

ORACLE CONTRACT ____
OGC CONTRACT NO. ____ /F21

**CONTRACT FOR PROFESSIONAL COMMISSIONING AGENT SERVICES ON AN
AS-NEEDED BASIS**

BETWEEN

SCHOOL DISTRICT OF PHILADELPHIA

AND

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Exhibits:

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| Exhibit A | Board of Education Action Item dated _____, 202_ |
| Exhibit B | Request for Proposals (RFP) for Commissioning Agent Services On An As-Needed Basis and Addendum Nos. _____ (if any) |
| Exhibit C | Proposal of Commissioning Agent (as modified hereby) for Commissioning Agent Services On An As-Needed Basis (incorporated by reference in its entirety into this Contract), and Cover Page and Organizational Chart of Proposal of Commissioning Agent (incorporated by reference in their entireties into this Contract) |
| Exhibit D | Letters of Understanding, Scopes of Work, and Task Orders for Individual Projects (collectively incorporated by reference in their entireties into this Contract) |
| Exhibit E | Fee Proposal of Commissioning Agent, Form Cover Sheets and Key Team Members (Hourly Rates) and Subconsultants Personnel (Hourly Rates) (collectively incorporated by reference in their entireties into this Contract) |
| Exhibit F | M/WBE Participation Plan of Commissioning Agent (incorporated by reference in its entirety into this Contract) |

Professional Commissioning Agent
Services Contract
Contract No. ____/F21

Approved by Board Action Item #__
Dated: _____, 202_

SCHOOL DISTRICT OF PHILADELPHIA
BOARD OF EDUCATION

This Contract for Professional Commissioning Agent Services (the “Contract”) is made as of this ____ day of _____, 202_ 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 the “Commissioning Agent”) located at _____.

BACKGROUND

The School District currently serves about 142,300 students enrolled in School District schools, which include pre-kindergarten, elementary, middle, high school and alternative schools. Various management structures are used to manage the education program in School District schools, including for-profit and non-profit organizations, in addition to School District staff. The Board of Education (“Board”) is the governing body of the School District pursuant to Public School Code, 24 P.S.C. §21-21-2 and §3-301.

The School District has entered into a Contract for Capital Program Management Services with Johnson, Mirmiran & Thompson, Inc. (the “Program Manager”) to provide comprehensive professional program management services for the implementation of the School District’s upcoming approximate \$500 million Capital Improvement Program, from February 2020 through January 2023, under the direction and management of the School District. The Capital Improvement Program consists of new construction, major renovations, life cycle replacements, modernizations to meet code requirements, and educational programming needs.

On May 28, 2020, the Board approved a six (6)-year amended Capital Improvement Program (“CIP”) for FY20 through FY25 totaling over \$1.85 billion and a proposed 6-year Capital Improvement Program (“CIP”) for FY21 through FY26 totaling over \$1.86 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 nearly 300 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 Proposals for Commissioning Agent Services on an As-Needed Basis (hereinafter referred to as "RFP for Commissioning Agent Services"), the School District requested proposals from qualified firms to provide commissioning for envelope, mechanical, electrical and plumbing systems, in compliance with the International Energy Conservation Code as adopted by the City of Philadelphia, and LEED commissioning prerequisite and enhanced points for building enclosure commissioning and energy systems, on an as-needed basis, for projects at various schools.

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

On _____, 202_, the Board, by Action Item #__, authorized the School District to execute and perform an Indefinite Delivery/Indefinite Quantity ("IDIQ") Contract for Commissioning Agent Services with _____ (__) qualified firms, including _____, for the three (3) year contract period commencing on _____, 202_ and ending on _____, 202_. A copy of the Board Action Item, with list of firms, is attached as Exhibit A, and incorporated by reference into this Contract.

The School District and the Commissioning Agent desire that the Commissioning Agent perform, on time and on-budget, professional commissioning services for envelope, mechanical, electrical and plumbing systems and LEED commissioning services prerequisite and enhanced points for building enclosure commissioning and energy systems, on an as-needed basis, at various schools, under the direction and management of the School District. The Commissioning Agent will perform, on-time and on-budget, the professional commissioning services work assignments that are assigned by the School District Director of Capital Programs, and will assume the responsibilities, duties and liabilities provided herein, and will work in concert with the School District and others in connection with the Capital Improvement Program, in strict accordance with the attached Board Action Item; and the School District's Request for Proposals for Commissioning Agent Services on an As-Needed Basis (referred to as "RFP for Commissioning Agent Services") and Addendum Nos. ____ (if any), attached collectively as Exhibit B and incorporated by reference into this Contract; and the Proposal of the Commissioning Agent (as modified hereby) for Commissioning Agent Services (referred to as "Commissioning Agent Services") On An As-Needed Basis (incorporated by reference in its entirety into this Contract) (only the Cover Page and the Organizational Chart of the Proposal of the Commissioning Agent are collectively attached as Exhibit C and incorporated by reference in their entireties into this Contract; however, the entire Proposal of the Commissioning Agent is referred to as Exhibit C and incorporated by reference in its entirety into this Contract); and the Letters of Understanding,

