

FACILITIES LEASE

For all or a portion of the following Site:

Tokay High School Modular Project Increment 2 Installation of Modular and/or Prefabricated
Classroom Buildings
1111 Century Blvd.
Lodi, CA 95240
APN:

By and between

Lodi Unified School District
1305 E. Vine Street
Lodi, CA 95240

And

[Developer]
[Address]

Dated as of _____, 2019

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FACILITIES LEASE

This facilities lease ("Facilities Lease"), dated as of _____, 2019 ("Effective Date"), is made and entered into by and between [Developer] ("Developer"), a [California corporation] duly organized and existing under the laws of the State of California, as sublessor, and Lodi Unified School District, a school district duly organized and validly existing under the laws of the State of California, as sublessee ("District") (together, the "Parties").

RECITALS

WHEREAS, the District is authorized under Section 17406 of the Education Code of the State of California to lease a site to a developer and to have that developer develop and construct the project on the site and to lease back to the District the site and the completed project; and

WHEREAS, the District desires to provide for the development and construction of certain work to be performed on portions of the School Site which will include construction of improvements to be known as the Tokay High School Modular Project Increment 1 Site Work ("Project"); and

WHEREAS, on the date hereof, the District has leased to Developer, a parcel of land located at 1111 Century Blvd., Lodi, CA 95240, known as Tokay High School, as more particularly described in **Exhibit A** and shown on **Exhibit B** attached hereto and incorporated herein by reference ("School Site"); and

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

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

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

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

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

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

WHEREAS, Developer has reviewed the Lease Documents; and

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

WHEREAS, the Parties have performed all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into of this Facilities Lease and all those conditions precedent do exist, have happened and have been performed in regular and due time, form and manner as required by law, and the Parties hereto are now duly authorized to execute and enter into this Facilities Lease; and

WHEREAS, Developer is authorized to lease the Project Site as lessee and to develop the Project and to have the Project constructed on the Project Site and to lease the Project and the Project Site back to the District, and has duly authorized the execution and delivery of this Facilities Lease.

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

1. **Definitions**

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

- 1.1 **"Developer"** or **"Lessor"** means [Developer], a [California corporation], organized and existing under the laws of the State of California, Contractor's license number [insert number] issued by the State of California, Contractors' State License Board, in accordance with division 3, chapter 9, of the Business and Professions Code, and its successors and assigns.
- 1.2 **"Developer's Representative"** means the Managing Member of Developer, or any person authorized to act on behalf of Developer under or with respect to this Facilities Lease.
- 1.3 **"Contract Documents"** are defined in **Exhibit "D"** to this Facilities Lease.
- 1.4 **"District"** or **"Lessee"** means the Lodi Unified School District, a school district duly organized and existing under the laws of the State of California.
- 1.5 **"District Representative"** means the Superintendent of the District, or any other person authorized by the Board of Education of the District to act on behalf of the District under or with respect to this Facilities Lease.
- 1.6 **"Permitted Encumbrances"** means, as of any particular time:
 - 1.6.1 Liens for general ad valorem taxes and assessments, if any, not then delinquent, or which the District may permit to remain unpaid;

- 1.6.2 The Site Lease.
- 1.6.3 This Facilities Lease.
- 1.6.4 Easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions which exist of record as of the date of this Facilities Lease.
- 1.6.5 Easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions established following the date of recordation of this Facilities Lease and to which Developer and the District consent in writing which will not impair or impede the operation of the Project Site.

2. **Exhibits**

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

- 2.1 **Exhibit A - Legal Description of the School Site:** The descriptions of the real property constituting the School Site.
- 2.2 **Exhibit B - Description of the Project Site:** The map or diagram depiction of the Project Site.
- 2.3 **Exhibit C - Guaranteed Maximum Price and Other Project Cost, Funding, and Payment Provisions:** A detailed description of the Guaranteed Maximum Price and the provisions related to the payment of that amount to the Developer, including Attachment 3, the Schedule of Lease Payments and Payoff Dates and Amounts.
- 2.4 **Exhibit D - General Construction Provisions:** The provisions generally describing the Project's construction.
- 2.5 **Exhibit D-1 – Special Conditions Provisions:** The provisions describing conditions specific to the Project's construction.
- 2.6 **Exhibit E - Memorandum of Commencement Date:** The Memorandum which will memorialize the commencement and expiration dates of the Lease Term.
- 2.7 **Exhibit F - Construction Schedule**
- 2.8 **Exhibit G – Schedule of Values**

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

- 3.1 Developer hereby leases the Project and the Project Site to the District, and the District hereby leases said Project and Project Site from Developer upon the terms and conditions set forth in this Facilities Lease.
- 3.2 The leasing by Developer to the District of the Project Site shall not affect or result in a merger of the District's leasehold estate pursuant to this Facilities

Lease and its fee estate as lessor under the Site Lease. Developer shall continue to have and hold a leasehold estate in the Project Site pursuant to the Site Lease throughout the term thereof and the term of this Facilities Lease.

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

4. Term

4.1 **Facilities Lease is Legally Binding**

This Facilities Lease is legally binding on the Parties upon execution by the Parties and the District Board's approval of this Facilities Lease. The Term of this Facilities Lease for the purposes of District's obligation to make Lease Payments shall commence on the earlier of the following two (2) events, whichever occurs first ("Commencement Date"):

- 4.1.1 The date the District takes beneficial occupancy of the Project; or
- 4.1.2 The date when Developer delivers possession of the Project to District and when all improvements to be provided by Developer are determined by the District to be completed as set forth in **Exhibits D and D-1** to this Facilities Lease.

