

CONTRACT NO.: ___/F18
SCS NO.

**CONTRACT FOR PROFESSIONAL ENGINEERING SERVICES
FOR RETRO-COMMISSIONING AT
COMMODORE JOHN BARRY ELEMENTARY SCHOOL**

BETWEEN

THE SCHOOL DISTRICT OF PHILADELPHIA

AND

March 2018

TABLE OF CONTENTS

	PAGE
Section 1. Incorporation of Background; Definitions; General Rules of Construction	3
1.1 Incorporation of Background	3
1.2 Definitions	3
1.3 General Rules of Construction	6
Section 2. Term of Contract	7
2.1 Term	7
Section 3. Commissioning Agent’s Services and Responsibilities	8
3.1 Status of Commissioning Agent	8
3.2 Commissioning Agent’s Representations, Warranties and Commitments	8
3.3 Basic Services and Additional Services	10
3.4 Standard of Performance	10
3.5 Labor, Materials, Supplies and Equipment	11
3.6 Revisions to Work and Documents	12
3.7 Cooperation with Other School District Consultants	12
3.8 Project Meetings	12
3.9 Project Minutes, Reports, Correspondence and Communications	12
3.10 Coordination and Safety of Onsite Activities	12
3.11 Subletting and Assignment	13
3.12 Legal Costs	15
3.13 Claims Services and Cooperation with Litigation	15
3.14 Changes	15
3.15 Force Majeure	17
3.16 Print and Electronic Media Copies	17
3.17 Ownership and Use of Documents	17
3.18 Findings Confidential	18
3.19 No Responsibility for Hazardous Materials	18
3.20 Deliverables	18
3.21 Safety Responsibilities	19
3.22 Stormwater Management Fees and Charges	19
Section 4. Scope of Services	20
4.1 Schedule	20
4.2 Statement of Services	21
Section 5. School District’s Services and Responsibilities	29
5.1 Summary of Services and Responsibilities	29
5.2 Review and Changes to Documents and Information	30
5.3 No Waiver by Review, Approval, Acceptance or Payment	30
5.4 Purpose of Review and Approval	30
Section 6. Compensation and Payment	30
6.1 Compensation	30
6.2 Payment	30

	PAGE
6.3 Applications for Payment and Subconsultant Payment Confirmation	31
6.4 Withholding of Payments	33
6.5 Final Payment	33
6.6 Basic Services	33
6.7 Additional Services	33
6.8 Reimbursable Expenses	34
6.9 Release	34
6.10 Non-Authorization of Funds	34
6.11 Unavailability of Funds	35
6.12 Crossing Fiscal Years	35
6.13 Audits; Records and Payments	36
Section 7. Contract Management	37
7.1 Contract Administrators	37
Section 8. Employment Practices	38
8.1 Key Personnel	38
8.2 Subconsultants	38
8.3 Equal Opportunity	39
8.4 Non-Discrimination	40
Section 9. Indemnification	43
9.1 Indemnification	43
Section 10. Insurance	44
10.1 Insurance	44
10.2 Evidence of Insurance Coverage	46
10.3 Notice of Claim or Lawsuit	47
10.4 Self-Insurance	47
Section 11. Confidentiality	48
11.1 Confidential and Proprietary Information	48
11.2 Non-Disclosure	48
11.3 School District Data	49
11.4 Exclusions	49
11.5 Remedy for Breach	50
Section 12. Disputes	50
12.1 Escalation	50
12.2 Tolling	50
Section 13. Project Stoppage, Suspension or Abandonment	50
13.1 Stoppage or Abandonment	50
13.2 Suspension for Convenience	51

	PAGE
Section 14. Termination	51
14.1 Termination for Convenience	51
14.2 Termination for Default	52
14.3 Termination Duties	54
14.4 Additional Remedies of the School District	54
14.5 Concurrent Pursuit of Remedies; No Waiver or Duty to Exercise	55
Section 15. Certification Regarding Debarment, Suspension and Ineligibility	55
15.1 Certification	55
15.2 Explanation	56
15.3 Notice	56
15.4 Remedies	56
15.5 Compensation	56
15.6 Survival	57
Section 16. Miscellaneous Provisions	56
16.1 Notices	56
16.2 Governing Law	57
16.3 Forum; Consent to Jurisdiction	57
16.4 Contract Documents; Order of Precedence	57
16.5 School District Liability; Responsibility or Risk of Loss	57
16.6 Compliance with Laws and Regulations	58
16.7 Publicity	58
16.8 General Publication Rights	58
16.9 Conflict of Interest	59
16.10 School District Officers and Employees Not to Benefit	59
16.11 Non-Solicitation	59
16.12 Assignment of Commissioning Agent’s Employees	59
16.13 Background Checks (Criminal, Child Abuse and FBI)	60
16.14 Successors and Assigns	60
16.15 Examination of Records	61
16.16 Survival	61
16.17 Taxes	61
16.18 Tax Compliance	62
16.19 Authority to Execute Contract	66
16.20 No Third Party Beneficiaries	66
16.21 No Waiver	66
16.22 Counterparts	66
16.23 Contract Drafted by All Parties	66
16.24 Severability and Partial Invalidity	67
16.25 Entire Contract	67

Exhibits

- Exhibit A School Reform Commission Resolution dated _____, 2018
- Exhibit B Request for Proposal (RFP) Professional Engineering Services for Retro-Commissioning at Commodore John Barry Elementary School
- Exhibit C Commissioning Agent’s Proposal (as modified hereby) Professional Engineering Services for Retro-Commissioning at Commodore John Barry Elementary School dated _____, 2018 (incorporated by reference into this Contract) and Commissioning Agent’s Proposal, Section B, Organizational Chart
- Exhibit D Commissioning Agent Fee Proposal and Staffing Plan (Hourly Rates) for Key Personnel of Commissioning Agent and its Subconsultants
- Exhibit E Commissioning Agent Proposal, M/WBE Participation Plan

Professional Engineering Services Contract
for Retro-Commissioning
Contract No. ___/F18

Approved by SRC Resolution #A-___
Dated: _____, 2018

SCHOOL DISTRICT OF PHILADELPHIA

SCHOOL REFORM COMMISSION

THIS CONTRACT for Professional Engineering Services for Retro-Commissioning (the “Contract”) is made as of the ___ day of _____, 2018, by and between the SCHOOL DISTRICT OF PHILADELPHIA (hereinafter called “the School District”), acting through its School Reform Commission (“SRC”), located at 440 North Broad Street, Philadelphia, Pennsylvania 19130-4015 and _____ (hereinafter called “Commissioning Agent” or “CxA” or “_____”) located at _____.

BACKGROUND

The School District currently serves about 142,300 students enrolled in School District schools, which include pre-kindergarten, elementary, middle, high school and alternative schools. The School District was designated a distressed school district on December 21, 2001 pursuant to the Pennsylvania Public School Code (“PSC”), 24 P.S. §6-691(c). The School Reform Commission (“SRC”) has been established pursuant to PSC, 24 P.S. §6-696, and is responsible for the operation and management and educational program of the School District pursuant to PSC, 24 P.S. §6-696(e)(1). Various management structures are used to manage the education program in School District schools, including for-profit and non-profit organizations in addition to School District staff.

On May 25, 2017, the SRC adopted a six (6)-year amended Capital Improvement Program (“CIP”) for FY17 through FY22 totaling over \$1.26 billion and a six (6)-year amended CIP for FY18 through FY23 totaling over \$1.28 billion. The CIP priorities include maintaining the physical integrity at existing facilities, upgrading existing facilities to meet code requirements and educational programming needs, replacing systems that have exceeded their lifecycle, and constructing new facilities and additions.

The School District’s Office of Capital Programs (“OCP”) is responsible for identifying and prioritizing capital work within the School District. The OCP shares responsibility for the long term upkeep and replacement of critical building systems over 25.6 million square feet, including nearly 500 buildings, annexes, administrative buildings and athletic fields. The OCP works closely to coordinate its OCP work with staff from the Office of Facilities and Maintenance, the Office of Environmental Management and Services, the Office of Real Property Management and the Office of General Counsel.

On May 25, 2017, the SRC also adopted the Capital Budget for FY 2018 totaling almost \$231 million. The basis for the budget is the sale of bonds, usually repayable with interest over 30 years. The Capital Budget is the basis for the multi-year Capital Improvement Program

(CIP). Projects are selected for inclusion in the CIP using building condition assessment reports, work order and deferred maintenance data, input from field maintenance employees and school administrators, and the priorities identified in the School District Superintendent's Strategic Action Plan.

On December 15, 2004, April 20, 2005, August 17, 2005, January 18, 2006, April 19, 2006, March 1, 2007, May 16, 2007, January 16, 2008, June 18, 2008, December 17, 2008, February 18, 2009, August 19, 2009, March 17, 2010, September 22, 2010, March 16, 2011, October 5, 2011, March 15, 2012, September 27, 2012, March 21, 2013, September 23, 2013, and March 20, 2014, respectively, the SRC, by Resolutions #A-14, #A-5, #A-21, #A-14, #A-4, #A-4, #A-7, #A-4, #A-3, #A-4, #A-7, #A-4, #A-4, #A-4, #A-11, #A-1, #A-2, #A-2, #A-1, #A-2 and #A-2, respectively, approved the classifications and pre-qualifications of a current total pool of 164 Prime Construction Contractors that have been pre-qualified prior to bidding by the School District through the Prime Construction Contractor's Classification and Pre-Qualification Application (RFQ) process, and authorized the School District to accept bids from, award contracts to, and enter into contracts with the current total pool of 164 pre-qualified Prime Construction Contractors. The Prime Construction Contractor's Classification and Pre-Qualification Application RFP process is now open enrollment. As of January 15, 2016, the current total pool of Prime Construction Contractors is 130.

In its Request for Proposal Professional Engineering Services for Retro-Commissioning at Commodore John Barry Elementary School ("Barry School") (hereinafter referred to as "RFP for Retro-Commissioning Services"), the School District requested proposals from qualified firms to provide professional retro-commissioning services of the existing mechanical and building automation systems at the Barry School.

_____ responded to the RFP for Retro-Commissioning Services with a Proposal.

On _____, 2018, the SRC, by Resolution #A-__, authorized the School District to negotiate, develop, and enter into a Contract for Professional Engineering Services for Retro-Commissioning at the Barry School with a qualified professional firm, _____ ("Commissioning Agent") for the _____ ()-year contract period commencing on _____, 2018 and ending on _____, 20___. A copy of the SRC Resolution is attached as Exhibit A, and incorporated by reference into this Contract.

The School District and the Commissioning Agent desire that the Commissioning Agent perform, on time and on-budget, professional engineering services for retro-commissioning the existing mechanical and building automation systems at the Barry School, under the direction and management of the School District. The Commissioning Agent will perform, on-time and on-budget, the professional engineering services for retro-commissioning the existing mechanical and building automation systems at the Barry School, and will assume the responsibilities, duties and liabilities provided herein, and will work in concert with the School District and others in connection with the Capital Improvement Program, in strict accordance with the attached SRC Resolution; and the School District's Request for Proposal ("RFP") Professional Engineering Services for Retro-Commissioning at Commodore John Barry Elementary School (referred to as "RFP for Retro-

Commissioning”), attached as Exhibit B and incorporated by reference into this Contract; and the Commissioning Agent’s Proposal (as modified hereby) Professional Engineering Services for Retro-Commissioning at Commodore John Barry Elementary School, referred to as Exhibit C and incorporated by reference into this Contract; and on the terms and conditions hereinafter set forth.

NOW, THEREFORE, IN CONSIDERATION of the foregoing Background and the mutual covenants, promises, and agreements set forth herein, the School District and the Commissioning Agent, intending to be legally bound, agree as follows:

Section 1. Incorporation of Background; Definitions; General Rules of Construction.

1.1 **Incorporation of Background.** The above Background is incorporated by reference into this Contract.

1.2 **Definitions.** Except as expressly provided otherwise in this Contract or in Exhibits A-F, capitalized terms shall have the meanings specified in this Paragraph 1.2. Such meanings shall be applicable to both the singular and plural of the term defined. Whenever the context requires, words used in the singular shall be construed to mean or include the plural and vice versa; and pronouns of any gender shall be deemed to include and designate the masculine, feminine, and neuter genders. “Or” shall include “and/or”.

(a) **Additional Services** – has the meaning attributed thereto in Paragraph 6.7, *Additional Services*.

(b) **Additional Term** – means the optional additional one (1)-year term described in Paragraph 2.2, *Option to Renew*.

(c) **Applicable Law** – means and includes all federal, state and local statutes, ordinances, resolutions and regulations, including the rules and regulations of any government authority, School District rules, regulations and policies applicable to the School District, the Commissioning Agent and the Work, and includes all applicable case law, court orders, injunctions and consent decrees.

(d) **Basic Services** – has the meaning attributed thereto in Paragraph 6.6, *Basic Services*.

(e) **Capital Improvement Program or CIP or Capital Program** – means the amended 6-year Capital Improvement Program (FY18 through FY23) approved by the SRC on May 25, 2017, and any additions, deletions, changes, adjustments, and annual updates approved by the SRC.

(f) **City or Local** – means the City of Philadelphia and its legislative, executive, and administrative branches of government.

(g) **Commencement FY** – has the meaning attributed thereto in Paragraph 6.12, *Crossing Fiscal Years*.

(h) **Commissioning Agent** or **CxA** – means the qualified professional consulting services firm performing professional engineering services for retro-commissioning the existing mechanical and building automation systems at the Barry School pursuant to this Contract.

(i) **Contract** – means this professional services contract for professional engineering services for retro-commissioning the existing mechanical and building automation systems at the Barry School, including all exhibits or documents attached hereto and/or incorporated herein, as amended from time to time by written amendment executed by both parties, and all modifications or revisions made in accordance with the terms hereof.

(j) **Contract Administrator** – means a Contract Administrator designated by a party pursuant to Paragraph 7.1, *Contract Administrators*.

(k) **Contract Documents** – has the meaning attributed thereto in Paragraph 16.4, *Contract Documents; Order of Precedence*.

(l) **Contract Modification** – has the meaning attributed thereto in Paragraph 3.14, *Changes*.

(m) **Contractor** or **Prime Contractor** or **Construction Contractor** – means the construction contractor performing construction work, including general construction work, heating, ventilating and air conditioning (HVAC) work, plumbing work, and electrical work, for the capital projects identified and addressed in the School District Capital Improvement Program, and is under the School District's Capital Improvement Program, pursuant to a single construction contract or separate multiple construction contracts with the School District, under the bidding and contracts requirements of the Public School Code, 24 P.S. §7-751(a.2).

(n) **Deliverables** – means all required submittals, schedules, work product, materials, documents, drawings, magnetic media and reports, including all underlying information, data and research, to be provided to or by the Commissioning Agent at regular review points and at the completion of the work as expressly noted herein or as may be required by the Commissioning Agent or the School District.

(o) **Effective Date** – means the date first written above.

(p) **Event of Default** – means those events defined and identified in Paragraph 14.2.1 of this Contract.

(q) **Federal** – means the United States of America and its legislative, executive, and administrative branches of government.

(r) **Force Majeure Condition** – means a force majeure event or condition described in Paragraph 3.15, *Force Majeure*.

(s) **Initial Term** – means the Initial Term specified in Paragraph 2.1, *Initial*

Term.

(t) **Key Personnel** – means those job titles and the persons assigned to those positions in accordance with the provisions of Paragraph 8.1, *Key Personnel* of this Contract, and any persons that the Commissioning Agent shall invoice the School District for in performance of required services.

(u) **MBE/WBE** – means minority-owned business enterprise and women-owned business enterprise as certified or qualified by the School District Office of Small Business Development or certified by the City of Philadelphia’s current Office of Economic Opportunity or former Minority Business Enterprise Council, or certified by the Southeastern Pennsylvania Transportation Authority’s DBE Program Office, or certified by any other certifying agency designated by the School District in its discretion.

(v) **Notice to Proceed** – means written authorization by the Contract Administrator for the School District to commence its respective services.

(w) **OSHA** – means the Occupational Health and Safety Act of 1970.

(x) **PDE** – means the Department of Education of the Commonwealth of Pennsylvania or the Pennsylvania Department of Education.

(y) **Phase Submission Review Document** – means the document prepared by the School District and submitted to the Commissioning Agent along with the Scope for the Project, and as possibly modified by modifications, and is incorporated by reference as part of the Contract.

(z) **Project** – means the individual Project for the Barry School.

(aa) **Project Schedule** – means the schedule developed and included in the approved Scope for the Project for the designated school, together with all modifications.

(bb) **Proposal** – means the Proposal dated _____, 2018 submitted by the Commissioning Agent in response to the RFP, together with all subsequent modifications and supporting materials submitted by the Commissioning Agent to the School District in response to the RFP.

(cc) **Request for Information or RFI** – means Request for Information.

(dd) **Request for Proposal or RFP** – means the Request for Proposal Professional Engineering Services for Retro-Commissioning at Commodore John Barry School (referred to as “RFP for Retro-Commissioning Services”) issued by the School District, including all Addenda thereto issued, if any.

(ee) **School District or Owner** – means the School District of Philadelphia.

(ff) **Scope or Scope of Work or SOW** – means the overall plan, including scope or scope of work, schedule, phase submission review document, and budget, for the Project at the Barry School, together with all modifications, provided by the School District and agreed to by the School District.

(gg) **Services or Commissioning Services** – means collectively, those services necessary to complete the Work, including without limitation those services, and such additional services as may be directed by the School District, to be provided by the Commissioning Agent in accordance with the terms and conditions of this Contract and set forth in the Construction Documents, including any Project Schedule, Deliverables, supplements, modifications, or amendments hereto, and any work functions necessary in order to complete such Services.

(hh) **SRC or School Reform Commission** – means the School District’s School Reform Commission appointed pursuant to 24 P.S. §6-696, or any successor body.

(ii) **State** – means the Commonwealth of Pennsylvania and its legislative, executive, and administrative branches of government.

(jj) **Subconsultant or Subcontractor** – means any person, firm, partnership, corporation, other entity, or combination thereof, or their respective duly authorized representative(s), who has or will enter into a contract with the Commissioning Agent to perform any Services covered by this Contract.

(kk) **Subcontract** – means a contract entered into by the Commissioning Agent with a Subconsultant in order to perform, directly or indirectly, its Services under this Contract.

(ll) **Supplemental Construction Manager** – means the qualified professional consulting services firm performing professional construction management services under the School District’s Capital Improvement Program pursuant to a contract with the School District.

(mm) **Termination Notice** – means a notice given by the School District of its intent to terminate and its termination of this Contract. The termination procedure is set forth in Section 14, *Termination*.

(nn) **U.S.** – means United States of America.

(oo) **Work** – means the Scope of Services set forth in Section 4 of this Contract.

*(pp) _____ – means _____, a corporation duly organized and existing under the laws of the [State/Commonwealth] of _____, and licensed and authorized to do business under the laws of the Commonwealth of Pennsylvania, with offices at _____.

[Since definition list is alphabetical, clause must be moved and put in alphabetical order.]

1.3 **General Rules of Construction.** Except as expressly stated otherwise, all references to “Paragraph(s)” or “Section(s)” in this Contract are references to Paragraphs and

Sections of this Contract or the Exhibits attached to this Contract; and all references to Exhibit(s) are references to the Exhibits attached hereto. The table of contents and headings used in this Contract are for reference and convenience only, do not in any way define, limit, describe, or amplify the provisions of this Contract or the scope or intent of its provisions, are not a part of this Contract, and will not enter into the interpretation of this Contract. All references to “days” in this Contract mean calendar days unless otherwise stated. The term “business day” means Monday through Friday, excluding holidays observed by the School District.

Section 2. Term of Contract.

2.1 **Term.** The Term of this Contract shall commence on the date of award of this Contract, and, unless sooner terminated by the School District pursuant to the terms of this Contract, shall continue in full force and effect for a contract time period of ____ () years up to ____ ().

Section 3. Commissioning Agent’s Services and Responsibilities.

3.1 Status of Commissioning Agent.

3.1.1 The School District has engaged the Commissioning Agent as an independent contractor to carry out the Work, and neither the Commissioning Agent nor any of the Commissioning Agent’s agents, employees or Subconsultants shall in any way or for any purpose whatsoever be deemed an agent or employee of the School District. Neither the Commissioning Agent nor any of its agents, employees or Subconsultants constitute employees of the School District, and these persons shall have no right to receive any School District employee benefits, or any other privileges available to School District employees. Neither the Commissioning Agent nor its agents, employees or Subconsultants shall represent themselves in any way as agents or employees of the School District, and none of the Commissioning Agent, its agents, employees or Subconsultants has any power to bind legally the School District to any third party.

