

CONTRACT NO. ___/F20

SCS: _____

ABC CODE: _____

CONTRACT FOR

PROFESSIONAL CAPITAL PROGRAM MANAGEMENT SERVICES

FOR THE CAPITAL PROGRAM

BETWEEN

SCHOOL DISTRICT OF PHILADELPHIA

AND

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Exhibits:

Exhibit A	Board of Education Action Item dated _____, 2019
Exhibit B	Request for Proposal Capital Program Management and Addendum No. _ (if any)
Exhibit C	Program Manager Proposal (as modified hereby) Capital Program Management dated _____, 20__ (incorporated by reference into this Contract) and Proposal, <u>Cover Page</u> , <u>Cover Letter</u> , <u>Organizational Chart</u> and <u>Proposed Management Approach</u>
Exhibit D	Program Manager Proposal, Key Personnel List and Resumes of Key Personnel
Exhibit E	Program Manager Fee Proposal
Exhibit F	Program Manager Proposal, M/WBE Participation Plan

Professional Capital Program Management
Services Contract
Contract No. ___/F20

Approved by Board Action Item #_
Dated: _____, 2020

SCHOOL DISTRICT OF PHILADELPHIA

BOARD OF EDUCATION

This Contract for Professional Capital Program Management Services (the “Contract”) is made as of this ___ day of _____, 2020 by and between the SCHOOL DISTRICT OF PHILADELPHIA (hereinafter called “the School District”), acting through its Board of Education, located at 440 North Broad Street, Philadelphia, Pennsylvania 19130-4015 and _____ (hereinafter called “Program Manager”) located at _____.

BACKGROUND

The School District is a separate and independent home rule school district of the first class, established in the Philadelphia Home Rule Charter under the First Class City Public Education Home Rule Act, P.L. 643. A nine member Board of Education (“Board”) currently governs the School District pursuant to Public School Code, 24 P.S.C. §21-21-2 and §3-301. The School District provides a full range of education services contemplated by statute. These include general, special and vocational education at the elementary and secondary levels, as well as related supportive services. Preschool services are also provided in response to the needs of the community. The School District employs approximately 18,000 employees at more than 200 locations, including 218 schools, 3 administrative sites, and 3 bus garages.

On May 30, 2019, the Board approved a six (6)-year amended Capital Improvement Program (“CIP”) for FY19 through FY24 totaling over \$1.74 billion and a proposed 6-year Capital Improvement Program (FY20 through FY25) totaling over \$1.72 billion. The CIP priorities include constructing new facilities and additions, renovation of existing facilities, maintaining the physical integrity of existing facilities and upgrading existing facilities to meet code requirements and educational programming needs, and replacing systems that have exceeded their lifecycle.

The School District’s Office of Capital Programs (“OCP”) is responsible for identifying and prioritizing capital work within the School District, including maintaining the physical integrity of existing facilities, constructing new buildings, and renovating existing facilities to accommodate the educational needs of 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 500 buildings, annexes, administrative buildings and athletic fields, and other School District offices. 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.

The basis for the budget for the OCP is the sale of bonds, usually repayable with interest over 30 years. The Capital Budget is also 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.

In its Request for Proposal Capital Program Management (hereinafter referred to as "the RFP"), the School District requested proposals from program management professionals to provide comprehensive professional program management services for the implementation of an approximate \$500 million Capital Program. The Capital Program consists of new construction, major renovations, life cycle replacements, modernizations to meet code requirements and educational programming needs. A list of the proposed capital projects in the Capital Program is included as Appendix K of the RFP.

_____ responded to the RFP with a Proposal.

On _____, 2020, the Board, by Action Item #_, authorized the School District to execute and perform a Contract for Capital Program Management Services with _____, for the over three-(3) year contract period commencing on March 1, 2020 and ending on June 30, 2023. A copy of the Board Action Item is attached as Exhibit A, and incorporated by reference into this Contract.

The School District and the Program Manager desire that the Program Manager perform, on time and on-budget, professional capital program management services to successfully implement all of the proposed capital projects listed in Appendix K of the RFP and any additional capital projects included in the Capital Program, under the direction and management of the School District. The Program Manager will perform all of the services necessary to assist the School District to ensure the successful implementation, completion and integrity of all of the capital projects and their components regardless of their stages of development, and will assume the responsibilities, duties and liabilities provided herein, in strict accordance with the attached Board Action Item, the School District's Request for Proposal Capital Program Management (referred to as "the RFP") and Addendum No. _ (if any), attached collectively as Exhibit B and incorporated by reference into this Contract; and the Program Manager's Proposal (as modified hereby) Capital Program Management (only the Cover Page, Cover Letter, Organizational Chart, and Proposed Management Approach Sections of the Program Manager's Proposal are attached as Exhibit C; however, the entire Program Manager's Proposal is 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 Program Manager, 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) **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 Program Manager and the Work, and includes all applicable case law, court orders, injunctions and consent decrees.

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

(d) **Architect/Engineer or Architect or Design Professional** – means the qualified professional consulting services firm performing professional architecture and engineering services for capital projects pursuant to its Contract with the School District.

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

(f) **Board or Board of Education** – means the School District’s Board of Education appointed pursuant to 24 P.S. §21-2101 and §3-301, or any successor body.

(g) **Capital Improvement Program or CIP** – means the amended 6-year Capital Improvement Program (FY19 through FY24) and the proposed 6-year Capital Improvement Program (FY20 through FY25) approved by the Board on May 30, 2019, and any additions, deletions, changes, adjustments, and annual updates approved by the Board.

(h) **Capital Program** – means the approximate \$500 million Capital Program that includes the proposed capital projects listed in Appendix K of the RFP, and any additions, deletions, changes, adjustments, and annual updates approved by the Board.

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

(j) **Commencement FY** – has the meaning attributed thereto in Paragraph

6.12, *Crossing Fiscal Years*.

(k) **Construction Manager** – means the representative from the Program Manager or the School District who will lead the construction activities and efforts and act as the Construction Manager on the capital projects or the qualified professional consulting services firm who may be performing professional construction management services on an individual capital project pursuant to its Contract with the School District.

(l) **Contract or Professional Capital Program Management Services Contract** – means this professional services contract for professional capital program management services for the Capital Program, 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.

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

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

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

(p) **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 project that is identified and addressed in 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).

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

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

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

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

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

(v) **Key Personnel** – means those job titles and the persons assigned to those positions in accordance with the provisions of Paragraph 3.2.13 and Paragraph 8.1, *Key Personnel* of this Contract and any persons that the Program Manager shall invoice the School District for in performance of required services.

(w) **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.

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

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

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

(aa) **Program** – has the meaning attributed thereto in Paragraph 3.1.1, *The Program*.

(bb) **Program Manager** – means _____, the professional consulting services firm performing professional capital program management services for the School District’s Capital Program pursuant to this Contract.

(cc) **Program Master Schedule** – means the overall schedule for the Capital Program.

(dd) **Project(s) or Capital Project(s)** – means the individual capital project(s) on which the Program Manager is performing professional capital program management services under the School District Capital Program or Capital Improvement Program.

(ee) **Project Master Plan** – means the overall plan, including scope, schedule and budget, for an individual capital project included in the School District’s Capital Program or Capital Improvement Program, agreed to by the School District and the Program Manager, in accordance with the terms of this Contract.

(ff) **Proposal** – means the Proposal dated _____, 20__ submitted by the Program Manager in response to the RFP, together with all subsequent modifications and supporting materials submitted by the Program Manager to the School District in response to the RFP.

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

(hh) **Request for Proposal or RFP** – means the Request for Proposal Capital

Program Management issued by the School District, including all Addenda thereto issued, if any.

(ii) **School District** – means the School District of Philadelphia.

(jj) **Services** – mean, collectively, those 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 Program Manager in accordance with the terms and conditions of this Contract, including any Deliverables, supplements, modifications, or amendments hereto, and any work functions necessary in order to complete such Services.

(kk) **SRC or School Reform Commission** – means the predecessor governing body of the School District appointed pursuant to 24 P.S. §6-696.