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

- 4.2 After Developer has completed construction of the Project and the District has accepted the Project, the Parties shall execute the Memorandum of Commencement Date attached hereto as **Exhibit E** to memorialize the commencement date of the Lease Payments and expiration date of the Term. Notwithstanding this Term, the Parties hereby acknowledge that each has obligations, duties, and rights under this Facilities Lease that exist upon execution of this Facilities Lease and prior to the beginning of the Lease Payment obligations.

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

- 4.3.1 An Event of Default by District as defined herein and Developer's election to terminate this Facilities Lease as permitted herein, or
- 4.3.2 An Event of Default by Developer as defined herein and District's election to terminate this Facilities Lease as permitted herein, or
- 4.3.3 Consummation of the District's purchase option pursuant to the Guaranteed Maximum Price and Other Project Cost, Funding, and Payment Provisions indicated in **Exhibit C** ("Guaranteed Maximum Price Provisions").

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

5. **Payment**

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

6. **Title**

- 6.1 During the Term of this Facilities Lease, the District shall hold fee title to the School Site, including the Project Site, and nothing in this Facilities Lease or the Site Lease shall change, in any way, the District's ownership interest.
- 6.2 During the Term of this Facilities Lease, Developer shall have a leasehold interest in the Project Site pursuant to the Site Lease.
- 6.3 During the Term of this Facilities Lease, the Developer shall hold title to the Project improvements provided by Developer which comprise fixtures, repairs, replacements or modifications thereto.
- 6.4 If the District exercises its Purchase Option pursuant to the Guaranteed Maximum Price Provisions indicated in **Exhibit C** or if District makes all necessary payments under the Guaranteed Maximum Price Provisions indicated in **Exhibit C**, all right, title and interest of Developer, its assigns and successors in interest in and to the Project and the Project Site shall be transferred to and vested in the District at the end of the Term. Title shall be transferred to and vested in the District hereunder without the necessity for any further instrument of transfer; provided, however, that Developer agrees to execute any instrument requested by District to memorialize the termination of this Facilities Lease and transfer of title to the Project.

7. **Quiet Enjoyment**

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

8. **Representations of the District**

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

8.1 **Due Organization and Existence**

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

8.2 **Authorization**

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

8.3 **No Violations**

Neither the execution and delivery of this Facilities Lease nor the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Project Site, except Permitted Encumbrances.

8.4 **Condemnation Proceedings**

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

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

9. **Representations of the Developer**

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

9.1 **Due Organization and Existence**

The Developer is a California company duly organized and existing under the laws of the State of California, has the power to enter into this Facilities Lease and the Site Lease; is possessed of full power to lease, lease back, and hold real and personal property and has duly authorized the execution and delivery of all of the aforesaid agreements.

9.2 Authorization

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

9.3 No Violations

Neither the execution and delivery of this Facilities Lease and the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which Developer is now a party or by which Developer is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of Developer, or upon the Project Site, except Permitted Encumbrances.

9.4 No Bankruptcy

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

9.5 No Encumbrances

Developer shall not pledge any District payments of any kind, related to the Site Lease, this Facilities Lease, or in any way derived from the Project Site, and shall not mortgage or encumber the Project Site, except as may be specifically permitted pursuant to the provisions of this Facilities Lease related to Developer's financing the construction of the project.

9.6 Continued Existence

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

- 9.6.1 Two (2) years following completion of the Project.
- 9.6.2 One (1) year following expiration or earlier termination of the Term.
- 9.6.3 After dismissal and final resolution of any and all disputes between the Parties and/or any third-party claims related, in any way, to the Project.

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

10. **Preconstruction Services**

10.1 **Scope of the Preconstruction Services**

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

10.1.1 **General Services**

- 10.1.1.1 Developer shall attend regular meetings during Project development between the Architect, the District, District site personnel, and any other applicable consultants of the District as required to discuss the Project, including budget, scope and schedule.
- 10.1.1.2 Developer shall assist the Architect with making formal presentations to the governing board of District. Such assistance is anticipated to include floor plans and elevations necessary for any architectural presentation.
- 10.1.1.3 Developer shall prepare a rough schedule in Microsoft PROJECT and update as necessary.
- 10.1.1.4 Developer shall prepare and update the components of the Guaranteed Maximum Price and shall be primarily responsible for ensuring that the Project can and is constructed for no more than that amount.
- 10.1.1.5 While the Architect is anticipated to provide primary assistance, Developer shall assist District with City land use issues;
- 10.1.1.6 Architect shall act as lead and Developer will assist District and Architect with DSA review, input, and timeframe for same;
- 10.1.1.7 Architect shall act as lead and Developer will assist with review and comment upon geotechnical / soils investigation and report;
- 10.1.1.8 Architect shall act as lead and Developer will assist with review and comment upon survey of the Project site;

10.1.2 **Review of Design Documents.**

- 10.1.2.1 Review Project design and budget with the District and the Architect based on the Design Development Documents, 50% Construction Documents, and the 100% Construction Documents submitted to DSA to:

