Documents and that, upon satisfaction of the requirements of the Agreement, Developer is entitled to final Payment.
- 1.21 **Final Occupancy** shall mean when the Owner fully occupies all portions of the school or schools as the case may be that are the subject of this Agreement.
- 1.22 **Furniture, Fixtures and Equipment (“FF&E”)** means the items such as desks, chairs, etc., that are ordered, purchased, and installed by Owner.
- 1.23 **Guaranteed Maximum Price (“GMP”)** means the maximum amount available to Developer as defined in Section 5.4 and as adjusted by any Owner approved change orders.
- 1.23.1 **Adjusted Guaranteed Maximum Price (AGMP)** means the maximum amount available to the Developer as defined in Section 5.4.2 and subject to any Owner approved change orders.
- 1.24 **Land** shall mean the real property described in Exhibit A.
- 1.25 **Maximum Reimbursable Construction Cost (“MRCC”)** means the maximum amount payable to Developer for reimbursable costs as defined in Section 5.2.
- 1.26 **Owner’s Representative** means ~~M. B. Kahn Construction Co. Inc.~~, the firm designated by the School Board, employed by and directly responsible to the School Board, contracted to perform the functions specified in this Agreement.
- 1.27 **Payments** means the installments ~~of the Project Cost agreed~~ to be paid to Developer in accordance with the Draw Schedule for Developer’s Fee in Paragraph 5.3 and Article 6 for payment of Reimbursable Costs.
- 1.28 **Person** means any individual, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof.
- 1.29 **Plans and Specifications** means the surveys, plans and specifications prepared for the Projects which have been accepted by Owner, as provided in this Agreement, and which will be made a part hereof as they are developed.
- 1.30 **Projects** means the two separate projects for two prototypical school facilities for grades 9-12 (or other grade designations as determined by the Owner) and associated on-site improvements to be designed and constructed by Developer on the Land in accordance with the Plans and Specifications and the terms of this Agreement.
- 1.31 **Project Schedule** means the estimated schedule of benchmarks or milestones for

construction of the Projects, which is set forth in Exhibit C attached thereto.

- 1.32 **Punch List Items** means a list of items of work to be completed and deficiencies to be corrected in accordance with the Contract Documents, identified by Owner and Architect, which items shall not affect the attainment of Substantial Completion. Such items shall be complete before Final Completion can take place.
- 1.33 **Reimbursable Costs** means the amounts to be paid to Developer in addition to the Developer's Fee as further defined in Section 5.2.
- 1.34 **Requisition** means an application for payment in the form attached as Exhibit F.
- 1.35 **RFP** shall mean the request for the Proposal issued by the Owner dated June 28, 2011.
- 1.36 **Scope of Work** means the total work to be performed under the terms of this Agreement in order to complete the Projects as described in Exhibit B.
- 1.37 **Services** means all pre-construction and development services and all architectural and engineering design, procurement and construction services related to the Projects furnished by or through Developer, including all labor, materials and facilities, and all other things that are required to provide for the construction and equipping of the Projects in accordance with the Contract Documents.
- 1.38 **Specifications** shall mean that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and Workmanship for the Work and performance of related services.
- 1.39 **State** means the Commonwealth of Virginia.
- 1.40 **Subcontractor** means an entity to which Developer subcontracts or a Subcontractor subcontracts a portion of its responsibilities with respect to the work under this Agreement. Subcontractor shall refer to subcontractors, sub-subcontractors, vendors, and suppliers at any tier level.
- 1.41 **Substantial Completion** means that construction of the Projects is so sufficiently complete in accordance with the Plans and Specifications, including issuance of an occupancy permit, that they may be utilized for their intended uses, and all life/safety items are operational.
- 1.42 **Term** means the duration of this Agreement as specified in Section 2.1

ARTICLE 2

TERM AND INDEPENDENT CONTRACTORS

2.1. Effective Date and Term

This Agreement shall become effective upon its execution and delivery by the parties (the “Effective Date”), and shall continue in full force and effect as to the Projects until expiration of Developer’s warranty, insurance and indemnification obligations, unless terminated prior thereto in accordance with the provisions hereof. Whenever the terms “day” or “days” is used in this Agreement, it shall mean calendar days unless indicated otherwise.

2.2. Independent Contractor

For all purposes hereunder, Developer is an independent contractor and shall not be deemed an employee of Owner. Neither Developer nor any of its Subcontractors, or vendors of any tier, nor any of their employees employed at the Projects shall be deemed to be agents, representatives, employees, or servants of Owner. In accordance with Va. Code § 56-575.9.D, the duties of the Developer shall include the duties of the ‘private entity’ under the PPEA.

2.3. Subcontractors and Sub-Subcontractors

Developer may subcontract any portion of the Services to be performed hereunder but shall not in any event be relieved of any of its obligations set forth herein. Developer may subcontract the construction work to a Subcontractor(s) who shall furnish to Owner’s Representative for its information a list of possible Subcontractors who are to furnish materials, equipment, or services. Owner’s Representative shall, within five (5) days, reply in writing to Developer if it knows of any reasonable objection to any such Subcontractor. Owner shall retain the right to later object to and order the removal of any proposed Subcontractor for reasonable cause. The receipt of such list shall not require Owner’s Representative to investigate the qualifications of the Subcontractors. The qualification of any Subcontractors or vendors, of any tier, is not the responsibility of Owner and in all cases remains with Developer. Prior to any Subcontractor performing any work on the Projects, the Subcontractor shall have a copy of its license on file with Owner’s Representative.

2.3.1 Developer shall procure the Projects in the most economical and expedient manner taking into account price, performance and schedule. Based upon a market analysis of the construction market, Developer will divide the scope of work taking into account economy, quality, and expediting the schedule. Developer may also seek design, supply and erect subcontracts (design-build) for certain systems and materials from qualified subcontractors.

2.3.2 Developer and any Subcontractor subcontracting any of the Work shall endeavor to invite at least three qualified bidders for each portion of the work or bid package, if reasonable under the circumstances, and make every reasonable effort to receive price quotations from at least three firms for all Subcontracts for equipment, equipment rentals, materials, labor contracts, and any supplies or services. Developer shall make every reasonable

effort to offer the opportunity to qualified Wise County firms to submit price quotations to the Developer. Owner's Representative may suggest additional Subcontractor bidders to Developer. Should Owner's Representative be aware of any reason as to exclude a potential bidder, Owner's Representative shall make Developer aware of such reason. Prior to payment of construction costs, Developer shall provide copies of bids or proposals received and/or copies of all subcontracts or purchase orders, including all modifications and/or revisions.

ARTICLE 3 **THE WORK**

3.1. Statement of Work/Specifications

- 3.1.1. Developer shall furnish the necessary personnel, material, equipment, services, and facilities (except as otherwise specified) to perform the Projects in a workmanlike manner.
- 3.1.2. Owner reserves the right to add to the scope of work to be performed under this Agreement. Developer agrees to meet and confer with Owner regarding the added scope, and upon agreement of the parties; such work shall be added as a change order to this Agreement.

3.2. Conditions Affecting the Work

Developer shall take steps reasonably necessary to ascertain the nature and location of the Projects, condition of the Land, and the general and local conditions that can affect the work or its costs, including, but not limited to, such things as political processes, permitting processes, public meetings and hearings, availability of labor, materials, parking and staging areas, and general weather conditions. Developer has performed sufficient investigation prior to development of the GMP to satisfy Developer of the conditions affecting the projects. Any failure by Developer to reasonably ascertain the conditions affecting the Projects based upon the terms of the Guaranteed Maximum Price does not relieve Developer from responsibility for successfully performing the work without additional expense to Owner and without extension of any deadlines. Owner assumes no responsibility for any understanding or representation concerning conditions made by any of its officers, employees or agents before execution of this Agreement unless such understanding or representation by Owner is expressly stated in this Agreement.

Developer has not assumed or included, and is therefore not responsible for, any deep conditions such as mines, sink holes, karst, or hazardous materials. Developer would be entitled to an adjustment in cost and/or schedule should such conditions be encountered. The Developer has assumed responsibility for the unclassified site as it pertains to rock and undercut for unacceptable bearing capacity of soils.

3.3. Order of Precedence

- 3.3.1 Any inconsistency in the provisions of any Contract Document will be resolved by giving precedence in the following order:
 - 3.3.1.1 Modifications issued after execution of this Agreement.
 - 3.3.1.2 This Agreement, including Exhibits to this Agreement.
 - 3.3.1.3 Provisions contained in Exhibits or incorporated by reference.
- 3.3.2 Anything mentioned in the Specifications and not shown on the Plans, or shown on the Plans and not mentioned in the Specifications, is of like effect as if shown or mentioned in both. In case of discrepancy or conflicts between Plans and Specifications, the Specifications will govern.
- 3.3.3 In case of difference between small and large-scale Plans, the large-scale Plans will govern. Schedules on any Plans take precedence over conflicting information on that or any other Plans. On any of the Plans in which a portion of the work is detailed or drawn out and the remainder is shown in outline, the parts detailed or drawn out will apply also to all other like portions of the work.

ARTICLE 4 PROJECT DEVELOPMENT

4.1. Design and Construction

Developer shall be responsible for the professional quality, technical accuracy and the coordination of all designs, drawings, specifications, and other services furnished by Developer under this Agreement. All design services furnished pursuant to this Agreement, including without limitation, all design services furnished by or through Architect, shall meet the standard of care for the designer's profession for design services for projects of similar scope and complexity within the Commonwealth of Virginia. Developer shall be liable to Owner for any failure of design services furnished pursuant to this Agreement to meet the standard of care. The Owner shall have the final approval of Project design and Specifications. Such review shall be in accordance with the Project Schedule.

4.2. Plans and Specifications

Based upon Wise County Schools Educational Specifications (Exhibit G) and Minimum Design Production (Exhibit C), the requirements of the Virginia Board of Education and the Virginia Department of Education, and/or requirements furnished by Owner in writing and included herein, Developer, as developer and design-builder of the Projects, shall cause the Architect to prepare the complete Plans and Specifications as required by this Agreement. All design submissions for these Projects shall be made in both drawing/documents and Computer Aided Design and Drafting ("CADD") electronic file form. The minimum scale for building Plans

shall be 1/8 inch = 1 foot except for small scale Plans of the floor plan of the entire building with space tabulation. Design submissions shall be made as outlined below. Owner's review and/or approval period shall be in accordance with the Project Schedule; provided, however, that the Projects' Schedule shall allow Owner a reasonable time for such review and approval.

- 4.2.1. Schematic Design Submission (SDS): Developer shall cause Architect to prepare the Schematic Design submission. The Schematic Design submission shall provide, as a minimum, a Site Plan, Utilities Plan, Storm Water Management Plan, Building Floor Plans, Elevations, Building Sections, Typical Wall Sections, Typical Details, Schematic Structural Plans, Schematic HVAC Plans, Schematic Plumbing Plans, Schematic Electrical Plans, Perspective, Floor Area Tabulations, Draft Specification and Cost Estimate. The Schematic Design Submission will be provided to Owner for review and approval in accordance with the latest mutually agreeable Projects' Schedule. Owner's approval shall confirm its agreement that the design meets Owner's plans and requirements. Developer may seek improved life cycle costs and shall submit any proposed modifications. Developer shall cause Architect to continue with the development of the Construction Documents during the review period. It is understood that Owner may be performing a value engineering review during this period and the final Construction Documents shall reflect reasonable value engineering revisions directed by Owner and acceptable to the Architect in regards to applicable design standards and codes.
- 4.2.2. Construction Documents Submission: Based upon an approved Schematic Design Submission, Developer shall cause Architect to prepare the Final Plans and Specifications. Intermediate submissions may be provided for the design of foundations, structural steel and other items or systems requiring either advance procurement or construction start prior to the completion of the overall design in accordance with the Project Schedule attached as Exhibit C or any agreed to updates. Owner's review period will be completed within 14 days.
- 4.2.3 Drawings, specifications, and other documents and electronic data furnished by Architect through Developer are instruments of service. Developer, Developer's Architect, and other providers of professional services shall retain all common law, statutory and other reserved rights, including copyright in those instruments of service furnished by them. Notwithstanding anything to the contrary contained herein, Developer grants, and shall ensure its Architect and other providers of professional services grant, to Owner an irrevocable license for Owner and its contractors and consultants to use and/or revise these instruments of service for Owner's Projects in Wise County; provided, however, if such use or reuse occurs without Developer's and/or Architect's involvement in such project(s), Developer and Architect shall not be liable for any claims or liability relating to such use or reuse. Developer shall include a provision in its contract with Architect giving Owner, as intended third-party beneficiary, the rights provided Owner under this 4.2.3 including attorneys' fees and costs, arising out of or resulting from any such reuse. Neither the Architect nor the Developer shall have any liability for any such reuse of such drawings, specifications or other documents by Owner absent a written agreement to the contrary.

- 4.2.4 Developer hereby grants Owner (i) an irrevocable license to use instruments of service for completion of the Projects, and (ii) the right to contract directly with Architect for services to complete the Projects, if Developer defaults in any of its obligations to Owner.
- 4.2.5 All designs and bid packages will be reviewed and approved by the Owner's Representative for compliance with the Contract Documents prior to the documents being issued for construction.
- 4.2.6 The Developer shall cause the Architect to provide adequate drawings for the permitting, approval and construction of the Projects.