3.1.2 The Commissioning Agent is an authorized representative of the School District on the Project, and shall have the powers, duties and responsibilities that are designated by the School District to the Commissioning Agent under this Contract.

3.2 **Commissioning Agent’s Representations, Warranties and Commitments.** The Commissioning Agent hereby represents, warrants and commits to the School District, which representations, warranties and commitments shall survive the execution and delivery of this Contract, that:

3.2.1 The Commissioning Agent has the power and authority to enter into and perform this Contract.

3.2.2 The Commissioning Agent, when executed and delivered, shall be a valid

and binding obligation of the Commissioning Agent enforceable in accordance with its terms.

3.2.3 The Commissioning Agent is financially solvent and possesses sufficient working capital to perform the services set forth in this Contract, on-time and on-budget, and is current in the payment of taxes and other indebtedness to the City of Philadelphia and the Commonwealth of Pennsylvania.

3.2.4 The Commissioning Agent is ready, willing and able and has sufficient experience and competence to perform all of the responsibilities and duties set forth in this Contract, on-time and on-budget.

3.2.5 The Commissioning Agent is authorized to do business in the Commonwealth of Pennsylvania and is properly licensed or registered by all necessary governmental and public and quasi-public authorities having jurisdiction over it, the services required hereunder, and the capital projects that are part of the CIP.

3.2.6 The Commissioning Agent is a firm experienced and skilled in performing professional engineering services for retro-commissioning mechanical and building automation systems of comparable size and complexity to the School District's Project.

3.2.7 The Commissioning Agent has the necessary skills, experience, expertise, ability and available qualified, licensed or registered staff to facilitate rapid professional engineering services for retro-commissioning mechanical and building automation systems for a school project, on time and within the budget.

3.2.8 The Commissioning Agent shall visit the site of the Project and familiarize itself with the local conditions under which the services required hereunder are to be performed.

3.2.9 All retro-commissioning work and other disciplines and features of the Commissioning Agent's work shall be reviewed, approved and sealed, where required, by licensed or registered professionals registered to practice as engineers in the Commonwealth of Pennsylvania.

3.2.10 The Commissioning Agent shall provide and maintain sufficient organization, personnel and management to carry out the requirements of this Contract, on-time and on-budget. The Commissioning Agent shall assign to this Contract personnel having the necessary competency, qualifications, experience, skill and knowledge required to perform the respective services. The School District reserves the right to direct the Commissioning Agent to remove any personnel from the Services provided under this Contract upon material reason therefore given in writing. If removal of personnel is for cause, any costs of such removal shall be borne by the Commissioning Agent.

3.2.11 **Commissioning Agent's and its Subconsultants' Key Personnel.** Key Personnel are defined as, but not limited to, the following positions or functions: (i) Commissioning Engineering Professional; (ii) Controls Specialist; (iii) Test and Balance Specialist; (iv) Project Administrator; (v) Commissioning Specialist; and (vi) Peer Review Engineer/Specialist. The Key Personnel of the Commissioning Agent and its Subconsultants are listed in the Commissioning Agent's Proposal, at Section B, Organizational Chart (Exhibit C). The Key Personnel List, with

hourly labor rates, (Staffing Plan) is attached as Exhibit D and incorporated by reference into this Contract. The Key Personnel of the Commissioning Agent and its Subconsultants, all of whose resumes have been provided, shall perform those engineering and other services of the Commissioning Agent required under this Contract. These persons shall devote their time as necessary to the Project to ensure the Commissioning Agent's full and timely performance of this Contract, on-time and on-budget. The Commissioning Agent shall not remove, reassign, replace, or substitute any listed Key Personnel, without the prior written notice to and consent of the School District, which consent shall not be unreasonably withheld. In the event that these persons become unavailable to serve on the Project, the Commissioning Agent shall obtain the School District's prior approval of any selected substitute personnel, which approval shall not be unreasonably withheld.

3.2.12 **Commissioning Agent's Subconsultants.** The Commissioning Agent shall engage the following Subconsultants, which have been approved by the School District, to perform engineering and other services required of the Commissioning Agent under this Contract, on-time and on-budget: _____ . The Commissioning Agent shall require each of its Subconsultants to place his licensed engineering stamp (with name, seal, and dated signature) on any commissioning plans, specifications and reports prepared by his licensed engineers in accordance with the Pennsylvania Engineer, Land Surveyor and Geologist Registration Law, 63 P.S. §§148-158.2. The Commissioning Agent shall not employ, contract with, or use the services of any person or firm, as a subconsultant or otherwise, without the prior written approval of the School District, which approval shall not be unreasonably withheld.

3.2.13 The Commissioning Agent shall coordinate the activities of all its consultants and all other members of its engineering team. The Commissioning Agent shall be responsible for all actions of its Subconsultants and other team members in accordance with Paragraphs 3.4, *Standard of Performance*, 3.5, *Labor, Materials, Supplies and Equipment*, and 3.11, *Subletting and Assignment*, of this Contract.

3.2.14 Any written commitment, warranty or representation by the Commissioning Agent within the scope of this Contract shall be binding upon the Commissioning Agent, whether or not incorporated into this Contract. Failure of the Commissioning Agent to fulfill any such commitment, warranty or representation, or if any commitment, warranty or representation was untrue in any material respect when made, shall constitute a default under Section 14, *Termination*. The commitments, warranties and representations of the Commissioning Agent within the meaning of this Paragraph 3.2.14 shall include, without limitation, the following:

(a) fees, costs and rates committed to remain in force over specified period(s) of time;

(b) any representation or warranty made by the Commissioning Agent in a proposal as to the Services to be performed under this Contract, the qualifications, licenses, registrations, credentials, training, experience, and capabilities of the Commissioning Agent and its personnel, and the licenses, registrations, capabilities, and experience of its Subconsultants;

(c) any representation or warranty made by the Commissioning Agent concerning the characteristics of items of services described in this Paragraph 3.2.14 made in any

literature, descriptions, or documents accompanying or referred to in a proposal;

(d) any modification of, or affirmation, or representation as to the characteristics of items of services described in this Paragraph 3.2.14 which is made by the Commissioning Agent in writing during the course of discussions whether or not incorporated into a formal amendment to the proposal in question; and

(e) any commitment, warranty or representation by the Commissioning Agent in a proposal, supporting documents, or other writing issued during the course of the proposal review as to services to be performed, or any other similar matter, regardless of the fact that the duration of such commitment, warranty or representation may exceed the term of this Contract.

3.3 Basic Services and Additional Services. The Scope of Services and other requirements of this Contract constitute Basic Services, for which compensation will be paid under Paragraph 6.1 herein, but are not intended to have the effect of excluding services which are not specifically mentioned, but which are normally basic services required for performance of the obligations of the Commissioning Agent under this Contract. The Commissioning Agent shall furnish all other services that are necessary or required to fulfill the objectives of this Contract, for which Additional Services the Commissioning Agent will be compensated under Paragraph 6.7 of this Contract. The services and responsibilities delineated in this Contract are intended to substantively define the role of the Commissioning Agent, but may not include all of the services required of the Commissioning Agent under this Contract.

3.4 Standard of Performance. The Commissioning Agent shall exercise a high degree of professional skill, care, diligence, and competence in the rendition of its Services under this Contract in accordance with the professional standards prevailing in the metropolitan Philadelphia area for the provision of engineering services such as those provided in this Contract. The Commissioning Agent's attention is directed to the fact that the Services are urgently needed by the School District. The Commissioning Agent's Services under this Contract shall be performed as expeditiously as is consistent with said professional standards and sound professional practices. The Commissioning Agent shall assure timely and satisfactory completion of its Services in accordance with the Project Schedule and Project Budget. The Commissioning Agent shall at all times act in the best interest of the School District, consistent with the professional obligations assumed by it in entering into this Contract. The Commissioning Agent shall perform all Services under this Contract in accordance with the terms and conditions of this Contract and to the reasonable satisfaction of the School District. The Commissioning Agent shall design to cost when performing its Services under this Contract.

3.4.1 All Services to be performed by the Commissioning Agent that require the exercise of professional skill or judgment shall be accomplished by professionals licensed or registered to practice in the applicable professional discipline in the Commonwealth of Pennsylvania. The Commissioning Agent shall remain responsible for the professional and technical accuracy of all Services or Deliverables furnished under this Contract.

3.4.2 Nothing in the Pennsylvania Engineer, Land Surveyor and Geologist

Registration Law, 63 P.S. §§148-158.2, shall prohibit the Commissioning Agent from performing architectural services as may be incidental to its engineering services under this Contract.

3.4.3 When the Scope of Services of this Contract requires the Commissioning Agent to prepare commissioning plans, specifications, reports, logs, checklists, documents, procedures, or other Project-related items of a similar nature, the Commissioning Agent understands that such items must receive School District's review and approval prior to their use on the Project. All Deliverables shall be prepared in a form and content satisfactory to the School District and shall be delivered in a timely manner consistent with the approved Scope for the Project and all modifications thereto, Project Schedule, and Cost Guidelines.

3.4.4 In the event the Commissioning Agent fails to comply with the standards specified in Paragraph 3.4 of this Contract or elsewhere in this Contract, the Commissioning Agent shall perform again, at its own expense, any and all of the Services or Work that is required to be re-performed as a direct or indirect result of such failure. Notwithstanding any review, approval, acceptance, or payment for any and all of the Services by the School District, the Commissioning Agent shall remain responsible for the professional and technical accuracy of all of the Services and Deliverables, as defined herein and furnished under this Contract. This provision shall in no way be considered as limiting the rights of the School District against the Commissioning Agent either under this Contract, in law or in equity.

3.4.5 With the exception of information, data, test results and other materials provided to the Commissioning Agent by others, upon which the Commissioning Agent is entitled to rely for accuracy and completeness under this Contract, the Commissioning Agent shall be responsible for the professional quality, technical accuracy, completeness and coordination of all commissioning plans, specifications, reports, logs, checklists, documents and other services furnished by the Commissioning Agent and its Subconsultants under this Contract. Without any additional compensation, the Commissioning Agent shall diligently and expeditiously correct any errors, deficiencies or omissions in the Services or Work, and shall remain liable in accordance with this Contract and Applicable Law for all damages to the School District caused by the Commissioning Agent or its Subconsultants or the Services or Work. Any commissioning plans, specifications, reports, logs, checklists or documents furnished by the Commissioning Agent or its Subconsultants found to be defective, solely as a result of the errors, omissions or negligence of the Commissioning Agent or its Subconsultants, shall be promptly corrected by the Commissioning Agent or its Subconsultants, at no cost to the School District.

3.5 **Labor, Materials, Supplies and Equipment.** The Commissioning Agent shall furnish all personnel, labor, materials, supplies, equipment, tools, and instruments necessary for the proper provision of the Services described in this Contract, on-time and on-budget, including but not limited to, telephone, fax machine, and similar items, at its facility. The Commissioning Agent shall furnish the personnel and a sufficient amount of materials, supplies, equipment, tools, and instruments to perform the required Services, on-time and on-budget, in a complete, accurate, and timely manner consistent with the School District's interests or the requests of the School District and the requirements of this Contract. The Commissioning Agent shall be responsible for the means, methods, techniques, sequences, and procedures to perform the Services required under this Contract. The Commissioning Agent shall perform the required Services in such a manner as

to not create a risk of harm to the School District, its agents, representatives, and employees, the general public, and the environment. The Commissioning Agent shall perform the Services required under this Contract using qualified, licensed, or certified personnel at all times.

3.6 **Revisions to Work and Documents.** The Commissioning Agent shall make revisions in commissioning plans, specifications, reports, logs, checklists, or other documents produced for the Project, at no additional cost to the School District, whenever such revisions are required by reason of the documents for the Project being inconsistent with the approvals or instructions previously given by the School District, or such revisions are due to causes solely within the control of the Commissioning Agent. The School District has the right to inspect the Work of the Commissioning Agent and its Subconsultants in progress at any reasonable location and at any reasonable time. The Commissioning Agent shall revise its Work, at no cost to the School District, in accordance with the written directives of the School District's designated representatives, provided such directives are not inconsistent with previous approvals or instructions.

3.7 **Cooperation with Other School District Consultants.** The Commissioning Agent shall perform its Services on the Project in full cooperation with other School District Consultants. The School District shall require other School District Consultants to perform their services in full cooperation with the Commissioning Agent. The Commissioning Agent shall send to other School District Consultants copies of all notices and communications sent to the School District or received by the Commissioning Agent from parties other than the School District and the other School District Consultants relating to the Project. The School District shall require the other School District Consultants to send to the Commissioning Agent copies of all notices and communications sent to the School District or received by the other School District Consultants from parties other than the School District and the Commissioning Agent relating to the Project.

3.8 **Project Meetings.** The Commissioning Agent shall attend progress meetings on the Project with School District representatives from the Office of Capital Programs, in addition to other meetings specifically referred to herein.

3.9 **Project Minutes, Reports, Correspondence and Communications.** The Commissioning Agent shall review minutes of meetings, progress reports, and any other reports, correspondence and communications received on the Project from School District representatives of the Office of Capital Programs, other School District Consultants and the Construction Contractors. Upon request or as required by this Contract, the Commissioning Agent shall provide the School District with oral or written reports of its activities, on a monthly basis or more often as needed or required.

3.10 **Coordination and Safety of Onsite Activities.** The Commissioning Agent shall cooperate and coordinate with all other School District consultants, contractors, and vendors and with School District personnel and consultants whose services for the School District relate to the Commissioning Agent's Services, or requires them to perform activities in support of or in conjunction with the Commissioning Agent's Services; and the Commissioning Agent shall conduct its operations so that it does not interfere with such other School District consultants, contractors, and vendors and School District personnel and consultants. Any difference or conflict that may arise between the Commissioning Agent and other School District consultants,

contractors, or vendors, or between the Commissioning Agent and School District personnel or consultants, shall be decided solely by the School District. If requested by the School District in writing, the Commissioning Agent shall suspend any part of its Services, or modify its Services, if necessary to facilitate the services of other School District consultants, contractors, or vendors or School District personnel or consultants. In the event of such suspension or modification, the Commissioning Agent shall have the right to submit a claim for an extension of time equivalent to the period of any delay caused by compliance with the School District's request. Any such claim(s) of the Commissioning Agent shall be submitted and resolved in accordance with Paragraph 3.14, *Changes*. While on the premises of the School District or of any governmental or other entity other than the School District, the Commissioning Agent shall comply with all rules and regulations of the School District or such other entity.

3.11 Subletting and Assignment.

3.11.1 The Commissioning Agent shall not subcontract any Services hereunder without the School District's prior written consent, other than to the Subconsultants which have been approved by the School District under Paragraph 3.2.12 herein, nor permit any of its Subconsultants to do so. If the Commissioning Agent subcontracts any Services hereunder without the School District's prior written consent, said subcontracting shall be deemed a material breach of this Contract, thereby giving the School District the right to immediately terminate this Contract with no further obligation whatsoever on the part of the School District.

3.11.2 All Subcontracts between the Commissioning Agent and its Subconsultants must be in writing, and shall include at least a detailed description of the Services to be performed, and the agreed-upon compensation schedule. All Subcontracts must contain all contract provisions and certificates as are required by the School District and any State funding agency. In the event of non-performance by a Subconsultant under this Contract, the Commissioning Agent shall be responsible to perform these Services, on-time and on-budget. All terms and conditions under this Contract applying to the Commissioning Agent shall apply equally to its Subconsultants. The Commissioning Agent agrees that all Subcontracts made pursuant to this Contract shall be made expressly subject to all of the terms and conditions of this Contract. The Commissioning Agent shall ensure that it legally binds all Subconsultants to the same terms and conditions as the Commissioning Agent under this Contract.

3.11.3 The Commissioning Agent shall submit to the School District copies of all Subcontracts prior to execution by the Commissioning Agent with the Commissioning Agent's written request for the School District's consent. The Commissioning Agent shall not enter into any Subcontract without first obtaining the School District's written consent to the proposed subconsultant and the proposed subcontract, which consent the School District may grant, withhold, condition or delay in its sole discretion. In the event the School District does not consent to a proposed subconsultant, the Commissioning Agent shall immediately replace the proposed subconsultant with one to which the School District does consent; and if the School District does not consent to a proposed subcontract, the Commissioning Agent shall revise the subcontract as required by the School District. In no event shall the Compensation or time of performance be increased on account of the School District's exercise of any of its rights under this Paragraph 3.11.3. The School District's consent to or approval of any Subcontract or Subconsultant shall not

create any obligation of the School District to any Subconsultant or in any way relieve the Commissioning Agent of its responsibility for the performance of Subconsultants and their consultants.

3.11.4 The Commissioning Agent shall be fully responsible and liable for the performance of all Services, on-time and on-budget, required under this Contract in accordance with the Contract Documents, whether performed by the Commissioning Agent's own personnel, by Subconsultants of the Commissioning Agent, or by consultants of the Subconsultants.

3.11.5 The School District shall have no obligation to any Subconsultant. The Subconsultants shall have no recourse to the School District for any payment or for performance under their Subcontracts. No Commissioning Agent, nor its Subconsultants, or any other person or entity employed by any of them, shall have any right or claim against the School District for any costs or damages arising from their performance of any of the Services, or for any monies due and owing to the Commissioning Agent for the performance of any of the Services. The Commissioning Agent shall incorporate this requirement in all Subcontracts with Subconsultants.

3.11.6 The Commissioning Agent shall not assign or otherwise transfer all or any part of its rights, duties or obligations under this Contract, in whole or in part, except with the prior written consent of the School District; any assignment or transfer (including, but not limited to, assignment of any Subcontract) without such written consent shall be null and void. The absence of such provision or written consent shall void the attempted assignment or transfer, and the attempted assignment or transfer shall be of no effect as to the Services, the Work, or this Contract.

3.11.7 In no event shall the School District's consent to any assignment or transfer by the Commissioning Agent of any rights, duties or obligations under this Contract relieve the Commissioning Agent from its obligations hereunder or change the terms of this Contract. The Commissioning Agent accepts full responsibility for and guarantees the performance of any and all assignees and transferees (including Subconsultants) of the Commissioning Agent. The Commissioning Agent shall not transfer or assign any contract funds or monies or claims due or to become due hereunder, in whole or in part, without the School District's prior written approval. The attempted transfer or assignment of any contract funds or monies which are due or which become due to the Commissioning Agent, in whole or in part, or any interest therein, without such prior written approval, shall have no effect upon the School District.

3.11.8 Any assignment shall be in writing and shall contain an express assumption by the assignee of all liability accrued or thereafter accruing under this Contract. For purposes of this Paragraph 3.11 (*Subletting and Assignment*), an assignment includes the acquisition of the Commissioning Agent, or a controlling interest therein, through an asset sale or a corporate or other merger, the appointment of a receiver or bankruptcy trustee for the Commissioning Agent, and the transfer of this Contract or the Commissioning Agent in any bankruptcy or other insolvency-related proceeding. A receiver or trustee of or for the Commissioning Agent in any federal or state bankruptcy, insolvency or other proceeding concerning the Commissioning Agent shall comply with the requirements set forth in this Contract, including but not limited to this Paragraph 3.11 (*Subletting and Assignment*).

3.12 **Legal Costs.** The Commissioning Agent shall be responsible for all legal costs that must be incurred for it to properly perform the requirements of this Contract, on-time and on-budget, including but not limited to, legal costs that must be incurred for it to properly perform its work in accordance with the Pennsylvania Engineer, Land Surveyor and Geologist Registration Law, 63 P.S. §§148-158.2, and legal costs that must be incurred to defend, indemnify, and hold the School District harmless from and against any claims, causes of action, lawsuits, or actions which are brought against the School District or the Commissioning Agent by any governmental entity or any third party as a result of any act, failure to act, error, or omission by the Commissioning Agent or its Subconsultants in connection with this Contract according to the indemnity in Section 9, *Indemnification*, of this Contract.