- 10.1.2.1.1 Provide recommendations on site use and improvements, selection of materials, building systems and equipment and methods of Project delivery;
- 10.1.2.1.2 Provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction of the Project and subparts thereof if requested, and factors relating to cost including, but not limited to, construction costs of alternate designs of materials, preliminary budgets and possible economics that could be achieved through alternate methods or substitutions;
- 10.1.2.1.3 Provide interim design phase estimates to establish and maintain the Project budget and scheduled costs; and
- 10.1.2.1.4 Provide plan review.
- 10.1.2.1.5 **Value-engineering.** Prepare a value-engineering report for District review and approval that:
 - 10.1.2.1.5.1 Details areas of cost saving (e.g. construction processes/procedures, specified materials and equipment, and equipment or other aspects of the design documents that can be modified to reduce costs and/or the time for achieving final completion of the Project and/or to extend life-cycle and/or to reduce maintenance/operations costs, without diminution in the quality of materials/equipment/workmanship, scope or intended purposes of the Project);
 - 10.1.2.1.5.2 Provides detailed estimate for proposed value-engineering items;
 - 10.1.2.1.5.3 Defines methodology or approaches that maximize value; and
 - 10.1.2.1.5.4 Identifies design choices that can be more economically delivered.
- 10.1.2.1.6 **Constructability Review.** Prepare detailed interdisciplinary constructability review within Fourteen (14) days of receipt of the plans from the District that:
 - 10.1.2.1.6.1 Ensures construction documents are well coordinated and reviewed for errors;

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

10.1.2.1.6.3 Back-checks design drawings for inclusion of modifications;

10.1.2.1.6.4 Provides the District with written confirmation that:

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

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

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

10.1.3 **Budget of Project Costs.**

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

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

10.1.3.2.1 Overhead and profit;

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

10.1.4 Construction Schedule and Phasing Plan

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

10.1.5 Construction Planning and Bidding

- 10.1.5.1 For all of Developer's activities relating to construction planning and bidding, Developer shall comply with all applicable legal requirements, including but not limited to those set forth in Education Code section 17406.
- 10.1.5.2 Consult with District staff in relation to the existing site. Developer should make site visits, as needed to review the current site conditions. During this evaluation, Developer may make recommendations relating to soils investigations and utility locations and capacities, in order to minimize unforeseen conditions.

- 10.1.5.3 Attend meetings at the Project site with the Architect and the design team every two (2) weeks, until plans are ready for submittal to DSA (approximately 6 to 8 weeks, meeting duration is approximately 2 hours).
- 10.1.5.4 Provide plan review and constructability services with an emphasis on ensuring that the Project can be completed within the established schedule and within the available budget.
- 10.1.5.5 Provide a detailed analysis of all major Project systems with an emphasis on possible value engineering possibilities.
- 10.1.5.6 Prepare and distribute specifications and drawings provided by District to facilitate bidding to Developer's subcontractors.
- 10.1.5.7 Review the drawings and specifications to eliminate areas of conflict and overlapping in the work to be performed by various subcontractors, and with a view to eliminating change order requests by the Architect or subcontractors.
- 10.1.5.8 Conduct pre-bid conferences. Coordinate with District and the Architect in responding to subcontractor questions or providing clarification to all subcontractors.
- 10.1.5.9 DSA approved plans shall be utilized to receive subcontractor bids and develop the final GMP in accordance with the lease-leaseback agreement forms. The District representative shall be present during the receipt of bids from subcontractors.
 - 10.1.5.9.1 Developer shall engage in competitive bidding for subcontractors for all scopes of work on the Project that constitute more than one-half of one percent (0.5%) of the total GMP.
 - 10.1.5.9.2 Developer shall provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the District, including a fixed date and time on which qualifications statements, bids, or proposals will be due.
 - 10.1.5.9.3 Developer shall establish reasonable qualification criteria and standards.
 - 10.1.5.9.4 The District representative shall be present during the receipt of bids from subcontractors. Developer shall provide all bids received from all subcontractors to the District.

- 10.1.5.9.5 Developer shall award the subcontract either on a best value basis or to the lowest responsible bidder.
- 10.1.5.9.6 Developer is required to receive at least three (3) bona fide bids from subcontractors for all scopes of work, or seek the District's prior approval if it wishes to provide fewer than the minimum number of bona fide bids from subcontractors.
- 10.1.5.9.7 The process may include prequalification or short-listing.
- 10.1.5.9.8 This process shall not apply to subcontractors listed in the original proposal.
- 10.1.5.10 The GMP shall be presented to the District in the following manner within a three-ring binder as well as electronically on an external memory device such as a CD, USB drive, or other comparable device:
- 10.1.5.10.1 Cover sheet, signed by the Developer indicating the GMP dollar amount with a certification, indicating that the GMP is all inclusive per the plans, specifications and addenda (contract documents). Also include certification stating, "Developer hereby certifies that they have reviewed all subcontractor proposals and whether the subcontractor excluded portions of their scope the Developer has included all costs for a complete GMP in accordance with plans, specifications and addenda."
- 10.1.5.10.2 A bid tabulation sheet indicating the breakdown by subcontractor/trade along with the appropriate general condition amount, other fees (as submitted with the response to the RFQ/P).
- 10.1.5.10.3 Behind the bid tabulation sheet should be a sheet that indicates what is included in the general conditions, which should match what was submitted in the response to the RFQ/P.
- 10.1.5.10.4 Copies of all subcontractor bids received divided by trade that corresponds to the final spread sheet with a cover sheet indicating the scope and subcontractors that provided bids as well as those that were asked to bid, but did not submit a proposal. This sheet should have the dollar amounts for each subcontractor that provided a bid with the first column being the proposed subcontractor for that trade.
- 10.1.5.10.5 Behind the final spread sheet, described above, should be the bids for that trade with the proposed

subcontractor bid on top and the other subcontractor bids in descending dollar order.