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

(mm) **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 or consulting agreement with the Program Manager to perform any Services covered by this Contract.

(nn) **Subcontract** – means a contract or consulting agreement entered into by the Program Manager with a Subcontractor or Subconsultant in order to perform, directly or indirectly, its Services under this Contract.

(oo) **Term** – means the Term specified in Paragraph 2.1.

(pp) **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*.

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

(rr) **Work Schedule** – means that schedule submitted to and approved by the School District for the completion of those tasks necessary to complete the Work, as may be amended from time to time subject to the written approval of the School District.

*(ss) _____ – means _____, a (partnership or corporation or limited liability company) 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 **Initial Term.** The Initial Term of this Contract shall commence on March 1, 2020, 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 period of over three-(3) years through June 30, 2023.

2.2 **Option to Renew.** The School District may, at its sole discretion, renew this Contract for up to two (2) additional successive one (1)-year periods (each period referred to as an “Additional Term”). Pricing shall be subject to renegotiation between the parties at the time the School District exercises its option to renew. The Program Manager only guarantees the quoted pricing for the Initial Term. Except as expressly stated otherwise in an Amendment, the terms and conditions of this Contract shall apply throughout the Additional Term. At least sixty (60) calendar days prior to the expiration of the then current contract term, the School District, at its sole discretion, may notify the Program Manager, in writing, of its intention to recommend renewal of this Contract for up to an additional one (1)-year period to the Board. Within ten (10) days of the Program Manager’s receipt of the School District’s notice of its intention to recommend renewal of this Contract, the Program Manager shall supply a written price quote to the School District. Renewal shall be effective only upon formal approval by Action Item of the Board. The total authorized contract term under this Contract may be for a maximum time period of up to over five (5) years up through June 30, 2025, unless the Board or a successor entity authorizes a further renewal or extension by Action Item.

Section 3. Duties and Obligations of the Program Manager.

3.1 The Program.

3.1.1 **Program Description.** The description of the Program contained hereinbelow is intended to be general in nature and should not be construed to be a complete description of the Program, any specific Project, or a limitation on the Services to be provided hereunder.

The Program is the School District’s approximate \$500 million upcoming Capital Program and any additions, deletions, changes, adjustments, and annual updates approved by the Board. The proposed capital projects included in the upcoming Capital Program are listed in

Appendix K of the RFP. The Program consists of new construction, major renovations, life cycle replacements, modernizations to meet code requirements and educational programming needs. It is currently anticipated that the upcoming Capital Program will impact at least 130 facilities, including the design and construction of three (3) new schools. The upcoming Capital Program will occur throughout the City of Philadelphia and impact approximately 86,000 students. The Program Manager will be responsible for managing the planning, evaluation, scheduling, design process (including selection and regular review), constructability analysis, cost estimation, construction, project close-out and all aspects of the successful delivery of the Program. The Program Manager's Contract will support the School District's intent to accomplish approximately 200 critical projects over the next thirty (30) months.

3.1.2 Role of the Program Manager in the Program. The Program Manager's role in the Program is to manage the School District's Capital Program in accordance with the directions and decisions of the School District. The Program Manager is responsible for the oversight, coordination, and management of individual capital projects under the Capital Program.

3.1.3 Role of the School District in the Program. The School District, acting through its officials, employees and other agents, shall retain final authority with regard to all Program and individual Capital Project-related decisions. The School District shall hold the contracts of the various consultants and contractors performing services or work for the Program.

3.1.4 Program Management Office Organization. Program management staff shall work closely with staff in the School District's Office of Capital Programs to successfully deliver the Program. The Program Manager shall report to the School District's Director of Capital Programs. If desired, the Program Manager's staff can be housed on School District property, in close proximity to the Capital Programs staff in order to facilitate effective communication and coordination of this aggressive Capital Program. The Program Manager's staff shall be required to meet all School District requirements for drug testing, state child abuse checks and background checks. The costs of such requirements shall be considered a part of overhead and shall not be directly chargeable to the School District. The Program Manager's staff shall at all times comply with all safety and security regulations and requirements of the School District or of any Federal or State agency for any location where the Program Manager's Services are being performed.

3.1.5 Status of the Program Manager. The School District has engaged the Program Manager as an independent contractor to carry out the Work of the Program, and neither the Program Manager nor any of the Program Manager'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 Program Manager 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 Program Manager nor its agents, employees or Subconsultants shall represent themselves in any way as agents or employees of the School District, and none of the Program Manager, its agents, employees or Subconsultants has any power to bind legally the School District to any third party.

3.1.6 Separation of Responsibility. The Program Manager and its

Subconsultants, including any joint venture partners, parent or subsidiary companies or affiliates under common control, shall not be eligible to have a concurrent role in any capital project that the Program Manager has responsibility for during the duration of this Contract.

3.2 **Program Manager's and its Subconsultants' Key Personnel.** The Key Personnel of the Program Manager and its Subconsultants are listed in the Program Manager's Proposal, Organizational Chart. The Key Personnel List of the Program Manager and its Subconsultants, with hourly labor rates, is attached as Exhibit E and incorporated by reference into this Contract. The Key Personnel of the Program Manager and its Subconsultants, all of whose resumes have been provided, shall perform those program management services of the Program Manager required under this Contract. These persons shall devote their time as necessary to the Capital Project(s) or the Work assignments to ensure the Program Manager's full and timely performance of this Contract, on-time and on-budget. The Program Manager 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 perform services on the Capital Project(s) or the Work assignments, the Program Manager shall obtain the School District's prior approval of any selected substitute personnel, which approval shall not be unreasonably withheld.

3.3 **Program Manager's Subconsultants.** The Program Manager shall engage the Subconsultants, which have been approved by the School District, to perform program management services required of the Program Manager under this Contract, on-time and on-budget, and shall require each of its Subconsultants to place his name, seal, stamp and signature on any documents or reports prepared by him. The Program Manager 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.

3.3.1 The Program Manager shall coordinate the activities of all its consultants and all other members of its team. The Program Manager 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.

3.4 **Standard of Performance.** The Program Manager 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 program management services such as those provided in this Contract. The Program Manager's attention is directed to the fact that the Services are urgently needed by the School District. The Program Manager's Services under this Contract shall be performed as expeditiously as is consistent with said professional standards and sound professional practices. The Program Manager shall use its best efforts to assure timely and satisfactory completion of its Services in accordance with the Program Master Schedule and the Project Master Plan for each individual capital project. The Program Manager 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 Program Manager 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 Program Manager shall design to cost when performing its Services under this

Contract.

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

3.4.2 When the Scope of Services of this Contract requires the Program Manager to prepare documents, reports, procedures, or other Work-related items of a similar nature, the Program Manager understands that such items must receive the School District's review and approval prior to their use in the Work. 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 established Work Schedule.

3.4.3 In the event the Program Manager fails to comply with the standards specified in Paragraph 3.4 of this Contract, the Program Manager 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 Program Manager 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 Program Manager either under this Contract, in law or in equity.

3.4.4 With the exception of information, data, test results and other materials provided to the Program Manager by others, upon which the Program Manager is entitled to rely for accuracy and completeness under this Contract, the Program Manager shall be responsible for the professional quality, technical accuracy, completeness and coordination of all reports, documents, and other services furnished by the Program Manager and its Subconsultants under this Contract. The Program Manager shall be responsible for any errors, omissions, deficiencies, inconsistencies or conflicts in the recommendations, reports or other documents prepared by the Program Manager or its Subconsultants or both, and in any other Work, Services or Deliverables performed by the Program Manager or its Subconsultants or both. Without any additional compensation from the School District, the Program Manager shall promptly correct any errors, omissions, deficiencies, inconsistencies or conflicts in the recommendations, reports or other documents prepared by the Program Manager or its Subconsultants or both, and in any other Work, Services or Deliverables prepared by the Program Manager or its Subconsultants or both. In addition, the School District may deduct from the Program Manager's Project Compensation any "premium costs" incurred by the School District for additional work by the Prime Contractors due to errors, omissions, deficiencies, inconsistencies or conflicts in the recommendations, reports or other documents prepared by the Program Manager or its Subconsultants or both. As used in this Subparagraph, the term "premium costs" means costs that would not have been incurred if such recommendations, reports or other documents had been prepared free of any errors, omissions, deficiencies, inconsistencies or conflicts. Any recommendations, reports or other documents furnished by the Program Manager or its Subconsultants found to be defective, solely as a result of the errors, omissions or negligence of the Program Manager or its Subconsultants, shall be promptly corrected

by the Program Manager or its Subconsultants, at no cost to the School District.