written Scopes or Scopes of Work, and Task Orders for individual Projects assigned by the School District, referred to as Exhibit D and collectively incorporated by reference in their entirety into this Contract; and on the terms and conditions hereinafter set forth.

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

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

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

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

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

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

(c) **Additional Term** – means the one (1) of the two (2) optional additional one (1)-year or twelve (12)-months term described in Paragraph 2.2, *Option to Renew*.

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

(e) **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.

(f) **Capital Improvement Program or CIP or Capital Program** – means the amended 6-year Capital Improvement Program (FY20 through FY25) and the proposed 6-year Capital Improvement Program (FY21 through FY26) approved by the Board on May 28, 2020, and any additions, deletions, changes, adjustments, and annual updates approved by the Board.

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

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

6.12, *Crossing Fiscal Years*.

(i) **Commissioning Agent** – means the qualified professional consulting services firm which is performing professional commissioning services for individual Projects at various schools pursuant to this Multi-Party Contract.

(j) **Contract** or **Professional Commissioning Agent Services Contract** – means this professional services contract for professional commissioning services for the Capital Improvement Program, including all exhibits or documents attached hereto and/or incorporated herein, as amended from time to time by written amendment executed by all parties, and all modifications or revisions made in accordance with the terms hereof.

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

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

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

(n) **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 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).

(o) **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 Commissioning Agent at regular review points and at the completion of the work as expressly noted herein or as may be required by the Commissioning Agent.

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

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

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

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

(t) **Key Personnel** – means those job titles and the persons assigned to those positions in accordance with the provisions of Paragraph 3.2.13 and Paragraph 8.1, *Key Personnel*

of this Contract and any persons that the Commissioning Agent shall invoice the School District for in performance of required services.

(u) **Letter of Understanding** – means the written agreement signed by the School District and the Commissioning Agent that describes, attaches, incorporates, or explains the Scope or Scope of Work, the Task Order, the Project Schedule or Work Schedule, the basis of the applicable Fee method, and other requirements for individual Projects assigned by the School District.

(v) **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.

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

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

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

(z) **Phase Submission Checklist** – means the document prepared by the School District and distributed to the Commissioning Agent along with the Letter of Understanding, Scope, or Task Order for the Project, and as possibly modified by modifications, and is incorporated by reference as part of the Contract.

(aa) **Program Manager** – means Johnson, Mirmiran & Thompson, Inc. (“JMT”), the qualified professional consulting services firm who is performing professional capital program management services, including professional construction management services, for the Project under the School District’s Capital Improvement Program pursuant to its Contract with the School District.

(bb) **Project(s)** – means the individual project(s) that is (are) identified and addressed in the School District Capital Improvement Program.

(cc) **Project Schedule** – means the schedule developed and included in the approved Scope for each project that is identified and addressed in the School District Capital Improvement Program, together with all modifications.

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

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

(ff) **Request for Proposal** or **RFP** – means the Request for Proposals for Commissioning Agent Services on an As-Needed Basis (referred to herein as “RFP for Commissioning Agent Services”) issued by the School District, including all Addenda thereto issued, if any.

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

(hh) **Scope** or **Scope of Work** or **SOW** – means the overall plan, including scope or scope of work, schedule, phase submission checklist, and budget, for a Project for a designated school, together with all modifications, provided by the School District and agreed to by the School District.

(ii) **Services** or **Commissioning Services** or **Commissioning Agent 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 Commissioning Agent in accordance with the terms and conditions of this Contract and set forth in the Construction Documents, including any Project Schedule, Work Schedule, Deliverables, supplements, modifications, or amendments hereto, and any work functions necessary in order to complete such Services.

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

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

(ll) **Subcontractor or Subconsultant** – 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 Commissioning Agent to perform any Services covered by this Contract.

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

(nn) **Task Order** – means a written list or itemization of work to be performed for an individual school facility assigned by the School District.