4.3. Construction

Phased or fast track construction is anticipated and will be allowed prior to overall final approval of Construction Documents and Specifications. Those Construction Documents and Specifications for activities commencing prior to completion of 100% final Construction Documents shall be approved by the Owner's Representative. When design-build delivery is utilized for a particular subcontract, system or materials, construction documents shall be approved prior to the start of the respective construction activity. Where design-build subcontracts are to be utilized, the Developer shall submit to Owner for review the Request for Proposals prior to solicitation for proposals.

4.4. Financing

Developer will cooperate with Owner and the County of Wise to facilitate the financing for the Projects. It is anticipated that the Projects will be financed by the issuance of tax exempt bonds, grants or other interim or permanent financing including General Obligation bonds, as determined by the County of Wise Public Schools and the governing body. Owner shall have sufficient funds available for payment of all amounts due under this Agreement. This paragraph in no way negates the Owner's rights under Article 18. The Owner may use various State and Federal funding sources that require special reporting and/or accounting procedures. The Developer shall comply with all reasonable and customary accounting requirements as directed by the Owner's Representative. Such requirements shall be identified prior to establishment of the Adjusted Guaranteed Maximum Price.

Prior to commencement of the Work, the Developer may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligation under the Agreement. Thereafter, the Developer may only request such evidence if (1) the Owner fails to make payments to the Developer as the Agreement requires; (2) a change in the Work materially changes the Contract Sum; or (3) the Developer identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Developer.

- 4.4.1 In addition to the Guaranteed Maximum Price, Owner shall include in its Budget request to the County amounts necessary and customary to complete the Projects including cost of Owners Representative, legal and bond issuance cost, fixtures, furnishings, equipment, land acquisition (including mineral rights), testing by Owner, Owner's insurance and Owner's contingency.
- 4.4.2 Developer understands that the two high schools facilities are separate Projects and that they may be financed differently. In that regard, part of the financing for one of the high schools facilities will come from Qualified School Construction Bonds ("QSCBs"), thereby making the Davis-Bacon Act and related labor standards apply to it (see Exhibit N attached). Developer has developed its budget with this requirement in mind. Developer shall keep the two Projects for the two separate high schools separate so as to avoid the applicability of Davis-Bacon Act requirements to the separate high school project not being financed in part by QSCBs. Developer shall maintain separate contracts and separate payrolls for the two Projects and shall ensure that Developer's subcontractors at every tier do the same. The Davis-Bacon Act and Related Labor Standard Requirements clause at Exhibit N hereto shall apply to the project that is being financed in part by QSCBs. Notwithstanding the prior sentence, if the Developer and Owner, after consulting with the County and the County's outside bond counsel, conclude that they can lawfully create separate projects for the school project financed in part by QSCBs and elect by written Change Order to do so, then the Davis-Bacon Act and Related Labor Standards Requirements at Exhibit N hereto shall only apply as indicated by such Change Order.

ARTICLE 5

COSTS

5.1. Prices

Developer will provide all work called for under this Agreement, including furnishing all material, labor and equipment to perform Developer services. Reimbursable Construction Costs shall be those costs related to the Projects and performance of services required to meet the terms of this Agreement.

5.2. Maximum Reimbursable Construction Costs ("MRCC")

- 5.2.1 Owner will reimburse Developer for all allowable development and construction costs and actual expenditures by the Developer and the Developer's contractors in the best interest of the Projects. These costs include but are not limited to:

- 5.2.1.1 Amounts paid to Subcontractors under the terms of their subcontracts with Developer for labor, materials, supplies, and equipment (including subcontractor allocation for overhead and profit as part of its bid submission if subcontractor is performing on a cost plus or time and material basis) either incorporated directly into the design and/or construction required to accomplish a design, construction, cost of warranties, including equipment

rental, transportation, and storage in accordance with the terms of Subcontracts, including amounts owed for fees, costs and reimbursable expenses to the Architect and professional consultants employed by the Architect in connection with the design, construction, or warranty of the Projects.

- 5.2.1.2 Direct out-of-pocket costs paid by Developer relating to the Projects including: taxes, including gross receipts tax, utility availability, onsite utility relocation and usage costs (tap fees excluded), cleanup, and warranty services. Additionally, all cost including legal services, consultant and engineering services to the extent requested by Owner to obtain special use permits or other permits as required to construct the Projects on the sites provided by Owner.
- 5.2.1.3 Amounts paid for all materials supplies and equipment purchased by Developer to the extent used in connection with or permanently incorporated in the Work.
- 5.2.1.4 Cost, including transportation, and maintenance, of all temporary facilities and all materials, supplies and equipment, which are utilized in the performance of the Work.
- 5.2.1.5 Rental charges of all necessary equipment, used at the Site of the Work by Developer. Rental rates of equipment owned by Developer shall not exceed 40% of those rates as published by the nationally recognized Associated Equipment Distributors (AED) unless otherwise authorized by Owner's Representative.
- 5.2.1.6 The actual cost of premiums for all bonds which Developer purchases and maintains, in the performance of the Work including those costs paid under Developer's subcontractor bonding program. Developer shall provide a performance and payment bond in the amount of 100% of the GMP.
- 5.2.1.7 The cost of premiums and deductibles for all insurance which Developer is required to purchase and maintain pursuant to Article 10 or elsewhere in this agreement and the cost of premiums and deductibles for additional commercially reasonable insurance carried and maintained by Developer, if any, in the performance of the Work. Developer shall provide a schedule of all insurance coverage's it anticipates procuring, identifying with respect to each such coverage the insurance company, any coverage exclusions and such other information as Owner may, reasonably request. Owner has the right to approve the purchase of such additional insurance, which approval shall not be unreasonably withheld. Developer shall provide General Liability, Automotive Liability and Excess Liability as required under Article 10 of this agreement. Developer shall provide Contractor's Pollution Liability (mold and mildew coverage). All billed insurance shall include documentation from

- agent indicating actual cost to Developer for coverage. The Owner shall provide and pay for Builder's Risk insurance.
- 5.2.1.8 Sales, use or similar taxes (not including income tax) for which Developer is liable in connection with the Work and imposed by any governmental authority; provided, however, that Developer and Owner shall explore practical ways to take advantage of Owner's tax exempt status to avoid costs of sales, use, or similar taxes, and if they can agree upon a reasonable method to do so, shall adopt such method by Change Order.
- 5.2.1.9 Project-specific fees; licenses; costs of all tests, inspections and approvals, as may be required by the Construction Documents or by laws, ordinances or any public authority, and any royalties required to be paid for in order to perform the Work
- 5.2.1.10 Costs of removal and disposal of all debris from the Site.
- 5.2.1.11 Costs incurred due to emergencies beyond the control of the Developer (e.g., hurricanes, floods, blizzards, and the like) affecting the safety of persons and property; provided, however, that the Guaranteed Maximum Price shall be appropriately adjusted but the Developer's Fee shall not be increased on account thereof. Developer shall provide written notice to Owner's Representative within 24 hours of the occurrence of a qualifying emergency.
- 5.2.1.12 Any expense incurred by Developer for protection of adjoining property and repairs and reimbursement for damages thereto not otherwise covered by insurance for which Developer is not at fault.
- 5.2.1.13 The cost of renderings and photographs of the projects. Models or three dimensional illustrations or animations are not included in the project costs and will be provided at additional cost at Owner's request.
- 5.2.1.14 Other costs incurred in the performance of this Agreement if and to the extent approved in advance in writing by Owner.
- 5.2.1.15 Owner shall pay Developer \$50,000.00 per site within thirty (30) days after Owner's receipt of notice of mobilization and thereafter 18 equal monthly payments of (a) \$74,617.38 monthly, totaling \$1,343,113.00 in the aggregate, for the Central High School Project, and (b) \$74,925.33 monthly, totaling \$1,348,656.00 in the aggregate, for the Union High School Project for Lump Sum General Conditions which are defined in Exhibit M attached. There shall be no retainage on the Lump Sum General Conditions. Developer shall not bill Owner separately as a Reimbursable Cost any amounts from the categories of General Conditions costs listed in Exhibit M. Developer understands and agrees that the Lump Sum General Conditions amounts payable to Developer provide Developer the full payment to which Developer is entitled from Owner for these categories of costs, and Developer will ensure

that Owner is not double-billed by including amounts following within these categories of costs as separate Reimbursable Costs.

- 5.2.2 Costs that are not reimbursable: Some Developer costs are considered as indirect and are not reimbursable. All indirect costs shall be included in the Developer's Fee. Indirect costs not reimbursable include initial PPEA proposal preparation costs (unless agreed to in writing by the Owner), overhead and home office costs, bonuses to senior executives, and travel by company executives or officers. Additionally, repair of Developer or Subcontractor owned (including any subsidiary companies) rental equipment or any equipment repair required as a result of Developer or Subcontractor negligence is not reimbursable. Repair costs and routine maintenance of rental equipment are to be included in the equipment rental price.
- 5.2.3 Disallowed costs: No payment will be made for disallowed costs, which include: bad debts, contributions and donations, dividends or payments of profits, entertainment, fines or penalties, life insurance for officers, partners, or proprietors, interest on loans, lobbying, losses, income taxes, and, except as specifically permitted herein, legal costs.
- 5.2.4 No payment will be made by Owner under this Agreement in excess of the GMP as amended by change order.
- 5.2.5 A Contingency appropriate for the status of design and construction of the Projects in an amount as shown in Exhibit D is included in the MRCC and GMP for the exclusive use of Developer. This Contingency is included to provide funds for Developer's use to meet unforeseen events in preparation of the GMP and performance of the terms of this agreement. No part of the Contingency may be used to compensate Developer for costs incurred as a consequence of Developer's breach of any requirement of this agreement in connection with any claim with the Owner. Developer shall provide a monthly cost accounting of contingency expenditures along with Developer's monthly Requisition.

5.3. Developer Fee

Owner will pay Developer a Fee plus Lump Sum General Conditions as enumerated in paragraphs 5.3.1 and 5.3.2 below. This Developer's Fee will include management of the development, design, and construction activities as provided in this Agreement as sufficient to provide all services and scope as proposed in the Conceptual and Detailed proposals. The Developer's Fee includes all home office support and overhead costs and profit and is the only amount payable to Developer under the terms of this Agreement, except as specifically provided as a Reimbursable Cost hereinabove. The Developer's Fee will be paid as defined in Paragraph 5.3.1, 5.3.2 and 5.3.3. The Developer's Lump Sum General Conditions are further defined in Exhibit M attached.

5.3.1 Union High School Developer Fee Compensation

Developer Fee compensation shall include all profit and overhead costs.

Pre-Construction Phase Services Developer's Fee is equal to Fifty Thousand Dollars (\$50,000.00).

Construction Phase Services Developer's Fee is equal to Four point Nine-Five Percent (4.95.%) of the MRCC Retainage shall be withheld per Paragraph 5.3.3.

Design Fees including Architect, engineers and other consultants is a lump sum fee which is \$1,211,595.00 and is a part of the MRCC and subject to Developer's Fee mark-up of 4.95%. No retainage shall be withheld from the Design Fees.

5.3.2 Central High School Developer Fee Compensation

Developer Fee compensation shall include all profit and overhead costs.

Pre-Construction Phase Services Developer's Fee is equal to Fifty Thousand Dollars (\$50,000).

Construction Phase Services Developer's Fee is equal to Four point Nine-Five Percent (4.95.%) of the MRCC Retainage shall be withheld per Paragraph 5.3.3.

Design Fees including Architect, Engineers and other consultants is a Lump Sum Fee which is \$1,216,665.00 and is a part of the MRCC and subject to Developer's fee mark-up of 4.95%. No retainage shall be withheld from the Design Fees.

5.3.3 Fee Schedule

Design Fees shall be paid commensurate with progress as follows;
Schematic phase – earned 25% of lump sum fee.
Construction Phase documents – earned 55% of lump sum fee.
Construction Administration – earned 20% of lump sum fee.
All Design Fees will be paid in equal monthly installments for each phase.

For Preconstruction Services, the Developer's Fee shall be billed in equal monthly installments based upon the Project(s) schedules in Attachment C for Preconstruction Phase Services. No retained funds shall be withheld from the Preconstruction Services Fee.

For Construction Phase Services the Developer's Fee shall be billed based upon percentage of construction completed and in place.

Retained funds withheld from Construction Phase Fee shall be paid upon completion of all Punch List items. Upon request of the Developer, and with the written approval of the bonding company, Owner may release retainage for Subcontractors provided the Subcontractor's Scope of Work has been completed (including punch list) and approved by Designer and Owner's Representative.

5.4. Guaranteed Maximum Price

5.4.1 The Owner has established a total aggregate budget for both Projects of \$50,000,000 (Fifty Million Dollars), which is all inclusive of Developer Fee, Developer's Lump Sum General Conditions, Developer's costs, all reimbursable construction costs and Owner costs as defined in Paragraph 5.4.3. The Developer shall design, construct, and equip the Projects for a sum not to exceed the total Guaranteed Maximum Price (GMP) of \$45,339,179.00, which GMP includes all Developer's Fees, Lump Sum General Conditions, Developer's Cost, MRCC and Contingency, but which excludes the Owner cost as defined in Paragraph 5.4.3, and those costs specifically excluded in the Developer's Detailed Proposal. The GMP for Union High School is hereby established as \$22,217,096.00 and the GMP for Central High School is hereby established as \$23,122,083.00.