3.4.5 If the Program Manager or its Subconsultants supply false information in the recommendations, reports or other documents produced for the guidance of others, the Program Manager or its Subconsultants are subject to liability for pecuniary loss caused to others by their justifiable reliance upon the false information supplied by the Program Manager or its Subconsultants if the Program Manager or its Subconsultants fail to exercise reasonable care or competence in obtaining or communicating the information in the recommendations, reports or other documents.

3.5 **Labor, Materials, Supplies and Equipment.** The Program Manager 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 Program Manager 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 Program Manager shall be responsible for the means, methods, techniques, sequences, and procedures to perform the Services required under this Contract. The Program Manager 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 Program Manager 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 Program Manager shall make revisions in its Work or Documents produced for the Capital Project(s), at no additional cost to the School District, whenever such revisions are required by reason of the documents for the Capital Project(s) 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 Program Manager. The School District has the right to inspect the Work of the Program Manager and its Subconsultants in progress at any reasonable location and at any reasonable time. The Program Manager 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 Program Manager shall perform its Services on the Capital Project(s) in full cooperation with other School District Consultants. The School District shall require the other School District Consultants to perform their services in full cooperation with the Program Manager.

3.8 **Project Meetings.**

3.8.1 The Program Manager shall meet with representatives of the School District on a regular basis throughout the term of this Contract, to inform the School District's Director of Capital Programs regarding the status of the Work, including without limitation, resolved and unresolved issues, schedules, costs, recommendations, and any other appropriate

items. The Program Manager shall submit a written status report to the School District's Director of Capital Programs no less than monthly summarizing the status of the Work, Work Schedule, and cost and outlining all other appropriate issues. The Program Manager shall further attend such meetings with representatives of the School District and other interested parties as may be required in connection with the Work.

3.8.2 The Program Manager shall assign a Key Personnel member qualified to act, in a liaison capacity, and to be available at all times, on matters pertinent to the Work. The Program Manager shall be responsible for the preparation of minutes documenting the Program Manager's understanding of all such meetings. Copies of such minutes shall be distributed by the Program Manager to interested parties in accordance with directions of the School District's Director of Capital Programs or his designated representative.

3.9 **Project Minutes, Reports, Correspondence and Communications.** The Program Manager shall prepare and distribute minutes of meetings, progress reports, and any other reports, correspondence, communications and documents concerning the Work assignments or the Capital Project(s) to School District representatives of the Office of Capital Programs, the Program Manager's Subconsultants, the Construction Contractors, and any other Project participants, in an electronic format designated by the School District. Upon request or as required by this Contract, the Program Manager 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 Program Manager 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 Program Manager's Services, or requires them to perform activities in support of or in conjunction with the Program Manager's Services; and the Program Manager 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 Program Manager and other School District consultants, contractors, or vendors, or between the Program Manager and School District personnel or consultants, shall be decided solely by the School District. If requested by the School District in writing, the Program Manager 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 Program Manager 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 Program Manager 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 Program Manager shall comply with all rules and regulations of the School District or such other entity, including all safety and security requirements.

3.11 **Subletting and Assignment.**

3.11.1 The Program Manager 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 3.3 herein, nor permit any of its

Subconsultants to do so. If the Program Manager 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 Program Manager 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 Program Manager shall be responsible to perform these Services, on-time and on-budget. All terms and conditions under this Contract applying to the Program Manager shall apply equally to its Subconsultants. The Program Manager 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 Program Manager shall ensure that it legally binds all Subconsultants to the same terms and conditions as the Program Manager under this Contract.

3.11.3 The Program Manager shall submit to the School District copies of all Subcontracts prior to execution by the Program Manager with the Program Manager's written request for the School District's consent. The Program Manager 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 deny in its sole discretion. In the event the School District does not consent to a proposed subconsultant, the Program Manager 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 Program Manager 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 Program Manager of its responsibility for the performance of Subconsultants and their consultants.

3.11.4 The Program Manager 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 Program Manager's own personnel, by Subconsultants of the Program Manager, 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 Program Manager, 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 Program Manager for the performance of any of the Services. The Program Manager shall incorporate this requirement in all Subcontracts with Subconsultants.

3.11.6 The Program Manager 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, the Project or this Contract.

3.11.7 In no event shall the School District's consent to any assignment or transfer by the Program Manager of any rights, duties or obligations under this Contract relieve the Program Manager from its obligations hereunder or change the terms of this Contract. The Program Manager accepts full responsibility for and guarantees the performance of any and all assignees and transferees (including Subconsultants) of the Program Manager. The Program Manager 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 Program Manager, 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 Program Manager, 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 Program Manager, and the transfer of this Contract or the Program Manager in any bankruptcy or other insolvency-related proceeding. A receiver or trustee of or for the Program Manager in any federal or state bankruptcy, insolvency or other proceeding concerning the Program Manager 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 Program Manager 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 any applicable laws and statutes that govern its estimating and scheduling services 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 Program Manager by any governmental entity or any third party as a result of any act, failure to act, error or omission, or breach of contract by the Program Manager 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 Capital Project(s), the Program Manager shall provide any services which may be required to review and evaluate claims relating to the execution or progress of construction, or the interpretation of the Construction Documents submitted in connection with the work on the Capital Project(s), so long as the Program Manager is qualified to provide such interpretation and it relates to aspects of the Capital Project(s) for which the Program

Manager is responsible. Such services shall be rendered by the Program Manager, on-time and on-budget, without additional fee or compensation, unless they require participation or involvement in litigation or arbitration to which the Program Manager is not a party. The Program Manager 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 Program Manager is not a party. During the duration of the Capital Project(s), at no additional cost to the School District, except where the Program Manager is not a party, the Program Manager shall assist the School District in the investigation and defense of any claims which arise from the estimates, analyses, recommendations, reports or other documents prepared by the Program Manager or its Subconsultants or which result solely from the breach of contract, errors, omissions or negligence of the Program Manager or its Subconsultants. At no additional cost to the School District, except where the Program Manager is not a party, the Program Manager 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 Program Manager's breach of contract, errors, omissions or negligence.

3.13.2 **Notice of Claims.** If the Program Manager receives notice of a legal claim against it in connection with or in any way related to this Contract, the Program Manager 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 Program Manager 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 (*Program Manager'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 Program Manager, as evidenced by the signatures of both the School District's Contract Administrator and the Program Manager'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 Program Manager 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 Program Manager 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 Program Manager 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 Paragraph 6.1.1 must be approved in writing by the School District's

Director 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 Program Manager 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 Program Manager's Damages.** The Program Manager agrees that in no event shall the School District be liable to the Program Manager 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 Program Manager'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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager. The School District shall not be liable to the Program Manager 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 Program Manager shall promptly provide its Deliverables to the School District on electronic media acceptable to the School District (e.g., CD-ROM, AutoCAD PDF format) and in hard copy or other format as required by the School District.

3.17 **Ownership and Use of Documents.**

3.17.1 **Restrictions on Program Manager's Use.** The Program Manager shall not, without the prior written consent of the School District, use or allow to be used the documents uniquely developed specifically for the Program or Work assignments or Capital Project(s) pursuant to this Contract, or any documents substantially similar thereto for any project other than the Capital Project(s).

3.17.2 **No Publication by Submission or Distribution.** Submission or distribution of documents to meet official regulatory requirements or for other purposes in connection with the Program or Work assignments or Capital Project(s) is not to be construed as publication in derogation of the Program Manager's reserved rights.