- 10.1.5.11 Produce detailed construction CPM schedules to be incorporated into the Project documents including identification of the Project critical path and agency approvals.
- 10.1.5.12 Plan the phases and staging of construction, staging areas, temporary fencing, office trailer placement, access, etc. as required.
- 10.1.5.13 Any other services that are reasonable and necessary to control the budget and schedule. List those areas where subconsultants will be required and where the Developer has in-house expertise. Provide resumes of persons providing each of these services and for key personnel assigned to the Project, not previously provided to the District.

10.2 **Schedule**

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

10.3 **Ownership of Records**

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

10.4 **Open Book Policy**

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

10.5 **Compensation to Developer for Preconstruction Services**

District agrees to reimburse Developer in the total amount not to exceed [Amount in Words] Dollars (\$[Amount in Numbers]), for the performance of preconstruction services contemplated by this Agreement. Developer shall be paid monthly for the actual fees and allowed costs and expenses for all time and materials required and expended for work requested and specified by the District as completed. Said amount shall be paid within thirty (30) days upon submittal to and verification by the District of a monthly billing statement

showing completion of the tasks for that month on a line item basis. In the event Developer and District enter into an amendment to the Facilities Lease for the construction of the Project, this compensation for services rendered will be included as part of the Guaranteed Maximum Price ("GMP") to be paid to Developer by District.

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

10.6 Termination before Construction Phase

10.6.1 Before the Notice to Proceed with Construction is issued by the District, this Agreement may be terminated at any time without cause by District upon fourteen (14) days written notice to Developer. In the event of such a termination by District, the District shall pay Developer for all undisputed services performed and expenses incurred per this Agreement, supported by documentary evidence, including, but not limited to, payroll records, invoices from third parties retained by Developer pursuant to this Agreement, and expense reports up until the date of notice of termination plus any sums due Developer for Board-approved extra services. In ascertaining the services actually rendered hereunder up to the date of termination of this Agreement, consideration shall be given to completed work and work in process that would best serve the District if a completed product was presented.

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

10.7 Construction Phase

Developer shall not commence any construction work before DSA approval of the Plans and Specifications.

11. Construction of Project

11.1 Construction of Project

11.1.1 Developer agrees to cause the Project to be developed, constructed, and installed in accordance with the terms hereof and the Construction Provisions set forth in **Exhibit D**, including those things reasonably inferred from the Contract Documents as being

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

11.1.2 **Contract Time / Construction Schedule**

It is hereby understood and agreed that the Contract Time for this Project shall be _____ (_____) calendar days, commencing on the date of the Notice to Proceed with Construction ("Contract Time"). The Construction Schedule must be approved by the District.

11.1.3 **Schedule of Values**

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

11.1.4 **Liquidated Damages**

Time is of the essence for all work Developer must perform to complete the Project. It is hereby understood and agreed that it is and will be difficult and/or impossible to ascertain and determine the actual damage that the District will sustain in the event of and by reason of Developer's delay; therefore, Developer agrees that it shall pay to the District the sum of _____ Dollars (\$_____) per day as liquidated damages for each and every day's delay beyond the Contract Time.

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

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

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

11.1.5 **Guaranteed Maximum Price**

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

11.1.6 **Modifications**

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

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

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

12. **Maintenance**

Following delivery of possession of the Project by Developer to District, the repair, improvement, replacement and maintenance of the Project and the Project Site shall be at the sole cost and expense and the sole responsibility of the District, subject only to all punch list items and warranties against defects in materials and workmanship of Developer as provided in **Exhibit D**. The District shall pay for or otherwise arrange for the payment of the cost of the repair and replacement of the Project resulting from ordinary wear and tear. The District waives the benefits of subsections 1 and 2 of Section 1932 of the California Civil Code, but such waiver shall not limit any of the rights of the District under the terms of this Facilities Lease.

13. **Utilities**

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

14. **Taxes and Other Impositions**

All ad valorem real property taxes, special taxes, possessory interest taxes, bonds and special lien assessments or other impositions of any kind with respect to the Project, the Project Site and the improvements thereon, charged to or imposed upon either Developer or the District or their respective interests or estates in the Project, shall at all times be paid by District. In the event any possessory interest tax is levied on Developer, its successors and assigns, by virtue of this Facilities Lease or the Site Lease, District shall pay such possessory interest tax directly, if possible, or shall reimburse Developer, its successors and assigns for the full amount thereof within forty-five (45) days after presentation of proof of payment by Developer.

15. **Insurance**

15.1 **Developer's Insurance**

The Developer shall comply with the insurance requirements as indicated here and in **Exhibit D-1**.