5.4.2 When the Plans and Specifications are sufficiently complete, as mutually agreed by the Owner and Developer, the Developer shall propose an Adjusted Guaranteed Maximum Price proposal ("AGMP") and a written statement of its basis in the format as provided in Exhibit D not to exceed \$TBD. The AGMP is defined as the total cost to Owner to complete the Projects, including but not limited to the MRCC as defined in Section 5.2 and the Developer's Fee as defined in Section 5.3, the Contingency defined in 5.2.5, and Owner allowances, contingencies, etc., as the Developer may be directed to carry in its AGMP. Upon acceptance of the AGMP and its basis, this Agreement shall be amended to include the AGMP and its basis, in general form as set Forth in Exhibit D. The Owner will obtain appropriate approvals of the Adjusted Guaranteed Maximum Price (AGMP) prior to directing Developer to proceed further with the Projects. Should the Owner and Developer be unable to reach agreement on the Adjusted Guaranteed Maximum Price and associated scope of work, the Owner, at its sole option, shall have the authority to either, 1, terminate this Agreement, or 2, direct the Developer to design and construct the Projects in accordance with Developer's response to PPEA Request for Detailed Proposals dated September 23, 2011 in the amount of \$45,339,179.00.

5.4.3 Owner Cost

The Owner has cost associated with the Projects including but not limited to the following: Builders Risk insurance, electrical utility usage, land purchase, fixtures, furnishings and equipment (FFE), technology, Owners Representative, contingencies other than those defined in Paragraph 5.2.5, finance, legal costs, moving costs, insurance costs, Owner inspections and road improvements not adjacent to the project sites, etc. These costs are not included in the Developers GMP or AGMP.

5.4.4. Basis of Adjusted Guaranteed Maximum Price - (AGMP)

The Developer's Adjusted Guaranteed Maximum Price proposal shall include a written statement of its basis, which shall include:

- .1 A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Adjusted Guaranteed Maximum Price proposal.
 - .2 A list of allowances and a statement of their basis. No additional Allowances shall be added other than those allowances specifically attached to this agreement in Attachment I.
 - .3 A list of the clarifications and assumptions made by the Developer in the preparation of the Adjusted Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
 - .4 The proposed Adjusted Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the fee that comprise the Adjusted Guaranteed Maximum Price.
 - .5 The Date of Substantial Completion upon which the proposed Adjusted Guaranteed Maximum Price is based, and a schedule of the Construction Documents issuance dates upon which the date of Substantial Completion is based.
- 5.4.5 The Developer shall meet with the Owner to review the Adjusted Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner discovers any inconsistencies or inaccuracies in the information presented, the Owner will promptly notify the Developer, who shall make appropriate adjustments to the Adjusted Guaranteed Maximum Price proposal, its basis or both. The Owner may require further detail and adjustment, either up or down, in the AGMP, with appropriate scope adjustments, to meet budget restraints or requirements.
- 5.4.6 The Owner may accept the AGMP and execute a Change Order modifying this Agreement to include the AGMP and a written statement of its basis, or Owner may cooperate with the Developer in reducing cost and / or scope to bring the AGMP within the Owner's budget. Developer shall be wholly responsible for any overrun except as provided by change order to the AGMP. The Developer by entering into this Agreement has established a Guaranteed Maximum Price of \$45,339,179.00 for the design and construction of the two Projects to a minimum standard of quality and space per the Exhibits to this Agreement. Should the Owner and Developer be unable to reach agreement on the Adjusted Guaranteed Maximum Price and associated scope of work, the Owner, at its sole option, shall have the authority to either, 1, terminate this Agreement, or 2, direct the Developer to design and construct the Projects in accordance with Developer's response to PPEA Request for Detailed Proposals dated September 23, 2011, in the amount of \$45,339,179.00
- 5.4.7 If the sum of the MRCC, together with the Developer's Fee, Developer's Contingency expenditures, Owner's allowances which had been used in accordance with an applicable Change Order is less than the AGMP, all of the savings shall accrue as indicated in 5.4.7.

The Projects shall be conducted on an “open book” basis with the Project’s accounting records subject to audit upon request by Owner. At the conclusion of the Projects, Developer shall provide to Owner a final cost accounting of Projects costs, which shall be subject to audit by an independent accounting firm selected by the Owner. All cost associated with Project audits shall be borne by Owner.

5.4.8 Share of the Savings

If the final Maximum Reimbursable Construction Costs plus Developer’s Fee and Developer’s Lump Sum General Conditions, as presented by Developer within sixty (60) days after Final Completion and then reviewed and audited by the Owner, are less than the AGMP, as adjusted for any Changes made in accordance with this Agreement, then savings represented by the difference shall be shared 40% to the Developer and 60% to the Owner.

The Developer’s Contingency amount in the AGMP shall be subject to Shared Savings.

- 5.4.9** If a change to Codes and Standards occurs after the date of execution of this Agreement but prior to permitting that would require a change in design, Developer, upon timely written notice of same and presentation of reasonable evidence of impact, shall be entitled to an appropriate adjustment in the Adjusted Guaranteed Maximum Price (AGMP) and/or schedule as applicable. Such adjustment may include both design and construction costs as well as time. The Construction Documents shall be modified by Developer to conform to all such amended Codes and Standards.

ARTICLE 6 **PAYMENTS**

6.1. Invoices

- 6.1.1. Developer’s Requisitions shall be submitted to the Owner’s Representative on or before the last day of each month. Developer’s Requisition shall be submitted before payment can be made. No more than one Developer’s Requisition may be submitted in a single calendar month for each Project except for in the case of a Requisition Supplement as referenced in 6.2.1.1.
- 6.1.2. Developer agrees that submission of a Requisition to Owner for payment is a certification that:
- 6.1.2.1. Any services being billed for have been performed in accordance with the requirements; of this Agreement;
 - 6.1.2.2. Developer’s lien waivers and/or releases have been submitted covering any of the work for which a payment is requested and copies of said lien waivers and/or releases shall accompany the Requisition the form of which is attached as

Exhibit F; and

- 6.1.2.3. Any supplies for which Owner is being billed have been delivered or suitably stored off site, with appropriate insurance coverage, and in the quantities shown on the Requisition, and that the supplies are in the quantity and of the quality designated in this Agreement, Developer shall provide, subject to Owner's Representative approval, evidence of insurance for storage facility, a complete inventory of items, a written right of access to the items, and certification of title to Owner.
- 6.1.3. To ensure proper payment Developer shall furnish all documents required elsewhere in this Agreement and/or as reasonably required by Owner's Representative.

6.2. Payment

6.2.1. Reimbursable Construction Costs:

- 6.2.1.1. Owner will make progress payments monthly within thirty (30) calendar days of receipt of Developer's Requisition. The Developer's Requisition shall include a contract price breakdown showing the values assigned to portions of the work, the form of which is contained in Exhibit F. The values in the breakdown will be used for determining progress payments. Unless otherwise provided under the terms of this Agreement, interest shall accrue at the rate of Prime plus one percent (1%) per annum on amounts overdue by more than 30 days. In the event the Owner rejects a portion of the Requisition (such rejection shall be provided in writing), the amount not in dispute shall be paid and the balance shall be resubmitted under a Requisition supplement. The Requisition supplement shall be treated as a new requisition and the payment terms above apply.
- 6.2.1.2. Material delivered to the Projects or stored in accordance with paragraph 6.1.2.3 that will be incorporated into the structure will be taken into consideration in completing progress payments. Before each payment is made, Developer shall furnish Owner's Representative proof of the quantity, value, and delivery of materials.
- 6.2.1.3. In making construction progress payments, Owner will retain ten percent (10%) of the construction progress payments up to 50% complete at which point no further retainage on further payments shall be withheld subject to satisfactory progress and completion of work as determined by Owner and consent of surety until such time as the Projects are Substantially Complete. Once a particular Subcontractor has satisfactorily completed the work required under its Subcontract, Developer may apply to Owner for payment of the retainage applicable to said Subcontract which amount may be paid with the approval of Owner's Representative.

- 6.2.1.4. All material and work covered by progress payments will be the sole property of Owner. However, this paragraph does not:
 - (a) Relieve Developer of responsibility for all material and work for which payment has been made or for restoration of any damaged or vandalized work; or
 - (b) Waive the right of Owner to require fulfillment of all contract terms; or
 - (c) Relieve Developer of any responsibility for the security of the material and work, nor of responsibility for the materials and work being in the condition required under this Agreement at the time of transfer to Owner.
- 6.2.1.5. Within seven (7) days after receipt of amounts paid to Developer by Owner for work performed under this Agreement, Developer shall do one of the following:
 - (a) Pay each Subcontractor for the proportional share of the total payment received from Owner attributable to the work performed by the Subcontractor under this Agreement; or
 - (b) Notify Owner and relevant Subcontractor, in writing, of Developer's intention to withhold all or part of the subcontractor's payment and provide the reason for nonpayment.
- 6.2.1.6. Deleted.
- 6.2.1.7. In each Subcontract, Developer shall include similar provision(s) requiring each Subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier Subcontractor.
- 6.2.1.8. Developer's obligation to pay interest to a Subcontractor pursuant to the prompt payment provisions is not an obligation of Owner, and no agreement modification shall be made and no cost reimbursements shall be made for the purpose of providing reimbursement for such interest charge.
- 6.2.1.9. Before receiving final payment under this Agreement, Developer shall certify to Owner's Representative that payment due Subcontractors under contractual arrangements with them has been made from the proceeds of prior payments or will be made in a timely fashion from the payment then due Developer and provide Owner with a mechanic's lien waiver from Developer.
- 6.2.2. Payment of the Developer's Fee will be made in accordance with Paragraph 5.3.
- 6.2.3. At any time or times before final payment, Owner's Representative may have Developer's invoices, vouchers, statements of cost, or any other item of financial or

regulatory concern audited at Owner's expense. Any payment, whether or not audited, may be:

6.2.3.1. Reduced by amounts found by Owner's Representative not to constitute Reimbursable Construction Costs; or

6.2.3.2. Adjusted for prior overpayments or underpayments.

6.2.4. Final Payment:

6.2.4.1. Developer shall submit a final Requisition, designated as such, promptly upon completion and acceptance of the Projects, but not later than sixty (60) days from the date of Final Completion. Upon approval of the final Requisition, and upon Developer's compliance with all terms of this Agreement, Owner will promptly pay any balance of allowable costs and that part of the Fee (if any) which was retained and not previously paid. If the sum of all progress payments and the balance invoiced by Developer is greater than the AGMP as modified by approved change orders, then no payments in excess of the AGMP as modified by approved change orders will be made. In the event that seeding and planting is delayed as provided in Section 11.6 below, Owner may retain the costs (\$121,830.00 for Union, \$69,239.00 for Central) applicable thereto and Final Payment may be subject to completion and payment as provided in Section 11.6.

6.2.4.2. In exchange for final payment, Developer shall release Owner and its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this Agreement.

ARTICLE 7
MEASUREMENTS, DRAWINGS, SPECIFICATIONS

7.1. Requirement for Verification of Measurements/On Site Documents

7.1.1. Developer shall keep at the sites copies of all drawings and specifications related to the Projects and shall at all times give Owner's Representative access to them.

7.1.2. When the word "similar" appears on the drawings, it has a general meaning and shall not be interpreted as meaning identical, and all details shall be worked out in relation to their location and connection with other parts of the work.

7.1.3. In case of material discrepancy either in figures, drawings, or specifications, the matter shall be promptly submitted to Architect, who will provide a determination in writing to the Developer and Owners Representative, for approval by Owner's Representative. Any adjustment by Developer without such approval will be at Developer's own risk and expense. Developer shall furnish from time to time such detailed drawings and other information as may be necessary.

7.2. Plans and Specification Requirements

- 7.2.1. Developer shall submit to Owner's Representative, in triplicate, a schedule listing all items that will be furnished for review and approval no later than thirty (30) days after final approval of Plans and Specifications. For example, the schedule shall include shop drawings and manufacturer's literature, test procedures, test results, certificates of compliance, material samples, and special guarantees, etc. The schedule shall indicate the type of item, contract requirement reference, Developer's scheduled date for submitting the above items, identification of the first scheduled activity and projected needs for approval answers to support procurement or installation. In preparing the schedule, reasonable time will be allowed for review, approval, and possible re-submittal, also, the scheduling shall be coordinated with the approved construction progress chart. Developer shall revise and/or update the schedule as required by the progress of the work. The schedule shall be made available to Owner's Representative for monitoring.
- 7.2.2. Required technical specifications shall be prepared in accordance with industry standards. Specifications shall be complete, concise, and free of repetition and ambiguity. Care shall be exercised to avoid specifying the same work in more than one section and to avoid duplication or conflict with the general provisions, special provisions, and the drawings.
- 7.2.3. The Specifications shall be submitted on 8-1/2"x 11" sheets but may be transmitted electronically.
- 7.2.4. If guide specifications for Owner Projects are not furnished, typical specifications developed and used by the architect-engineer in general practice shall be used in preparing contract specifications. The Construction Specifications Institute ("CSI") Format for Construction Specifications, CSI Document MP-2A, shall be used in the arrangement of Project Specifications.
- 7.2.5. Testing that the Developer and Designer deem necessary to establish contract compliance for critical items or critical portions of the work shall be Developer's responsibility paid for under the allowance for construction testing and inspections. Testing shall be consistent with that required under standard commercial practices. If testing, by statute, must be designated by Owner, the costs will be borne by Owner. Any testing requirements specified do not limit Owner from performing additional testing and inspection as deemed necessary.
- 7.2.6. Submittals such as shop drawings, samples, and certificates shall be specified as necessary to establish contract compliance for critical portions of the work. Developer should not require submittals for minor commercial items or for items of marginal value. Developer shall include in the mechanical and electrical sections the extent of a manufacturer's literature, rating data, performance curves, spare parts lists, and shop drawings that shall be furnished for review and approval before procurement.