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

3.17.4 **Risk of Loss.** During the performance of the Services herein provided for, the Program Manager shall be responsible for any loss or damage to the documents, data, records, reports, and files that are produced by the Program Manager 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 Program Manager.

3.17.5 **Review and Access.** Full access to the Work during the Program Manager'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*.

3.17.6 **Termination or Expiration.** Upon termination or expiration of this

Contract, the Program Manager 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 Program Manager is considered confidential by the School District. The Program Manager agrees to refer all inquiries by outside parties to the School District. The Program Manager 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 Program or Work assignments of the Capital Project(s), or any information developed or obtained during the performance of Services for the Program or Work assignments or the Capital Project(s), 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 Paragraph 3.19, *Special Publication Rights*, 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 Program Manager and its Consultants 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 Capital Project(s) site(s), including but not limited to asbestos, asbestos products, polychlorinated biphenyl (“PCB”) or other toxic substances; provided, however, the Program Manager shall report to the School District the presence and location of any hazardous material that it notices or that an Program Manager of similar skill and expertise should have noticed. Nothing in this Contract shall impose liability on the Program Manager 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 Program Manager shall provide the Deliverables identified in Section 4, *Scope of Services*, of this Contract, on-time and on-budget, in strict conformity with the Work Schedule for each Work assignment. 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 Program Manager of its schedule or cost commitments hereunder.

3.21 **Safety Responsibilities.** Although the Program Manager 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 Program Manager’s work. The Program Manager shall perform its work with due regard to the safety of persons and property. It is a condition of this Contract, and the Program Manager agrees, that the Program Manager 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 any applicable OSHA regulations. Applicable safety laws, rules and regulations, and codes shall be observed by the Program Manager and its Subconsultants. It is the responsibility of the Program Manager 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 Program Manager 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 Construction Management Firm (if the Construction Management Firm is assigned to the Project).

3.21.1 The Program Manager'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 Program Manager is expected to fully comply with the Project physical fall protection requirement. The Program Manager's personnel shall complete a Project Safety Orientation. The Program Manager's personnel shall comply with identification badge requirements. The Program Manager'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's Project Manager and the Construction Management Firm (if the Construction Management Firm is assigned to the Project) shall be notified in writing within 24 hours of occurrence if any Program Manager personnel are injured on the Project.

Section 4. Scope of Services.

4.1 Schedule.

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

4.1.2 **Work Schedule.** The Program Manager shall develop a Program Master Schedule for the overall Program that includes and tracks the scheduling information for all of the capital projects included in the Capital Program, including the proposed Capital Projects listed in Appendix K of the RFP. The Program Manager shall review and make recommendations on changes, adjustments and updates to the Program Master Schedule on a weekly basis or more frequently as necessary or required. The Program Master Schedule shall be used by the Program Manager and the School District to assure that all milestone dates are being met for the Capital Projects included in the Capital Program and that the Capital Projects are being performed and completed on-time and on-budget. The Program Manager shall also review and make recommendations on changes, adjustments or updates to the project schedules developed for individual Capital Projects that are included in Project Master Plans for individual Capital Projects. The Program Manager shall develop and submit to the School District, for its review and approval, a Work Schedule for the program management activities of itself and its Subconsultants during the duration of the Contract. The Program Manager shall update these activities in the Work Schedule as required for the School District's review and approval. The approved Work Schedule, as modified, adjusted and updated, shall be binding on the Program Manager and the School District.

4.1.3 **Time is of the Essence.** Time is of the essence in the Capital Program and on the individual Capital Projects. The Program Manager shall commence its Services immediately

upon Notice to Proceed and shall diligently prosecute the Work for the Capital Improvement Program to completion. The Program Manager shall use its best efforts to complete the Work on or ahead of the Work Schedule referred to in Paragraph 4.1, *Schedule*, of this Contract.

4.2 **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 Program Manager under this Contract. The Program Manager shall furnish all other services that are necessary or required to fulfill the objectives of this Contract, for which Additional Services the Program Manager 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 Program Manager, but may not include all of the services required of the Program Manager under this Contract.

4.3 **Statement of Services.**

4.3.1 The Program Manager shall perform all of the services that are necessary and required to successfully implement the School District's Capital Program and to fulfill this Contract, in strict accordance with the "Scope of Services" section of the RFP, which is attached as Exhibit "B" and incorporated by reference into this Contract, and the Proposal incorporated by reference into this Contract in its entirety, as modified hereby; and on the terms and conditions set forth in this Contract, within the time deadlines set forth in Section 4, *Scope of Services*, of this Contract and within budget requirements. The services and responsibilities delineated in this Contract are intended to substantively define the role of the Program Manager, but may not include all of the services required of the Program Manager under this Contract. The Program Manager shall perform any additional services that it deems necessary for the successful delivery of the Program.

4.3.2 The Program Manager shall perform the services and responsibilities set forth below, on-time and on-budget.

A. **Program Management, Controls and Reporting.**

1. The Program Manager shall assist with project planning, evaluation and sequencing, including the development of a "fatal flaw" analysis to determine potential challenges in the delivery of the Program in the time frame required by the School District.

2. The Program Manager shall assess the capacity of regional design, environmental remediation and construction firms in order to project the maximum, yet deliverable, number and type of simultaneous projects.

3. The Program Manager shall integrate comprehensive environmental remediation requirements and building system upgrades into the scope of work for the design of potential projects.

4. The Program Manager shall develop and manage a competitive, quality-based selection process for design services in accordance with School District procurement requirements. This process shall include School District staff and the selection shall be made by the School District. The School District shall hold a separate contract with the design firm on each project. The Program Manager shall provide advice and assistance to the School District in negotiating design contracts.

5. The Program Manager shall develop and manage a competitive, quality-based selection for necessary environmental, geotechnical and other specialized services needed for the Program. This process shall include School District staff and the final award of any contract shall be made in accordance with School District policies. The School District shall hold the contract for any of these services unless the services are included as part of the construction contractor's scope of service.

6. The Program Manager shall provide cost estimation and budgeting for all projects and the total Program.

7. The Program Manager shall create a value engineering process that creates the opportunity for cost savings without impacting the fundamental scope of each project.

8. The Program Manager shall develop project and program schedules and evaluate construction logistics, including the need for temporary or "swing" locations.

9. The Program Manager shall create a procurement process to obtain the services of the most cost effective and high performing construction contractors in accordance with School District procurement requirements. The Program Manager shall manage all construction pre-bid conferences. This process shall include School District staff and the final award of the construction contract shall be made in accordance with School District policies. The School District shall hold the contract with each construction contractor selected for a project in the Program.

10. The Program Manager shall manage project construction, including compliance with all contract requirements, progress in meeting project schedules, on-site testing and environmental compliance, communication with stakeholders, including reports to the Superintendent and the Board of Education, change order management and, if necessary, development of recovery plans.

11. The Program Manager shall work closely with the School District's Office of Minority and Small Business Development to ensure maximum M/WBE business participation in all phases of the Program, and to ensure goals are both identified and met. The Program Manager shall assist the School District in the development of an effective and measurable construction workforce diversity program.

12. The Program Manager shall collect data from each project for MBE/WBE participation and diverse workforce participation in a format that allows for public distribution and reporting to City and/or State agencies.

13. The Program Manager shall coordinate with multiple School District departments (*e.g.*, Capital Programs, Facilities, Management and Services, including Facilities and Maintenance Departments, Environmental Management and Services, Academic Supports, and School Personnel) during programming, design and construction.

14. The Program Manager shall review current contractual terms and conditions and make recommendations to improve the School District's current design, specialized services and construction contracts, including making reports to the Superintendent and the Board of Education.

15. The Program Manager shall coordinate with the Office of Capital Programs, and shall serve as a liaison for the School District in communicating with various stakeholders, public officials, parent-teacher groups, and school officials during the project planning and programming, design and construction phases.

16. The Program Manager shall identify or create a reporting system or tool to be used by project users and others to regularly report and evaluate project progress. This reporting process shall enable easy compilation to provide reports on both individual and aggregate project progress on a regular and as-needed basis. The Program Manager shall provide detailed information on the system being proposed, its experience using the system and the cost to the School District, if any, to purchase the system at the completion of the Program.