3.13 **Claims Services and Cooperation With Litigation.**

3.13.1 During the duration of the Work, the Commissioning Agent shall provide any services which may be required to review and evaluate claims relating to the Project design or execution or progress of Project construction, so long as the Commissioning Agent is qualified to provide such interpretation and it relates to aspects of the Work for which the Commissioning Agent is responsible. Such services shall be rendered by the Commissioning Agent, on-time and on-budget, without additional fee or compensation, unless they require participation or involvement in litigation or arbitration to which the Commissioning Agent is not a party. The Commissioning Agent shall provide any services that may be required to review and evaluate claims (whether submitted pre-litigation or during litigation) relating to the provision of the Services, without additional fee or compensation, unless they require participation or involvement in litigation or arbitration to which the Commissioning Agent is not a party. During the duration of the Project, at no additional cost to the School District, except where the Commissioning Agent is not a party, the Commissioning Agent shall assist the School District in the investigation and defense of any claims which arise from the commissioning plans, specifications, reports, logs, checklists or other documents prepared by the Commissioning Agent or its Subconsultants or which result solely from the breach of contract, errors, omissions or negligence of the Commissioning Agent or its Subconsultants. At no additional cost to the School District, except where the Commissioning Agent is not a party, the Commissioning Agent shall assist the School District in the investigation and defense of any claims (whether submitted pre-litigation or during litigation) which arise from the provision of the Services, or which result solely from the Commissioning Agent's breach of contract, errors, omissions or negligence.

3.13.2 **Notice of Claims.** If the Commissioning Agent receives notice of a legal claim against it in connection with or in any way related to this Contract, the Commissioning Agent shall (a) submit appropriate written notice of such claim to its insurance carrier within the time frame required for submission of claims by the applicable insurance policy, and (b) within five (5) business days of receipt of notice of the claim, give notice of such claim to the School District.

3.14 **Changes.**

3.14.1 At any time during the term of this Contract, the School District or the Commissioning Agent may, without invalidating this Contract, make changes in any of the Services required under this Contract, within the general scope of this Contract as set forth in

Section 3, *Commissioning Agent's Services and Responsibilities*, including, without limitation, requiring additional or different services, and changes in the time of performance; provided, however, as follows: (i) All such changes shall be made in accordance with the terms and conditions of this Paragraph 3.14 and the other provisions of this Contract, and shall be by Contract Modification, which shall be a written order or request that is accepted and agreed to by both the School District and the Commissioning Agent, as evidenced by the signatures of both the School District's Contract Administrator and the Commissioning Agent's Contract Administrator. (ii) If any such change causes an increase or decrease in the prices of services or the time required for the performance of this Contract, the Commissioning Agent shall notify the School District at the earliest reasonable opportunity, and an equitable adjustment of this Contract amount or time of performance will be made, and will be incorporated as part of the Contract Modification, subject to the following condition: In no event shall the School District be liable to the Commissioning Agent for additional compensation for any alleged change to the Services for which the School District has not agreed to and signed a Contract Modification. A Contract Modification shall set forth this Contract of the Commissioning Agent and the School District on all of the following: (i) a change in the Services; (ii) the amount of adjustment in the Compensation, if any; and (iii) any adjustment in the time of performance. Any Contract Modification that increases the Compensation set forth in Subparagraph 6.1.1 must be approved in writing by the School District's Director or Operations Manager of Capital Programs to become effective.

3.14.2 All changes in the Services pursuant to this Paragraph 3.14 shall be performed, on-time and on-budget, under applicable provisions of this Contract, and the Commissioning Agent shall proceed to perform the change in accordance with the time of performance provided in the Contract Modification, or if none is provided, shall proceed promptly to avoid adverse impact to the Services.

3.14.3 **Assignment of School District's Right to File Direct Claims against the Prime Contractor for Commissioning Agent's Damages.** The Commissioning Agent agrees that in no event shall the School District be liable to the Commissioning Agent for payment of additional compensation for any direct, indirect or impact damages, including but not limited to costs of acceleration or for loss of revenue, overhead or profit, or for any delay damages, costs or expenses, including but not limited to attorneys' fees, court costs and legal expenses of whatever kind or nature, arising from any changes in any of the Commissioning Agent's Services required under this Contract, including, without limitation, additional or different services, or changes in the time of performance, that are caused by or attributed to the fault, negligence, breach of contract, or willful act or omission of the Prime Contractor or any of its subcontractors or consultants on the Project, or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the Project. Instead, as its sole right and remedy with respect to such fault, negligence, breach of contract, willful act or omission, or such delay, disruption, interference or hindrance, of the Prime Contractor or any of its subcontractors or consultants, the Commissioning Agent shall be entitled to make, assert, file or bring a direct claim, action, cause of action or lawsuit against the Prime Contractor or any of its subcontractors or consultants, as an assignee of the School District, pursuant to this Paragraph 3.14.3. For **the sole and only purposes** of making, asserting, filing or bringing direct claims, actions, causes of actions or lawsuits against the Prime Contractor or any of its subcontractors or consultants, the School District hereby assigns to the Commissioning Agent the School District's right under the Prime Contract to

make, assert, file or bring direct claims, actions, causes of action or lawsuits against the Prime Contractor or any of its subcontractors or consultants for any additional compensation, damages, losses, costs and expenses of the Commissioning Agent that are caused by or attributed to the fault, negligence, breach of contract, or willful act or omission of the Prime Contractor or any of its subcontractors or consultants on the Project, or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the Project.

3.15 **Force Majeure.** In the event that either party is unable to perform any of its obligations under this Contract because of reasons beyond its reasonable control, including but not limited to natural disaster, any act of God, war, civil disturbance, court order, labor dispute, change in governmental regulations, delay or failure by third parties to provide critical goods or services, delay in obtaining project site access due to problems or delays in the land acquisition process that are not caused by the School District, delay in obtaining project site access due to failure or refusal of adjoining property owner to give necessary permission for required construction work or necessary entry onto adjoining property to perform required construction work, or delay or failure of governmental or regulatory authorities having jurisdiction over the project to give necessary or required approvals or documents for project site access, construction work, or remediation of known, unknown, differing, or unforeseen project site conditions or environmental hazards or conditions, (hereinafter referred to as a “Force Majeure Condition”), the party that has been so affected shall immediately give notice to the other party; and shall exercise every commercially reasonable effort to resume performance as quickly as possible. The Commissioning Agent shall not be in default under Paragraph 14.2, *Termination for Default*, if any event of default as provided therein is the result of a Force Majeure Condition and its occurrence is without the fault or negligence of the Commissioning Agent. The School District shall not be liable to the Commissioning Agent for any failure to perform any of its obligations under this Contract if such failure is the result of a Force Majeure Condition. Neither party shall be entitled to compensation for the other party’s delays or nonperformance resulting from Force Majeure Conditions.

3.16 **Print and Electronic Media Copies.** The Commissioning Agent shall promptly provide its commissioning plans, specifications, reports, logs, checklists and other documents to the School District on electronic media acceptable to the School District (e.g., CD-ROM, AutoCAD and PDF format) or in prints or any other format required by the School District. These documents shall be conformed by the Commissioning Agent to include revisions by addenda, bulletins or other changes made during the course of the Project.

3.17 **Ownership and Use of Documents.**

3.17.1 **Ownership of Documents, Data and Files.** All documents in any form, data studies, computer files of any type, database records, and reports that are produced by the Commissioning Agent under this Contract shall be the property of the School District, and shall remain the property of the School District.

3.17.2 **Risk of Loss.** During the performance of the Services herein provided for, the Commissioning Agent shall be responsible for any loss or damage to the documents, data, records, reports, and files that are produced by the Commissioning Agent under this Contract while they are in its possession, and any such documents, data, records, reports, and files lost or damaged

shall be restored at the expense of the Commissioning Agent.

3.17.3 **Review and Access.** Full access to the Work during the Commissioning Agent's preparation of the documents, data, records, reports, and files shall be available to the School District and other public agencies interested in this Work during normal business upon reasonable notice. For additional requirements pertaining to review and access to records, reports, and documents, see Paragraph 6.13, *Audits, Records and Payments*, Paragraph 16.8, *General Publication Rights*, and Paragraph 16.15, *Examination of Records*.

3.17.4 **Termination or Expiration.** Upon termination or expiration of this Contract, the Commissioning Agent shall deliver copies of those records, data, information and other documents, delivery of which is required by this Contract, to the School District. Said copies of records, data, information and documents shall remain the property of the School District.

3.18 **Findings Confidential.** Information developed and obtained by the Commissioning Agent is considered confidential by the School District. The Commissioning Agent agrees to refer all inquiries by outside parties to the School District. The Commissioning Agent further agrees that it will not publish any articles, newsletters, marketing materials or other informational materials for public release or its own benefit regarding the Project, or any information developed or obtained during the performance of Services for the Project, without the express written approval of the School District. Employee newsletters and professional experience statements are not subject to this Paragraph 3.18. For additional requirements pertaining to confidentiality, publicity, and publication, see Section 11, *Confidentiality*, Paragraph 16.7, *Publicity*, and Paragraph 16.8, *General Publication Rights*.

3.19 **No Responsibility for Hazardous Materials.** Unless otherwise provided in this Contract, the Commissioning Agent and its Subconsultants shall have no responsibility for the discovery, presence, handling, removal or disposal of or exposure of persons to hazardous materials in any form at the Project site, including but not limited to asbestos, asbestos products, polychlorinated biphenyl ("PCB") or other toxic substances; provided, however, the Commissioning Agent shall report to the School District the presence and location of any hazardous material that it notices or that an Commissioning Agent of similar skill and expertise should have noticed. Nothing in this Contract shall impose liability on the Commissioning Agent for claims, lawsuits, expenses or damages arising from or in any manner related to the exposure to or the handling, manufacture or disposal of asbestos, asbestos products, or hazardous waste in any of its various forms, as defined by the United States Environmental Protection Agency.

3.20 **Deliverables.** The Commissioning Agent shall provide the Deliverables identified in Section 4, *Scope of Services*, of this Contract, on-time and on-budget, in strict conformity with the Scope for the Project and all modifications thereto and the Project Schedule. Partial or incomplete Deliverables may be accepted for review only when required for a specific and well-defined purpose and when consented to in advance by the School District. Such partial or incomplete Deliverables may not be considered as satisfying the specific submittal requirements as set forth herein. Partial or incomplete Deliverables shall in no way relieve the Commissioning Agent of its schedule or cost commitments hereunder.

3.21 **Safety Responsibilities.** Although the Commissioning Agent does not have direct safety responsibilities on the Project, it is expressly understood that the requirements of safety in conduct of the work to be performed hereunder shall be fundamental to the execution of the Commissioning Agent's work. The Commissioning Agent shall perform its work with due regard to the safety of persons and property. It is a condition of this Contract, and the Commissioning Agent agrees, that the Commissioning Agent shall not require its employees employed in the performance of this Contract to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous to personal health and safety, as determined under the provisions of the Safety Manual established for the School District of Philadelphia, as well as any applicable OSHA regulations. Applicable safety laws, rules and regulations, and codes shall be observed by the Commissioning Agent and its Subconsultants. It is the responsibility of the Commissioning Agent to ensure that the work of its employees and Subconsultants required hereunder is performed in a safe and workmanlike manner and in compliance with general safety standards for the performance of such work. The Commissioning Agent must ensure that all its personnel are able to adhere to applicable safety laws, rules and regulations, and codes. Safety deficiencies shall be brought to the attention of the School District and the Supplemental Construction Manager (if the Supplemental Construction Manager is assigned to the Project).

3.21.1 The Commissioning Agent's personnel shall wear a hard-hat, long pants, shirts, and proper footwear while on the Project site. Appropriate eye protection is required when there is a potential for a foreign object to enter an employee's eye. All School District Projects shall have a 100% physical fall protection requirement for working at heights of six feet or more above a lower level. The Commissioning Agent is expected to fully comply with the Project physical fall protection requirement. The Commissioning Agent's personnel shall complete a Project Safety Orientation. The Commissioning Agent's personnel shall comply with identification badge requirements. The Commissioning Agent's personnel are prohibited from use and possession of alcoholic beverages, drugs (other than prescription), carrying weapons or ammunition onto the Project jobsite. The School District Project Manager(s) and the Supplemental Construction Manager (if the Supplemental Construction Manager is assigned to the Project) shall be notified in writing within 24 hours of occurrence if any Commissioning Agent personnel are injured on the Project.

3.22 **Stormwater Management Fees and Charges.** The Commissioning Agent shall pay the current Miscellaneous Stormwater Management fees and charges set forth in the current version of the Philadelphia Water Department Regulations, Chapter 3 Rates and Charges, Section 308.0 Miscellaneous Stormwater Management Charges. The Commissioning Agent shall pay the current Stormwater Plan Review Fees for all development or redevelopment plans submitted to the Philadelphia Water Department under Chapter 6 Stormwater of the Philadelphia Water Department Regulations for stormwater management approvals:

3.22.1 Review time shall be based on the City of Philadelphia's tabulation of actual hours expended by the Philadelphia Water Department employees or consultants reviewing the plans associated with a particular development or redevelopment project for compliance with Chapter 6 Stormwater of the Philadelphia Water Department Regulations.

3.22.2 The Philadelphia Water Department shall refund any fees specified in this Paragraph if a plan submittal is not approved or denied within 21 days for conceptual site plans and

within 45 days for technical site plans.

3.22.3 The words “development”, “redevelopment” and “new development” shall have the following meanings as specified in Chapter 6 Stormwater of the Philadelphia Water Department.

(a) Development means any human-induced change to improved or unimproved real estate, whether public or private, including but not limited to land development, construction, installation, or expansion of a building or other structure, land division, street construction, and site alteration such as embankments, dredging, grubbing, grading, paving, parking or storage facilities, excavation, filling, stockpiling, or clearing. Development encompasses both new development and redevelopment. Development includes the entire development site, even when the project is performed in stages.

(b) Redevelopment means any development on a site that requires demolition or removal of existing structures or impervious surfaces and replacement with new impervious surfaces. Redevelopment includes replacement of impervious surfaces that have been removed on or after January 1, 1970, with new impervious surfaces. Maintenance activities such as top-layer grinding and re-paving are not considered redevelopment. Interior remodeling projects are not considered redevelopment.

(c) New Development means any development project that does not meet the definition of redevelopment or any development project at a site where structures or impervious surfaces were removed before January 1, 1970.

Section 4. Schedule.

4.1 Schedule.

4.1.1 **Mobilization.** The Commissioning Agent shall commence its Services immediately upon receipt of the written Notice to Proceed issued by the School District.

4.1.2 **Work Schedule.** Schedule information for the Commissioning Agent’s Services will be described in the Project Schedule of the Scope and all modifications thereto for the Project as appropriate. The Commissioning Agent shall provide, for the School District’s written approval, an initial summary level Project Schedule for the Pre-Construction Phase and Construction Phase Services of the Project that illustrates how the Commissioning Agent intends to manage the Project, and includes the following, at a minimum:

(a) a CPM schedule that integrates critical design and School District Operations activity;

(b) Illustration of an understanding of the School District’s processes, required Project approvals, and durations for Project design reviews; and

(c) An understanding of the overall process and sequencing of Project activities starting with pre-construction through the end of construction.

4.1.2.1 The Commissioning Agent's Project Schedule shall include the Project milestone dates listed below:

<u>Milestone</u>	<u>Milestone Date</u>
Retro-Commissioning Services Award	May 17, 2018
Targeted Pre-Functional Checklist	June 19, 2018
Targeted Functional Checklist	June 29, 2018
List of All Deficiencies Within the Mechanical System	July 13, 2018
Recommendations for Repairs and Updates for Proper Operation of the Mechanical System	July 27, 2018
Balancing, Balancing Report, and Re-Inspection of the Repaired Mechanical System	At the Conclusion of the Repair Process

4.1.2.2 The Commissioning Agent's Services must be provided within the time schedule provided in the Scope and all modifications thereto for the Project. The Commissioning Agent shall refine schedules for the Project utilizing scheduling software approved by the School District.

4.1.2.3 If requested by the School District, the Commissioning Agent shall submit an updated Project Schedule to the School District on a monthly basis for updating of Project activities. The monthly Project Schedule submission shall include any reports, graphic, or electronic copies as required by the School District.

4.1.2.4 In order to facilitate overall planning and scheduling of the CIP program, certain standardized requirements, including activity WBS and codes, will be utilized in preparing CMP schedules. These codes will be provided prior to beginning work on the schedule.

4.1.2.5 Schedules shall be prepared using Microsoft Project 2013 or later. Schedules shall be cost loaded to reflect the approved schedule of values.

4.1.3 **Time is of the Essence.** Time is of the essence in the CIP and on the Project. The Commissioning Agent shall commence its Services immediately upon Notice to Proceed and shall diligently prosecute the Work to completion. The Commissioning Agent shall use its best efforts to complete the Work on or ahead of the Project Schedule described in the Scope and all modifications thereto for the Project.

4.2 **Statement of Services.** The Commissioning Agent shall perform the professional engineering services and field oversight and coordination, and building retro-commissioning of the existing mechanical and building automation systems, in strict accordance with the Project Scope section of the RFP, which is attached as part of Exhibit B and incorporated by reference into this Contract; and the Proposal as outlined in the approved Scope incorporated by reference into this Contract; and on the terms and conditions set forth in this Contract, within the time deadlines set forth in Section 4, *Schedule*, of this Contract and within budget requirements. The

Commissioning Agent shall provide these engineering services through Pre-Construction Phase, Construction Phase and Post-Construction Phase activities on the Project. The Commissioning Agent shall place strict emphasis on quality, schedule, and budget. The Commissioning Agent shall employ competent personnel as required to properly perform these engineering services in a timely and professionally competent manner as per the RFP and in accordance with Paragraph 3.4, *Standard of Performance*.

4.2.1 “Commissioning” is defined as “the process of ensuring that systems are installed, functionally tested, and capable of being operated and maintained to perform in conformity with their Design, the Specifications in the Construction Contract Documents, and for the purpose intended”.

4.2.2 The Commissioning Agent shall report directly to the assigned School District representative within the School District’s Office of Capital Programs. The School District’s Office of Capital Programs shall directly administer the work of the Commissioning Agent, emphasizing on-time and on-budget performance.

4.2.3 The Commissioning Agent shall utilize a retro-commissioning program to be approved by the School District. The selected software program must be compatible with the existing software of the School District and shall be non-proprietary.

4.2.4 All reports of the Commissioning Agent shall be in PDF, Word Document, Excel or other acceptable format, as the type of report dictates, so that the School District is not required to purchase or subscribe to the selected project management software program. All project files and documents of the Commissioning Agent shall become the property of the School District at the Project’s completion.

4.2.5 The Commissioning Agent shall maintain adequate, dedicated, on-site staffing from the start of construction through final completion on the Project to ensure timely completion of the Project, including punch list and corrective work for final acceptance.

4.2.6 The Commissioning Agent shall perform the services and responsibilities described in this Contract that are summarized in Paragraph 4.2.7, on time and on-budget.

4.2.7 Summary of Commissioning Services. A brief summary of the retro-commissioning services and the post-construction services for the Project are as follows:

(1) The Commissioning Agent shall manage and facilitate the implementation of all retro-commissioning processes and guidelines.

(2) The Commissioning Agent shall confirm all equipment and facility inventory information is inputted into the School District facilities inventory database.

(3) The Commissioning Agent shall coordinate between School District staff and Construction Contractors and School District staff and manufacturers for training sessions.

(4) The Commissioning Agent shall attend meetings with the School District and Construction Contractors.

(5) The Commissioning Agent shall provide adequate, dedicated, on-site staffing through Project final completion to assure timely completion of punch lists and corrective Project construction work for final acceptance of Project construction work.

(6) The Commissioning Agent shall conduct punch list inspections of Project construction work. The Commissioning Agent shall prepare reports of remaining items of Project construction work for completion or correction and shall submit these reports to the School District.

(7) The Commissioning Agent shall prepare punch lists in conjunction for correction or completion of Project construction work, after Project Substantial Completion, for final completion of Project construction work.

(8) The Commissioning Agent shall conduct punch list review meetings with the Construction Contractors at least bi-weekly to monitor scheduling and completion of punch lists and corrective Project construction work.

(9) The Commissioning Agent shall receive and review Project as-built drawings of the Construction Contractors for accuracy and shall transmit these drawings to the School District.

(10) The Commissioning Agent shall verify air flow and all sensors of the mechanical and building automation systems and ensure their proper operation.

(11) The Commissioning Agent shall create customized/targeted pre-functional and functional test checklists.