- 7.2.7. The Specifications shall require the responsible Subcontractors to make field tests and balancing reports of heating and air conditioning systems to demonstrate that the equipment will perform as required. The results of the tests are to be submitted before the final inspection. Subcontractor and manufacturer's representatives as appropriate will be required on site for inspection, startup, and instructions in the operation and maintenance of HVAC equipment.
- 7.2.8. The Specifications shall require that Developer furnish manufacturer's manuals, spare parts lists, diagrams, instructions, performance data, curves, and shop drawings as approved for major items of equipment to be installed in the work.
- 7.2.9. Developer shall provide three (3) full size and three (3) half size plans to Owner which shall include all addenda and changes for each Project. A digital copy shall also be transmitted to the Owner.
- 7.2.10. All final Plans shall be detailed working Plans as necessary for efficient execution of the construction work. They shall conform with the above general requirements and the requirements previously stated. All original Plans shall be prepared at an adequate scale to properly present the design data development including detailed features. Drawing scales for buildings or structures smaller than 1/8-inch = 1'-0" are not permitted without prior approval of Owner's Representative. Coordination drawings for the integration of the mechanical, including plumbing, HVAC and sprinkler, electrical and specialty trades shall be provided under the scope of work of this Agreement.
- 7.2.11. The electrical design shall be separated into a minimum of two plans, when necessary to avoid congestion: one devoted to the power, receptacle, telephone, fire alarm and intercommunication systems, and the other to lighting. Similarly, the plumbing and heating/air conditioning shall be separated, when necessary to avoid congestion. A minimum scale of 1/4-inch = 1'-0" shall be used for all details of areas of congestion such as mechanical rooms, toilet rooms, and the like, and as may otherwise be reasonably designated by Owner's Representative. Drawing scale for site, utility, or other related work (work outside five foot building line), including details (engineers) shall clearly and adequately reflect the design data developed. Drawings shall be organized and provide appropriate details of the site work (layout, grading, paving, and drainage) and the utilities (water, sewer, gas, power, and communications) separate from the building and/or structure drawings.
- 7.2.12. All design submissions prepared using CADD support shall be accompanied by electronic files.
- 7.2.13. Any discrepancies in figures, drawings, specifications, or submittals shall be promptly resolved by Developer and any correspondence and communications regarding such discrepancies shall be furnished to Owner's Representative.
- 7.2.14. Approval of Plans and schedules will be general and may not be construed as:

- 7.2.14.1. Permitting any departure from the Project requirements, including Plans and Specifications;
 - 7.2.14.2. Relieving Developer of responsibility for any errors, including details, dimensions, and materials; or
 - 7.2.14.3. Approving departure from full-sized details furnished by Owner's Representative.
- 7.2.15. If Plans or schedules show variations from the Project requirements because of standard shop practice or for other reasons, Developer shall describe the variation in the letter of transmittal or other form of documentation. If acceptable, Owner's Representative may approve any or all variations and issue an approval. Developer is not relieved of the responsibility for executing the work in accordance with this Agreement, including Plans and Specifications, even though the drawings or schedules have been approved.
- 7.2.16. The design documents production shall comply with schedule in Exhibit C, Minimum Design Production.

7.3. Record "as-built" Drawings

- 7.3.1. Developer shall, during the progress of the work, keep a master set of prints on the job sites, on which is kept a complete, careful, and neat record of all deviations from the Plans and Specifications and drawings made during the course of the work.
- 7.3.2. Developer shall provide Owner with one complete reproducible set of Plans and Specifications incorporating the revisions and changes made during construction up to acceptance of the Projects. These updated Plans shall reflect all changes to the original Construction Documents to indicate the "As-Built" conditions, including revisions in site and building area tabulations. These Plans and Specifications shall be certified as to their accuracy by the signature of Developer and used in preparing a permanent set of "As-Built" drawings.
- 7.3.3. In addition to reproducible submissions, Developer shall submit a CADD system electronic file for these "As-Built" documents prepared with a CADD system compatible with Owner's CADD system identified by Owner's Representative.
- 7.3.4. Owner reserves the right to review "As-Built" documents at any time during the life of the Projects.
- 7.3.5. Developer shall forward all "As-Built" Plans, specifications and photographs to Owner's Representative not later than thirty (30) calendar days after Projects completion.
- 7.3.6. Costs associated with the preparation and completion of the "As-Built" drawings will not be paid for until they are approved by Owner's Representative. The approval of such

shall not be unreasonably withheld.

7.4. Spare Parts

- 7.4.1. Developer shall furnish spare-parts data for each different item of equipment furnished. The data shall include a complete list of parts and supplies, with current unit prices and sources of supply; a list of parts and supplies that are either normally furnished at no extra cost with the purchase of the equipment, or specified to be furnished as part of the contract; and a list of additional items recommended by the manufacturer to ensure efficient operation for a period of one year. Developer shall also furnish extra items such as carpet, vinyl flooring, and ceiling tiles (“attic stock”) as required by the Specifications or, in the absence thereof, in accordance with generally accepted industry standards.
- 7.4.2. The foregoing does not relieve Developer of any responsibilities under the warranties and guarantees provided herein or at law.

7.5. Owner Representative Space

Developer shall provide for temporary office facilities and telephone line at the site for use by Owner’s Representative in Developer’s trailer.

ARTICLE 8 **SAMPLES**

8.1. Sample Approval

- 8.1.1. After issuance of the notice to proceed with construction, Developer shall furnish samples required by the specifications or by Owner’s Representative, for Owner’s approval. Owner’s review and approval shall not be unreasonably withheld, conditioned or delayed and shall be made in a time frame so as not to unreasonably delay Developer or Contractor(s). They shall be delivered to Owner’s Representative as specified or as directed. Developer shall pay all shipping charges on samples. Materials or equipment for which samples are required may not be used in the Projects until Owner’s Representative approves them in writing.
- 8.1.2. Samples of materials or equipment delivered on the site or in place may be taken by Owner’s Representative for testing. Failure of a sample to meet contract requirements may void previous approvals of the item tested. Developer shall replace materials or equipment found not to have met contract requirements at no cost to the Owner.

8.2. Testing

Except as otherwise specified, if tests are called for in the Specifications, Developer shall pay all costs of these tests as part of the construction and testing allowance. In the event that any work or samples do not conform to Plans and Specifications Developer shall, at its sole cost and not as

a Reimbursable Construction Cost, remove all work and material failing to conform, and replace with work and materials in full conformity. The Specifications will also include all tests and inspections required by law. Required testing to be listed in attached schedule and where appropriate testing shall conform to ASTM standard.

ARTICLE 9

WARRANTY

9.1. Warranties

- 9.1.1. Unless otherwise provided in the Plans and Specifications, Developer warrants (a) that the materials and equipment furnished pursuant to this Agreement shall be of good quality and new unless this Agreement requires or permits otherwise; (b) that the work will be free of defects; and (c) that all work shall be in accordance with the requirements of this Agreement, the Plans, and the Specifications, and shall be free from defective or inferior materials, equipment, and workmanship for one year after the date of Final Completion or Occupancy whichever is first as defined herein. Longer warranties for items such as the HVAC system and roof will be agreed to prior to the final approval of Plans and Specifications and GMP. Developer further warrants that the work shall be in accordance with all applicable Codes and Standards and with all applicable statutory requirements of the Virginia Department of Education.
- 9.1.2. Developer shall obtain and assign to Owner the benefits of each transferable guarantee or warranty for equipment, materials or installation furnished by any manufacturer or installer in the ordinary course of the business or trade. Developer shall obtain and furnish to Owner all information required to make any such guarantee or warranty legally binding and effective, and shall submit both the information and the guarantee or warranty to Owner in sufficient time to permit Owner to meet any time limit requirements specified in the guarantee or warranty or, if no time limit is specified, before completion and acceptance of all work under this Agreement.

9.2. Repairs

- 9.2.1. If within the warranty period, Owner's Representative finds that warranted work needs to be repaired or changed because the materials, equipment, or workmanship were inferior, defective, or not in accordance with the contract terms, Developer shall promptly and without additional expense to Owner:
- 9.2.1.1. Place in a satisfactory condition all of the warranted work including tear out if required to reach and repair or replace warranted work;
- 9.2.1.2. Satisfactorily correct all damage to equipment, the site, the building, or its contents that is the result of such unsatisfactory work; and
- 9.2.1.3. Satisfactorily correct or repair any work, materials, or equipment disturbed in fulfilling the warranty;

- 9.2.2. Should Developer fail to proceed promptly in accordance with the foregoing warranties and covenants, Owner may have the work performed at Developer's expense following 3 days notice to Developer for items that directly impact school operations, and 5 days for items that do not directly impact school operations. All warranty claims shall be made by written notice to Developer.

9.3. Non-Waiver

Owner, by accepting Developer's warranties, does not waive any other legal right or remedy that Owner may have against Developer.

ARTICLE 10 **INSURANCE AND BONDS**

10.1. Contractor Bonds

Developer shall provide a performance and payment bonds from Developer and a surety licensed to do business in the Commonwealth of Virginia as obligors in the amount of 100% of all subcontracts, plus MRCC cost, plus Developer's Fee for Construction Phase Services. The Developer may provide a separate bond for each of the two projects. The Developer may require first tier Subcontractors to provide 100% payment and performance bonds for the construction portion of the Projects. Developer's Bonds shall be provided prior to construction commencing on Site and to the extent any Subcontractors have been given a notice to proceed with construction at the site. The bonds shall include Owner as a dual obligee. The bonds shall be issued by a surety licensed to do business in The Commonwealth of Virginia. The bonds shall be issued on AIA Form A312, 1984 edition, or on such other form as Owner and its attorneys approve.

10.2. Insurance

- 10.2.1. During the term of this Agreement and any extension, Developer shall carry the insurance required under Article 10, with the cost of the premiums within the GMP and AGMP. Insurance companies shall be licensed to perform in the Commonwealth of Virginia. Policies shall include all terms and provisions normally included in a policy of the type specified. Owner shall be included as an additional insured on the general and excess liability policies.
- 10.2.2. Developer shall maintain and furnish evidence of workers compensation, employer's liability insurance, and the following general public liability and automobile liability insurance:

GENERAL LIABILITY: Combined single limit per occurrence of \$2 million.

AUTOMOBILE LIABILITY: Combined single limit per occurrence of \$2 million.

PROFESSIONAL LIABILITY: \$2 million for Developer.

Excess Liability (umbrella): \$10 million

- 10.2.3. Developer shall furnish written notice to Owner of any reduction in or cancellation of the insurance described in paragraph 10.2.2 thirty (30) days in advance of the effective date or within five (5) days after receipt by Developer of a notice of cancellation of or reduction in coverage, whichever occurs first.
- 10.2.4. Developer shall furnish a certificate of insurance or, if required by Owner's Representative, true copies of all liability policies, Builder's Risk policies and manually countersigned endorsements of any changes. All insurance policies shall be effective, and evidence of acceptable insurance furnished, before beginning performance under this Agreement. Evidence of renewal shall be furnished not later than five days before a policy expires.
- 10.2.5. The maintenance of insurance coverage as required by this Article 10 is a continuing obligation and the lapse or termination of insurance coverage without replacement coverage being obtained will be grounds for termination for default.
- 10.2.6. Owner will provide Builder's Risk insurance coverage.

10.3. Errors and Omissions

- 10.3.1. Developer shall ensure that Architect shall (a) maintain professional liability insurance in an amount of not less than \$2,000,000 per occurrence with a deductible of no greater than \$150,000 with an insurance company licensed in Virginia, rated A-1 or better in quality and IV or larger in size by A.M. Best; and (ii) such insurance shall be on a claims-made basis and kept in force for no less than the period from prior to commencement of any construction on the Projects until five years after Final Completion of the Projects. Developer shall include in its contract with Architect a provision requiring that Architect maintain the insurance specified in this 10.3.1.
- 10.3.2. Unless the Architect's policy is prepaid, non-cancelable, and issued for a period at least equal to the term of this contract on an occurrence basis, the Architect shall furnish written notice to Owner of any reduction in or cancellation of the insurance described in paragraph 10.3.1 thirty (30) days in advance of the effective date or within five (5) days after receipt by Architect of a notice of cancellation of or reduction in coverage, whichever occurs first.
- 10.3.3. Developer shall furnish a certificate of insurance or, if required by Owner's Representative, true copies of Developers and Architects liability policies and manually countersigned endorsements of any changes. Insurance policies shall be effective, and evidence of acceptable insurance furnished, before beginning performance under this Agreement. Evidence of renewal shall be furnished not later than five days before a policy expires.