17. The Program Manager shall assist in developing a performance evaluation plan for consultants and construction contractors.

18. As required, the Program Manager shall assist in developing, negotiating and implementing the School District Project Labor Agreement (also known as the Partnership Agreement).

19. The Program Manager shall assist the School District as required in project/program financial or programmatic audits.

20. The Program Manager shall perform cash flow analysis for all projects as required to support the School District financial team in preparing documents for finance reporting and compliance.

21. The Program Manager shall review and approve all requests for payments from architects, engineers, consultants, and construction contractors. The Program Manager shall provide the approved requests for payments to the School District for review. All payments shall be made directly by the School District.

22. The Program Manager shall develop and manage a program to ensure safety and environmental management during active construction projects, including for projects in schools with student populations.

23. The Program Manager shall assist the School District in

application for PLANCON reimbursement from the State, as well as any other Federal/State/Local capital funding source identified. The Program Manager shall attend meetings with these entities as necessary and provide project information to them as required.

24. The Program Manager shall determine the current status of all projects and shall make reports and recommendations to the Director of Capital Programs regarding project issues and problems as needed or required.

25. The Program Manager shall assist the School District in developing cost estimates, financial budgets and forecasts, as requested, for the Program.

26. The Program Manager shall review schedules, estimates and budgets developed for individual Capital Projects and make recommendations on changes, adjustments, modifications and revisions to the School District.

27. The Program Manager shall assist the School District in developing, implementing and administering a project control system necessary to track, monitor, and manage all planning, design, and construction activities of the Program.

28. The Program Manager shall assist the School District with developing quality control and monitoring processes and in developing and maintaining a document control system for the Program.

29. The Program Manager shall prepare and provide monthly Program and Capital Project-level reports, addressing schedule, budget, general progress, and problems being encountered. The Program Manager shall clearly identify any deviations from the baseline, and shall recommend action to correct such deviations. The Program Manager shall chair and record monthly Program level progress meetings. The Project Manager shall participate in regular construction update meetings as required for each Capital Project.

B. Design Process.

1. The Program Manager shall manage the overall design process from conceptual design through schematic and detailed, biddable construction documents, and shall make recommendations to achieve process efficiencies. The Program Manager shall confirm that all construction bidding complies with the Pennsylvania Separations Act, the Public School Code, the School Procurement Code, and School District policies.

2. The Program Manager shall assist in creating systems for projects to move expeditiously through City review/approval processes, including Art Commission, Historical Commission, and Water Department as needed.

3. The Program Manager shall collaborate with the School District's Office of General Counsel and the School District's outside counsel on permitting and review process.

4. The Program Manager shall evaluate change orders attributed to

design errors, omissions and deficiencies, and shall render professional opinions to the School District and assist the School District in recovery efforts, if necessary.

5. The Program Manager shall develop and implement a communication process to involve all stakeholders in the design process.

6. The Program Manager shall collaborate with the Office of General Counsel and the Office of Risk Management on any legal, risk management or insurance issues or any claims or lawsuits related to design services on projects.

C. Construction.

1. The Program Manager shall develop requirements to prequalify construction contractors and implement procedures that ensure quality workmanship and adherence to construction schedules.

2. The Program Manager shall ensure construction contractor compliance with all safety plans and environmental management plans for the Program.

3. The Program Manager shall maintain site personnel on projects as necessary, manage bi-weekly construction and coordinate all communication with the construction contractors on the Program. The Program Manager shall work within and plan for the active school year. The Program Manager must take into account the possibility that projects may have to be completed around active learning in schools.

4. The Program Manager shall guard against unnecessary expenses, defective or nonconforming work of construction contractors, overpayment to construction contractors or consultants, and any unnecessary increase in the project cost or duration. The Program Manager shall alert the School District to any pending, known or proposed changes, conditions, or other circumstances affecting the construction scope, budget or schedule.

5. The Program Manager shall determine substantial completion, coordinate completion of punch lists, and secure final guarantees, releases, warranties and certificates of occupancy.

6. The Program Manager shall oversee building commissioning and shall coordinate with the School District's Office of Facilities, Management and Services, including the Facilities and Maintenance Departments. For the purpose of this paragraph, the School District adopts the following definition of "commissioning" 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 Contract Documents, and for the purpose intended".

7. The Program Manager shall collect and review project close-out information for each individual project, and shall ensure smooth handoff at project completion to end users.

8. The Program Manager shall assist in the evaluation of construction contractors and subcontractors to determine if they will remain eligible to bid on future construction work.

9. The Program Manager shall collaborate with the Office of General Counsel and the Office of Risk Management on any legal, risk management or insurance issues or any claims or lawsuits related to construction work on projects.

D. Limits On Authority and Responsibility.

1. The Services to be performed by the Program Manager under this Contract shall not impose upon it any obligation to assume any responsibilities, duties, services, or activities assumed or required to be rendered or performed by any Architect, Construction Manager, Construction Contractor or any other School District Consultant employed by, or associated with, the School District in relation to the Capital Program.

2. Nothing contained in this Contract shall be construed to mean that the Program Manager assumes any of the contractual duties, responsibilities, or liabilities of the Architect, Construction Manager, Construction Contractor or any other School District Consultants in their contracts with the School District, or any of the customary duties, responsibilities, or liabilities of an Architect, Construction Manager, Construction Contractor or other School District Consultant on a construction project.

3. Notwithstanding the provisions of Paragraph 3.21, *Safety Responsibilities*, and any other provisions contained in this Contract, the Program Manager 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 Program Manager 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 Program Manager 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 Construction Documents and in the Safety Manual established for the School District of Philadelphia.

Section 5. School District's Services and Responsibilities.

The School District, at its sole discretion, may elect to furnish, or direct and authorize the Program Manager to provide as Reimbursable Services (with no additional markup), the following analyses, investigations, surveys and reports:

5.1 **Land Surveys and Site Legal Information.** The School District may furnish, or authorize the Program Manager to provide a certified land survey of the Capital Project(s) site(s) describing physical characteristics, legal limitations and utility locations for the site(s) and a written legal description of the site(s). The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; right-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site(s); locations, dimensions and complete data pertaining to existing buildings, other improvements and trees; and full information concerning available utility services and including inverts and depths. All information on the survey shall be referenced to a Project benchmark. The School District shall make available to the Program Manager documentation pertinent to the Capital Project(s), including site plans and soil analyses.

5.2 **Site Surface and Subsurface Information.** The School District may furnish, or direct and authorize the Program Manager to retain, the services of geotechnical consultants, soil consultants or other consultants when such services are reasonably required by the scope of the Capital Project(s). Such services shall include, but are not limited to, test borings, test pits, determinations of soil bearing values, percolation tests, soil reports, subsurface investigations, air and water pollution tests, evaluations of hazardous materials and hazardous materials storage, ground corrosion and resistivity tests, including necessary operations for determining or anticipating subsoil, air and water conditions, with reports and appropriate professional recommendations. The Program Manager shall review and confirm the sufficiency of the tests and information furnished to the Program Manager, by or on behalf of the School District pursuant to this Paragraph 5.2, based upon conditions then known to exist, but such review shall not constitute confirmation of their accuracy.

5.3 **Site Laboratory and Environmental Test Information.** The School District may furnish, or direct and authorize the Program Manager to provide structural, mechanical, chemical,

air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports required by the Construction Documents and/or recommended by the Program Manager.

5.4 **Furnished Equipment and Furniture Plan.** The School District shall furnish a list of School District furnished equipment, and a furniture plan, including electrical characteristics and heat load, if required, for assigned Capital Projects.

5.5 **Time for Furnishing Information and Reliance on Information.** The services, information, and documents required by the above paragraphs, or otherwise to be furnished by the School District or other consultants employed by the School District, shall be furnished with reasonable promptness at the School District's expense, and the Program Manager shall be entitled to rely upon the accuracy and completeness thereof.