(12) The Commissioning Agent shall identify mechanical and electro-mechanical components and equipment requiring replacement to meet the original mechanical system(s) design intent.

4.2.8. General Requirements.

(1) The School District Owner is committed to retro-commissioning the Project to ensure that all systems are complete and functioning properly, to the original design intent, prior to material completion and that School District facility staff has adequate system documentation and training.

(2) The Commissioning process shall oversee and coordinate the traditionally separate functions of equipment startup, system performance testing and balancing, control system calibration, construction and system documentation, and training.

(3) Specific requirements of the Commissioning process and responsibilities, duties, and obligations of the Commissioning Agent team are described in this Contract. To accomplish these tasks, the Commissioning Agent shall be required to coordinate its activities with other entities. The Commissioning process does not take away from or reduce the responsibility of the Project designers or installing Construction Contractor to provide a finished and fully functioning product. The Commissioning Agent is not responsible for providing the services of the Project design team, Construction Contractors, and their Subcontractors.

(4) The primary role of the Commissioning Agent on the Project shall be to:

(a) Identify all mechanical deficiencies through testing each component in each of the Barry School's mechanical and building automation systems; and

(b) Restore the Barry School's mechanical system to its original design intent; and

(c) Recommend preventative maintenance procedures to prolong the mechanical equipment life at the Barry School.

(5) The Commissioning Agent shall develop, coordinate and execute a Retro-Commissioning Plan for the Barry School. The Commissioning Agent shall observe and document the design intent of the existing mechanical equipment and systems testing at the Barry School to establish that mechanical equipment and systems are functioning in accordance with the requirements of the original design intent per the Construction Contract Documents; and to assist the School District, the Barry School, and School District maintenance personnel in developing correct and complete documentation of the primary role of the commissioning effort.

(6) The Commissioning Agent will not be responsible for design concept, design criteria, compliance with codes, design, or general construction scheduling, cost estimating, construction management, or construction supervision on the Project. The Commissioning Agent may assist the Project design group in the Office of Capital Programs with design issues, problem solving, or the correction of construction non-conformance or deficiencies on the Project, but the ultimate responsibility for meeting the Project objectives and requirements that are listed in Paragraph 4.2 of this Contract resides with the Commissioning Agent and its Subcontractors.

4.2.9 Systems to Retro-Commission. The specific systems that shall be retro-commissioned on the Project include, but are not limited to:

(1) Mechanical Systems:

- Thermometers & gauges;
- Vibration Isolation;
- Steam Condensation System;
- Computer room HVAC systems;

- Chemical Water Treatment Systems;
- Chillers;
- Cooling Towers;
- Condenser Water System;
- Air Terminal Unit Systems, VAV, PIU, AHU, etc.;
- Humidifiers and controls;
- Duct Silencers;
- Dampers;
- Variable Frequency Drives & Motors;
- Air Distribution Systems;
- Exhaust Air Systems;
- Building automation systems, including controlled devices, sensors, control loops, and logic;
- Test and Balance verification;
- Refrigeration equipment and controls;
- Chilled Water System.

(2) HVAC Controls:

- Component FPT and Calibration;
- Control air supply;
- Air terminal units (non-lab);
- Sequence controls to include:
 - AUU, 100% OSA;
 - EAHU, HVAC equipment;
 - AHU, H&V;
 - Exhaust air fans;
 - Differential bypass valve;
 - Air terminal units, CV;
 - Air terminal units, VAV/CV;
 - Air terminal units, VAV;
 - Heat exchanger;
 - Variable speed pumps;
 - Cabinet unit heaters;
 - Condenser water system;
 - Humidifiers;
 - Water heaters;
 - Heating coils/radiant hoods;
 - Condenser water filters;
 - Steam generator;
- Graphic display;
- Trend logs;
- Status review screens, checks and alarming;
- Network communication.

4.2.10 The Commissioning Agent shall also inspect existing face and bypass dampers and shall provide input and corrective actions, where required, for the existing control system at end equipment.

I. Background/Operations.

The School District may assign a Supplemental Construction Manager on the Project. The Supplemental Construction Manager may act as the assigned School District representative on the Project. The Supplemental Construction Manager may act as one of the representatives of the School District's Office of Capital Programs on the Project. The following describes the Supplemental Construction Manager's services and responsibilities on the Project.

1. The Supplemental Construction Manager's services, duties and responsibilities during the Pre-Construction Phases of the Project will include, but not be limited to, the following: (a) performing and preparing detailed constructability reviews at completion of Schematic Design Phase drawings, completion of the Design Development Phase drawings, completion of the Construction Documents Phase drawings, and completion of the Bid Documents Phase drawings; (b) preparing construction cost (pre-bid) estimates at completion of Design Development Phase drawings, and Construction Documents Phase drawings; (c) reviewing and providing a final construction cost (pre-bid) estimate at the completion of Construction Documents Phase drawings; (d) supporting the Project Designer's efforts in obtaining required approvals; (e) determining required permits and ensuring the Contractor obtains appropriate permits; (f) developing the Project specific front end construction specifications to be included with the School District standard front end construction specifications; and (g) providing procurement support services including assisting in the issuance of addenda, and assisting the School District Project Manager in contractor bid evaluations.

2. The School District shall provide site inspection, coordination and contract administration services for the Project during the Construction Period through the Supplemental Construction Manager. The Supplemental Construction Manager's services, duties and responsibilities during the Construction Period of the Project will include, but not be limited to, the following: (a) performing field oversight and coordination services on the Project; and (b) safety monitoring services, all as set forth in the Supplemental Construction Manager's contract with the School District. The School District shall furnish the Commissioning Agent with a copy of any written agreement between the School District and the Supplemental Construction Manager.

II. Commissioning Services.

A. Commissioning Agent's Services During Design Intent Review Phase.

1. The Commissioning Agent shall assist in documenting the Project's requirements, the School District's design intent, and the original basis of design and rationale for accomplishing these requirements. The Commissioning Agent shall complete the following tasks:

a. Review Owner's Project Requirements ("OPR") documentation for

familiarization of Scope of Work (“SOW”) intent.

b. Review Basis of Design (“BOD”) document to ensure consistency with OPR.

c. Develop preliminary Commissioning Plan and provide Project design team with a draft of this Plan.

d. Develop a targeted pre-functional testing checklist.

e. Incorporate Commissioning Specifications into the School District’s Project Management Procedures.

f. Create commissioning deficiencies/issues log to be updated throughout Commissioning.

g. Complete checklist verifying that that the Commissioning Agent has received the latest version of Project Design Documents.

2. The Commissioning Agent, with cooperation from the School District Design Group in the Office of Capital Programs, shall provide adequate written OPR, Basis of Design, and full sequences of operations, complete with points lists and control schematics, for all equipment and systems for inclusion in the School District Operations and Maintenance (“O&M”) manuals and for the Commissioning Agent to use in writing functional tests.

B. Commissioning Agent’s Services During Occupancy and Warranty Phase.

1. The Retro Commissioning at the Post Occupancy Phase of the Project is intended to assist the School District and facility operating staff in identifying any defects in the installed equipment or system operation.

2. The Commissioning Agent shall complete the following tasks during the Warranty Phase:

a. Complete final Commissioning issues log that includes resolved and unresolved issues.

b. Address concerns with operating facility and staff.

c. Verify the installation and performance of all commissioned systems no later than ten (10) months after Substantial Completion of the Project.

d. Complete final commissioning report.

e. Assist the School District with a twelve (12)-month measurement and verification (“M&V”) of energy performance (optional).

f. Coordinate or witness deferred and seasonal testing and balancing.

C. Commissioning Agent's Services During Testing of Equipment.

1. The installing Construction Contractors shall provide all tools or the use of all tools required to start, checkout, and functionally test equipment and systems, except for specified testing with supplemental portable data loggers, which shall be supplied and installed by the Commissioning Agent.

2. To expedite air-water balance testing, and to minimize additional cost to the Construction Contractor, the Commissioning Agent shall verify the Test and Balance ("TAB") Contractor's air-water balance values by witnessing the testing and verifying the results while on the Project site. All testing shall be performed after school hours, on weekends or during summer/winter recess sessions.

3. Data logging equipment, monitoring devices, specialized equipment, and software not required to be provided by the installing Construction Contractor in the Project Construction Documents, and provided by the Commissioning Agent to monitor, confirm, or verify the Construction Contractor's testing procedures, shall remain the property of the Commissioning Agent. Equipment provided shall meet the minimum accuracy, calibration, and performance standards required by the performance test.

4.2.11 **Limits On Authority and Responsibility.**

(1) The Commissioning Agent is not authorized to change, enlarge, relax, alter or release any requirement of any of the Project Design or Construction Contract Documents or the Prime Contract, or to approve or accept any construction work that is not performed in accordance with the Prime Contract.

(2) Nothing contained in this Contract shall be construed to mean that the Commissioning Agent assumes any of the contractual design or construction management duties, responsibilities, or liabilities of the Project Designer or Supplemental Construction Manager (if a Supplemental Construction Manager is assigned to the Project) in their design or construction management contracts with the School District, or any of the customary design or construction management duties, responsibilities, or liabilities of an architect or a construction manager on a construction project.

(3) Nothing contained in this Contract shall be construed to mean that the Commissioning Agent assumes any of the contractual construction duties, responsibilities, or liabilities of the Construction Contractors in their contracts for construction work with the School District, or any of the customary construction duties, responsibilities, or liabilities of a construction contractor on a construction project.

(4) Notwithstanding the provisions of Paragraph 3.21, *Safety Responsibilities*, and any other provisions contained in this Contract, the Commissioning Agent is not acting in any manner so as to assume responsibility, in whole or in part, for noncompliance of

any Construction Contractors and their subcontractors with applicable federal, state, and local safety laws, statutes, ordinances, codes, rules, regulations, orders and decrees, including but not limited to, OSHA, or with safety standards and regulations established by the School District for the assigned Project(s), including but not limited to standards and regulations set forth in the Safety Manual established for the School District of Philadelphia, or with federal, state, and local health laws, regulations and building codes, or for any accidents arising out of or in connection with safety precautions and safety programs in connection with the construction work on School District construction projects which caused death, personal injury or property damage and which were caused by any Construction Contractors or their subcontractors. Nothing contained in this Contract shall be construed to mean that the Commissioning Agent is acting in a manner so as to assume the Construction Contractors' and their subcontractors' responsibilities or liabilities, in whole or in part, for safety precautions and safety programs in connection with construction work on School District construction projects. Nothing contained in the Safety Manual established for the School District of Philadelphia shall be construed to mean that the School District or the Commissioning Agent are responsible for the jobsite safety of the construction means, methods, techniques, sequences, or procedures utilized by the Construction Contractors and their subcontractors in connection with construction work on School District construction projects. The Construction Contractors and their subcontractors are fully and solely responsible for the jobsite safety of the construction means, methods, techniques, sequences, and procedures utilized by the Construction Contractors and their subcontractors in connection with construction work on the assigned Project(s). The Construction Contractors and their subcontractors are responsible for maintaining and supervising all safety precautions and programs in connection with construction work on School District construction projects, and for any violations of the safety precautions and programs in connection with construction work on School District construction projects. The Construction Contractors and their subcontractors are also responsible for complying with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property, or their protection from damage, injury or loss, in connection with construction work on School District construction projects, and for taking all necessary precautions to protect the safety and health of their employees and others on the jobsites of School District construction projects, including compliance with all applicable federal, state and local safety and health laws, regulations, and building codes, and for adhering to and enforcing the safety regulations set forth in the Prime Contracts and in the Safety Manual established for the School District of Philadelphia.

III. **Standards of Design.** All design work shall comply with the standards as established by the School District. These include "Educational Standards" and "Building Design Criteria and Technical Standards". Any deviations required a written variance by the School District.

Section 5. School District's Services and Responsibilities.

5.1 **Summary of Services and Responsibilities.** The School District will supervise and manage the Commissioning services for the Project. The School District's services, duties and responsibilities will include, but not be limited to, the following: (a) the developing and preparing the Scope of Work for the Project; (b) directly supervising and managing the Commissioning Agent's services for the Project, emphasizing on-time and on-budget performance; (c) verifying or monitoring

the Commissioning Agent's compliance with contract terms and the requirements incorporated into the RFP and the Contract; (d) notifying the Commissioning Agent of any non-compliance with contract terms and the requirements incorporated into the RFP and the Contract; (e) overseeing the processing and approval of invoice payments for the Commissioning Agent; and (f) reviewing and evaluating the Commissioning Agent's commissioning recommendations and documents for the Project.

5.2 **Review and Changes to Documents and Information.** The School District shall review all Commissioning Agent Plans, Specifications, Logs, Checklists, Reports, Documents, and other information prepared and submitted by the Commissioning Agent to the School District under this Contract, and shall advise the Commissioning Agent of any suggested changes, comments or recommendations thereto in a timely manner so as to cause no delay to the Commissioning Agent.

5.3 **No Waiver by Review, Approval, Acceptance or Payment.** Neither the School District's review, approval or acceptance of, nor payment for, any of the services required under this Contract shall be construed to operate as a waiver of any rights under this Contract or of any cause of action arising out of the performance of this Contract.

5.4 **Purpose of Review and Approval.** Notwithstanding anything to the contrary contained in this Contract, the School District's review and approval of any and all documents or other matters required herein shall be for the purpose of providing the Commissioning Agent with information as to the School District's objectives, goals and educational requirements with respect to the Project and not for the purpose of determining the accuracy and completeness of such documents.

Section 6. Compensation and Payment.

6.1 **Compensation.** The School District's SRC, by Resolution #A-_, has authorized an expenditure of funds not to exceed the total amount of _____ Dollars (\$_____) as the Compensation in total for the performance of professional engineering services for retro-commissioning at the Barry School.

6.2 Payment.

6.2.1 The School District shall pay the Commissioning Agent for Basic Services actually performed on this Project, on a monthly basis, based on defined staffing and contract rates (hourly rates). The defined staffing and contract rates (hourly rates) are listed in the Commissioning Agent's Fee Proposal (Staffing Plan), attached as Exhibit D and incorporated by reference into this Contract. These hourly billable wage rates shall be fully loaded, and shall include all labor, benefits, taxes, insurances, fees, overhead costs, administrative costs, reimbursable costs, and profit costs, and shall be firm and fixed priced for the entire duration of this Contract. These hourly billable wage rates shall be all-inclusive wage rates for all personnel listed in the Commissioning Agent's Fee Proposal. These wage rates shall be used for all services. Only one (1) hourly wage rate for each position of Key Personnel for the duration of the Contract shall be permitted and accepted. Ranges for positions of Key Personnel shall not be accepted by the School District.

6.2.2 The Commissioning Agent's Contract is a lump sum contract for all required services. The Compensation of the Commissioning Agent is a lump sum amount. The lump sum of the Compensation shall not be adjusted for delays to Substantial Completion of ninety (90) days or less. For purposes of this Paragraph 6.2.2, Substantial Completion means completion of all areas or phases so that they are suitable for full operation as intended, with only minor punch lists remaining uncompleted. Delays to Substantial Completion shall not increase the Commissioning Agent's Compensation for Post-Construction Phase Services.

6.2.3 The percentage of the total fee to be paid monthly for completion of each phase (Pre-Construction, Construction, Post-Construction, and Warranty Inspection) shall be based on the percentage of estimated manhours to be expended during that phase, and shall not exceed the percentage of the total fee for the Contract allocated to that phase.

6.2.4 The Commissioning Agent's home office management and support services are deemed to be overhead costs and shall not be separately compensated by the School District.

6.3 Applications for Payment and Subconsultant Payment Confirmation.

6.3.1 The Commissioning Agent shall submit monthly Applications for Payment or Professional Services Invoices for payment of Services actually performed and approved and Reimbursable Expenses actually incurred during the previous calendar month to the School District administrator named in Paragraph 7.1 of this Contract.

6.3.2 Applications for Payment or Professional Services Invoices for Services shall be limited to the persons listed on the Commissioning Agent's Key Personnel Team List and the Subconsultants Personnel Lists, and at the hourly billable wage rates indicated on the Commissioning Agent's Key Personnel Team List and the Subconsultants Personnel Lists. Any additional key personnel added to the Services and their hourly billable wage rate must be approved by the School District before the Commissioning Agent's submission of Applications for Payment or Professional Services Invoices for their time expended on the Services. The School District shall not make payment to the Commissioning Agent for Services performed by persons not listed on the Commissioning Agent's Key Personnel Team List and the Subconsultants Personnel Lists, or additional key personnel added to the Services that have not been approved in advance by the School District. The School District shall also not make payment to the Commissioning Agent for Services performed by persons or additional key personnel whose hourly billable wage rates have not been approved in advance by the School District.

6.3.3 All Applications for Payment or Professional Services Invoices must be submitted in a form acceptable to the School District, and shall, at a minimum, include the following: (1) amount of payment applied for; (2) an itemized description of all Services actually performed during the previous calendar month for which payment is sought and their associated costs and total charges based upon the hourly billable wage rates of the Commissioning Agent's Key Team Members and its Subconsultants Personnel, attached as Exhibit D and incorporated by reference into this Contract; (3) the total charges; (4) whether the Services performed were Basic or Additional Services; and (5) School District SCS number (where applicable) and Contract number, and shall attach such supporting evidentiary documents as the School District may

require.

6.3.4 The Commissioning Agent shall submit one (1) monthly Application for Payment or Professional Services Invoice and one (1) monthly written summary of Project activities.

6.3.5 Applications for Payment or Professional Services Invoices shall be exclusive of state or local sales, use or gross receipts taxes, and federal excise taxes. The School District's Pennsylvania Sales Tax Blanket Exemption Number is 76-51500-1; its Federal I.D. Number is 23-6004102; and its Federal Excise Tax Number is 23-63-0021-K.

6.3.6 Payment shall be made by the School District within thirty (30) working days after its receipt and approval of the Commissioning Agent's Application for Payment or Professional Services Invoice.

6.3.7 No payment shall be due to the Commissioning Agent before the School District's receipt of a properly itemized Application for Payment or Professional Services Invoice, together with written summary of Project activities, from the Commissioning Agent. If the Commissioning Agent, after a request by the School District, does not provide evidence satisfactory to the School District to support any item or items set forth on an Application for Payment or Professional Services Invoice, the School District shall have no liability to make any payment with respect to that item or items. If the School District has already made payment for that item or items, the School District may, by notice to the Commissioning Agent, require the Commissioning Agent to refund to the School District the amount of any such overpayment, or the School District, at its option, may set off such overpayment against any payments accruing thereafter to the Commissioning Agent under this Contract.

6.3.8 The Commissioning Agent's Federal Tax Identification Number is _____.

6.3.9 All amounts paid shall be subject to audit by the School District pursuant to Paragraph 6.13, *Audits; Records and Payments*, and all Applications for Payment or Professional Services Invoices must be approved by the School District's Accounting Services/Accounts Payable Department or Auditing Services Office as a condition of payment.

6.3.10 **Subconsultant Payment Confirmation.** The Commissioning Agent shall pay each Subconsultant performing Services promptly, after receipt of payment from the School District, out of the amount paid to the Commissioning Agent on account of the Services of such Subconsultant the amount to which such Subconsultant is entitled. Together with each monthly Application for Payment or Professional Services Invoice, exclusive of the first monthly Application for Payment or Professional Services Invoice, the Commissioning Agent shall submit, to the School District administrator named in Paragraph 7.1 of this Contract, a written release or affidavit or payment confirmation from each Subconsultant that such Subconsultant has received from the Commissioning Agent full payment of the amount to which such Subconsultant was entitled to receive from the Commissioning Agent the previous calendar month. No payment shall be due to the Commissioning Agent by the School District before the School District's receipt of

all required Subconsultant Payment Confirmations from the Commissioning Agent.

6.4 **Withholding of Payments.** Notwithstanding any other payment terms or conditions to the contrary, the School District reserves the right to withhold promised payments for the Commissioning Agent's substantial failure to perform as agreed. However, before withholding payment under this Contract, the School District shall notify the Commissioning Agent in writing of such failure and grant the Commissioning Agent the opportunity to remedy same within fourteen (14) working days of said written notice. The School District may extend such remedial period, at its sole discretion, if there is evidence of the Commissioning Agent's good faith effort to remedy the failure. The School District will pay pro rata for the Commissioning Agent's partial performance, provided such performance is acceptable to the School District and is rendered satisfactorily.