10.4. Waiver of Subrogation

10.4.1. Owner and Developer waive all rights against each other, and against the Subcontractors, consultants, agents and employees of the other, for damages covered by any property insurance during construction and the Developer shall each require appropriate similar waivers from their Subcontractors, consultants and agents.

10.5. Bankruptcy

In the event Developer enters into proceedings relating to bankruptcy insolvency, or receivership, or in the event of default, whether voluntary or involuntary, Developer shall furnish by certified mail, written notification of the bankruptcy or default to Owner's Representative responsible for administering the contract. The notification shall be furnished within five days of the initiation of the bankruptcy proceedings. The notification shall include the date on which the bankruptcy petition was filed, the court in which the petition was filed. This obligation remains in effect until final payment under this Agreement. Failure of Developer to obtain dismissal of any such bankruptcy, insolvency, or receivership proceedings within thirty (30) days of their initiation shall be a material default of Developer under this Agreement and shall entitle Owner to terminate this Agreement for default and use any and all remedies available to it hereunder or at law.

ARTICLE 11 NOTICES TO PROCEED, COMMENCEMENT AND COMPLETION

11.1. Initial Notice to Proceed

Execution of this Agreement by Owner constitutes Notice to Proceed with Preconstruction services, design, and construction document preparation.

11.2. Notice to Proceed for Construction, Prosecution, and Completion of Work

No construction work will be performed except pursuant to a Notice to Proceed with Construction issued by Owner's Representative. Developer shall:

- 11.2.1. Commence work under this agreement within 10 calendar days after the date it receives the Notice to Proceed from Owner's Representative,
- 11.2.2. Prosecute the work diligently, and
- 11.2.3. Owner and Developer agree that "Time is of the Essence". Each project shall have a separate project schedule and shall have separate substantial completion dates. The Developer shall achieve Substantial Completion not later than the latest mutually agreed Project Schedule in Exhibit C as may be amended and FF&E installation will commence at least 45 days prior to Substantial Completion, unless Substantial Completion is extended by agreement or by events beyond Developer's control. The

time stated for completion includes cleanup of the Land and Project premises. Developer shall obtain Final Completion of the work, with exception of landscaping, seeding and other site improvements as may be weather dependent, as soon as possible but not later than sixty (60) days after Substantial Completion unless otherwise approved in paragraph 6.2.4.1. Developer agrees that completion of punch list work after the school is occupied by the Owner, shall be performed when school is not in session or after regular school hours. At the time of receipt of the building permit and monthly thereafter, Developer will consult with Owner with regard to the likely Substantial Completion date and earlier occupancy dates so as to allow Owner to plan its program for the appropriate school year. With the Owner's agreement the Developer's schedule may indicate two Substantial Completion dates for each project for new building construction and site demolition/site development.

- 11.2.4. Owner may seek Beneficial Occupancy or partial occupancy prior to Substantial Completion. In the event Beneficial Occupancy or partial occupancy is achieved, Substantial Completion and Final Completion may be extended as reasonably determined by Developer and Owner. Substantial Completion and Final Completion and any liquidated damages shall be modified as determined by Developer and Owner.

11.3. Notice of Delay

Promptly upon becoming aware of any difficulties that might delay deliveries under this Agreement, Developer shall notify Owner's Representative in writing. The notice shall identify the difficulties, the reasons for them, and the estimated period of delay anticipated. Notice shall be given within 7 days of the event causing such delay. Developer shall be granted the right to perform work on site 7 days a week between the hours of 7:00 am and 8:00 pm Monday through Friday and between the hours of 8:00 am and 6:00 pm on Saturday and Sunday. Work activities inside the building after the building is enclosed shall be allowed at any time.

11.4. Liquidated Damages for Delay

- 11.4.1. Owner and Developer agree that "Time is of the Essence". If Developer fails to complete either of the two Projects to Substantial Completion or Final Completion within the time specified in this Agreement or any extension as granted by the Owner in the latest mutually agreed Project Schedule, Developer shall, in place of actual damages for delay, pay to Owner the sum of \$500.00 for each day for the first 29 days and \$2,000.00 for each day thereafter as liquidated damages, and not as a penalty, for each calendar day of delay. Liquidated damages are not a Reimbursable Construction Cost, and shall be deducted first from the Developer's Fees and then the Reimbursable Contract Costs due or paid to Developer. Developer hereby agrees that the amount of liquidated damages provided for herein is a reasonable estimate of actual damages that Owner will suffer as a result of delay in completion and waives any right to contest the amount of such liquidated damages.
- 11.4.2 If Developer is materially delayed at any time in the progress of the Work by the Owner, Owner's employees or agents, separate contractors employed by Owner,

governmental bodies, unusually adverse weather conditions not reasonably anticipated (“Abnormal Weather”), by unusual or unanticipated delays by permitting or inspecting authorities, or by any other causes which Owner and Developer agree may justify delay, the contract time allowed for construction activities shall be reasonably extended by Change Order. There shall be no extension granted for any delays due to circumstances, which are within Contractor’s control or which could reasonably be anticipated in projects of this magnitude. If the Developer is delayed at any time in the progress of the work by any condition or act contained herein, 60 days or less in total per school, the Developer will not charge additional General Conditions costs. However, delays in excess of 60 days will be charged in the amount of \$2,000.00 per day per school.

- 11.4.3 Developer, in submitting its proposal, acknowledges that it has taken into consideration normal weather conditions for the estimated period of construction. Normal weather does not mean statistically average weather, but rather means a range of weather patterns which might be reasonably anticipated based on weather data for the past ten (10) years, (i.e. conditions which are not extremely unusual). Normal weather conditions shall be determined from the public historical records available. No additional compensation will be paid to Developer because of adverse weather conditions or abnormal weather regardless of whether an extension of time is granted; however, an extension of time due to Abnormal Weather will be granted by Owner under the following conditions:

- 11.4.3.1 The request for additional time shall be substantiated by weather data collected during the period of delay at the Site. Said data shall demonstrate that an actual and materially adverse departure from normal weather occurred at the Site during the dates in question;
- 11.4.3.2 The extension requested shall be supported by a delay in Substantial Completion of the Project shown on the critical path of the schedule required for the Project. Interim delays which do not affect Substantial Completion will not be grounds for an extension of time.
- ~~11.4.3.3~~ Notice of an Abnormal Weather and the request for an extension of time shall be made in writing within five (5) calendar days of the completion of the each 1 month period during which Abnormal Weather is claimed at the Site. Owner’s decision shall be made within 21 days following Developer’s request for an extension of the Substantial Completion date.

11.5. Construction Progress Chart

- 11.5.1. Within 21 days after receiving notice to proceed for construction, Developer shall prepare and submit to Owner’s Representative for approval a complete electronic file and six copies of a practical progress chart. The chart shall show the principal categories of work, the order in which Developer proposes to carry on the work, the date on which it will start each category of work, and the contemplated dates for

completion. The chart shall be in suitable scale to indicate graphically the total percentage of work scheduled to be in place at any time. Developer shall use a Critical Path Method (CPM) format or Microsoft Project. This schedule shall be in Primavera P3, P6, Suretrak, or Contractor format, with at least 200 activities including sitework, procurement, delivery, and installation of construction materials and equipment. Activities shall be organized by work areas. A critical path shall be developed based on scheduling logic that identifies all successor and predecessor activities and identify float.

At the end of each progress payment period, or at such reasonable intervals as directed by Owner's Representative, Developer shall:

- 11.5.1.1. Adjust the chart to reflect any changes in the contract work, completion time, or both, as approved by Owner's Representative;
 - 11.5.1.2. Enter on the chart the progress of work actually in place; and
 - 11.5.1.3. Submit three copies of the adjusted chart, and a complete electronic update, to Owner's Representative.
- 11.5.2. If the work falls behind schedule in excess of 21 days, Developer shall take such action as necessary to bring the status of the work to that required by the Schedule. Owner's Representative may require Developer to submit a revised chart demonstrating its program and proposed plan to make up the lag in scheduled progress. If Owner's Representative finds the proposed plan unacceptable, Developer may be required to submit a new plan. If the new plan submitted is not acceptable to the Owner, after consultation with Developer, Owner's Representative may require Developer to increase the work force, accelerate the planned construction volume, increase assigned construction equipment or the number of work shifts, without any increase to the GMP or AGMP .
- 11.5.3. Failure of Developer to comply with these requirements will be considered grounds for a determination by Owner's Representative that Developer is failing to prosecute the work with such diligence as will ensure its completion within the time specified.

11.6. Exception to Completion Schedule and Liquidated Damages

In cases where Owner's Representative determines that seeding and/or planting and/or specified maintenance thereof is not feasible prior to the date of Final Completion, such work will be excepted from the completion schedule and the Liquidated Damages clause. Notwithstanding the foregoing work shall be accomplished or completed during the first seeding and/or planting period or the specified maintenance period following the original completion date, but in no event later than 30 days after, weather permitting. Owner shall retain payment of the cost related thereto until completion of said work.

ARTICLE 12
SUPERVISION AND PERFORMANCE BY DEVELOPER

12.1. Performance and Superintendence of Work by Developer

- 12.1.1. Developer shall give personal supervision to the work by providing a competent Project Manager with authority to act on behalf of Developer and by having a Superintendent or his approved alternate on the payroll, approved by Owner's Representative, on the site at all times work is in progress.
- 12.1.2. Developer is required to submit a daily construction report by 2:00 pm of the following working day. Reports shall indicate the number of people by trade or craft, and the type and location of work. Format of daily report shall be agreed upon by Owner and Developer prior to issuance of bids. It will include Subcontractors, safety and quality violations observed, corrective measures taken to correct the violations, and other information as may be requested by Owner's Representative. Owner's Representative may, with Developer's approval, reasonably modify the requirements of this report as the Projects progress. Such approval shall not be unreasonably withheld.

12.2. Materials and Workmanship; Substitution

- 12.2.1. Unless otherwise specifically provided, all equipment and materials incorporated in the work shall be new and of suitable grade for the purpose intended. Unless otherwise specifically provided, reference to any equipment, material, or patented process by brand name, make, or catalog number establishes a standard of quality only. Developer may substitute any equipment, material, or process that Owner's Representative finds to be equal to that named. To obtain approval to use a different equipment, material, or process, Developer shall furnish Owner's Representative the manufacturer's name, the model number, and other identifying data and information regarding the nature and performance of the proposed substitute. If requested by Owner's Representative, samples shall be submitted for approval at Developer's expense, shipping charges paid. Materials or processes substituted without approval may be rejected.
- 12.2.2. In the event of substitution in accordance with paragraph 12.2.1 above, Developer shall furnish to Owner's Representative for approval the manufacturer's name, the model number, and any other relevant information on the performance, capacity, nature, and rating of equipment or materials proposed for substitution.
- 12.2.3. Developer shall obtain Owner's Representative's approval of the machinery and mechanical equipment incorporated into the work. Developer shall submit samples of all materials and equipment as required by the Plans and Specifications.
- 12.2.4. All work shall be performed in a skillful and workmanlike manner. Owner's Representative may, in writing, require Developer to remove from the work any employee the Owner's Representative reasonably deems incompetent, careless, or

otherwise objectionable.

12.3. Responsibility for Design

- 12.3.1. It is understood and agreed that this Agreement contemplates Developer to act as a Design Builder and to use Virginia licensed and registered professionals, including Architect, to provide design services. Developer will subcontract portions of the scope of work for design services. This shall not relieve the Developer of its obligations to Owner. Developer has the right to engage architects, engineers, and draftsmen to perform the design work. Developer represents that any designer selected by it includes a registered architect and licensed engineer authorized to practice in the Commonwealth of Virginia. Developer further represents that structural, electrical, mechanical, and other engineering disciplines necessary in the design of the Projects will be under the direct supervision of Virginia registered and licensed professional engineers.
- 12.3.2. Developer is responsible for the professional quality, technical accuracy, and coordination of all designs, drawings, specifications, and other services furnished by Developer under this Agreement with all design services to be performed in accordance with the applicable standards of care. Developer shall, without any changes to the Developer's Fees or AGMP, correct any errors in the designs, Plans, Specifications, and other services, and the cost of such corrections shall be a Reimbursable Construction Cost and charged to the Contingency. Developer shall correct any mistake in the construction which is a result of any design mistake or omission. The cost of such correction shall be a Reimbursable Construction Cost and charged to the Contingency. Any additional costs, such as tear-out to install the omitted items, which are a result of the mistake in the design, shall be charged against the Contingency.
- 12.3.3. As part of Developer's responsibility under this Agreement, Developer shall coordinate with federal, state and local authorities as necessary to ensure that the design and construction of the Projects complies with reasonable interpretations of all applicable codes and standards, local ordinances, and with the statutory requirements of the Virginia Board of Education and the Virginia Department of Education in effect as the date of execution of this Agreement.