15.2 **District's Insurance**

15.2.1 **Rental Interruption Insurance**

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

15.2.2 **Property Insurance**

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

16. **Indemnification and Defense**

16.1 To the fullest extent permitted by California law, Developer shall indemnify, keep and hold harmless the District and its respective Board Members, officers, representatives, employees, consultants, the Architect and Construction Manager in both individual and official capacities and their consultants ("Indemnitees"), against all suits, claims, damages, losses, and expenses, including but not limited to attorney's fees and costs, caused by, arising out of, resulting from, or incidental to, the performance of the Work under this Contract by the Developer or its Subcontractors, vendors and/or

suppliers, including any suit, claim, damage, loss, or expense attributable to, without limitation, bodily injury, sickness, disease, death, alleged patent violation or copyright infringement, or injury to or destruction of tangible property (including damage to the Work itself) and including the loss of use resulting therefrom, except to the extent caused wholly by the active negligence or willful misconduct of the Indemnitees, and/or defects in design furnished by the Architect, as found by a court or arbitrator of competent jurisdiction, in which case the Developer's indemnification and hold harmless obligation shall be reduced by the proportion of the Indemnitees' and/or Architect's liability. This indemnification and hold harmless obligation includes, but is not limited to, any failure or alleged failure by Developer to comply with any law and/or provision of the Contract Documents, including, without limitation, any stop payment notice actions or liens, including Civil Wage and Penalty Assessments and/or Orders by the California Department of Industrial Relations.

- 16.2 Developer shall also defend, at its own expense, Indemnitees against all suits, claims, allegations, damages, losses, and expenses, including but not limited to attorneys' fees and costs, caused by, arising out of, resulting from, or incidental to, the performance of the Work under this Contract by Developer, its Subcontractors, vendors, or suppliers, except to the extent caused by the sole negligence, active negligence, or willful misconduct of the Indemnitees, and/or defects in design furnished by the Architect, as found by a court or arbitrator of competent jurisdiction, in which case the Developer's defense obligation shall be reduced by the proportion of the Indemnitees' and/or Architect's liability. The District shall have the right to accept or reject any legal representation that Developer proposes to defend the Indemnitees. If the Indemnitees provide their own defense due to failure to timely respond to tender of defense, rejection of tender of defense, or conflict of interest of proposed counsel, Developer shall reimburse Indemnitees for any expenditures, including reasonable attorney's fees and costs. This defense obligation includes, but is not limited to, any failure or alleged failure by Developer to comply with any provision of law, any failure or alleged failure to timely and properly fulfill all of its obligations under the Contract Documents in strict accordance with their terms, and without limitation, any failure or alleged failure of Developer's obligations regarding any stop payment notice actions or liens, including Civil Wage and Penalty Assessments and/or Orders by the California Department of Industrial Relations. This agreement and obligation of the Developer shall not be construed to negate, abridge, or otherwise reduce any right or obligation of defense that would otherwise exist as to any party or person described herein.
- 16.3 The Developer shall give prompt notice to the District in the event of any injury (including death), loss, or damage included herein. Without limitation of the provisions herein, if the Developer's agreement to indemnify and hold harmless the Indemnitees or its agreement to defend Indemnitees as provided herein against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of any of the Indemnitees shall to any extent be or be determined to be void or unenforceable, it is the intention of the parties that these circumstances shall not otherwise affect the validity or enforceability of the Developer's agreement to indemnify, defend, and hold harmless the rest of the Indemnitees, as provided herein, and in the case of any such suits, claims,

damages, losses, or expenses caused in part by the default, negligence, or act or omission of the Developer, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, and in part by any of the Indemnitees, the Developer shall be and remain fully liable on its agreements and obligations herein to the fullest extent permitted by law.

- 16.4 In any and all claims against any of the Indemnitees by any employee of the Developer, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the Developer's indemnification obligation herein shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Developer or any Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.
- 16.5 The District may retain so much of the moneys due to the Developer as shall be considered necessary, until disposition of any such suit, claims or actions for damages or until the District, Architect and Construction Manager have received written agreement from the Developer that Developer will unconditionally defend the District and its respective Board Members, officers, representatives, employees, consultants, the Architect and Construction Manager and their sub-consultants and pay any damages due by reason of settlement or judgment.
- 16.6 The indemnification and defense obligations hereunder shall survive the completion of Work, including the warranty/guarantee period, and/or the termination of the Contract.

17. **Eminent Domain**

17.1 **Total Taking After Project Delivery**

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

- 17.1.1 The financial interest of Developer shall be limited to the amount of principal payments pursuant to the Guaranteed Maximum Price Provisions indicated in Exhibit C that are then due or past due together with all remaining and succeeding principal payments pursuant to the Guaranteed Maximum Price Provisions indicated in Exhibit C for the remainder of the original Term. For example, if all of the Project and the Project Site is taken at the end of the third year of the Term, Developer shall be entitled to receive from the eminent domain award the sum of all principal payments pursuant to the Guaranteed Maximum Price Provisions indicated in Exhibit C that would have been owing for the fourth year through the end of the Term had there been no taking.
- 17.1.2 The balance of the award, if any, shall be paid to the District.

17.2 Total Taking Prior to Project Delivery

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

17.3 Partial Taking.

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

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

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

18. Damage and Destruction

If, following delivery of possession of all or a portion of the Project by Developer to District, the Project is totally or partially destroyed due to fire, acts of vandalism, flood, storm, earthquake, Acts of God, or other casualty beyond the control of either party hereto, the Term shall end and District shall no longer be required to make any payments required pursuant to the Guaranteed Maximum Price Provisions indicated in **Exhibit C** that are then due or past due or any remaining and succeeding principal payments pursuant to the Guaranteed Maximum Price Provisions indicated in **Exhibit C** for the remainder of the original Term. Nothing in this section shall relieve District of its obligations, nor deny Developer its rights, under section 15.2

19. Abatement

19.1 If, after the Parties have executed the Memorandum of Commencement Date attached hereto as **Exhibit E**, the Project becomes destroyed or damaged beyond repair, the District may determine its use of the Project abated. Thereafter, the District shall have no obligation to make, nor shall the Developer have the right to demand, the Lease Payments as indicated in the Guaranteed Maximum Price Provisions indicated in **Exhibit C** to this Facilities Lease. The Term shall cease at that time. Nothing in this section shall relieve District of its obligations, nor deny Developer its rights, under section 15.2.