6.5 **Final Payment.** Final payment, including any unpaid balances and unpaid Reimbursable Expenses to date, shall be due and payable upon the satisfactory completion by the Commissioning Agent of all Services on the Project.

6.6 **Basic Services.** All services that the Commissioning Agent is required to perform for the Project under this Contract shall constitute Basic Services for which compensation will be paid under Paragraph 6.1 herein.

6.7 **Additional Services.** The Commissioning Agent shall not be compensated as Additional Services if the delay, disruption, interference or hindrance in construction on the Project is (are) due (1) to the fault, negligence, failure to act, error, omission or breach of contract of the Commissioning Agent, or (2) to a Force Majeure Condition as provided in Paragraph 3.15, or (3) to actions, inactions, errors, omissions, negligence, breach of contract, or willful act or omission caused by or attributed to the Prime Contractor(s) or any of its (their) subcontractors or consultants.

6.7.1 Minor changes or necessary corrections to the Commissioning Agent's Work shall not constitute Additional Services. Changes or corrections to the Commissioning Agent's Work, requested by the School District and made after the School District's previous final approval of such Work, shall constitute Additional Services.

6.7.2 All Additional Services of the Commissioning Agent must be approved in advance by the School District's designated representative.

6.7.3 The School District agrees to pay the Commissioning Agent for its identified and approved Additional Services in accordance with the hourly billable wage rates for its Key Personnel that are listed in the Commissioning Agent's Fee Proposal (Staffing Plan) which are attached as Exhibit D and incorporated by reference into this Contract. The School District also agrees to pay the Commissioning Agent for Additional Services performed by persons not listed on the Commissioning Agent's Key Personnel Team List and the Subconsultants Personnel Lists or additional key personnel added to the Services, provided the persons not listed or the additional key personnel, together with their hourly billable wage rates, have both been approved in advance by the School District.

6.7.4 **Assignment of School District's Right to File Direct Claims against the Prime Contractor for the Commissioning Agent's Additional Services.** The Commissioning Agent agrees that in no event shall the School District be liable to the Commissioning Agent for payment of compensation for Additional Services for any of the Commissioning Agent's Services that are caused by or attributed to the fault, negligence, breach of contract, or willful act or omission of the Prime Contractor or any of its subcontractors or consultants on the assigned Project(s), or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the assigned Project(s). Instead, as its sole right and remedy with respect to such fault, negligence, breach of contract, willful act or omission, or such delay, disruption, interference or hindrance, of the Prime Contractor or any of its subcontractors or consultants, the Commissioning Agent shall be entitled to make, assert, file or bring a direct claim, action, cause of action or lawsuit against the Prime Contractor or any of its subcontractors or consultants, as an assignee of the School District, pursuant to this Paragraph 6.7.4. For **the sole and only purposes** of making, asserting, filing or bringing direct claims, actions, causes of actions or lawsuits against the Prime Contractor or any of its subcontractors or consultants, the School District hereby assigns to the Commissioning Agent the School District's right under the Prime Contract to make, assert, file or bring direct claims, actions, causes of action or lawsuits against the Prime Contractor or any of its subcontractors or consultants for additional compensation due to the Commissioning Agent for the Commissioning Agent's Services that is caused by or attributed to the fault, negligence, breach of contract, or willful act or omission of the Prime Contractor or any of its subcontractors or consultants on the assigned Project(s), or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the assigned Project(s).

6.8 **Reimbursable Expenses.** The School District agrees to pay the Commissioning Agent, as Reimbursable Expenses on the Project, at 100% of their actual costs, only for incidental materials and services authorized by the School District. The Commissioning Agent shall not be entitled to any other Reimbursable Expenses, except with the prior written consent of the School District. Normal printing of documents for the School District's approvals, or for the Commissioning Agent's or its Subconsultants' use, travel expenses, and meals shall not be paid as Reimbursable Expenses. The cost of normal reports and documentation requested by the School District for its review or record shall not be considered a Reimbursable Expense.

6.9 **Release.** Prior to final payment, the Commissioning Agent shall furnish to the School District a release of all claims against the School District.

6.10 **Non-Authorization of Funds.** The Commissioning Agent acknowledges that payments under this Contract may not exceed the amount that the School District's Auditing Services Office certifies as available for this Contract. During the Term of this Contract, the School District reserves the right to fund the balance of the Compensation in varying amounts from time to time as funds become available, not to exceed in total the maximum amount stated in this Contract. The Commissioning Agent agrees that the School District shall not be obligated to fund this Contract except out of funds certified by the School District's Auditing Services Office as currently available, even if those funds are less than the maximum amount stated in this Contract. If at any time sufficient funds are not certified as available, the School District may, at its sole discretion, exercise its options described in Paragraph 6.11, *Unavailability of Funds*.

6.11 **Unavailability of Funds.** In the event the School District, in its sole discretion, does not or cannot obtain or continue the funding for this Contract from any source or sources at an aggregate level sufficient to allow for payment for the Services required under this Contract, the School District may, in its sole discretion, exercise one of the following alternatives:

(a) Terminate this Contract effective upon a date specified in a Termination Notice pursuant to Section 14, *Termination*; or

(b) Continue this Contract by reducing, through written notice to the Commissioning Agent, the scope of the Services required under this Contract and the amount of the Compensation, consistent with the nature, amount, and circumstances of the loss of funding; or

(c) Suspend the Services until such time as sufficient funds are available; provided, that in the event of such suspension, but only upon the availability of sufficient funds, the Commissioning Agent shall resume the Services within thirty (30) calendar days following the School District's written notice to resume.

Any reduction of this Contract pursuant to this Paragraph shall not affect any obligations or liabilities of either party accruing prior to such reduction. The School District shall not face any liability or penalty as a result of such reduction of this Contract. In the event of termination or suspension pursuant to this Paragraph, the Commissioning Agent shall have the rights and obligations set forth in Paragraph 13.2, *Suspension for Convenience* and Paragraph 14.1, *Termination for Convenience*.

6.12 **Crossing Fiscal Years.** If the School District will pay any portion of the compensation set forth in this Section 6 in any School District fiscal year (the School District's fiscal year runs July 1 - June 30) subsequent to the fiscal year in which the Term of this Contract commences (in either case, "Commencement FY"), the Commissioning Agent understands and agrees that the portion of the compensation under this Contract payable with School District funds that may accrue hereunder in a subsequent fiscal year remains subject to legally mandated budget authorization by the SRC of the School District under Applicable Law. If for any reason funds for that portion of the compensation that may accrue hereunder in a subsequent fiscal year are not continued in any subsequent School District fiscal year, this Contract and the School District's liability under this Contract shall automatically terminate at the end of the fiscal year of the then current Commencement FY; provided, however, that the Commissioning Agent shall be compensated in accordance with the terms of this Contract for Services that have been provided and accepted by the School District prior to the end of the fiscal year of the then current Commencement FY. Payments to the Commissioning Agent pursuant to this Contract shall not exceed the amount authorized for this Contract plus any other amounts properly available for obligation for this Contract. If such funding is not available in a timely manner, the School District shall have the right to terminate this Contract. In the event of termination or suspension pursuant to this Paragraph, the Commissioning Agent shall have the rights and obligations set forth in Paragraph 13.2, *Suspension for Convenience* and Paragraph 14.1, *Termination for Convenience*.

6.13 **Audits; Records and Payments.**

6.13.1 **Audits.** From time to time during the term of this Contract and for a period of six (6) years after the expiration or termination of this Contract (*see* 24 P.S. §5-518), the School District (including, without limitation, the Auditing Services Office), the Controller of the City, the Commonwealth of Pennsylvania (including, without limitation, its Auditor General and the Pennsylvania Department of Education), or a department, agency or instrumentality of the United States of America if the School District funds this Contract with federal funds, or any of their authorized representatives (each, for the purposes of this Paragraph, an “Auditor”) may audit any and all aspects of the Commissioning Agent’s performance under this Contract, including but not limited to its billings and applications for payment or invoices and payments received. If requested by an Auditor or the School District, the Commissioning Agent shall submit to the Auditor and the School District, for review or inspection, all vouchers and applications or invoices presented for payment pursuant to this Contract, all cancelled checks, Materials, invoices, vouchers, reports, work product, work papers, books, records and accounts (whether in electronic, paper, or other form or medium) upon which the vouchers or applications or invoices are based, and any and all documentation and justification in support of expenditures or fees incurred pursuant to this Contract.

6.13.2 **Inspection.** The Commissioning Agent acknowledges and agrees that any Auditor may inspect or review all of its Work and all of its sites, locations and facilities related to its performance under this Contract. Inspection and review of Work and Materials shall take place at the offices of the Commissioning Agent in the City, or in another location with the Auditor’s consent. The Commissioning Agent shall cooperate with all School District, City, Commonwealth of Pennsylvania and federal inspections and reviews conducted in accordance with the provisions of this Contract. The scope of such inspection and review of the Work and Materials, sites, locations and facilities, including, without limitation, programs, lies in the sole discretion of the Auditor. Such inspection or review may include, without limitation, meetings with persons receiving services under this Contract, review of staffing ratios and job descriptions, and meetings with any of the Commissioning Agent’s staff members who either directly or indirectly participate or participated in carrying out any of the Work, including preparing, delivering or installing any Materials.

6.13.3 **Availability of Records.** The Commissioning Agent shall make available, within the School District or in the City or at the Commissioning Agent’s offices during regular business hours, at reasonable times during the term of this Contract and for the period set forth above in this Paragraph 6.13, all records (whether in electronic, paper, or other form or medium) pertaining to this Contract for the purpose of inspection, audit or reproduction by any Auditor. The Commissioning Agent shall provide such records without unreasonable delay when requested by an Auditor.

6.13.4. **Retention of Records.** The Commissioning Agent shall retain all records, books of account and documentation pertaining to this Contract, including applications for payment, invoices, payments, or the documentation thereof under this Contract, for the greater of the period required by Applicable Law or six (6) years following expiration or termination of this Contract; however, if any litigation, claim or audit commences prior to expiration of said six (6)

year period, then the Commissioning Agent shall retain the records until all litigation, claims or audit findings have been completely terminated or resolved, without right of further appeal. The Commissioning Agent shall include this Paragraph 6.13 in all Subcontracts for Services required by this Contract.

6.13.5 **Definition of Materials.** For purposes of this Paragraph, Materials means any and all reports, records, documents, documentation, information, supplies, plans, original drawings, specifications, computations, sketches, renderings, arrangements, videos, pamphlets, advertisements, statistics and other data, computer tapes, computer software, and other tangible work product, materials or goods prepared, supplied or developed by the Commissioning Agent as part of or in connection with the Work, or for the Commissioning Agent by a Subconsultant in connection with the Work, and deliverable or delivered to the School District by the Commissioning Agent or its Subconsultants pursuant to this Contract.

Section 7. Contract Management.

7.1 **Contract Administrators.** The Commissioning Agent and the School District shall each designate a qualified Contract Administrator prior to the Commissioning Agent's commencement of the Services. The Contract Administrators shall be in charge of the work covered by this Contract and the principal points of contact with respect to administration of this Contract and the parties' overall relationship, and resolution of disputes arising hereunder. Either party may designate a successor Contract Administrator at any time by giving notice to the other party.

7.1.1 The Commissioning Agent's initial Contract Administrator shall be:

Telephone number: _____
Facsimile number: _____
Email address: _____

7.1.2 The School District's initial Contract Administrator shall be:

Leigh Clark, Acting Director of Capital Programs
or Nicole Ward, Design Manager of Capital Programs
The School District of Philadelphia
Office of Capital Programs
440 North Broad Street, Suite 371
Philadelphia, PA 19130-4015
Telephone number: (215) 400-4730
Facsimile number: (215) 400-4731
Email address: lclark@philasd.org or nward@philasd.org

Section 8. Employment Practices.

8.1 **Key Personnel.** Upon Contract award, the Commissioning Agent shall assign the Key Personnel as noted in Exhibit C (Section B, Organizational Chart) and Exhibit D (Commissioning Agent Key Personnel List) to perform the engineering and other services of the Commissioning Agent required under this Contract. The Commissioning Agent and its Subconsultants shall not reassign or replace any Key Personnel in Exhibit C or Exhibit D, without the School District's prior written consent, which shall not be unreasonably withheld. All Key Personnel must participate in the Project in their respective roles, and failure of any Key Personnel to do so may be grounds for termination of this Contract pursuant to Section 14, *Termination*. The School District reserves the right to direct the Commissioning Agent to remove any Key Personnel from the Services provided under this Contract upon material reason therefore given in writing, and to review and approve the replacement of Key Personnel. If removal is for cause, any cost of such removal shall be borne by the Commissioning Agent.

8.2 **Subconsultants.** Subconsultants of the Commissioning Agent shall look only to the Commissioning Agent for payment, satisfaction, or legal redress in the event of any dispute arising out of this Contract, and hereby waive any claim or cause of action against the School District arising out of a Subcontract or other transaction with the Commissioning Agent. The School District shall have no obligation to pay nor to see to the payment of any monies to any Subconsultant of the Commissioning Agent, except as may otherwise be required by law. Nothing contained in Paragraph 6.3, *Applications for Payment and Subconsultant Payment Confirmation*, shall give rise to any duty on the part of the School District to pay or to see to the payment of any monies to any Subconsultant of the Commissioning Agent. The School District of Philadelphia is a "distressed school district" under the Public School Code, Act of March 10, 1949, P.L. 30, No. 14 (24 P.S. §6-691) and a "first class school district" under the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class (known as "PICA Act"), Act of June 5, 1991, P.L. 9, No. 6 (53 P.S. § 12720.104), and therefore the prompt payment provisions of the Award and Execution of Public Contracts Law, Act of December 12, 1994, P.L. 1042, No. 142 (73 P.S. §§1626.8(c)(2)&(4)) (repealed), and the prompt payment provisions of the Commonwealth Procurement Code, General Procurement Provisions, Act of May 15, 1998, P.L. 358, No. 57 (62 Pa.C.S.A. §§3938(b)(2)&(4)), do not apply to the School District of Philadelphia and its contracts for construction, reconstruction, alteration, repair, improvement, or demolition of its buildings or improvements of any kind to its real properties. Neither the Commissioning Agent nor its Subconsultants can make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the prompt payment provisions of the Award and Execution of Public Contracts Law (repealed), or the prompt payment provisions of the Commonwealth Procurement Code, General Procurement Provisions. The School District of Philadelphia is also a "school district" and a "political subdivision" of the Commonwealth of Pennsylvania, and therefore the Contractor and Subcontractor Payment Act, Act of February 17, 1994, P.L. 73, No. 7 (73 P.S. §501 *et seq.*), does not apply to the School District of Philadelphia and its contracts for work or improvements on its real properties. Neither the Commissioning Agent nor its Subconsultants can make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the Contractor and Subcontractor Payment Act.

8.3 Equal Opportunity.

8.3.1 The School District is an Equal Opportunity Employer and demands no less of companies with which it does business. The School District will not do business with companies or persons who unlawfully discriminate on the basis of age, race, color, sex, sexual orientation, handicap, disability, religious creed, ancestry, national origin, Vietnam-era or any other veteran status, or any other impermissible ground in their hiring, promotion, subcontracting, or procurement practices. By submitting any proposal to contract or entering into any contract with the School District, the Commissioning Agent represents and certifies that it is an Equal Opportunity Employer; conducts its business affairs without improper regard to age, race, color, sex, sexual orientation, disability, creed, ancestry, national origin, or other impermissible ground; and has not been debarred, suspended, or declared ineligible to contract by any public or private agency or entity because of its discriminatory practices. The certifications in Paragraph 8.3 herein are material representations of fact upon which reliance was placed when this transaction was entered into. If it is later discovered or determined that the Commissioning Agent knowingly rendered an erroneous certification, the School District may pursue available remedies, including termination of this contract, suspension or debarment.

8.3.2 All parties hereto agree that in the performance of this Contract there shall be no discrimination against any employee or other person on account of age, race, color, sex, sexual orientation, handicap, disability, religious creed, ancestry or national origin, disabled or Vietnam-era or any other veteran status. The School District, upon receipt of evidence of such discrimination by the Commissioning Agent or its agents, employees, representatives, or Subconsultants, shall have the right, at its sole discretion, to terminate this Contract. The Commissioning Agent agrees to include this Paragraph 8.3, with appropriate adjustments for the identity of the parties, in any Subcontracts that are entered into for Services to be performed under this Contract.

8.3.3 The Commissioning Agent shall not discriminate nor permit discrimination against any person because of race, color, religious creed, age, sex, national origin, ancestry, handicap, disability, sexual orientation, union membership, disabled or Vietnam-era or any other veteran status, or limited English proficiency in the performance of this Contract, including, but not limited to, preparation, manufacture, fabrication, installation, erection and delivery of all supplies and equipment. In the event of receipt of such evidence of such discrimination by the Commissioning Agent or its agents, employees or representatives, the School District shall have the right to terminate this Contract. In the event of the continued refusal on the part of the Commissioning Agent to comply with this anti-discrimination provision, the Commissioning Agent may be removed from the list of approved bidders of the School District. The Commissioning Agent agrees to include this Paragraph 8.3, with appropriate adjustments for the identity of the parties, in all Subcontracts which are entered into for work to be performed pursuant to this Contract.

8.3.4 **M/WBE Participation.** The Commissioning Agent shall ensure that minority-owned business enterprises (“MBEs”), and women-owned business enterprises (“WBEs”) have the maximum opportunity to participate in the performance of this engagement, and shall make a good-faith effort to achieve the goals. [The Commissioning Agent represents and certifies that it is a minority-owned business enterprise (MBE) firm or a woman-owned

business enterprise (WBE) firm or a dual minority-owned and woman-owned business enterprise (M/WBE) firm.] The Commissioning Agent [further] represents and certifies that it will include a combined minimum of 15% to 20% participation with a minority-owned business enterprise(s) (MBE) and a woman-owned business enterprise(s) (WBE) based on the total contract award in the performance of this School District Contract. The Commissioning Agent [further] represents and certifies that it is a minority-owned business enterprise (MBE) or a woman-owned business enterprise (WBE) or a dual minority-owned and woman-owned business enterprise (M/WBE) firm and that it will perform 100% of the total amount of services provided in the performance of this School District Contract, as set forth in the Proposal, M/WBE Participation Plan.] The Commissioning Agent [further] represents and certifies that it will use the following MBE and WBE firms as Subconsultants under this Contract in the percentages listed as set forth in the Proposal, M/WBE Participation Plan: (1) _____ (MBE) – ___%; and (2) _____ (WBE) – ___%. The Commissioning Agent’s Proposal, M/W/BE Participation Plan, is attached as Exhibit E and incorporated by reference into this Contract. The Commissioning Agent’s Proposal, M/WBE Participation Plan, shall be enforceable as any other contractual term or condition of this Contract. Sanction for breach of the Commissioning Agent’s Proposal, M/WBE Participation Plan, may include suspension, cancellation of this Contract and/or debarment from future contracting opportunities with the School District.

8.3.5 The Commissioning Agent shall **not** replace or substitute the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent’s Proposal, M/WBE Participation Plan, without the prior written notice to and approval of the School District. The Commissioning Agent shall **not** increase or decrease the contract MBE/WBE percentages, or change the scopes of work, or increase or decrease the dollars amounts, if applicable, for the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent’s Proposal, M/WBE Participation Plan, without the prior written notice to and approval of the School District. The Commissioning Agent shall promptly submit a revised M/WBE Participation Plan, for School District approval, **before** the Commissioning Agent: (a) replaces or substitutes the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent’s Proposal, M/WBE Participation Plan; or (b) increases or decreases the contract MBE/WBE percentages for the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent’s Proposal, M/WBE Participation Plan; or (c) changes the scopes of work for the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent’s Proposal, M/WBE Participation Plan; or (d) increases or decreases the dollars amounts, if applicable, for the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent’s Proposal, M/WBE Participation Plan.

8.4 **Non-Discrimination.**

8.4.1 **Non-Discrimination in Hiring.** The Commissioning Agent agrees that it will comply with provisions of the Philadelphia Fair Practices Ordinance administered by the Human Relations Commission of the City of Philadelphia, the Pennsylvania Human Relations Act, No. 222, October 27, 1955, as amended, 43 P.S. Section 951 et seq.; Title 7 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 et seq., and all pertinent regulations adopted pursuant to the foregoing in providing equal employment opportunities in connection with all work performed by it pursuant to this Contract. The Commissioning Agent, therefore, agrees:

(1) That it will not discriminate nor permit discrimination by its agents, servants or employees against any employee or applicant for employment with regard to hiring, tenure or employment, promotion, or any other terms, conditions or privileges of employment because of race, color, religion, age, national origin, sex, ancestry, handicap or disability and will move aggressively as is hereinafter set forth to prevent same.