5.6 **Information Required by Governmental Authorities.** The School District may furnish, or direct and authorize the Program Manager to provide, any special surveys, environmental studies and submissions required for approval of governmental authorities or others having jurisdiction over the assigned Project.

5.7 **Required Documents and Fees for Construction, Use and Occupancy.** The City Administrative Board has approved a waiver of the construction permit fees imposed under Section A902.2 of the City Administrative Code and levied by the City Department of Licenses and Inspections ("L&I Department") for School District capital projects, effective prospectively from October 12, 1999. In accordance with the City Administrative Board Rule No. 4, no permit fee is to be paid by the School District to the City for the following permits: zoning, building, fire service, plumbing, electrical, and other similar construction permits. With assistance from the Program Manager, the School District shall complete and file the required Waiver of Permit Fees applications for the zoning and building permits with the City L&I Department, Permit Services Division, in order to obtain City waivers of the zoning and building permit fees for the Project.

5.8 **Review and Changes to Documents and Information.** The School District shall review all Deliverables prepared and submitted by the Program Manager to the School District under this Contract, and shall advise the Program Manager of any suggested changes, comments or recommendations thereto in a timely manner so as to cause no delay to the Program Manager.

5.9 **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.

5.10 **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 Program Manager 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 Board, by Action Item # ___, has authorized an expenditure of funds not to exceed the total amount of _____ Dollars and ___ Cents (\$_____) as the Compensation in total for the performance of professional capital program management services for the Program. The School District agrees to pay the Program Manager up to that lump sum amount authorized by the Board, as Compensation for the Basic Services and Additional Services performed and Reimbursable Expenses incurred by the Program Manager under this Contract during the Initial Term of this Contract specified in Section 2, *Term of Contract*. No funds have currently been authorized for any Additional Term.

6.2 **Payment.** The School District agrees to pay the Program Manager for the Services actually performed, on a monthly basis, up to the lump sum price that is set forth in Paragraph 6.1, in accordance with the negotiated and approved hourly billable wage rates for Key Personnel of the Program Manager and its Subconsultants that are set forth on the Program Manager's Key Personnel List with Hourly Rates, which is attached as Exhibit E and incorporated by reference into this Contract. In computing Compensation, the Program Manager shall multiply the time (man-hours expended) by the previously negotiated and approved hourly billable wage rates. 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 persons listed as Key Personnel on the Program Manager's Key Personnel List with Hourly Rates. Only one (1) wage rate per position of Key Personnel shall be permitted. Ranges for positions of Key Personnel shall not be accepted by the School District. These hourly billable wage rates shall be used for all services.

6.3 **Applications for Payment and Subconsultant Payment Confirmation.**

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

6.3.2 Applications for Payment or Professional Services Invoices for Services shall be limited to the persons listed on the Program Manager's Key Personnel Team List and the Subconsultants Personnel Lists, and at the hourly billable wage rates indicated on the Program Manager'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 Program Manager'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 Program Manager for Services performed by persons not listed on the Program Manager'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 Program Manager 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 Program Manager's Key Team Members and its Subconsultants Personnel, attached as Exhibit E 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 Program Manager shall submit one (1) monthly Application for Payment or Professional Services Invoice for each Project assignment 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 23-600-4102; 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 Program Manager's Application for Payment or Professional Services Invoice for the Work assignment and written summary of Work activities.

6.3.7 No payment shall be due to the Program Manager before the School District's receipt of a properly itemized Application for Payment or Professional Services Invoice for the Work assignment, together with written summary of Work activities, from the Program Manager. If the Program Manager, after a request by the School District, does not provide evidence satisfactory to the School District to support any item or items set forth in 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 Program Manager, require the Program Manager 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 Program Manager under this Contract.

6.3.8 The Program Manager'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, and all Applications for Payment or Professional Services Invoices must be approved by the School District's Accounting Services or Audit Services Department as a condition of payment.

6.3.10 **Subconsultant Payment Confirmation.** The Program Manager shall pay

each Subconsultant performing Services promptly, after receipt of payment from the School District, out of the amount paid to the Program Manager 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 Program Manager shall submit, to the School District administrator named in Paragraph 7.1, *Contract Administrators*, of this Contract, a written release or affidavit or payment confirmation from each Subconsultant that such Subconsultant has received from the Program Manager full payment of the amount to which such Subconsultant was entitled to receive from the Program Manager the previous calendar month. No payment shall be due to the Program Manager by the School District before the School District's receipt of all required Subconsultant Payment Confirmations from the Program Manager.

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 Program Manager's substantial failure to perform as agreed. However, before withholding payment under this Contract, the School District shall notify the Program Manager in writing of such failure and grant the Program Manager 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 Program Manager's good faith effort to remedy the failure. The School District will pay pro rata for the Program Manager's partial performance, provided such performance is acceptable to the School District and is rendered satisfactorily.

6.4.1 Without limiting the School District's other rights under this Contract or applicable law, the Program Manager expressly authorizes the School District to withhold and deduct from the Contract amounts otherwise due the Program Manager "premium costs" incurred by the School District on account of any errors, omissions, deficiencies, inconsistencies or conflicts in the estimates, analyses, recommendations, reports or other documents prepared by the Program Manager or its Subconsultants, or both. As used in this subparagraph, the term "premium costs" means costs that would not have been incurred if such estimates, analyses, recommendations, reports or other documents had been prepared free of any errors, omissions, deficiencies, inconsistencies or conflicts.

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 Program Manager of all Services on the Capital Project(s), and the School District has received all Deliverables required under this Contract, and has approved all Deliverables required under this Contract as being in compliance with the Contract requirements.

6.6 **Basic Services.** All services that the Program Manager is required to perform for the Capital Project(s) under this Contract shall constitute Basic Services for which compensation will be paid under Section 6.1, *Compensation*, herein.

6.7 **Additional Services.** The Program Manager shall not be compensated as Additional Services if the delay, disruption, interference or hindrance in construction on the Capital Project(s) is (are) due (1) to the fault, negligence, failure to act, error, omission or breach of contract

of the Program Manager, or (2) to a Force Majeure Condition as provided in Paragraph 3.15, *Force Majeure*, 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 Program Manager's Work shall not constitute Additional Services. Changes or corrections to the Program Manager'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 Program Manager must be approved in advance by the School District's designated representative.

6.7.3 The School District agrees to pay the Program Manager for its identified and approved Additional Services in accordance with the hourly billable wage rates for its Key Personnel that are set forth on the Program Manager's Key Personnel Team List and its Subconsultants' personnel that are set forth on the Subconsultants Personnel Lists, which are attached collectively as Exhibit E and incorporated by reference into this Contract. The School District also agrees to pay the Program Manager for Additional Services performed by persons not listed on the Program Manager'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 Program Manager's Additional Services.** The Program Manager agrees that in no event shall the School District be liable to the Program Manager for payment of compensation for Additional Services for any of the Program Manager'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 Capital Project(s), or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the Capital 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 Program Manager 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 Program Manager 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 Program Manager for the Program Manager'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 Capital Project(s), or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the Capital Project(s).

6.8 **Reimbursable Expenses.** The School District agrees to pay the Program Manager, as Reimbursable Expenses on an individual project, at 100% of their actual costs, for:

6.8.1 Reproduction of bidding documents, special presentation documents required for public meetings (such as zoning board), and testing services.

6.8.2 The Program Manager shall not be entitled to any other Reimbursable Expenses, except with the prior written consent of the School District.

6.8.3 Normal printing of documents for the School District's approvals or the Program Manager's use, or its Subconsultant(s)' use, travel expenses, and meals shall not be paid as Reimbursable Expenses.

6.8.4 The cost of normal progress prints 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 Program Manager shall furnish to the School District a release of all claims against the School District.