12.4. Use of Premises

- 12.4.1. Developer, any Contractors or Subcontractors, and their employees shall comply with all regulations governing access to, operation of, and conduct while on the construction site.
- 12.4.2. As permitted by the site conditions, Developer shall cordon off the area using barricades or other means to prevent access by the public. Developer is, at all times, responsible for security of the land and the Projects until substantial completion or Occupancy by Owner.

- 12.4.3. Developer shall provide a Site Utilization Plan for Owner review at the time of the Schematic Design submission.
- 12.4.4. The Owner at its sole discretion may accept partial occupancy or early occupancy of any portion of the Projects.

12.5. Permits and Responsibilities

- 12.5.1. Developer shall obtain any necessary licenses and permits, and for complying with the applicable Codes and Standards in connection with the prosecution of the work on the Projects including all building codes. Owner shall in prompt fashion provide authorization, assistance, and necessary signatures to secure special use permits, rezoning permits or adjustments to the County of Wise comprehensive land plan or other permits as required to construct the Projects on the Sites provided by Owner. Developer shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. Developer is responsible also for all materials delivered and work performed until substantial completion and acceptance of each Project.
- 12.5.2. Developer shall comply with all environmental permit, assessment, or impact statement requirements and regulations prior to, and during construction. Any change in such requirements or regulations after execution of this Agreement which results in additional cost or time of performance shall result in adjustment to the GMP and schedule as appropriate.

12.6. Federal, State, and Local Taxes

The GMP and AGMP include all applicable federal, state, and local taxes and duties.

12.7. Notice and Assistance Regarding Patent and Copyright Infringement

- 12.7.1. Developer shall report to Owner's Representative, in writing, promptly and in reasonable detail, any notice, claim, or suit regarding patent or copyright infringement (or unauthorized use of a patented copyright) based on performance of this Agreement.
- 12.7.2. At Owner's Representative's request, Developer shall furnish all evidence and information in its possession pertaining to the suit or claim. The evidence and information will be furnished at the expense to Developer.
- 12.7.3. This clause shall be included in all subcontracts under this contract, at any tier, over \$50,000.

12.8. Patent Indemnity

- 12.8.1. Developer agrees to indemnify, hold harmless and defend Owner, its employees, and

its agents from and against any and all demands, claims, actions, causes of actions, damages, penalties, losses of any kind, cost, fees, and liabilities, including legal costs and fees, for patent infringement (or any unauthorized use) arising from, or in relation to, the Projects, including without limitation the manufacture, use, or delivery of any equipment, supplies, software, the performance of services, the construction or alteration of any property, or the disposal of property by or for Owner.

- 12.8.2. Owner shall promptly notify Developer of any claim alleging patent infringement or unauthorized use of a patent which is subject to the indemnity of paragraph 12.8.1 above.
- 12.8.3. To the extent allowed by law, Developer shall defend any suit to which this clause applies.
- 12.8.4. This clause shall be included in all subcontracts under this Agreement, at any tier, over \$50,000. This Paragraph 12.8 shall survive termination of this Agreement.

12.9. Non-Disclosure

Developer shall not disclose any information received from Owner that is marked confidential unless such disclosure is approved by Owner, such approval not to be unreasonably withheld or delayed. Owner shall not knowingly disclose any information received from the Developer clearly marked "Confidential" subject to the Virginia FOIA.

12.10. Debris and Cleanup

- 12.10.1. On a periodic basis not less than once weekly during the progress of the work, Developer shall remove and dispose of the resultant dirt and debris and keep the premises clean.
- 12.10.2. Developer shall, upon completion of the work, remove all construction equipment and surplus materials (except materials or equipment that are to remain Owner property as provided by this Agreement), and leave the premises in a clean, neat, and orderly condition satisfactory to Owner's Representative.

12.11. Advertising of Contract Awards

Developer shall be able to refer to Owner or the Projects in its commercial advertising. Should Developer make any representations regarding Owners satisfaction or Developers performance regarding the project Developer shall have prior approval of Owner.

12.12. Ground Breaking Ceremonies

Developer agrees to participate in groundbreaking ceremonies at a time specified by Owner.

12.13. The Virginia Fair Employment Contracting Act

During the performance of this Agreement, Developer agrees as follows:

- 12.13.1. Developer will not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of Developer. Developer agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.
- 12.13.2. Developer, in all solicitations or advertisements for employees placed by or on behalf of Developer, will state that such Developer is an equal opportunity employer.
- 12.13.3. Notices, advertisements, and solicitations placed in accordance with federal law, rule, or regulation shall be deemed sufficient for the purpose of meeting requirements of this section.

Developer will include the provisions of the foregoing paragraphs 12.13.1 and 12.13.2 in every subcontract or purchase order of over ten thousand dollars (\$10,000), so that the provisions will be binding upon the Subcontractor or vendor.

12.14. Drug Free Workplace

During the performance of this contract, Developer agrees to (i) provide a drug-free workplace for Developer's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in Developer's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of Developer that Developer maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000.00, so that the provisions will be binding upon the Subcontractors or vendors. For the purposes of this section "drug-free workplace" means a site for the performance of work done in connection with a specified contract awarded to a Developer in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of this Agreement.

ARTICLE 13

OWNER RIGHTS AND RESPONSIBILITIES

13.1. Owner's Representative

Owner has appointed M.B. Kahn Construction Company, Inc. and its agents as Owner's Representative. Owner's Representative shall be the point of contact for the Developer. Owner's

Representative may be removed or replaced at any time without prior notice to Developer, but notification of the change, including the name and address of any successor Owner's Representative, will be provided in writing promptly to Developer.

13.2. Owner Directed Staffing Changes

- 13.2.1. Should Owner's Representative reasonably deem it to be in the best interests of Owner to require the removal of any person working on or under this Agreement, that person shall be removed from the projects.
- 13.2.2. "Person," as used in this clause shall mean an individual employed by Developer and/or its consultants and subcontractors under contract or otherwise, whether a permanent part of its organization or not.

13.3. Examination of Records

- 13.3.1. Developer shall allow, until five years after final payment under this Agreement, full access to and the right to examine any directly pertinent books, documents, papers, or other records of Developer involving transactions related to this Agreement.
- 13.3.2. Developer agrees to include in all subcontracts under this Agreement a provision to the effect that the Subcontractor shall allow Owner and its authorized representatives, until two years after final payment under the subcontract, full access to and the right to examine any directly pertinent books, documents, papers, or other records of the Subcontractor involving transactions related to the work performed by the Subcontractor on the Projects.

13.4. Survey Monuments and Benchmarks

- 13.4.1. Developer shall perform a boundary and ALTA title survey and any other surveys reasonably necessary to enable Developer to proceed with the work and as required for any financing for the Projects. Developer shall provide new monuments where required or specified. If Developer finds that any previously established reference points have been destroyed or displaced, or that none has been established, Developer shall replace or establish such markers as necessary to provide required reference points.
- 13.4.2. Developer shall protect and preserve established benchmarks and monuments and make no changes in locations without the written approval of Owner's Representative. Established reference points that may be lost, covered, destroyed, or disturbed in the course of performance of the work under this contract, or that require shifting because of necessary changes in grades or locations, shall be replaced and accurately located or relocated by a licensed land surveyor.
- 13.4.3. Developer shall verify the figures shown on the survey and site plan before undertaking any construction work and will be responsible for the accuracy of the

finished work.

13.4.4. Developer shall furnish Owner with certified and signed copies of all surveys.

13.5. Partial Occupancy

Owner's Representative reserves the right to seek Beneficial Occupancy or partial occupancy if permitted by law, after consultation with Developer for use of facilities, services, and utilities, before final acceptance, without constituting the completion or acceptance of any part of the Projects by Owner. If Owner occupies building prior to final completion, Owner shall be responsible for payment of utility costs. Before such occupancy or use, Owner's Representative shall furnish Developer an itemized list of work remaining to be performed or corrected. Failure to list an item will not relieve Developer of the responsibility for complying with the terms of this Agreement.

13.6. Records Inspection and Copying

Notwithstanding any state law providing for retention of rights in the records, Developer agrees that Owner may, at its option and expense, inspect and copy all records relating to the services provided under this Agreement. Developer shall retain all records relative to the Projects for a period of at least five years following final completion of the Projects.

ARTICLE 14 **ADMINISTRATIVE**

14.1. Standard References

All publications and other documents (such as manuals, handbooks, codes, standards, and specifications) cited in this Agreement for the purpose of establishing requirements applicable to equipment, materials, or workmanship are thereby incorporated by reference in this Agreement as fully as printed and bound with the specifications of this Agreement.

14.2 Kickbacks and Purchase of Building Materials

14.2.1 Developer warrants and represents that neither Developer nor any of the Subcontractors shall demand or receive from any of its suppliers or its subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.

14.2.2 Developer warrants and represents that no building materials, supplies or equipment for the Projects shall be sold by or purchased from any person employed as an independent contractor to furnish architectural or engineering services, for the Projects or from any partnership, association or corporation in which such architect or engineer has a personal interest, as defined in Va. Code Sec. 2.2-3101.

- 14.2.3 Developer warrants and represents that no building materials, supplies or equipment for the Projects shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in the Projects to any independent contractor employed to furnish architectural or engineering services in which such person has a personal interest as defined in Va. Code Sec. 2.2-3101.

14.3. Gratuities or Gifts

- 14.3.1 Developer warrants and represents that it has not before made and it shall make no payment, loan, subscription, advance, deposit of money, services or anything of value, present or promised, to any public official having official responsibility with respect to these Projects, unless consideration of substantially equal or greater value is or was exchanged.
- 14.3.2. Owner may terminate this Agreement for default if, after notice and a hearing, Owner determines that Developer or Developer's agent or other representative:
- 14.3.1.1. Offered or gave a gratuity or gift (as defined in Va. Code Sec. 2.2-3101) to an officer, member, agent, or employee of Owner or Owner's Representative exceeding fifty dollars (\$50.00) in value.
- 14.3.3. The rights and remedies of Owner provided in this clause are in addition to any other rights and remedies provided by law or under this contract.
- 14.3.4. Developer represents and warrants that it has not offered or given, nor will it offer or give any gratuity or gift, as defined herein, to any officer, member or employee of Owner.

14.4. Contingent Fees and Related Parties

- 14.4.1. Developer warrants that no person or selling agency has been employed or retained to solicit or obtain this contract for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide, established commercial or selling agencies employed by Developer for the purpose of obtaining business.
- 14.4.2 Developer warrants and represents that no employee, member or officer, or any partner of or member of the immediate family of any employee, member or officer (as defined in Va. Code Sec. 2.2-4368) of Owner is employed by Developer, or has participated in or has any pecuniary interest in the transaction which is the subject of this Agreement.
- 14.4.3. For breach or violation of this warranty, Owner has the right to terminate this Agreement without liability or to deduct from the contract price or otherwise recover the full amount of the commission, percentage, brokerage fee, or contingent fee, in addition to any other remedies under the law or under this Agreement.

14.5. Conflicts of Interest

- 14.5.1. Developer warrants and represents that, to the best of its knowledge and belief, it does not presently have organizational conflicts of interest that would diminish its capacity to provide impartial, technically sound objective research assistance or advice, or would result in a biased work product, or might result in an unfair competitive advantage, except for advantages flowing from the normal benefits of performing this Agreement.
- 14.5.2. Developer agrees that, if after execution of this Agreement, it discovers any organizational conflict of interest that would diminish its capacity to provide impartial, technically sound, objective research assistance or advice, or would result in a biased work product, or might result in an unfair competitive advantage, except advantages flowing from the normal benefits of performing this agreement, Developer shall make an immediate and full disclosure in writing to Owner's Representative, including a description of the action Developer has taken or proposes to take to avoid, eliminate, or neutralize this conflict of interest.

14.6. Indemnification

- 14.6.1 To the fullest extent permitted by Virginia law, Developer shall indemnify and hold harmless Owner, Owner's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Services, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Services themselves) including loss of use resulting there from, but only to the extent caused by negligent acts or omissions of Developer, anyone directly or indirectly employed by Developer, or anyone for whose acts Developer may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 14.6. This indemnity obligation shall terminate five years after the date of Substantial Completion of each of the Projects.
- 14.6.2 In claims against any person or entity indemnified under this Paragraph 14.6 by an employee of Developer, anyone directly or indirectly employed by Developer or anyone for whose acts Developer may be liable, the indemnification obligation under this paragraph 14.6 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for Developer under workers' compensation acts, disability benefit acts or other employee benefit acts.
- 14.6.3 Developer's obligations under this paragraph 14.6 shall survive until five years from Substantial Completion of the Projects.

14.7 Successors and Assigns

- 14.7.1 Owner and Developer, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors and assigns of such other party with respect to all covenants of this Agreement. Neither Owner nor Developer shall assign this Agreement without the written consent of the other. If either party makes such an assignment, that party shall nevertheless remain legally responsible for all obligations under this Agreement, unless otherwise agreed by the other party.