(i) In all publications or advertisements for employees to work at the job site covered by this Contract placed by or on behalf of the Commissioning Agent, the Commissioning Agent will state that all qualified applicants will receive consideration for employment without regard to race, color, religion, age, national origin, sex, ancestry, handicap or disability.

(ii) The Commissioning Agent will notify each labor union or workers' representative from whom it seeks workers of the Commissioning Agent's commitment as set forth in its proposal, and request that each union or workers' representative include minority group members and women among its referrals.

(iii) The Commissioning Agent will hire minority and female workers for the skilled and unskilled jobs required to perform this Contract in proportion to their availability in the relevant labor pools in the Philadelphia Metropolitan Statistical Area, or to their availability in its qualified applicant pool, whichever is greater.

(iv) The Commissioning Agent will post in conspicuous places available to its employees and to applicants for employment, a notice of fair practices to be provided by the Philadelphia Human Relations Commission.

(v) The Commissioning Agent will maintain a work environment free of harassment, intimidation and coercion, and will ensure that all on-site supervisory personnel are aware of and carry out the Commissioning Agent's obligation to maintain such a working environment.

(2) That it will identify on each certified payroll form submitted to the School District those of its employees who are minority group members and those who are female. As used here, "minority" means African American, Hispanic, Asian, or Native American. The School District shall at all times have access to work site and to the Commissioning Agent's employment records to assure compliance with this subsection.

(3) That it will maintain on forms to be supplied by the School District, the name, race, sex, national origin, skill or craft, address, telephone number, and source of referral of each applicant for employment, which record shall show which applicants were hired.

(4) That in the event apprentices are hired in any skilled craft area,

the Commissioning Agent will endeavor to hire equal numbers of culturally diverse male and female trainees in each skill area.

8.4.2 **Non-Discrimination in Contracting.** It is the policy of the School District that business concerns owned and controlled by minority group members and women shall have full and fair opportunity to participate in performance of contracts let by the School District. Participation of minority-owned and women-owned business enterprises must be meaningful and substantial in all phases of this Contract. The Commissioning Agent represents and agrees that it will use the minority-owned and women-owned business enterprises for the services and in the combined range of percentages listed in Paragraph 8.3.4 herein. The representations and agreements in Paragraph 8.4 herein are material representations of fact upon which reliance was placed when this transaction was entered into. If it is later discovered or determined that the Commissioning Agent has not made a good faith effort to comply with the listed combined M/W/BE range of percentages in Paragraph 8.3.4 herein, within the School District's sole judgment, the School District may pursue available remedies, including suspension or debarment of the Commissioning Agent from future School District work as non-responsible.

8.4.3 **Liability of Subcontractors.** Any Subconsultant of the Commissioning Agent shall have the same responsibilities and obligations as the Commissioning Agent to comply with the provisions of this Paragraph 8.4 and shall be subject to the same penalties for failure to comply as set forth in Paragraph 8.4.4.

8.4.4 **Penalties for Failure to Comply.**

(1) It is hereby agreed that failure to comply and demonstrate a good faith effort to comply with the foregoing requirements shall constitute a substantial breach of this Contract.

(2) In the event that the School District determines, after investigation, that the Commissioning Agent or any Subconsultant has failed to comply with any provision of this Paragraph 8.4 and to demonstrate a good faith effort to comply, the School District may, in its sole discretion, invoke the termination provisions of this Contract or move to disqualify, suspend, or debar the Commissioning Agent or any Subconsultant pursuant to Board Policy No. 621.

(3) The Commissioning Agent or any Subconsultant, as the case may be, shall be given written notice of any determination of non-compliance and opportunity to achieve compliance within a time period to be specified in the notice.

(4) In the event the School District, after a hearing, determines to terminate the Contract, entered into under this Contract, for non-compliance with and failure to demonstrate a good faith effort to comply with the requirements of this Paragraph 8.4, all obligation on the School District's part to perform this Contract shall cease except for the obligation to pay the Commissioning Agent the sums due.

Section 9. Indemnification.

9.1 Indemnification.

9.1.1 The Commissioning Agent agrees to assume liability for and does specifically agree to indemnify, save, protect, and hold harmless the School District, its officers, employees, agents and members of the School Reform Commission and the Board of Education, from and against any and all liability, losses, claims, suits, actions, costs, damages and expenses (including, but not limited to, attorneys' fees, court costs and legal expenses of whatever kind or nature) imposed on or asserted against the School District, and arising out of or in any way related to or resulting from the Commissioning Agent's carrying out the provisions of this Contract, including, but not limited to, any claim for actual or alleged loss of life, bodily injury, personal injury, or damage to property, alleged to have been caused, in whole or in part, by the negligent acts, errors, omissions, breaches of contract, intentional acts or omissions, or employment discrimination of the Commissioning Agent, its officers, agents, employees, servants, or Subconsultants acting pursuant to this Contract; or arising out of this Contract with the School District and related to any claim whatsoever brought by or against any agent, servant, employee, or Subconsultant of the Commissioning Agent for any alleged negligence or condition caused or contributed to, in whole or in part, by the School District; and from any claim for license fees or taxes for which the Commissioning Agent is or may become responsible. The Commissioning Agent agrees that in the event that any employee of the Commissioning Agent makes any claim or files a lawsuit against the School District for any alleged injury on School District property or in connection with services being performed by the Commissioning Agent under this Contract that the Commissioning Agent shall fully defend, indemnify and hold harmless the School District for all damages, losses and expenses which may result therefrom (including attorneys' fees, court costs and legal expenses of whatever kind or nature). This indemnity provision is expressly intended to waive the statutory immunity afforded to the Commissioning Agent as an employer pursuant to §481(b) of the Pennsylvania Workers' Compensation Act, 77 P.S. §481(b), and to permit the School District to seek contribution or indemnity from the Commissioning Agent in the event that the School District is sued by an employee of the Commissioning Agent. The parties further intend that this waiver satisfy the judicial requirements applicable to an express waiver as articulated by the Superior Court of Pennsylvania in Bester v. Essex Crane Rental Corp. v. Russell Construction Co., 619 A.2d 304 (Pa.Super. 1993).

9.1.2 This indemnity provision is intended, *inter alia*, to protect the School District, its commission members, board directors, officers, agents, representatives and employees from all claims that are asserted by employees, agents, or workers of any contractors or consultants who are injured on or by School District real property, or on, by or as a result of School District personal property, or who assert an employment claim of any kind (including claims relating to the termination of employment) regardless of when the claim is made, from the commencement to the completion of this Contract, whether the death, injury, damage or loss to persons and/or property, or the economic loss, damage or expense, or employment discrimination, is due to School District negligence, in whole or in part, and is not limited to death, injury, damage or loss to persons or property, or economic loss, damage or expense, or employment discrimination, which occur in actual performance of this Contract, nor is this indemnity provision limited by the Pennsylvania Workers' Compensation Act. This indemnity provision shall not be construed to alter, limit, negate, abridge or otherwise reduce

any other right or obligation of indemnity which would otherwise exist as to any party or persons described in this Contract, and is independent of whether or not the Commissioning Agent or any of its Subconsultants has insurance.

9.1.3 In the event the School District receives notice of a claim based upon the Commissioning Agent's services, omission or breach, the School District will promptly notify the Commissioning Agent in writing of such claim and will require and permit the Commissioning Agent to assume the defense of the School District, its officers, employees, agents and members of the School Reform Commission and the Board of Education, whenever and wherever under the circumstances indicated in Paragraph 9.1 herein, claims, suits or actions are brought against the School District, its officers, employees, agents or members of the School Reform Commission and the Board of Education. The Commissioning Agent shall require all insurance policies in any way related to the work and secured and maintained by the Commissioning Agent and all tiers of its Subconsultants to include clauses stating each underwriter will waive all rights of recovery, under subrogation and otherwise, against the School District.

9.1.4 This Paragraph 9.1 (*Indemnification*) shall apply, particularly, but not exclusively, to the claims of the Commissioning Agent and its officers, agents, representatives and employees, or the claims of any of its Subconsultants and their officers, agents, representatives and employees, against the School District, its officers, employees and agents, and the members of the School Reform Commission and the Board of Education. Any violation of any of the provisions of this Paragraph 9.1 (*Indemnification*) by the Commissioning Agent shall be deemed a material breach of this Contract. The Commissioning Agent and its officers, agents, representatives and employees, and all of its Subconsultants and their officers, agents, representatives and employees, shall have no claim against the School District, its officers, agents, representatives and employees, and the members of the School Reform Commission and the Board of Education for the acts, failures to act or negligence of the School District, directly or indirectly, or its officers, employees and members of the School Reform Commission and the Board of Education; and should this exculpatory clause be declared invalid by law, such invalidity shall in no manner affect or invalidate any or all other foregoing provisions in this Paragraph 9.1 (*Indemnification*).

Section 10. Insurance.

10.1 **Insurance.** Unless otherwise approved by the School District's Office of Risk Management in writing, prior to commencing Services under this Contract, the Commissioning Agent shall, at its sole cost and expense, procure and maintain in full force and effect, covering the performance of the Services required under this Contract, the types and minimum limits of insurance specified below. All insurance shall be procured solely from reputable insurers who are financially responsible and authorized to do business on an admitted basis in the Commonwealth of Pennsylvania or otherwise acceptable to the School District Office of Risk Management. All insurance must be procured through an insurance carrier or carriers, each of which shall have at least an A- (Excellent) **FSC-XI** rating from A.M. Best. All insurance required herein, except the Professional Liability Insurance, shall be written on an "occurrence" basis and not a "claims-made" basis. IN NO EVENT SHALL THE COMMISSIONING AGENT COMMENCE PERFORMING ANY PART OF THE SERVICES UNTIL THE REQUIRED PROOF OF

INSURANCE HAS BEEN DELIVERED TO THE SCHOOL DISTRICT. The insurance shall provide for at least thirty (30) calendar days' prior written notice to be given to the School District in the event that the Commissioning Agent or its insurer or insurers materially change, cancel, or non-renew any insurance policy. The Commissioning Agent shall advise the School District immediately upon receiving any notice of cancellation or nonrenewal of the required insurance. The Commissioning Agent shall ensure that the School District of Philadelphia, its commission members, board directors, officers, employees and agents shall be named as Additional Insureds on the General Liability Insurance policy and the Commissioning Agent shall ensure that its insurer or insurers so endorse said policy. The Commissioning Agent shall procure and maintain an endorsement or endorsements stating that: (i) the coverage afforded the School District and its commission members, board directors, officers, employees and agents, as additional insureds, shall be primary to any other coverage available to them, and (ii) no act or omission of the School District commission members, board directors, officers, employees and agents shall invalidate the coverage, other than an act or omission that would constitute willful misconduct or gross negligence. The Commissioning Agent shall require its Subconsultants under this Contract to maintain the required levels of insurance.

(a) WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE

- (1) Workers' Compensation: Statutory Limits.
- (2) Employers' Liability: \$500,000 Each Accident - Bodily Injury by Accident; \$500,000 Each Employee - Bodily Injury by Disease; and \$500,000 Policy Limit - Bodily Injury by Disease.
- (3) Other states insurance coverage and Pennsylvania endorsement.

(b) COMMERCIAL GENERAL LIABILITY INSURANCE

- (1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability; \$1,000,000 personal and advertising injury; \$2,000,000 general aggregate and \$2,000,000 aggregate for products and completed operations. The School District may require higher limits of liability or aggregate coverages at any time during the term of the Contract, if, in the School District's sole discretion, the potential risk warrants it.
- (2) Coverage: Premises operations; blanket contractual liability; personal injury liability; products and completed operations; independent contractors; employees and volunteers as additional insureds; cross liability; and broad form property damage (including completed operations).

(c) AUTOMOBILE LIABILITY INSURANCE

- (1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.

- (2) Coverage: Owned, non-owned, and hired vehicles when any motor vehicle is used in connection with the Services required under this Contract.

(d) **ARCHITECTS AND ENGINEERS PROFESSIONAL LIABILITY INSURANCE**

- (1) Limit of Liability: \$2,000,000 with a deductible not to exceed \$50,000.
- (2) Coverage: Engineering Errors and omissions, including liability assumed under this Contract.
- (3) Architects and Engineers Professional Liability Insurance may be written on a claims-made basis provided that coverage for occurrences arising out of the performance of the Services required under this Contract shall be maintained in full force and effect for a retroactive date prior to work and an extending reporting period of three (3) years after completion of work.

(e) **EXCESS UMBRELLA INSURANCE**

- (1) Limit of Liability: at least \$3,000,000 combined single limit and at least \$3,000,000 aggregate limit with an additional insured endorsement for the School District on the liability policy.
- (2) Coverage: Limits in excess of underlying limits in underlying primary insurance policies and broader coverage than combined scope of underlying primary insurance policies and all aspects of this Contract (including general liability, automobile liability, workers' compensation, employer liability, and professional liability).

(f) **VALUABLE PAPERS AND RECORDS COVERAGE**

- (1) The Commissioning Agent shall also purchase valuable papers and records coverage for plans, specifications, drawings, reports, maps, books, blueprints and other printed documents in an amount sufficient to cover the cost of recreating or reconstructing valuable papers related to the assigned Project(s).

10.2 **Evidence of Insurance Coverage.** Certificates of Insurance evidencing the required coverages and Endorsements must specifically reference the School District Contract number for which they are being submitted, and the Commissioning Agent shall attach a copy of each insurance certificate and Endorsement to this Contract. The originals of the Certificate(s) of Insurance and Endorsements providing proof of insurance shall be submitted to the School District's Contract Administrator at the following address set forth in Paragraph 16.1, *Notices*:

The School District of Philadelphia
Office of Risk Management

440 North Broad Street, Suite 325
Philadelphia, PA 19130-4015
Attn.: Riccardo Zucaro, Director of Risk Management
(Fax No.: 215-400-4591)

with a copy to:

The School District of Philadelphia
Office of Capital Programs
440 North Broad Street, Suite 371
Philadelphia, PA 19130-4015
Attn.: Gerald Thompson, Contracts Manager
(Fax No.: 215-400-4731)

Both submissions must be made at least ten (10) calendar days before Services are begun and again at least ten (10) calendar days before an Additional Term. The ten (10) calendar day requirement for advance documentation of coverage may be waived in situations where such waiver will, in the sole judgment of the School District Director of Risk Management, benefit the School District; but under no circumstances shall the Commissioning Agent actually begin Services (or continue Services, in the case of an Additional Term) without providing the required evidence of insurance. The Endorsement adding the School District of Philadelphia as an additional insured must specifically reference the School District Contract number and be submitted to the School District Director of Risk Management and School District's Contract Administrator at the above addresses. The School District reserves the right to require the Commissioning Agent to furnish certified copies of the original policies of all insurance required under this Contract at any time upon ten (10) calendar days' written notice to the Commissioning Agent.

10.3 Notice of Claim or Lawsuit. The Commissioning Agent shall advise the School District in writing, within ten (10) calendar days upon notification of a claim or lawsuit based upon the Commissioning Agent's services, omission or breach, that it will abide fully by Paragraph 9.1 (*Indemnification*) and Section 10 (*Insurance*) of this Contract, and that the applicable insurance carrier(s) has (have) been advised to defend, indemnify, and hold harmless the School District in accordance with the provisions of Paragraph 9.1 (*Indemnification*) and Section 10 (*Insurance*) of this Contract. The Commissioning Agent shall not decline to provide the School District with full protection and coverage under Paragraph 9.1 (*Indemnification*) and Section 10 (*Insurance*) of this Contract because some other contractor or consultant may, in whole or in part, be responsible for the occurrence, death, injury, damage, or loss to persons or property, or economic loss, damage, or expense, or because the School District may be a co-insured or an additional insured on some other contractor's or consultant's policy of insurance. The Commissioning Agent agrees that any violation of this Paragraph 10.3 of Section 10 (*Insurance*) shall be deemed a material breach of this Contract.

10.4 Self-Insurance. The Commissioning Agent may not self-insure any of the coverages required under this Contract without the prior written approval of the School District Director of Risk Management. In the event that the Commissioning Agent desires to self-insure any of the coverages listed above, it shall submit to the School District's Contract Administrator and School

District Director of Risk Management, prior to the commencement of Services hereunder, a certified copy of the Commissioning Agent's most recent audited financial statement, and such other evidence of its qualifications to act as a self-insurer (e.g., State approval) as may be requested by the School District's Contract Administrator or School District Director of Risk Management. In the event such approval is granted, it is understood and agreed that the School District, its commission members, board directors, officers, employees and agents shall be entitled to receive the same coverages and benefits under the Commissioning Agent's self-insurance program that they would have received had the insurance requirements been satisfied by a reputable insurance carrier authorized to do business in the Commonwealth of Pennsylvania or otherwise acceptable to the School District Director of Risk Management. If at the time of commencement of this Contract, the Commissioning Agent self-insures its professional liability or workers' compensation and employers' liability coverage, the Commissioning Agent may, in lieu of the foregoing, furnish to the School District Director of Risk Management and School District a current copy of the State certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate. The insurance (including self-insurance) requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made in this Contract by the Commissioning Agent to the School District, or to limit the Commissioning Agent's liability under this Contract to the limits of the policies of insurance (or self-insurance) required to be maintained by the Commissioning Agent hereunder.

Section 11. Confidentiality.

11.1 **Confidential and Proprietary Information.** The Commissioning Agent acknowledges that it will be exposed to confidential and proprietary information of the School District and that such confidential and proprietary information will be contained in papers, records, documents and materials belonging to the School District or stored on equipment owned and operated by the School District. The Commissioning Agent shall keep in strictest confidence all information relating to this Contract and all information that may be acquired in connection with or as a result of this Contract, that is not generally known to others, or which the School District designates as confidential or proprietary. The School District hereby designates the School District Data listed in Paragraph 11.3 as "Confidential and Proprietary Information". During the term of this Contract and at any time thereafter, without the prior written consent of the School District, the Commissioning Agent shall not publish, disclose, or use to its advantage, profit or gain any information which has been designated by the School District as proprietary or confidential, or which from the surrounding circumstances in good conscience ought to be treated by the Commissioning Agent as proprietary or confidential, or any other information subject to a third party's proprietary right, such as a copyrighted or trademarked work. The term "Confidential or Proprietary Information" is not meant to include any information that is in the public domain. Notwithstanding any other terms or conditions to the contrary, the Commissioning Agent shall return to the School District all of the Confidential and Proprietary Information designated by the School District in Paragraphs 11.1 and 11.3 at the termination of this Contract.

11.2 **Non-Disclosure.** The Commissioning Agent and its employees, agents, Subconsultants, and any person or entity acting on its behalf (i) will maintain in strict

confidentiality all of the “School District Data,” as defined and set forth in Paragraph 11.3; (ii) will not, without the School District’s written permission, divulge, disclose, communicate, or distribute any of the School District Data to any person or entity except as may be strictly necessary to perform this Contract; (iii) will not, without the School District’s written permission, in any way use any of the School District Data for their businesses or other advantage or gain (except as may be necessary to perform this Contract), including, without limitation, any use of the School District Data in any presentation, demonstration, or proposal to perform services, to the School District or to others, that may be conducted or created as part of their business activities or otherwise; (iv) will use the School District Data solely and exclusively in accordance with the terms of this Contract in order to carry out its obligations and exercise its rights under this Contract; (v) will afford the School District Data at least the same level of protection against unauthorized disclosure or use as the Commissioning Agent uses to protect its own trade secrets, proprietary information, and other confidential information (but will in no event exercise less than reasonable care and protection); and (vi) will, immediately upon termination or expiration of this Contract, return all School District Data to the School District, destroy any and all copies of any School District Data that are in their possession, whether on paper or in electronic or other form, and if requested by the School District in writing, will certify in writing that there has been full compliance with this Paragraph 11.2.