- 19.2 The Parties hereby agree that the net proceeds of the District's rental interruption insurance that the District must maintain during the Term, as required herein, shall constitute a special fund for the payment of the Lease Payments indicated in the Guaranteed Maximum Price Provisions indicated in **Exhibit C**.
- 19.3 The District shall as soon as practicable after such event, apply the net proceeds of its insurance policy intended to cover that loss ("Net Proceeds"), either to:
- 19.3.1 Repair the Project to full use.
 - 19.3.2 Replace the Project, at the District's sole cost and expense, with property of equal or greater value to the Project immediately prior to the time of the destruction or damage, and that replacement, once completed, shall be substituted in this Facilities Lease by appropriate endorsement; or
 - 19.3.3 Exercise the District's purchase option as indicated in the Guaranteed Maximum Price Provisions indicated in Exhibit C to this Facilities Lease.
- 19.4 The District shall notify the Developer of which course of action it desires to take within thirty (30) days after the occurrence of the destruction or damage. The Net Proceeds of all insurance payable with respect to the Project shall be available to the District and shall be used to discharge the District's obligations under this Section.

20. **Access**

20.1 **By Developer**

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

20.2 **By District**

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

21. **Assignment, Subleasing**

21.1 **Assignment and Subleasing by the District**

Any assignment or sublease by District shall be subject to all of the following conditions:

- 21.1.1 This Facilities Lease and the obligation of the District to make the payments required pursuant to the Guaranteed Maximum Price

Provisions indicated in Exhibit C shall remain obligations of the District; and

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

21.2 **Assignment by Developer**

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

22. **Termination, Default And Suspension**

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

- 22.1.1 Except as otherwise expressly provided in this Facilities Lease, this Facilities Lease shall not terminate, nor shall District have any right to terminate this Facilities Lease or be entitled to the abatement of any necessary payments pursuant to the Guaranteed Maximum Price Provisions in Exhibit C or any reduction thereof. The obligations hereunder of District shall not be otherwise affected by reason of any damage to or destruction of all or any part of the Project; the taking of the Project or any portion thereof by condemnation or otherwise; the prohibition, limitation or restriction of District's use of the Project; the interference with such use by any private person or contractor; the District's acquisition of the ownership of the Project (other than pursuant to an express provision of this Facilities Lease); any present or future law to the contrary notwithstanding. It is the intention of the Parties hereto that all necessary payments pursuant to the Guaranteed Maximum Price Provisions indicated in Exhibit C shall continue to be payable in all events, and the obligations of the District hereunder shall continue unaffected unless the requirement to pay or perform the same shall be terminated or modified pursuant to an express provision of this Facilities Lease.
- 22.1.2 Nothing contained herein shall be deemed a waiver by the District of any rights that it may have to bring a separate action with respect to any Event of Default by Developer hereunder or under any other agreement to recover the costs and expenses associated with that action. The District covenants and agrees that it will remain obligated under this Facilities Lease in accordance with its terms.
- 22.1.3 Following completion of the Project, the District will not take any action to terminate, rescind or avoid this Facilities Lease,

notwithstanding the bankruptcy, insolvency, reorganization, composition, readjustment, liquidation, dissolution, winding-up or other proceeding affecting Developer or any assignee of Developer in any such proceeding, and notwithstanding any action with respect to this Facilities Lease which may be taken by any trustee or receiver of Developer or of any assignee of Developer in any such proceeding or by any court in any such proceeding. Following completion of the Project, except as otherwise expressly provided in this Facilities Lease, District waives all rights now or hereafter conferred by law to quit, terminate or surrender this Facilities Lease or the Project or any part thereof.

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

22.2 District's Right to Terminate Developer for Cause

22.2.1 Grounds for Termination

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

- 22.2.1.1 Developer refuses or fails to execute the Work or any separable part thereof; or
- 22.2.1.2 Developer fails to complete said Work within the time specified or any extension thereof; or
- 22.2.1.3 Developer persistently fails or refused to perform Work or provide material of sufficient quality as to be in compliance with the Facilities Lease; or
- 22.2.1.4 Prior to completion of the Project, Developer is adjudged a bankrupt, files a petition for relief as a debtor, or a petition is filed against the Developer without its consent, and the petition not dismissed within sixty (60) days; or
- 22.2.1.5 Prior to the completion of the Project, Developer makes a general assignment for the benefit of its creditors, or a receiver is appointed on account of its insolvency; or
- 22.2.1.6 Developer persistently or repeatedly refuses and/or fails, except in cases for which extension of time is provided, to supply enough properly skilled workers or proper materials to complete the Work in the time specified; or

- 22.2.1.7 Developer fails to make prompt payment to Subcontractors, or for material, or for labor; or
- 22.2.1.8 Developer persistently disregards laws, or ordinances, or instructions of District as indicated in **Exhibit D**, or otherwise in violation of **Exhibit D**; or
- 22.2.1.9 Developer fails to supply labor, including that of Subcontractors, that is sufficient to prosecute the Work or that can work in harmony with all other elements of labor employed or to be employed on the Work; or
- 22.2.1.10 Developer or its Subcontractor(s) is/are otherwise in breach, default, or in substantial violation of any provision of this Facilities Lease, including but not limited to a lapse in licensing or registration for Developer or any tier of Subcontractor.