6.10 **Non-Authorization of Funds.** The Program Manager acknowledges that payments under this Contract may not exceed the amount that the School District's Auditing Services Department certifies as available for this Contract. During the Initial Term and an Additional 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 Program Manager 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 Department 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 Program Manager, 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 Program Manager 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 Program Manager 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 Initial Term or an Additional Term of this Contract commences (in either case, "Commencement FY"), the Program Manager 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 Program Manager 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 Program Manager 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 Program Manager 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 Department), 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 Program Manager'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 Program Manager 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 Program Manager 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 Program Manager in the City, or in another location with the Auditor's consent. The Program Manager 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 Program Manager'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 Program Manager shall make available, within the School District or in the City or at the Program Manager'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 Program Manager shall provide such records without unreasonable delay when requested by an Auditor.

6.13.4. **Retention of Records.** The Program Manager 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 Program Manager shall retain the records until all litigation, claims or audit findings have been completely terminated or resolved, without right of further appeal. The Program Manager shall include this Paragraph 6.13 in all Subcontracts for Services required by this Contract.

Section 7. Contract Management.

7.1 **Contract Administrators.** The Program Manager and the School District shall each designate a qualified Contract Administrator prior to the Program Manager'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 Program Manager's initial Contract Administrator shall be:

_____, _____

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

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

Ahmed Sultan, Director 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: asultan@philasd.org

Section 8. Employment Practices.

8.1 **Key Personnel.** Upon Contract award, the Program Manager shall assign the Key Personnel as noted in Exhibit C (Section B, Organizational Chart) and Exhibit E (Program Manager’s Key Personnel List) to perform the program management services of the Program Manager required under this Contract. The Program Manager and its Subconsultants shall not reassign or replace any Key Personnel in Exhibit C or Exhibit E, without the School District’s prior written consent, which shall not be unreasonably withheld. All Key Personnel must participate in the Work assignment(s) 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 Program Manager 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 Program Manager.

8.2 **Subconsultants.** Subconsultants of the Program Manager shall look only to the Program Manager 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 Program Manager. The School District shall have no obligation to pay nor to see to the payment of any monies to any Subconsultant of the Program Manager, except as may otherwise be required by law. Nothing contained in Paragraph 6.3, *Invoices 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 Program Manager. The School District of Philadelphia is 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 Program Manager 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 Program Manager 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, disability, creed, ancestry, national origin, 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 Program Manager 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 Program Manager 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, creed, ancestry or national origin, disabled or Vietnam era veteran status. The School District, upon receipt of evidence of such discrimination by the Program Manager or its agents, employees, representatives, or Subconsultants, shall have the right, at its sole discretion, to terminate this Contract. The Program Manager 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 Program Manager shall not discriminate nor permit discrimination against any person because of race, color, religion, age, national origin, ancestry, creed, handicap, sexual orientation, union membership, disabled or Vietnam era 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 Program Manager 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 Program Manager to comply with this anti-discrimination provision, the Program Manager may be removed from the list of approved bidders of the School District. The Program Manager 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 The Program Manager 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 Program Manager 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 (MWBE) firm.] The Program Manager [further] represents and certifies that it will employ the services of Subconsultant(s), as necessary, to achieve minority-owned business enterprise (MBE) participation goals of 25% and woman-owned business enterprise (WBE) participation goals of 15% of the total amount of services provided in the performance of this School District Contract. [The Program Manager [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 owned 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 Program Manager [further] represents and certifies that it will use the following MBE and WBE firms as Subcontractors under this Contract in the percentages listed as set forth in the Proposal, M/WBE Participation Plan: (1) _____ (___BE) – ___%; (2) _____ (___BE) – ___%; and (3) _____. (___BE) – ___%. The Program Manager’s Proposal, M/WBE Participation Plan, is attached as Exhibit F and incorporated by reference into this Contract. The Program Manager’s Proposal, M/WBE Participation Plan, shall be enforceable as any other contractual term or condition of this Contract. Sanction for breach of the Program Manager’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 Program Manager shall **not** replace or substitute the MBE/WBE firms identified in Paragraph 8.3.4 and the Program Manager’s Proposal, M/WBE Participation Plan, without the prior written notice to and approval of the School District. The Program Manager 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 Program Manager’s Proposal, M/WBE Participation Plan, without the prior written notice to and approval of the School District. The Program Manager shall promptly submit a revised M/WBE Participation Plan, for School District approval, **before** the Program Manager: (a) replaces or substitutes the MBE/WBE firms identified in Paragraph 8.3.4 and the Program Manager’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 Program Manager’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 Program Manager'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 Program Manager's Proposal, M/WBE Participation Plan.

8.4 **Non-Discrimination.**

8.4.1 **Non-Discrimination in Hiring.** The Program Manager 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 Program Manager, 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 Program Manager, the Program Manager 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 Program Manager will notify each labor union or workers' representative from whom it seeks workers of the Program Manager'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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager'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 Program Manager'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 Program Manager 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 Program Manager represents and agrees that it will use the minority-owned and women-owned business enterprises for the services and in the 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 Program Manager has not made a good faith effort to comply with the listed M/WBE 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 Program Manager from future School District work as non-responsible.

8.4.3 **Liability of Subcontractors.** Any Subconsultant of the Program Manager shall have the same responsibilities and obligations as the Program Manager 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 Program Manager 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 Program Manager or any Subconsultant pursuant to Board Policy No. 621.

(3) The Program Manager 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 Program Manager the sums due.

Section 9. Indemnification.

9.1 Indemnification.

9.1.1 The Program Manager 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 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 Program Manager'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 Program Manager, 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 Program Manager 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 Program Manager is or may become responsible. The Program Manager agrees that in the event that any employee of the Program Manager 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 Program Manager under this Contract that the Program Manager 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 Program Manager 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 Program Manager in the event that the School District is sued by an employee of the Program Manager. 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 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, 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 Program Manager or any of its Subconsultants has insurance.

9.1.3 In the event the School District receives notice of a claim based upon the Program Manager's services, omission or breach, the School District will promptly notify the Program Manager in writing of such claim and will require and permit the Program Manager to assume the defense of the School District, its officers, employees, agents, members of 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 Board of Education. The Program Manager shall require all insurance policies in any way related to the work and secured and maintained by the Program Manager 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 Program Manager 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 members of the Board of Education. Any violation of any of the provisions of this Paragraph 9.1 (*Indemnification*) by the Program Manager shall be deemed a material breach of this Contract. The Program Manager 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 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 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 Program Manager

(including but not limited to Architects or Engineers) 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 PROGRAM MANAGER 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 Program Manager or its insurer or insurers materially change, cancel, or non-renew any insurance policy. The Program Manager shall advise the School District immediately upon receiving any notice of cancellation or nonrenewal of the required insurance. The Program Manager shall ensure that the School District of Philadelphia, its board directors, officers, employees and agents shall be named as Additional Insureds on the General Liability Insurance policy and the Program Manager shall ensure that its insurer or insurers so endorse said policy.. The Program Manager shall procure and maintain an endorsement or endorsements stating that: (i) the coverage afforded the School District and its 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 and its 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 Program Manager 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 so 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: Architectural 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 \$3,000,000.00 combined single limit and at least \$3,000,000.00 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 Program Manager 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 Capital 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 Program Manager 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 Insurance 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.: Jesse Jones, 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 Program Manager 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 Program Manager to furnish certified copies of the original policies of all insurance required under this Contract at any time upon (10) calendar days' written notice to the Program Manager.

10.3 **Notice of Claim or Lawsuit.** The Program Manager shall advise the School District in writing, within ten (10) calendar days upon notification of a claim or lawsuit based upon the Program Manager'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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager'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 Program Manager'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 Program Manager self-insures its professional liability or workers' compensation and employers' liability coverage, the Program Manager 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 Program Manager to the School District, or to limit the Program Manager's liability under this Contract to the limits of the policies of insurance (or self-insurance) required to be maintained by the Program Manager hereunder.

Section 11. Confidentiality.

11.1 **Confidential and Proprietary Information.** The Program Manager 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 Program Manager 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, 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 Program Manager shall not publish, disclose or use any such 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 Program Manager as proprietary or confidential. 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 Program Manager 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 or expiration of this Contract.