11.3 **School District Data.** Except as provided otherwise in Paragraph 11.4, the School District Data shall include any and all of the following, whether in electronic, microfilm, microfiche, video, paper, or other form, and any copies or reproductions thereof:

- (a) financial data, records, and information related to the assigned Project(s);
and
- (b) any Data provided by the School District to the Commissioning Agent in connection with the Services provided by the Commissioning Agent; and
- (c) any and all other records, documents, computer software (whether owned by the School District or licensed or otherwise furnished to the School District by third parties), and data furnished by the School District to the Commissioning Agent in relation to the Services required under this Contract; and
- (d) all records, documents, data, information, programs, and items of Services created by the Commissioning Agent for the School District as part of the Services required under this Contract.

11.4 **Exclusions.** School District Data shall not include any information or data which:

- (a) was known to the Commissioning Agent prior to the commencement of its performance of this Contract, free of any obligation to keep it confidential, or is proprietary to the Commissioning Agent; or
- (b) was generally known to the public at the time of receipt by the Commissioning Agent, or becomes generally known to the public through no act or omission of the

School District; or

(c) was independently developed by the Commissioning Agent without knowledge or use of any Data of the School District; or

(d) is required to be disclosed by law or judicial process.

11.5 **Remedy for Breach.** In the event of any actual or threatened breach of any of the provisions of this Section 11 by the Commissioning Agent, and in addition to any other remedies that may be available to the School District in law or equity, the School District shall be entitled to a restraining order, preliminary injunction, permanent injunction, or other appropriate relief to specifically enforce the terms of this Section 11. The parties agree that a breach of the terms of this Section 11 by the Commissioning Agent would cause the School District injury not compensable in monetary damages alone, and that the remedies provided herein are appropriate and reasonable.

Section 12. Disputes.

12.1 **Escalation.** The parties agree to exercise every reasonable effort to resolve disputes that may arise under this Contract through informal negotiation and cooperation. If the parties are unable to resolve any dispute arising under this Contract, then a party claiming that a dispute has arisen in connection with this Contract or its subject matter will give prompt notice to the other party describing the dispute in reasonable detail. Promptly after receipt of the Dispute Notice, the parties will negotiate in good faith to resolve the Dispute. Either party may escalate the Dispute negotiations to higher level personnel, by notice to the other party, as specified below:

School District	Commissioning Agent	Time After Dispute Notice
Project Engineer or Project Manager	Project Administrator	15 days
Design Manager or Contracts Manager	Project Administrator	15 days
Acting Director or Director, Capital Programs	Principal in Charge	15 days

12.2 **Tolling.** All limitations periods and the running of laches are tolled during the pendency of dispute resolution.

Section 13. Project Stoppage, Suspension or Abandonment.

13.1 **Stoppage or Abandonment.** The School District may order the Commissioning Agent, in writing, to stop or abandon all or any part of its Services for the Work assignment(s), for the convenience of the School District, or for work stoppages beyond the control of the School District or the Commissioning Agent. Any increased costs incurred as a result of the stoppage or abandonment of the Work assignment(s) shall be an equitable amount determined by the School

District and the Commissioning Agent in view of all the facts and circumstances. If, however, the Work assignment(s) is(are) abandoned, the School District shall pay the Commissioning Agent for all Services performed and Reimbursable Expenses incurred to the date of abandonment in accordance with Paragraph 14.1, *Termination for Convenience*, of this Contract.

13.2 **Suspension for Convenience.** The School District shall have the right, at any time during the term of this Contract, to suspend all or any part of the Services, for the convenience of the School District, for the period of time that the School District, in its sole discretion, determines to be in the best interest of the School District, upon thirty (30) days' prior written notice to the Commissioning Agent (except that in the event of a public emergency, as determined by the School District, no such period of notice shall be required.).

13.2.1 If a suspension of the Services pursuant to this Paragraph 13.2 is for greater than thirty (30) days, the Commissioning Agent shall have the right to submit a claim to the School District for the payment of costs for all Services performed and Reimbursable Expenses incurred in accordance with the provisions of this Contract prior to the effective date of the suspension.

13.2.2 The Commissioning Agent shall be entitled to a one-day extension of the time of performance provided in this Contract for each day that it is suspended pursuant to this Paragraph 13.2.

13.3.3 The School District shall have the right, during the period of any suspension pursuant to this Paragraph 13.2, to terminate this Contract as provided in Section 14, in Section 6, and elsewhere in this Contract.

Section 14. Termination.

14.1 **Termination for Convenience.**

14.1.1 **Termination for Convenience.** The School District shall have the right to terminate this Contract, in whole or in part, for the convenience of the School District, that is, for any reason or for no reason at all, at any time, upon thirty (30) calendar days' prior written notice to the Commissioning Agent. Such termination for convenience shall be, at the School District's sole discretion, and without penalty, cost, or liability to the School District.

14.1.2 **Effect of Termination for Convenience or Similar Grounds.**

(a) The Commissioning Agent shall be entitled to payment from the School District for any Services satisfactorily performed and Reimbursable Expenses incurred in accordance with the provisions of this Contract prior to the effective date of termination.

(b) Whether the termination occurs in the Initial Term or an Additional Term, the Commissioning Agent shall continue to perform this Contract in accordance with its terms through the effective date of the termination, and shall make diligent efforts to mitigate all costs and losses associated with the termination.

(c) The School District shall incur no liability beyond such stated amount for any Services that are terminated under Paragraph 14.1, *Termination for Convenience*, Paragraph 6.11, *Unavailability of Funds*, or Paragraph 6.12, *Crossing Fiscal Years*. Without limiting the generality of the foregoing, in no event shall the Commissioning Agent be entitled to receive, or to submit any claim for, any of the following costs directly or indirectly caused by the termination: (i) field or home office overhead; or (ii) costs caused by or related to loss of productivity or loss of profit related to the Services and this Contract, or to any other Contract or services that the Commissioning Agent performed or could have performed but was prevented from performing because of the termination or its commitment to the Services.

(d) In the event the School District partially terminates this Contract pursuant to this Paragraph 14.1.1, the Commissioning Agent shall continue to perform this Contract in accordance with its terms with respect to all Services not terminated. The School District shall pay the Commissioning Agent in accordance with this Contract for Services that are not terminated.

14.2 **Termination for Default.**

14.2.1 **Event of Default.** Each of the following constitutes an Event of Default by the Commissioning Agent under this Contract.

(a) The Commissioning Agent's failure to comply with any material provision, term, or condition of this Contract;

(b) the appointment of a receiver, trustee or custodian to take possession of all or substantially all the assets of the Commissioning Agent for the benefit of creditors, or any action taken or suffered by the Commissioning Agent under any federal or state insolvency, bankruptcy, reorganization, moratorium or other debtor relief act or statute, including the Commissioning Agent's filing for bankruptcy, and the filing of an involuntary petition against the Commissioning Agent under the federal bankruptcy code or any similar state or federal law which remains undismissed for a period of forty-five (45) days;

(c) material misrepresentation or material falseness or inaccuracy of any representation or commitment of the Commissioning Agent contained in this Contract, or in any other document submitted to the School District by the Commissioning Agent in relation to the Services, the RFP, or the Proposal, or otherwise by the Commissioning Agent directly or indirectly to the School District in connection with the School District's decision to execute, deliver and perform this Contract;

(d) failure of the Commissioning Agent to provide, within five (5) business days, assurance reasonably acceptable to the School District that it can perform the Work in conformity with the terms of the Contract if (1) the School District has a reasonable basis to believe at any time during the term of the Contract that the Commissioning Agent will not be able to perform the Work, and (2) the School District demands in writing assurance of the Commissioning Agent's performance;

(e) misappropriation by the Commissioning Agent of any funds provided under this Contract or failure by the Commissioning Agent to notify the School District upon discovery of any misappropriation;

(f) indictment of or other issuance of formal criminal charges against the Commissioning Agent or any of its directors, employees or agents or any of the directors, employees or agents of a Subcontractor or any criminal offense or any other violation of Applicable Law directly or indirectly relating to this Contract or the Work or Services required under this Contract, or which adversely affects the Commissioning Agent's performance of this Contract in accordance with its terms, whether or not a court of law or other tribunal ultimately accepts a verdict or plea of guilty or no contest regarding the charged offense;

(g) disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the capital project(s) or the Services;

(h) debarment or suspension of the Commissioning Agent or any director, agent, or employee or any person controlling, under common control with, or controlled by, the Commissioning Agent under a federal, state or local law, rule or regulation;

(i) failure by the Commissioning Agent to comply with any term, covenant or condition set forth in Paragraph 16.18, *Tax Compliance*, or the breach of any of the Commissioning Agent's representations and warranties set forth in Paragraph 3.2, *Commissioning Agent's Representations, Warranties and Commitments*.

14.2.2 Notice and Cure. If the Commissioning Agent commits or permits an Event of Default, the School District shall notify the Commissioning Agent in writing of its determination that an Event of Default has occurred, and shall specify in reasonable detail the nature of the Default. Except for the breaches set forth in subparagraphs (b) through (i) of this Paragraph 14.2, the Commissioning Agent shall have ten (10) business days from receipt of that notice to correct the Event of Default. If the Event of Default is not cured within that time period, the School District may terminate this Contract by providing the Commissioning Agent with written notice of Termination for Default. The School District may extend such time period, at its sole discretion, if there is evidence of the Commissioning Agent's good faith effort to cure the Event of Default within such time period. No notice from the School District or period of cure shall be required before invoking the remedies described in Paragraph 14.4, *Additional Remedies of the School District*, of this Contract if: (1) the Commissioning Agent has temporarily or permanently ceased performing the Work; (2) an emergency has occurred relating to the Work, and that emergency requires immediate exercise of the School District's rights or remedies, as determined by the School District in its sole discretion; (3) the School District has previously notified the Commissioning Agent more than once in the preceding twelve (12) month period of any Event of Default under this Contract; (4) an Event of Default occurs as described in Paragraphs 14.2.1(e), (f), or (h); or (5) the Commissioning Agent breaches any of its obligations under Paragraph 16.13, *Background Checks (Criminal, Child Abuse and FBI)*, or Paragraph 8.4, *Non-Discrimination*. Nothing set forth in this Paragraph shall limit the School District's rights under Paragraph 14.5, *Additional Remedies of the School District*.

14.3 **Termination Duties.** Upon receipt of a Termination Notice from the School District, the Commissioning Agent shall take immediate action toward the orderly discontinuation of Services under this Contract. The Commissioning Agent shall exercise due care and caution to protect and secure completed Work. Upon expiration or termination of this Contract, the Commissioning Agent shall be responsible for taking all actions necessary to accomplish an orderly discontinuation of performance of Services, and for collecting, assembling, and transmitting to the School District, at the Commissioning Agent's sole expense, all materials, reports, estimates, data, and other documentation which were obtained, prepared or developed as part of the Services required under this Contract. Materials, reports, estimates, data and documentation shall be clearly labeled and indexed, to the satisfaction of the School District, and delivered to the School District by the Commissioning Agent, within thirty (30) calendar days after receipt of a Termination Notice from the School District, or in such shorter period as the School District may specify in its Termination Notice.

14.4 **Additional Remedies of the School District.** In the event the Commissioning Agent commits or permits an Event of Default, the School District may, in its sole discretion, exercise one or more of the following remedies, in addition to or in lieu of the termination remedy provided in Paragraph 14.1:

(a) terminate this Contract in part only, in which case the Commissioning Agent shall be obligated to perform this Contract to the extent not terminated; or

(b) perform (or cause a third party to perform) the Services and this Contract, in whole or in part, including, without limitation, obtaining or paying for any required insurance or performing other acts capable of performance by the School District. The Commissioning Agent shall be liable to the School District, as damages, for all sums paid by the School District and all expenses incurred by the School District (or a third party) pursuant to this Paragraph 14.4, together with interest at the prime rate of interest as published from time to time by the *Wall Street Journal*, plus five percentage points (5.0%), from the date of the School District's incurring of such costs. The School District shall not in any event be liable for inconvenience, expense, loss of profits, or other damage incurred by the Commissioning Agent by reason of such performance or paying such costs or expenses, and the obligations of the Commissioning Agent under this Contract shall not be altered or affected in any manner by the School District's exercise of its rights under this Section 14; or

(c) withhold payment of, or offset against, any funds payable to or for the benefit of the Commissioning Agent; or

(d) collect, foreclose or realize upon any bond, collateral, security or insurance provided by or on behalf of the Commissioning Agent; or

(e) exercise any other right or remedy it has or may have at law, in equity, or under this Contract, including but not limited to a legal action for breach and damages against the Commissioning Agent; and,

(f) in addition to, and not in lieu of, the foregoing remedies, the School District shall have the right to stop the Services or any portion thereof in the event the Commissioning Agent fails to remedy any defects in any of the Services, or commits or permits any other event of default, following written notice by the School District, or fails to carry out any portion of the Services in accordance with this Contract, by issuing its written Stop Work Order, which shall be signed by the Director or Acting Director of Capital Programs. Any Stop Work Order shall state in reasonable detail the cause(s) for its issuance. Upon receiving a stop work order, the Commissioning Agent shall immediately cease working on that portion of the Services specified in the Stop Work Order until the School District notifies the Commissioning Agent in writing that the cause for the Stop Work Order has been eliminated, and directs the Commissioning Agent in writing to resume the Services. The Commissioning Agent shall resume the Services immediately upon receipt of such written notice from the School District.

14.4.1 **Specific Performance.** The Commissioning Agent's Work represents unique services not otherwise readily available to the School District. Accordingly, the Commissioning Agent acknowledges that, in addition to all other remedies, the School District shall have the right to enforce the terms of this Contract by a decree of specific performance or an injunction, or both, restraining a violation, or attempted or threatened violation, of any term, covenant or condition set forth in this Contract.

14.5 **Concurrent Pursuit of Remedies; No Waiver or Duty to Exercise.** The School District may exercise any or all of the remedies set forth in this Section 14, each of which may be pursued separately or in connection with such other remedy or remedies as the School District, in its sole discretion, shall determine. The School District may in its sole discretion elect not to exercise any of the remedies set forth in Section 14 and may permit the Commissioning Agent to continue to perform the Work. No extension or indulgence granted by the School District to the Commissioning Agent shall operate as a waiver of any of the School District's rights in connection with this Contract. The rights and remedies of the School District as described in this Section 14 and elsewhere in this Contract shall not be exclusive and are in addition to any other rights or remedies available to the School District under this Contract, at law, or in equity. Nothing contained in this Section 14 shall create a duty on the part of the School District to exercise any rights granted to it hereby for the benefit of the School District, or for the benefit of the Commissioning Agent, or any person or entity other than the School District.

Section 15. Certification Regarding Debarment, Suspension and Ineligibility.

15.1 **Certification.** By signing this Contract, in addition to binding itself to the terms and conditions of this Contract, the Commissioning Agent hereby certifies for itself, its principals and including, without limitation, its Subcontractors, if any, that none of them, nor any other person controlling, controlled by, or under common control with, the Commissioning Agent, are presently debarred, suspended, proposed for debarment, declared ineligible for contracts, bids, requests for proposals or contract awards, or voluntarily excluded from performing the services under this Contract by any Federal government or Commonwealth of Pennsylvania or City department or agency or any school district.

15.2 **Explanation.** In the event the Commissioning Agent is unable to certify to any of the statements in the above certification, the Commissioning Agent shall provide **an immediate written explanation** to the School District administrator named in Paragraph 7.1 of this Contract.

15.3 **Notice.** The Commissioning Agent shall provide **immediate written notice** to the School District administrator named in Paragraph 7.1 of this Contract if at any time, during the term of this Contract, the Commissioning Agent learns that the above certification was erroneous when the Commissioning Agent signed this Contract or subsequently became erroneous by reason of changed circumstances.

15.4 **Remedies.** If the Commissioning Agent is unable to certify to any statements in the above certification, or has falsely certified, then in that event the School District, at its sole discretion, may immediately terminate this Contract without any liability or obligation of the School District to the Commissioning Agent, and the Commissioning Agent shall reimburse the School District for any and all reasonable costs incurred by the School District as a result of any investigation by the federal government or the Commonwealth of Pennsylvania concerning the Commissioning Agent's compliance with the terms and conditions of this Contract that results in the debarment or suspension of the Commissioning Agent.

15.5 **Compensation.** If the compensation paid to the Commissioning Agent is derived from federal government or Commonwealth of Pennsylvania grant funds, the Commissioning Agent must bill the School District for any outstanding compensation owed to the Commissioning Agent within thirty (30) days after the ending date of this Contract, as set forth in Section 2 (*Term of Contract*). In the event the Commissioning Agent does not bill the School District for the balance of any compensation within said 30-day time period, the School District, in its sole discretion, reserves the right to withhold payment of the balance of the compensation to the Commissioning Agent because of the unavailability of federal government or Commonwealth of Pennsylvania funds, in which event the School District shall not be liable to the Commissioning Agent for the balance of the compensation.

15.6 **Survival.** This Section 15 shall survive termination of this Contract.

Section 16. Miscellaneous Provisions.

16.1 **Notices.** Any notice or communication required or permitted to be given under this Contract shall be given in writing, and shall be personally delivered by hand with receipt obtained, by a national overnight express carrier (e.g., Federal Express, Express Mail), by facsimile (with copy by registered or certified United States mail, return receipt requested, postage prepaid), or by registered or certified United States mail, return receipt requested, postage prepaid, addressed as follows:

IF TO SCHOOL DISTRICT:

Attn.: Leigh Clark, Acting Director of Capital Programs
or Nicole Ward, Design Manager of Capital Programs

The School District of Philadelphia
Office of Capital Programs
440 North Broad Street, Suite 371
Philadelphia, PA 19130-4015
Telephone number: (215) 400-4730
Facsimile number: (215) 400-4731

IF TO COMMISSIONING AGENT:

Attn.: _____

Telephone number: _____

Facsimile number: _____

Email address: _____

If mailed, such notice or communication shall be deemed to have been given on actual receipt by the intended recipient.

16.2 **Governing Law.** This Contract and all disputes arising under this Contract shall be governed, construed, and decided in accordance with the substantive laws of the Commonwealth of Pennsylvania.

16.3 **Forum; Consent to Jurisdiction.** The parties agree that when any dispute between the parties cannot be amicably resolved and resort is made to legal action, any lawsuit, action, claim, or legal proceeding involving, directly or indirectly, any matter arising out of or related to this Contract, or the relationship created or evidenced thereby, shall be brought exclusively in a federal or state court of competent jurisdiction in and only in Philadelphia County, Pennsylvania. It is the express intent of the parties that jurisdiction over any lawsuit, action, claim, or legal proceeding shall lie exclusively in this forum. The parties further agree not to raise any objection, as to forum or venue, to any lawsuit, action, claim, or legal proceeding which is brought in this forum, and the parties expressly consent to the jurisdiction and venue of this forum.

16.4 **Contract Documents; Order of Precedence.** The Contract Documents shall consist of the following: this Contract, Exhibits A-E to this Contract, and the Proposal (as modified hereby). In the event of conflict or variance between the body of this Contract (Sections 1-16) and any other document comprising the Contract Documents, this Contract shall govern. Conflicts and variances among the documents comprising the Contract Documents shall be resolved by giving precedence in the following order: This Contract, the Exhibits, and the Proposal.

16.5 **School District Liability; Responsibility or Risk of Loss.** Notwithstanding any other provisions of this Contract or any Addenda or Exhibits to the contrary, the School District, its officers, employees and agents and the members of the School Reform Commission and the Board of Education retain their statutory governmental, official and any other immunity as provided pursuant to the Applicable Law, including 42 Pa C.S.A. §§8501 and 8541 et seq., and do not waive

the defenses of governmental and official immunity derived from such laws. The Commissioning Agent acknowledges that the School District:

- (a) Is a local agency, as defined in 42 Pa. C.S.A. §8501, §8541, and,
- (b) Does not waive, for itself or for its officers, employees, or agents, or for the members of the School Reform Commission and Board of Education, the defenses of statutory governmental or official immunity or any other defenses or immunities available to it or any of them.

The School District does not waive for itself or for its officers, employees, agents, or for the members of the School Reform Commission and Board of Education, any other defenses or immunities available to it or any of them.

16.6 Compliance with Laws and Regulations. All services performed and documents prepared by the Commissioning Agent shall strictly conform to all federal, state, and local laws, statutes, codes, and ordinances and the applicable rules, regulations, policies, methods and procedures of the School District and all governmental bodies, boards, bureaus, offices, commissions, and other agencies.