22.2.2 **Notification of Termination**

- 22.2.2.1 Upon the occurrence at District's sole determination of any of the above conditions, or upon Developer's failure to perform any material covenant, condition or agreement in this Facilities Lease, District may, without prejudice to any other right or remedy, serve written notice upon Developer and its Surety of District's termination of this Facilities Lease and/or the Developer's right to perform the work of this Facilities Lease. This notice will contain the reasons for termination.
 - 22.2.2.1.1 Unless, within fifteen (15) days after the service of the notice, any and all condition(s) shall cease, and any and all violation(s) shall cease, or arrangement satisfactory to District for the correction of the condition(s) and/or violation(s) be made, this Facilities Lease and the Site Lease shall cease and terminate.
 - 22.2.2.1.2 If the failure stated in the notice cannot be corrected within fifteen (15) days after the service of notice, District may consent to an extension of time, provided Developer instituted and diligently pursued corrective action within the applicable fifteen (15)-day period and until the violation is corrected. Upon District determination, Developer shall not be entitled to receive any further payment until the entire Work is finished.

- 22.2.2.2 Upon Termination, District may immediately serve written notice of tender upon Surety whereby Surety shall have the right to take over and perform this Facilities Lease only if Surety:
 - 22.2.2.2.1 Within three (3) days after service upon it of the notice of tender, gives District written notice of Surety's intention to take over and perform this Facilities Lease; and
 - 22.2.2.2.2 Commences performance of this Facilities Lease within three (3) days from date of serving of its notice to District.
- 22.2.2.3 Surety shall not utilize Developer in completing the Project if the District notifies Surety of the District's objection to Developer's further participation in the completion of the Project. Surety expressly agrees that any developer which Surety proposes to fulfill Surety's obligations is subject to District's approval.
- 22.2.2.4 If Surety fails to notify District or begin performance as indicated herein, District may take over the Work and execute the Work to completion by any method it may deem advisable at the expense of Developer and/or its Surety. Developer and its Surety shall be liable to District for any excess cost or other damages the District incurs thereby. Time is of the essence in this Facilities Lease. If the District takes over the Work as herein provided, District may, without liability for so doing, take possession of and utilize in completing the Work all materials, appliances, plan, and other property belonging to Developer as may be on the Site of the Work, in bonded storage, or previously paid for.

22.2.3 **Effect of Termination**

- 22.2.3.1 If District terminates the Site Lease and the Facilities Lease pursuant to this section, the Project Site and any improvements built upon the Project Site shall vest in District upon termination of the Site Lease and Facilities Lease, and District shall thereafter be required to pay only the principal amounts then due and owing pursuant to the Guaranteed Maximum Price Provisions indicated in Exhibit C, less any damages incurred by District due to Developer's default, acts, or omissions.
- 22.2.3.2 The District shall retain all rights it possesses pursuant to this Facilities Lease including, without limitation.
 - 22.2.3.2.1 The right to assess liquidated damages due because of any project delay; and

- 22.2.3.2.2 All rights the District holds to demand performance pursuant to the Developer's required performance bond.
- 22.2.3.3 Developer shall, only if ordered to do so by the District, immediately remove from the Site all or any materials and personal property belonging to Developer that have not been incorporated in the construction of the Work, or which are not in place in the Work. The District retains the right, but not the obligation, to keep and use any materials and personal property belonging to Developer that have not been incorporated in the construction of the Work, or which are not in place in the Work. The Developer and its Surety shall be liable upon the performance bond for all damages caused the District by reason of the Developer's failure to complete the Work under this Facilities Lease.
- 22.2.3.4 In the event that the District shall perform any portion of, or the whole of the Work, pursuant to the provisions of the General Conditions, the District shall not be liable nor account to the Developer in any way for the time within which, or the manner in which, the Work is performed by the District or for any changes the District may make in the Work or for the money expended by the District in satisfying claims and/or suits and/or other obligations in connection with the Work.
- 22.2.3.5 In the event that the Site Lease and Facilities Lease are terminated for any reason, no allowances or compensation will be granted for the loss of any anticipated profit by the Developer or any impact or impairment of Developer's bonding capacity.
- 22.2.3.6 If the expense to the District to finish the Work exceeds the unpaid Guaranteed Maximum Price, Developer and Surety shall pay difference to District within twenty-one (21) days of District's request. District may apply any amounts otherwise due to Developer to this difference.
- 22.2.3.7 The District shall have the right (but shall have no obligation) to assume and/or assign to a replacement contractor or construction manager, or other third party who is qualified and has sufficient resources to complete the Work, the rights of the Developer under its subcontracts with any or all Subcontractors. In the event of an assumption or assignment by the District, no Subcontractor shall have any claim against the District or third party for Work performed by Subcontractor or other matters arising prior to termination of the Facilities Lease. The District or any third party, as the case may be, shall be liable only for obligations to the Subcontractor arising after assumption or assignment.