ARTICLE 15 **SUBCONTRACTS**

Nothing in this Agreement may be construed to create any contractual relationship between any Subcontractor and Owner. Developer is responsible to Owner for acts and omissions of its own employees and of Subcontractors and their employees. Developer is also responsible for the coordination of the work of the Subcontractors. Owner will not undertake to settle any differences among Developer and Subcontractors. The Developer shall provide the Owner a copy of all agreements with all Subcontractors within 30 days of execution of such agreements and any modifications to those agreements by Change Order.

ARTICLE 16 **PROTECTION OF PERSONS AND PROPERTY**

16.1. Accident Prevention

- 16.1.1. All construction work on these Projects shall be performed in compliance with the Occupational Safety and Health Act of 1970 and with local or state occupational safety and health regulations enforced by an agency of the locality or state under a plan approved by the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”). Where requirements are different or in conflict, the more stringent requirement will apply.
- 16.1.2. Developer shall maintain an accurate record of exposure data and all accidents incidental to work performed under this Agreement resulting in death, traumatic injury, occupational disease, or damage to property, material, supplies, or equipment. Developer shall submit regular Project safety reports, exposure data, and accident reports, as prescribed by Owner’s Representative.
- 16.1.3. Health and Safety Plans are required as follows:
- 16.1.3.1. Prior to commencing on-site work, the Developer shall have in place a Health and Safety Plan designed to provide a system by which hazards on the Projects site will be controlled to minimize or eliminate occupational injuries or illnesses during performance of this Agreement. The Health and Safety Plan shall be provided to Owner’s representative upon request.

- 16.1.3.2. The Health and Safety Plan shall state that all Subcontractors are required to comply with Developer's Project safety rules and requirements issued under the authority of that program.
- 16.1.3.3. The Health and Safety Plan shall identify, by name, Developer's representative responsible for the execution of the Project safety program. Developer's Project safety representative shall have the express written authority from Developer to stop work, to abate hazardous conditions or unsafe practices, and to eject Developer, Subcontractor, or vendor employees from the Projects sites for failure to comply with safety requirements.
- 16.1.4. The authority, responsibilities, and duties of Developer's Project safety representative shall be incorporated by Developer as part of the written Health & Safety Plan. The safety responsibilities include, but are not limited to, conducting Subcontractor construction safety program reviews, conducting employee safety orientation training, conducting weekly safety meetings, conducting daily site safety inspections, auditing Subcontractor safety compliance, and preparing required periodic and special safety reports.
- 16.1.5. In addition to the general requirements of Health and Safety Standards, Developer specifically shall comply with applicable OSHA requirements concerning Hazard Communications Standards. Details of Developer's hazard communications program shall be included in the Health & Safety Plan.
- 16.1.6. Developer shall ensure that all materials, supplies, articles, or equipment manufactured or furnished under this Agreement conform to the Occupational Safety and Health Standards pursuant to the authority of OSHA, and to other safety and health requirements specified in this contract or order. When conducting work on existing facilities, Developer shall provide Owner's Representative copies of Material Safety Data Sheets (MSDS) for any hazardous material, as defined by OSHA's Hazard Communications Standards, to be used on the job.
- 16.1.7. If no OSHA standard exists, federal or other nationally recognized standards apply.
- 16.2. **Protection of the Environment, Existing Vegetation, Structures, Utilities, and Improvements**
- 16.2.1. Developer shall perform all work necessary to implement and accomplish a program to prevent environmental pollution during or as a result of construction performed under this Agreement. As a minimum, Developer's work shall conform to all requirements of applicable federal, State and local law and such requirements shall be incorporated in all prime contracts and subcontracts.

- 16.2.1.1 Developer shall promptly notify Owner and Owner's Representative in writing if Developer, or anyone providing any of the services through Developer, encounters what are believed to be any hazardous materials on the Sites or either of them.
- 16.2.1.2 Neither Developer nor anyone performing any of the Services through Developer shall cause hazardous materials to be introduced to the Sites or either of them except as expressly allowed by the Plans and Specifications approved by Owner, nor shall they leave on the Site(s) after Substantial Completion any hazardous materials that they introduced.
- 16.2.1.3 Developer shall indemnify Owner and hold it harmless for any cost or expense Owner incurs (i) for remediation of a hazardous material that Developer or anyone providing any of the Services through Developer has introduced to the Sites or either of them; and (ii) due to Developer or anyone providing any of the Services through Developer violating 16.2.1.2.
- 16.2.2. Developer shall endeavor to preserve, protect and maintain existing vegetation (such as trees, shrubs and grass), landscape features that are to remain under the landscaping plan.
- 16.2.3. The Developer shall protect from damage all existing improvements or utilities at or near the site of the Projects. In the event of damage to these facilities, repair or restoration shall be at Developer's sole cost unless the damage was expected and a part of the Plans and Specifications, in which case it may be submitted as a reimbursable cost if it otherwise qualifies as such. If the Developer fails or refuses to repair such damage property, Owner's Representative may have the necessary work performed and charge the cost to the Developer, which cost shall not be a Reimbursable Cost under this Agreement. It is the responsibility of the Developer to ascertain the location of any underground utility lines or facilities and Developer will be liable for any costs or damages, including but not limited to, fines and penalties, for its failure to do so.
- 16.2.4. The Developer shall obtain approval from Owner's Representative for any temporary roads, embankments, and disposal areas not included in Project specifications or drawings and restore such areas to original conditions, including appropriate landscaping, upon the completion of work.
- 16.2.5. Developer shall ensure that items discovered that have potential historical or archeological interest are preserved to the extent practical. Developer shall leave any archeological find undisturbed and shall immediately report the find to the Owner's Representative.

16.3. Access to Site

The Developer's access to the site and use of existing roads will be as agreed to by the Developer and Owner's Representative including issuing vehicle passes, if necessary, for construction and

private vehicles.

ARTICLE 17

CHANGES/CLAIMS/DISPUTES

17.1. Changes

- 17.1.1. Owner's Representative may at any time, without notice to any sureties, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract as described below, including changes:
 - 17.1.1.1. In the Specifications (including Plans and designs);
 - 17.1.1.2. Intentionally omitted.
 - 17.1.1.3. In Owner furnished facilities, equipment, materials, services, or site; or
 - 17.1.1.4. Directing acceleration in the performance of the work as mutually agreed upon with Owner and Developer.
- 17.1.2. Except as provided in this clause or elsewhere in this Agreement, no statement or conduct of Owner's Representative may be treated as a Change Order under this clause or entitle Developer to an equitable adjustment except as provided for in this Agreement.
- 17.1.3. If Developer believes that any proposed Change Order will cause an increase or decrease in Developer's cost of, or the time required for, the performance of any part of the work under this Agreement, Developer shall, in advance of performance of the work, submit an itemized cost breakdown of any specific increases in costs, if any, relating to the proposed Change Order, or the specific increases in time required for performance of the work, which shall be reviewed by Owner's Representative who will make an equitable adjustment within or to the GMP and schedule if approved; and the revised cost or schedule shall be included in the Change Order. However, no claim for any change under this clause will be allowed for any costs incurred prior to the earlier of either a written notice of claim by Developer or issuance of a Change Order or CCD (see section 17.1.8). No claims will be allowed for costs resulting from defective work, Plans or Specifications prepared by Developer or any Subcontractors, or for any costs, charges or scheduling changes not approved in advance as part of a Change Order executed by Developer and Owner's Representative or by a CCD.
- 17.1.4. Developer shall notify Owner of any such estimated increased costs or scheduling changes within fourteen (14) days after receipt of a proposed Change Order under paragraph 17.1.1 above, and prior to commencement of any work covered by the Change Order.
- 17.1.5. No claim by Developer for an adjustment will be allowed if asserted after final

payment under this Agreement.

- 17.1.6. After approval of final Plans and Specifications, except for the correction of errors and omissions, Developer shall not make any changes to the Plans or Specifications, including drawings and designs, without approval of Owner's Representative.
- 17.1.7. ~~The AGMP, the MRCC and the Developer's Fee may provide for allowances for items such as FF&E, testing, and payment to Owner's Representative or other party representing Owner's interest in management or supervision of the Projects, Owner contingency allowance, other allowances as Owner may direct. Items covered by Allowances will be supplied for such amounts and by such persons or entities as Owner's Representative may direct or as required to perform the work, but Developer shall not be required to employ persons or entities to whom Developer has reasonable objection. Allowances may be paid directly to suppliers of their services or materials by Owner. Materials and equipment under an allowance shall be selected by Owner's Representative in sufficient time to avoid delay in the work.~~ **DELETED**
- 17.1.8. A Construction Change Directive (CCD) is a written order signed by Owner directing a change in the Work or Projects and stating a proposed basis for adjustment, if any, within or to the GMP or contract time or both. A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order. Upon receipt of a Construction Change Directive, Developer shall sign the CCD acknowledging receipt and promptly proceed with the work involved. The adjustment shall be based on one of the following methods
1. mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
 2. unit prices stated in the Contract Documents, AGMP or subsequently agreed upon;
 3. cost to be determined in a manner agreed upon by both parties and a mutually acceptable fixed or percentage fee
- 17.1.9 If Developer disagrees with the adjustment or method of adjustment in the AGMP or Contract time, Developer shall nonetheless perform the work and keep itemized accounting and supporting data, provided however, the Owner shall pay the Developer the reasonable cost of such work based on an estimate using current R.S. Means. The AGMP and the schedule shall be adjusted as appropriate after agreement on a Change Order for such work. Pending final determination of such costs, Owner shall pay amounts not in dispute in the payment Requisition. Any dispute over costs or time shall be determined under paragraph 17.3 Disputes.
- 17.1.10 Developer shall require provisions in subcontracts limiting the amount of overhead and profit allowable for contractor changes. For Subcontractor work performed with its own forces allowance for overhead and profit shall be 15% of the costs of the changed

work. For work that is not self performed, but subcontracted, the allowance for overhead and profit shall be 7% of the cost of the changed work.

17.2. Change Order Accounting

Owner's Representative may require change-order accounting whenever the estimated cost of a change or series of related changes exceeds \$100,000. Developer, for each change or series of related changes, shall maintain separate accounts or cost codes, by job order or other suitable accounting procedure, of all incurred segregable, direct costs (less allocable credits) of work both changed and not changed, allocable to the change. Developer shall maintain such accounts until the parties agree to an equitable adjustment for the changes ordered by Owner's Representative or the matter is finally disposed of in accordance with the Claims and Disputes clause.

17.3 Claims and Disputes

17.3.1. Notice: Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to the other party to the Agreement promptly (but in no event later than 30 days) after the start of the event giving rise thereto. Notice of the amount or extent of the Claim, dispute, or other matter with supporting data shall be delivered to the other party to this agreement within 60 days after the start of such event, unless additional time is reasonably needed for claimant to submit additional or more accurate data in support of such Claim, dispute, or other matter. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to the claimant within 30 days after receipt of the claimant's last submittal. In no event shall any disputes under this Agreement be submitted for resolution by arbitration. This Agreement shall be governed by the laws of the Commonwealth of Virginia, and venue for any and all litigation shall be the Circuit Court of Wise County, Virginia.

17.3.2 Cooperation; Resolution of Disputes.

The parties agree to cooperate to achieve the objectives of this Agreement, and to use reasonable and good-faith efforts to resolve all disputes and disagreements that may arise hereunder. Each party agrees to designate representatives with the authority to make decisions binding upon such party (subject in the case of Owner to those matters requiring an appropriate vote) so as to not unduly delay the Project's Schedule. The parties shall first endeavor to resolve any disputes, claims or other matters in question between them through direct negotiations, and if such direct negotiations fail, by non-binding mediation conducted by a mutually agreeable mediator, and if the parties cannot agree on a mediator, then pursuant to the Construction Industry Mediation Procedure of the American Arbitration Association, with the site of the mediation being the County of Wise, Virginia, or such other site as may be agreed upon by the parties. Such mediation shall be a condition precedent to litigation and be conducted as soon as reasonably possible. Should the dispute, claim or other matter in question remain unresolved for the shorter of (A) ninety (90) days following negotiation and mediation, or (B) ninety (90)

days after mediation is invoked by a party, then either party may institute an appropriate action, in the Circuit Court of the County of Wise, Virginia, or if the subject or amount in controversy is within its jurisdiction, the General District Court of the County of Wise, Virginia. The parties expressly waive any right they may have to a jury trial. Nothing herein shall prevent a party from seeking temporary injunctive or other temporary equitable relief in the Circuit Court of the County of Wise, Virginia, if circumstances so warrant.