11.2 **Non-Disclosure**. The Program Manager 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 Program Manager 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 Work assignment(s);
and

(b) any Data provided by the School District to the Program Manager in connection with the Services provided by the Program Manager; 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 Program Manager in relation to the Services required under this Contract; and

(d) all records, documents, data, information, programs, and items of Services created by the Program Manager 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 Program Manager prior to the commencement of its performance of this Contract, free of any obligation to keep it confidential, or is proprietary to the

Program Manager; or

(b) was generally known to the public at the time of receipt by the Program Manager, or becomes generally known to the public through no act or omission of the School District; or

(c) was independently developed by the Program Manager 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 Program Manager, 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 Program Manager 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	Program Manager	Time After Dispute Notice
Project Manager	Program Director or Project Manager	15 days
Contracts Manager	Program Director or Project Manager	15 days
Director or Operations Manager of 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 Program Manager, 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 Program Manager. 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 Program Manager in view of all the facts and circumstances. If, however, the Work assignment(s) is(are) abandoned, the School District shall pay the Program Manager 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 Program Manager (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 Program Manager 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 Program Manager 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.

13.2.3 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 this 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, at any time, upon thirty (30) calendar days' prior written notice to the Program Manager. 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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager shall continue to perform this Contract in accordance with its terms with respect to all Services not terminated. The School District shall pay the Program Manager 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 Program Manager under this Contract.

(a) The Program Manager'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 Program Manager for the benefit of creditors, or any action taken or suffered by the Program Manager under any federal or state insolvency, bankruptcy, reorganization, moratorium or other debtor relief act or statute, including the Program Manager's filing for bankruptcy, and the filing of an involuntary petition against the Program Manager 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 Program Manager contained in this Contract, or in any other document submitted to the School District by the Program Manager in relation to the Services, the RFP, or the Proposal, or otherwise by the Program Manager 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 Program Manager 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 Program Manager will not be able to perform the Work, and (2) the School District demands in writing assurance of the Program Manager's performance;

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

(f) indictment of or other issuance of formal criminal charges against the Program Manager 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 Program Manager'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 Program Manager or any director, agent, or employee or any person controlling, under common control with, or controlled by, the Program Manager under a federal, state or local law, rule or regulation;

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

14.2.2 Notice and Cure. If the Program Manager commits or permits an Event of Default, the School District shall notify the Program Manager 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 Program Manager 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 Program Manager 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 Program Manager'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 14.5, *Additional Remedies of the School District*, of this Contract if: (1) the Program Manager 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 Program Manager 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 Program Manager breaches any of its obligations under Paragraphs 16.13,

Background Checks (Criminal, Child Abuse and FBI), or 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 Program Manager shall take immediate action toward the orderly discontinuation of Services under this Contract. The Program Manager shall exercise due care and caution to protect and secure completed Work. Upon expiration or termination of this Contract, the Program Manager 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 Program Manager's sole expense, all designs, drawings, specifications, materials, reports, data, and other documentation which were obtained, prepared or developed as part of the Services required under this Contract. Designs, drawings, specifications, materials, reports, data and documentation shall be clearly labeled and indexed, to the satisfaction of the School District, and delivered to the School District by the Program Manager, within thirty (30) calendar days after receipt of a Termination Notice from the School District.

14.4 **Additional Remedies of the School District.** In the event the Program Manager 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 Program Manager 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 Program Manager 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 14.5, 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 Program Manager by reason of such performance or paying such costs or expenses, and the obligations of the Program Manager 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, or offset against, any funds payable to or for the benefit of the Program Manager; or

(d) collect, foreclose or realize upon any bond, collateral, security or insurance provided by or on behalf of the Program Manager; 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 Program Manager; 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 Program Manager 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 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 Program Manager shall immediately cease working on that portion of the Services specified in the Stop Work Order until the School District notifies the Program Manager in writing that the cause for the Stop Work Order has been eliminated, and directs the Program Manager in writing to resume the Services. The Program Manager shall resume the Services immediately upon receipt of such written notice from the School District.

14.4.1 **Specific Performance.** The Program Manager's Work represents unique services not otherwise readily available to the School District. Accordingly, the Program Manager 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 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 Program Manager to continue to perform the Work. No extension or indulgence granted by the School District to the Program Manager 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 Program Manager, 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 Program Manager 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 Program Manager, 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 Program Manager is unable to certify to any of the statements in the above certification, the Program Manager shall provide **an immediate written explanation** to the School District administrator named in Paragraph 7.1, *Contract Administrators*, of this Contract.

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

15.4 **Remedies.** If the Program Manager 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 Program Manager, and the Program Manager 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 or the City concerning the Program Manager's compliance with the terms and conditions of this Contract that results in the debarment or suspension of the Program Manager.

15.5 **Compensation.** If the compensation paid to the Program Manager is derived from Federal government or Commonwealth of Pennsylvania grant funds, the Program Manager must bill the School District for any outstanding compensation owed to the Program Manager within thirty (30) days after the ending date of this Contract, as set forth in Section 2 (*Term of Contract*). In the event the Program Manager 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 Program Manager because of the unavailability of Federal government or Commonwealth of Pennsylvania funds, in which event the School District shall not be liable to the Program Manager 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.: Ahmed Sultan, Director of Capital Programs or
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 PROGRAM MANAGER:

Attn.: _____, _____

Telephone number: _____
Facsimile number: _____

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-F 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 members of 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 Program Manager 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 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 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 Program Manager 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 Program Manager 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 Program Manager, the Program Manager 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 Program Manager may respond to press and public inquiries regarding the concept and design of the Work assignment(s) following notice to the School District's designated representative. During the term of this Contract, the Program Manager 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 Program Manager 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 Program Manager 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 Program Manager as a result of performance of this Contract shall remain with the Program Manager.

16.9 **Conflict of Interest.**

16.9.1 **Disclosure of Conflict of Interest.** The Program Manager 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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager, has a direct or indirect investment worth \$1,000 or more in the Program Manager or is a director, officer, partner, trustee or employee of the Program Manager.

16.10 **School District Officers and Employees Not to Benefit.** The Program Manager 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 Program Manager 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 Program Manager 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 Program Manager, 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 Program Manager to the School District officials or employees in violation of School District policy and Applicable Law shall be recoverable from the Program Manager 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 Program Manager.

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

this Contract. The Program Manager 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 Program Manager 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 Program Manager's starting Services) criminal history record information report and child abuse history official clearance statement for the Program Manager, if the Program Manager is an individual, and for each of the Program Manager'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 Program Manager 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 Program Manager, if the Program Manager is an individual, and for each of the Program Manager'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 Program Manager 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 Program Manager or of any Subconsultant of an arrest or conviction for an offense listed in 24 P.S. §1-111(e). The Program Manager 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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager'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 Program Manager, 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 Program Manager 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 Program Manager agrees that the School District shall, until the expiration of three (3) years after final payment under this Contract or five (5) 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 Program Manager 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 Program Manager'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 Program Manager 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 Program Manager, 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 Program Manager 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 Program Manager 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 Program Manager 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 Program Manager authorizes the School District, in its own name or the name of the Program Manager, 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 Program Manager all of its right, title and interest in any sales or use tax paid by the Program Manager 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 Program Manager'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 Program Manager's performance under this Contract. In the event, however, that the Program Manager is assessed or levied any taxes, fees, or similar charges related to this Contract or the Program Manager's performance hereunder (except income or corporate taxes assessed against or levied on the Program Manager), the School District agrees to cooperate fully with the Program Manager, at School District expense, in any administrative actions or legal proceedings with the appropriate taxing authorities. If a final judgment is entered against the Program Manager relating to the payment of such taxes, fees, or charges, the School District agrees to indemnify the Program Manager for the amount thereof, including any penalties incurred in such review or contest. In no event shall the Program Manager 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 Philadelphia 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 Philadelphia 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 Philadelphia 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 Program Manager 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 Program Manager 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 Program Manager. Nothing contained in this Contract is intended to benefit any third party. The Program Manager's Subconsultants, the Construction Management Firm (if the Construction Management Firm is assigned to the Project), and the Prime Contractor and its 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