Should the District so elect, the Developer shall execute and deliver all documents and take all steps, including the legal assignment of its contractual rights, as the District may require, for the purpose of fully vesting in the District the rights and benefits of its Subcontractors under Subcontracts or other obligations or commitments. Developer must include this assignment provision in all of its Facilities Leases with its Subcontractors.

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

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

22.3 Termination of Developer for Convenience

22.3.1 District in its sole discretion may terminate the Facilities Lease upon five (5) days written notice to the Developer. Under a termination for convenience, the District retains the right to all the options available to the District if there is a termination for cause. In case of a termination for convenience, the Developer shall have no claims against the District except:

22.3.1.1 The actual cost for labor, materials, and services performed that is unpaid and adequately documented through timesheets, invoices, receipts, or otherwise; and

22.3.1.2 Five percent (5%) of the total cost of work performed as of the date of termination, or five percent (5%) of the value of the Work yet to be performed, whichever is less. This five percent (5%) amount shall be full compensation for all Developer's and its Subcontractor(s)' mobilization and/or demobilization costs and any anticipated lost profits resulting from termination of the Developer for convenience.

22.4 Developer Remedies Upon District Default

22.4.1 Events of Default by District Defined

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

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

22.4.2 Remedies on District's Default

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

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

- 22.4.2.1.1 An amount determined by a mutually-agreed upon appraiser; or
- 22.4.2.1.2 If an appraiser cannot be agreed to, an amount equal to the mean between a District appraisal and a Developer appraisal for the Project Site, both prepared by MAI-certified appraisers.

22.4.2.2 District's obligation to make the payments required pursuant to the Guaranteed Maximum Price Provisions indicated in Exhibit C shall be:

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

22.4.2.2.2 Decreased by the amount of rent Developer receives in re-letting the Project Site.

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

22.4.3 **District's Continuing Obligation**

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

22.4.4 **No Remedy Exclusive**

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

22.5 Suspension of Work

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

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

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

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

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

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

23. Notices

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

If to District:

Lodi Unified School District
1305 E. Vine Street
Lodi, CA 95240
Attn: Leonard Kahn, CBO

If to Developer:

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

With a copy to:

Samuel Santana, Esq.
Dannis Woliver Kelley
115 Pine Ave, Suite 500
Long Beach, CA 90802

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

24. **Binding Effect**

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

25. **No Additional Waiver Implied by One Waiver**

In the event any agreement contained in this Facilities Lease should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

26. **Severability**

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

27. **Amendments, Changes and Modifications**

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

28. **Net-Net-Net Lease**

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

29. **Execution in Counterparts**

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

30. **Developer and District Representatives**

Whenever under the provisions of this Facilities Lease the approval of Developer or the District is required, or Developer or the District is required to take some action at the request of the other, the approval or request shall be given for Developer by Developer's

Representative and for the District by the District's Representative, and any party hereto shall be authorized to rely upon any such approval or request.

31. **Applicable Law**

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

32. **Attorney's Fees**

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

33. **Captions**

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

34. **Prior Agreements**

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

35. **Further Assurances**

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

36. **Recitals and Exhibits Incorporated**

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

37. **Time of the Essence**

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

38. **Force Majeure**

A party shall be excused from the performance of any obligation imposed in this Facilities Lease and the exhibits hereto for any period and to the extent that a party is prevented from performing that obligation, in whole or in part, as a result of delays caused by the other party or third parties, a governmental agency or entity, an act of God, war, terrorism, civil disturbance, forces of nature, fire, flood, earthquake, strikes or lockouts, and that non-performance will not be a default hereunder or a grounds for termination of this Facilities Lease.

39. **Interpretation**

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

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

ACCEPTED AND AGREED on the date indicated below:

Dated: _____, 2019

Dated: _____, 2019

Lodi Unified School District

[Developer]

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

EXHIBIT A

LEGAL DESCRIPTION OF SCHOOL SITE

Attached is the Legal Description for:

Tokay High School Modular Project Increment 2 Installation of Modular and/or Prefabricated Buildings
1111 Century Blvd.
Lodi, CA 95240

<INSERT>

EXHIBIT B

DESCRIPTION OF PROJECT SITE

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

<INSERT>

EXHIBIT C

GUARANTEED MAXIMUM PRICE AND

OTHER PROJECT COST, FUNDING, AND PAYMENT PROVISIONS

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

EXHIBIT D

GENERAL CONSTRUCTION PROVISIONS

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

EXHIBIT D-1

SPECIAL CONDITIONS

Attached are the special terms and conditions for the Project.

EXHIBIT E

MEMORANDUM OF COMMENCEMENT DATE

This MEMORANDUM OF COMMENCEMENT DATE is dated _____, 201__, and is made by and between [Developer] ("Developer"), as Lessor, and the Lodi Unified School District ("District"), as Lessee.

1. Developer and District have previously entered into a Facilities Lease dated as of _____, 2019, (the "Lease") for the leasing by Developer to District of the Project Site and Project in Lodi, California, referenced in the Lease.

2. District hereby confirms the following:

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

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

C. That the term for the Lease Payments under the Facilities Lease commenced on _____, 20__ and will expire at 11:59 P.M. on _____, 20__.

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

Dated: _____ , 201__

Dated: _____ , 201__

Lodi Unified School District

[Developer]

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

EXHIBIT F

CONSTRUCTION SCHEDULE

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

[To Be Attached.]

EXHIBIT G

SCHEDULE OF VALUES

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

[To Be Attached.]