ARTICLE 18

TERMINATIONS

18.1. Termination for Convenience

- 18.1.1. Performance under this Agreement may be terminated by Owner for convenience in whole or in part at any time. A termination may be effected by delivery to Developer of a notice of termination specifying the extent of work terminated, and the effective date and time of termination. At all times, this Agreement is subject to termination due to lack of appropriated funds for the Projects.
- 18.1.2. Upon receipt of a notice of termination, unless otherwise directed by Owner's Representative, Developer shall take the following actions:
 - 18.1.2.1. Stop work to the extent specified in the notice,
 - 18.1.2.2. Place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of the non-terminated work,
 - 18.1.2.3. Terminate all orders and subcontracts to the extent that they relate to the work terminated,
 - 18.1.2.4. Settle all outstanding liabilities and claims arising out of the termination of orders, prime contracts and subcontracts, and the Developer shall be entitled to receive reasonable payment for work executed and costs incurred by reason of such termination, but not overhead and profit for work not executed.
 - 18.1.2.5. Transfer title to Owner and deliver as directed by Owner's Representative to the extent that payment that is due is paid to the Developer
 - (a) Work in process, completed work, and other material produced as a part of or acquired for the work terminated; and
 - (b) The completed or partially completed plans, drawings, information, and other property that if the Agreement had been completed, would have been furnished to Owner,

- 18.1.2.6. Complete performance of the work not terminated,
- 18.1.2.7. Take any action that may be necessary, or that Owner's Representative may direct for protecting and preserving any property related to the Agreement that is in the possession of Developer and in which Owner has or may acquire an interest.
- 18.1.3. After termination, Developer shall submit to Owner's Representative a termination claim in the form and with the certification reasonably requested by Owner's Representative. The claim shall be submitted promptly, but in no event more sixty (60) days after the effective date of termination, unless an extension in writing is granted by Owner's Representative. Upon failure of Developer to submit a termination claim within the time allowed, Developer waives any right to make any claims for additional payment by Owner.
- 18.1.4. If Developer's termination claim is not approved by Owner and Developer and Owner's Representative fail to agree on the amount to be paid to Developer by reason of the termination, Owner will pay Developer the amount not in dispute and the disputed portion will then be resolved in accordance with paragraph 17.3.
- 18.1.5. In arriving at the amount due Developer, Owner may seek to offset:
 - 18.1.5.1. Any valid claim that Owner may have against Developer under this Agreement; and
 - 18.1.5.2. The agreed price for or the proceeds of sale of materials, supplies, or other things kept by Developer or sold and not recovered by or credited to Owner.
- 18.1.6. If the termination is partial, Developer shall file with Owner's Representative a request in writing for an equitable adjustment of the price specified in the Agreement relating to the continued portion of the Agreement.

18.2. Termination for Default

- 18.2.1. Owner may, by written notice of default to Developer, terminate this Agreement in whole or in part if Developer, through no material fault of the Owner, fails to:
 - 18.2.1.1. Complete the requirements of this Agreement within the time specified in the Agreement or any extension,
 - 18.2.1.2. Make progress so as to materially endanger timely performance of this Agreement.
 - 18.2.1.3. Perform any of the other material provisions of this Agreement.

- 18.2.2. Owner's right to terminate this Agreement under this Section 18.2 may be exercised if Developer does not commence to cure the failure within ten days (or more if authorized in writing by Owner's Representative) after receipt of the notice from Owner's Representative specifying the failure and diligently continue the cure until completion.
- 18.2.3. If Owner terminates this Agreement for cause in whole or in part, it may acquire similar supplies or services or complete the work in the reasonable exercise of Owner's discretion, and Developer will be liable to Owner for any excess costs reasonably incurred. Developer shall continue any work not terminated, and shall be paid according to the provisions of this Agreement.
- 18.2.4. If this Agreement is terminated for default, Owner may require Developer to transfer title and deliver to Owner, as directed by Owner's Representative, any completed supplies, partially completed supplies, and material, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights that Developer has specifically produced or acquired for the terminated portion of this Agreement. Upon direction of Owner's Representative, Developer shall also protect and preserve property in its possession in which Owner has an interest.
- 18.2.5. Owner will pay the price under this Agreement for completed items delivered, usable and accepted. Developer and Owner's Representative may agree on the amount of payment for items delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the "Claims and Disputes" clause. Owner may withhold from these amounts any sum Owner's Representative determines to be necessary to protect Owner against loss because of outstanding claims.
- 18.2.6. If, after termination, it is determined that Developer was not in default or that the delay was in whole or in part excusable, Owner shall compensate Developer as if the termination had been issued for convenience.
- 18.2.7. The rights and remedies of Owner under this clause are in addition to any other rights and remedies provided by law or under this Agreement.
- 18.2.8. Time shall be of the essence of this Section 18.2.

18.3. Developer's Right to Terminate for Cause

If, through no act or fault of Developer the Work is suspended for more than 90 consecutive days by Owner or under an order of court or other public authority, or Owner fails to act on any Application for Payment within 35 days after it is submitted, or Owner fails for 45 days to pay Developer any sum finally determined to be due, or if Owner is in material breach of a material

term of this Agreement, then, if such default is not cured by Owner within 7 days of Developer's written notice of such default, Developer may terminate the Agreement and recover from Owner all of Developer's damages. In lieu of terminating the Agreement, and without prejudice to any other right or remedy, including the right to terminate later, if Owner has failed to act on an Application for Payment within 35 days after it is submitted, or Owner has failed for 35 days to pay Developer any sum finally determined to be due, Developer may, seven days after written notice to Owner, stop the Work until payment is made of all such amounts due Developer, including interest thereon. The provisions of this paragraph do not preclude Developer from making a Claim for an adjustment in Contract Price or Contract Times nor otherwise for expenses or damages directly attributable to Developer's stopping the Work as permitted by this paragraph.

18.3.1 CONSEQUENTIAL DAMAGES.

(a) NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN THIS SECTION 18.3.1), NEITHER OWNER NOR DEVELOPER SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS REPUTATION OR FINANCING.

(b) The consequential damages limitation set forth above is not intended to affect the payment of liquidated damages, if any, pursuant to Section 11.4 above, which both parties recognize has been established, in part, to reimburse Owner for damages that might otherwise be deemed to be consequential.

ARTICLE 19 **INSPECTION AND ACCEPTANCE**

19.1. Inspection of Services

Owner's Representative may, at any time or place, inspect the services performed and the products, including documents and reports. Owner's Representative may reject any services or products that do not meet the requirements of this Agreement. No payment will be due for any services or products rejected under this clause until corrected.

19.2. Inspection and Acceptance

19.2.1. Owner inspection and testing of materials and workmanship will be made at reasonable times at the Site or off the Site as Owner's Representative may direct. Off-Site inspection or testing does not relieve Developer of responsibility for damage to or loss of the material prior to acceptance, or in any way affect the continuing rights of Owner after acceptance of the completed work under the terms of this Agreement.

19.2.2. Developer shall without charge, replace any material or correct any workmanship

found by Owner not to conform to the requirements of this Agreement unless Owner consents to accept such material or workmanship with an appropriate adjustment in price. Developer shall promptly segregate and remove rejected material from the Site.

- 19.2.3. If Developer does not replace rejected material or correct rejected workmanship within a reasonable time Owner may, by contract or otherwise, replace or correct it and charge the cost to Developer.
- 19.2.4. Owner will inspect the work as soon as practicable after completion.
- 19.2.5. Final acceptance of the Projects shall be in writing by Owner upon satisfactory completion of all work required under the terms of this Agreement and all Contract Documents and Plans and Specifications. Final acceptance of the Projects shall not in any way relieve Developer from any responsibilities under this Agreement and under the terms of any warranties. Final acceptance may be subject to completion of seeding or planting as provided in Section 11.6 above, if applicable.
- 19.2.6. Owner may terminate this Agreement for default and seek any remedy allowed by law if Developer does not follow Owner directions to replace or correct incorrect or defective items.

19.3. Projects Closeout

Unless specified for an earlier date elsewhere in this contract, Developer shall process all documents, changes, claim submissions, complete all Project closeout items, and submit a final report certifying that this action has been taken not later than sixty (60) days after the date of Projects Final Completion, subject to completion of seeding and planting as provided in section 11.6, if applicable.

19.4. Asbestos Free and Lead-Based Paint Free Certification

Developer shall certify that no asbestos containing building materials or lead-based paints (interior or exterior) were used in these Projects. Developer shall include completed and unaltered asbestos free and lead-based paint certifications as closeout submittal documents. The only acceptable alternative for asbestos-free or lead-free certification is to conduct a post-construction asbestos inspection in accordance with Asbestos Hazard Emergency Response Act requirements and/or lead survey in accordance with governmental regulations.

19.5 Owner and Developer Representations and Warranties.

19.5.1 Owner hereby represents and warrants to the Developer as follows:

- (a) Owner is the responsible public entity, as that term is used in the PPEA and the Guidelines, for the Projects. As such, Owner has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Contract

Documents.

- (b) The County's Board of Supervisors, as the local governing and appropriating body, has reviewed this Agreement and approved Owner's entry into this Agreement in accordance with the provisions of Virginia Code §56-575.16(5) and the Guidelines.
- (c) The zoning for the Site is consistent with the requirements of the Projects and is otherwise suitable and appropriate for the Projects.
- (d) Condition Precedent and Subsequent to Agreement's Effectiveness. It shall be a condition precedent to this Agreement's effectiveness that this Agreement has been properly executed by Owner and that the approved, executed Agreement has been delivered to the Developer no later than [December 31, 2011].
- (e) Copy of Agreement to Auditor of Public Accounts. Owner shall submit a copy of this Agreement to the Auditor of Public Accounts of the Commonwealth of Virginia within thirty (30) days of its effective date.

19.5.2 Developer hereby represents and warrants to Owner as follows:

- (a) That it has legal authority to enter into this Agreement and perform all of its obligations herein (including necessary state licenses) and that the execution of this Agreement by it has been duly and properly authorized. Developer shall provide the Owner with certified copies of any documents that the Owner requests to evidence such authorization.

ARTICLE 20

MISCELLANEOUS

20.1. Provision By Developer of Financial Statements

Developer shall provide Owner copies of Developer's most recent financial statements periodically upon request. If designated as Confidential Commercial Information, Owner will take reasonable steps to safeguard such financial statements from public disclosure.

20.2. Certifications by Developer

- 20.2.1. Attached as Exhibit H hereto are the certifications by Developer and the members of Developer's team required by page 23 of the Guidelines regarding the accuracy of information provided during the procurement leading to this Agreement.
- 20.2.2. Pursuant to Code of Virginia § 22.1-296.1.C. Developer certifies that neither it, its subcontractors, any others providing work through Developer or its subcontractors, nor any of their employees who will have direct contact with any of Owner's students have been convicted of a felony or any offence involving sexual molestation or physical or

sexual abuse or rape of a child. Developer shall promptly report to the Owner any change that would make this certification no longer accurate.

20.2.3. List of Exhibits

- A. Proposed Site Descriptions
- B. Scope of Work as defined by RFP and Addenda
- C. Schedule
- D. Guaranteed Maximum Price (GMP)
- E. Draw Schedule
- F. Requisition
- G. Educational Program Space Summary
- H. Certifications by Developer
- I. Allowances
- J. Plans and Specifications
- K. Conceptual Proposal
- L. Detailed Proposal
- M. Developer's General Conditions
- N. Davis-Bacon Provisions

20.3.1(a) Notices. All notices and demands by either party to the other shall be given in writing and sent by a nationally recognized overnight courier or by United States certified mail, postage prepaid, return receipt requested, and addressed as follows:

To School Board: Wise County Public Schools
628 Lake Street
Wise, Virginia 24293
Attn: Dr. Jeff Perry

with a copy to: Scott Mullins, Attorney for Wise County Public Schools.

To Developer: S.B. Ballard Construction Company
2828 Shipps Corner Road
Virginia Beach, Virginia 23563
Attn: Stephen B. Ballard

with a copy to: Paul Littlefield, V.P., S.B. Ballard Construction Company

20.3.1(b) Binding Effect. Subject to the limitations of subsection (a) above, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also shall be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

20.3.1(c) Waiver. No waiver by any party of any right or remedy under this Agreement or the other Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Contract Documents. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given. No provision of this Agreement shall be deemed to have been waived unless such waiver shall be in writing signed by the party to be charged.

20.3.1(d) Severability. If any term or provision of this Agreement shall be determined to be invalid or unenforceable in any respect, it shall be replaced with a substantially similar provision to the greatest extent possible, and the Agreement shall remain in full force and effect.

20.3.1(e) Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but both of which such counterparts together shall be deemed to be one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for the other counterpart.

20.3.1(f) Entire Agreement. This Agreement and the Exhibits attached hereto and forming a part hereof set forth all the covenants, promises, agreements, conditions and understandings between the Developer and Owner concerning the Projects, and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth. No alteration, amendment, change or addition to this Agreement shall be binding upon either party unless reduced to writing and signed by each party.

20.3.1(g) Headings. The section and paragraph headings appearing in this Agreement are for convenience of reference only, and shall not be deemed to alter or affect the meaning or interpretation of any provision hereof.

20.4 Any Owner review, approval or acceptance of, or payment for, any services shall not be construed to waive any rights arising out of the performance of this Agreement. Developer shall be liable to Owner, in accordance with applicable laws, for all bodily injury to persons or property damage caused by Developer's performance or that of any of the Developer's Subcontractors and consultants under this Agreement.

20.5 The rights and remedies of Owner provided for under this Agreement are in addition to and not in limitation of any other rights and remedies provided by law.

Execution of this Agreement by Owner constitutes Notice to Proceed with design and construction document preparation.

IN WITNESS WHEREOF, the parties thereto have caused this Agreement to be duly authorized representatives as of the date first above written.

WISE COUNTY SCHOOL BOARD

By: _____

Its: Chairperson

S.B. BALLARD CONSTRUCTION COMPANY

By: _____

Its: _____

Approved:
County of Wise, Virginia

By: _____

Its: _____