16.7 Publicity. Neither the School District nor the Commissioning Agent shall publicize this Contract or the Services, or attribute any comments or views about this Contract or the Services to employees or agents or officials of the other party, by press conference, press release, advertising or public relations materials without the prior written consent of the other party, which consent shall not be unreasonably withheld; provided, however, that nothing in this Paragraph 16.7 shall be construed to prohibit either party from making any disclosure relating to this Contract or Services that is required under federal or state securities laws or state or local election laws, or to prohibit either party from publicizing, with reasonable prior notice to the other party, the fact that this Contract has been entered into, the subject matter of this Contract, or the amount of this Contract. Except as may be required for its performance of this Contract, or as mutually agreed by the School District and the Commissioning Agent, the Commissioning Agent shall refer all press and public inquiries regarding the Work assignment(s) to the School District's designated representative during the term of this Contract. At any time thereafter, the Commissioning Agent may respond to press and public inquiries regarding the Work assignment(s) following notice to the School District's designated representative. During the term of this Contract, the Commissioning Agent shall provide reasonable assistance to the School District in public relations activities, and shall prepare appropriate information for, and when requested, attend public meetings regarding the Work assignment(s).

16.8 General Publication Rights. The Commissioning Agent agrees with regard to publication of reports, studies, or other works developed in the course of this Contract as a result thereof, that the publication will not contain information supplied to the Commissioning Agent by the School District which is confidential, or which identifies students, employees, or officers of the School District by name without first obtaining their written consent. The School District shall be allowed to review and suggest revisions to any proposed publication in which it is named for thirty (30) calendar days prior to submission for publication. Title to and the right to determine

the disposition of any copyrights and copyrightable materials first produced by the Commissioning Agent as a result of performance of this Contract shall remain with the Commissioning Agent.

16.9 **Conflict of Interest.**

16.9.1 **Disclosure of Conflict of Interest.** The Commissioning Agent represents, warrants and covenants that it has no public or private interest which does or may conflict in any manner with the performance of the Work and that neither it, nor any of its directors, officers, members, partners, employees or Subconsultants, has or shall during the Term acquire, directly or indirectly, any such interest. The Commissioning Agent shall promptly and fully disclose to the School District's Contract Administrator all interests which may constitute such a conflict.

16.9.2 **Improper Gift; Improper Relationship.** The Commissioning Agent represents, warrants and covenants that it has not directly or indirectly offered or given and shall not directly or indirectly offer or give any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value to any School District employee who participated in the decision to authorize or enter into this Contract. The Commissioning Agent warrants that, to its knowledge, neither a School District employee or officer who participated in the decision to enter into this Contract, nor any member of the employee's immediate family, receives more than \$1,000 per year from the Commissioning Agent, has a direct or indirect investment worth \$1,000 or more in the Commissioning Agent or is a director, officer, partner, trustee or employee of the Commissioning Agent.

16.10 **School District Officers and Employees Not to Benefit.** The Commissioning Agent shall not make any payment or give anything of more than nominal value to any School District official or employee except in accordance with Applicable Law and School District policy. The Commissioning Agent shall comply with the School District Vendor Code of Ethics, and also, to the extent applicable, with the School District's Code of Ethics for School District officers and employees. The Commissioning Agent shall disclose to the School District, with each invoice submitted, the name(s) of each School District official(s) or employee(s) who receive payment from the Commissioning Agent, the amount such official or employee receives and the services rendered by the official or employee in consideration of the payment. Any fees or compensation paid by the Commissioning Agent to the School District officials or employees in violation of School District policy and Applicable Law shall be recoverable from the Commissioning Agent as damages.

16.11 **Non-Solicitation.** Neither party shall solicit the employment of any employee of the other party who has been assigned responsibilities under this Contract for the period of twelve (12) months following termination of responsibilities of each such employee. The School District agrees that it will not, directly or indirectly, for any reason, either during the term of this Contract or for a period of twelve (12) months after the termination of this Contract, without regard to the reason for termination, engage, utilize, or employ any employee or subconsultant of the Commissioning Agent.

16.12 **Assignment of Commissioning Agent's Employees.** The Commissioning Agent agrees not to assign any person dismissed from School District employment to perform services

under this Contract. The Commissioning Agent further agrees to reassign immediately any person the School District finds unacceptable or incapable of performing contractual requirements.

16.13 **Background Checks (Criminal, Child Abuse and FBI).**

16.13.1 In accordance with 24 P.S. §1-111, as amended, and 23 Pa. C.S.A. §§6303, 6344 and 6354-6358, as amended, before starting any Services under this Contract, the Commissioning Agent shall submit to the School District, for inspection and copying, the originals of a current (i.e., processed by the Commonwealth of Pennsylvania within one (1) year prior to the Commissioning Agent's starting Services) criminal history record information report and child abuse history official clearance statement for the Commissioning Agent, if the Commissioning Agent is an individual, and for each of the Commissioning Agent's and any of its Subconsultant's employees, officers, agents, servants, or Subconsultants who will have direct contact with children while performing any of the Services under this Contract. In accordance with 24 P.S. §1-111, as amended, before starting any Services under this Contract, the Commissioning Agent shall also submit to the School District, for inspection and copying, the original of a current report of the Federal Bureau of Investigation federal criminal history record information for the Commissioning Agent, if the Commissioning Agent is an individual, and for each of the Commissioning Agent's and any of its Subconsultant's employees, officers, agents, servants, or Subconsultants who will have direct contact with children while performing any of the Services under this Contract. Commonwealth Board of Education regulations define "direct contact"; *see* 22 Pa. Code § 8.1.

16.13.2 **Arrests; Convictions.** The Commissioning Agent shall comply and shall ensure that its officers, employees, agents and Subconsultants comply with the requirements of 24 P.S. §1-111(j), which mandates, among other things, reporting within seventy-two (72) hours by any officer, employee or agent of the Commissioning Agent or of any Subconsultant of an arrest or conviction for an offense listed in 24 P.S. §1-111(e). The Commissioning Agent shall report to the School District, in a prompt and timely manner, all notices and reports required, and all checks conducted, under 24 P.S. §1-111(j).

16.13.3 **Report of Child Abuse.** The Commissioning Agent shall comply and shall ensure that its officers, employees, agents and Subconsultants comply with the requirements of 62 Pa. C.S.A. §6344.3(g), which mandates, among other things, written notice by any officer, employee or agent of the Commissioning Agent or of any Subconsultant within seventy-two (72) hours after having received notification of being named as a perpetrator in a founded or indicated report of child abuse. The Commissioning Agent shall report to the School District, in a prompt and timely manner, all notices required under 62 Pa. C.S.A. §6344.3(g).

16.13.4 The Commissioning Agent's failure to comply with any requirement of 24 P.S. §1-111, as amended, and 23 Pa. C.S.A. §§6344 and 6354 through 6358 shall be deemed a material breach of this Contract, thereby giving the School District the right, at its sole discretion, to immediately terminate this Contract with no further obligation or responsibility on the part of the School District.

16.14 **Successors and Assigns.** The School District and the Commissioning Agent, respectively, bind themselves, their heirs, executors, administrators, successors, permitted assigns

and legal representatives to the other party to this Contract, and to the heirs, executors, administrators, successors, permitted assigns and legal representatives of such other party with respect to all covenants of this Contract. The parties hereto bind themselves, their heirs, executors, administrators, successors, permitted assigns and legal representatives for the faithful performance of this Contract.

16.15 **Examination of Records.** The Commissioning Agent agrees, upon request and without expense to the School District, to make available its books and records concerning charges, fees and costs under this Contract, in the administrative offices of the School District, for inspection by appropriate School District agents. The Commissioning Agent agrees that the School District shall, until the expiration of three (3) years after final payment under this Contract or six (6) years after termination of this Contract, whichever is later, have access to and the right to examine and copy directly pertinent books, documents, papers and records of the Commissioning Agent directly related to this Contract which have not been previously delivered to the School District. The period of access and examination for records shall continue during any litigation and until the settlement of claims arising out of the performance of this Contract.

16.16 **Survival.** Any and all provisions set forth in this Contract which, by its or their nature, would reasonably be expected to be performed after the termination of this Contract shall survive and be enforceable after such termination, including, without limitation, the following:

- (a) Any and all liabilities, actual or contingent, which shall have arisen in connection with this Contract;
- (b) The Commissioning Agent's representations and covenants set forth herein;
- (c) Section 6, *Compensation and Payment*;
- (d) Section 9, *Indemnification*;
- (e) Section 11, *Confidentiality*;
- (f) Section 12, *Disputes*;
- (g) Section 14, *Termination*;
- (h) Section 15, *Certification regarding Debarment, Suspension and Ineligibility*;
- (i) Paragraph 16.2, *Governing Law*;
- (j) Paragraph 16.3, *Forum; Consent To Jurisdiction*; and
- (k) Paragraph 16.4, *Contract Documents; Order of Precedence*.

16.17 **Taxes.**

16.17.1 **City of Philadelphia Taxes.** The Commissioning Agent may incur liability for payment of one or more of the following taxes levied by the City of Philadelphia; (a) Mercantile License Tax; (b) Net Profits Tax; (c) City Wage Tax; and (d) Business Privilege Tax. The Commissioning Agent, if not already paying any such taxes, shall promptly apply to the City of Philadelphia, Department of Revenue, for a tax account number and shall file the appropriate business tax returns as provided by law.

16.17.2 **Sales and Use Tax.** The Commissioning Agent agrees to execute all documents requested by the School District or its representative, and to provide prompt access

to the School District or its representative, to all documents of the Commissioning Agent and its Subconsultants related to the Services performed on the Project, to assist the School District in making a claim or filing a petition for a refund of sales and/or use tax. The Commissioning Agent hereby assigns to the School District all of its right, title and interest in any sales or use tax paid or reimbursed by the School District that may be refunded as a result of any documentation, services, labor, supplies, tools, materials, or equipment purchased in connection with this Contract. The Commissioning Agent authorizes the School District, in its own name or the name of the Commissioning Agent, to file a claim for a refund of any sales or use tax subject to this assignment. Likewise, the School District hereby assigns to the Commissioning Agent all of its right, title and interest in any sales or use tax paid by the Commissioning Agent and not reimbursed by the School District that may be refunded as a result of any documentation, services, labor, supplies, tools, materials, or equipment purchased in connection with this Contract, and agrees to file, or at the School District's option, cooperate in the Commissioning Agent's filing of, a claim for a refund of any sales or use tax subject to this assignment.

16.17.3 **School District Tax Exemption.** Notwithstanding any other provision of this Contract or the Exhibits to the contrary, the School District represents that it is a tax-exempt organization and is therefore not subject to taxes arising out of this Contract or the Commissioning Agent's performance under this Contract. In the event, however, that the Commissioning Agent is assessed or levied any taxes, fees, or similar charges related to this Contract or the Commissioning Agent's performance hereunder (except income or corporate taxes assessed against or levied on the Commissioning Agent), the School District agrees to cooperate fully with the Commissioning Agent, at School District expense, in any administrative actions or legal proceedings with the appropriate taxing authorities. If a final judgment is entered against the Commissioning Agent relating to the payment of such taxes, fees, or charges, the School District agrees to indemnify the Commissioning Agent for the amount thereof, including any penalties incurred in such review or contest. In no event shall the Commissioning Agent be exposed to any liability for the payment or nonpayment of any such taxes, charges, or fees.

16.18 **Tax Compliance.** It is the policy of the School District to ensure that firms, businesses and other legal entities receiving School District contracts are current in their payment of City of Philadelphia ("City") taxes and School District taxes or other indebtedness owed to the City or the School District, including but not limited to taxes collected by the City on behalf of the School District, at the time of contract award. Pursuant to SRC Resolution SRC-2 dated February 21, 2013, the School District's SRC has adopted a Tax Compliance of Vendors Policy which provides that generally, the SRC will not authorize the award of a School District contract to a firm, business or other legal entity that is delinquent in its payment of City or School District taxes or other indebtedness owed to the City and/or the School District at the time of contract award.

16.18.1 All firms, businesses and other legal entities (hereafter called "Contractor") receiving a School District contract shall comply with all of the terms and conditions of the Tax Compliance of Vendors Policy.

16.18.2 **Tax Indebtedness Representation, Warranty and Covenant.**

(A) The Contractor represents, warrants and covenants to the School

District that the Contractor and any other person controlling, controlled by, or under common control with the Contractor are not currently indebted to the City or the Commonwealth of Pennsylvania for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District) for which no written settlement agreement or payment plan with the City, or the Commonwealth of Pennsylvania, as the case may be, has been executed and delivered.

(B) The Contractor further represents, warrants and covenants to the School District that the Contractor and any other person controlling, controlled by, or under common control with the Contractor will not at any time during the term of this Contract (including any extensions or renewals thereof) be indebted to the City or the Commonwealth of Pennsylvania for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District), liens, judgments, fees or other debts for which no written settlement agreement or payment plan with the City of Philadelphia, or the Commonwealth of Pennsylvania, as the case may be, has been executed and delivered.

16.18.3 **Proof of Tax Compliance.**

(A) During the duration of any School District contract, the Contractor shall provide proof of its tax compliance in the form of a “Certificate of Tax Clearance” to the School District, at the School District’s written request, in the sole discretion of the School District.

16.18.4 **Satisfactory Arrangement, Settlement Agreement or Payment Plan with City.**

(A) The Contractor agrees to provide written proof to the School District of any satisfactory arrangement, settlement agreement or payment plan with the City to become compliant in the payment of City or School District taxes or other indebtedness owed to the City or the School District.

(B) The Contractor shall continue to comply with said City satisfactory arrangement, settlement agreement or payment plan during the duration of any School District contract.

16.18.5 **Agreement to Set off or Offset for Delinquent Tax or other Indebtedness.**

(A) The Contractor agrees that the School District may set off or offset the amount of any City or School District tax or taxes or other indebtedness owed to the City or the School District against any School District payment or payments due under any School District contract.

(B) In addition to any other rights or remedies available to the School District at law or in equity, the Contractor acknowledges and agrees that the School District may set off or offset the amount of any City or School District tax or taxes or other indebtedness owed to the City or the School District against any School District payment or payments due under any

School District contract if the Contractor breaches the tax indebtedness representation, warranty and covenant, and such breach is not resolved, to the School District's satisfaction, within a reasonable time frame specified by the School District in writing.

16.18.6 **Agreement to Withholding of Contract Payment.**

(A) The Contractor agrees that the School District may withhold payment or payments due to the Contractor under any School District contract if the Contractor is delinquent in its payment of City or School District tax or taxes or other indebtedness owed to the City or the School District.

(B) The Contractor agrees that the School District may withhold payment or payments due to the Contractor under any School District contract if the Contractor is delinquent in its payment of City or School District tax or taxes or other indebtedness owed to the City or the School District, and the Contractor has not entered into a satisfactory arrangement, settlement agreement or payment plan with the City to become compliant in the payment of City or School District tax or taxes or other indebtedness owed to the City or the School District.

(C) The Contractor agrees that the School District may withhold payment or payments due to the Contractor under any School District contract if the Contractor is in default of any satisfactory arrangement, settlement agreement or payment plan with the City.

(D) In addition to any other rights or remedies available to the School District at law or in equity, the Contractor acknowledges and agrees that the School District may withhold payment or payments due to the Contractor under any School District contract if the Contractor breaches the tax indebtedness representation, warranty and covenant, and such breach is not resolved, to the School District's satisfaction, within a reasonable time frame specified by the School District in writing.

(E) The Contractor agrees that the School District may continue withholding payment or payments due to the Contractor under any School District contract until the City Revenue Department notifies the School District that the Contractor is tax compliant.

16.18.7 **Good Faith Contest.**

(A) The Contractor shall be permitted to, in good faith, contest the amount of any Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District.

(B) The Contractor shall diligently and expeditiously proceed to resolve the matter with the City, or the Commonwealth of Pennsylvania, as the case may be, in order to reach a satisfactory settlement agreement or payment plan with the City, or the Commonwealth of Pennsylvania, as the case may be.

(C) The Contractor shall expeditiously pay all uncontested obligations.

16.18.8 **Termination of Contract.**

(A) Termination for Convenience. The School District, at its sole discretion, may terminate any School District contract for its convenience, at any time, upon fourteen (14) days' prior written notice to the Contractor of the School District's intention to terminate said contract ("Termination Notice"), and without penalty, cost or liability to the School District, provided the Contractor is:

(i) delinquent in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and

(ii) the Contractor has not contested the amount of the Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and

(iii) the Contractor has not entered into or executed any satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Pennsylvania or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District; or

(iv) the Contractor is in default of any satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Pennsylvania or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District.

(B) Termination for Default. The School District may terminate any School District contract for default by giving the Contractor a Termination Notice provided:

(i) the Contractor is delinquent in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and

(ii) the Contractor has not contested the amount of the Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and

(iii) the School District has requested in writing that the Contractor enter into or execute a satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Pennsylvania or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District, and the Contractor has willfully or in bad faith refused or declined to comply with said School District request; or

(iv) the School District has requested in writing that the Contractor cure its default of any satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Pennsylvania or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District, and the Contractor has willfully or in bad faith refused or declined to comply with said School District request.

The Contractor shall be liable for all excess costs and other damages resulting from said termination for default.

16.19 **Authority to Execute Contract.** The Commissioning Agent and the School District each represents and warrants that it has caused this Contract to be duly authorized, executed, and delivered by and through persons authorized to execute this Contract on its behalf.

16.20 **No Third Party Beneficiaries.** Nothing in this Contract, express or implied, is intended or shall be construed to confer upon or give to any person, firm, corporation, or legal entity, other than the Commissioning Agent and the School District, any rights, remedies, or other benefits under or by reason of this Contract. Nothing contained in this Contract shall be deemed to create any contractual relationship with, or to give a cause of action in favor of, any third party against either the School District or the Commissioning Agent. Nothing contained in this Contract is intended to benefit any third party. The Commissioning Agent's Subconsultant(s) and its(their) subcontractors and consultants are not intended third-party beneficiaries of this Contract.

16.21 **No Waiver.**

16.21.1 No delay or omission by either party hereto to exercise any right or power occurring upon any noncompliance or default by the other party with respect to any of the terms of this Contract shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties hereto of any of the covenants, conditions, or agreements to be observed by the other shall not be construed to be a waiver of any succeeding breach thereof, or of any other covenant, condition, or agreement herein contained. Unless stated otherwise, all remedies provided for in this Contract shall be cumulative and in addition to, and not in lieu of, any other remedies available to either party at law, in equity, or otherwise.

16.21.2 No term or provision hereof shall be deemed waived by the parties, unless such waiver or consent shall be in writing signed by both parties. No breach shall be excused, unless the agreement to excuse that breach is in writing signed by the non-breaching party.

16.22 **Counterparts.** This Contract may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute one instrument; provided, that this Contract shall be effective and binding on the parties upon, but only upon, the execution by each party of one copy hereof.

16.23 **Contract Drafted by All Parties.** This Contract is the result of arms-length

negotiations between the parties, and shall be deemed to have been drafted by both parties, and any ambiguities in this Contract shall accordingly not be construed against either party.

16.24 Severability and Partial Invalidity.

16.24.1 The provisions of this Contract shall be severable. If any provision of this Contract, or the application thereof, for any reason or circumstance, is to any extent held to be invalid or unenforceable, the remaining provisions of this Contract (as well as the application of all provision(s) that were held to be invalid or unenforceable to persons or entities other than those as to which they were held invalid or unenforceable) shall not be affected or impaired thereby; and each provision of this Contract shall be valid and enforceable to the fullest extent permitted by law.

16.24.2 If any of the provisions of this Contract are determined to be invalid, then such invalidity shall not affect or impair the validity of the other remaining provisions, which shall be considered severable, and shall remain in full force and effect.

16.25 **Entire Contract.** This Contract, which includes all Exhibits referred to herein, contains the entire and integrated contract between the parties with respect to the subject matter hereof; supersedes all prior negotiations, representations, contracts, and undertakings, either written or oral, between the parties with respect to such subject matter; and cannot be changed, modified or amended except by contract in writing signed by both parties. No amendment or modification changing its scope or terms shall have any force or effect, unless it is in writing and signed by both parties. This Contract shall not be superseded by any provision of the documents for construction.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Contract as of the Effective Date.

SCHOOL DISTRICT OF PHILADELPHIA

By: _____
Name: _____
Title: _____

By: _____
Name: WILLIAM R. HITE, JR., Ed.D.
Title: Superintendent

Examined and Approved:

Dawn Renee Chism
Attorney for
SCHOOL DISTRICT OF PHILADELPHIA