(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 (Commonwealth or State) of _____, and licensed and authorized to do business under the laws of the Commonwealth of Pennsylvania, with offices at _____.

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 _____, 202_, 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 three (3) years through _____, 202_.

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 (12 months) periods (individually an “Additional Term”, and collectively, “Additional Terms”). Pricing shall be subject to renegotiation between the School District and the Commissioning Agent at the time the School District exercises its option to renew. The Commissioning Agent 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 Commissioning Agent, in writing, of its intention to recommend renewal of this Contract for up to an additional one (1)-year (12 months) period to the Board. Within ten (10) days of the Commissioning Agent’s receipt of the School District’s notice of its intention to recommend renewal of this Contract, the Commissioning Agent 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 five (5) years up through _____, 202_, unless the Board or a successor entity authorizes a further renewal or extension by Action Item.

Section 3. Commissioning Agent’s Services and Responsibilities.

3.1 **Role of Program Manager.** The Program Manager is responsible for managing the planning, evaluation, scheduling, design and design process (including selection and regular review),

constructability, analysis, cost estimation, construction, project close-out and all aspects of the successful delivery of approximately 200 critical projects, including the New T.M. Peirce Elementary School Project, the New Lewis C. Cassidy Elementary School Project and the new Hamilton Disston Elementary School Project, in the upcoming approximate \$500 million Capital Program, over the next thirty (30) months, in accordance with the directions and decisions of the School District. The Program Manager's role in the Capital 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: (a) Leading the day-to-day management of the Project design and overseeing the overall Project design/coordination; (b) Managing the Project constructability reviews and Project Value Engineering; (c) Identifying and facilitating all Project applications, permits and approvals; (d) Liaising between the municipality and various community/business organizations and the School District; (e) Managing and hosting the Project community outreach events in collaboration with the Commissioning Agent and the School District; and (f) providing oversight, coordination and management of individual capital projects, including the New T.M. Peirce Elementary School Project, the New Lewis C. Cassidy Elementary School Project and the New Hamilton Disston Elementary School Project, under the Capital Program.

The School District, acting through its officials, employees and other agents, shall retain final authority with regard to all Capital Program and Project-related decisions. The School District shall hold the contracts of the various consultants and contractors performing services or work on individual capital projects, including the New T.M. Pierce Elementary School Project, the New Lewis C. Cassidy Elementary School Project and the New Hamilton Disston Elementary School, under the Capital Program.

The Program Manager is the School District's authorized representative on the Project and is in charge of pre-construction, construction and post-construction activities on the Project. The Program Manager's staff will work closely with the staff of the School District in the School District Office of Capital Programs to successfully deliver the Capital Program and individual capital projects, including the New T.M. Peirce Elementary School Project, the New Lewis C. Cassidy Elementary School Project and the New Hamilton Disston Elementary School Project, under the Capital Program. The Program Manager will report to the School District's Director of Capital Programs.

The School District shall furnish the Commissioning Agent with a copy of any written agreement between the School District and the Program Manager.

3.1.1 Program Manager's Services and Responsibilities. The Program Manager will be performing the services and responsibilities set forth below during the pre-construction, construction and post-construction periods of the Project.

(a) The Program Manager will assign a Key Personnel member to oversee and manage all program management services performed by the Program Manager on the Project and to act as the Program Manager's primary authorized representative and principal contact person for all participants on the Project.

(b) The Program Manager will 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 for the Project.

(c) The Program Manager will coordinate with the Office of Capital Programs and will 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. The Program Manager will develop and implement a communication process on the Project to involve all stakeholders in the Project design process.

(d) The Program Manager will be managing the design of the Project during the pre-construction phases of the Project in consultation with the designated representatives of the School District's Director of Capital Programs. The Program Manager will design to cost when performing its services during the Project. The School District, through its Director of Capital Programs, shall retain final authority with regard to Project design and design-related activities and decisions. The Program Manager will also be managing or overseeing the overall Project design process from conceptual design through schematic and detailed, biddable construction documents, and will make recommendations to achieve process efficiencies. The Program Manager will confirm that all Project construction bidding complies with the Pennsylvania Separations Act, the Public School Code, the School Procurement Code, and School District policies. The Program Manager will manage all Project construction pre-bid conferences.

(e) The Program Manager will assist the School District in creating systems for the Project to move expeditiously through City review/approval processes, including Art Commission, Historical Commission, and Water Department as needed.

(f) The Program Manager will collaborate with the Commissioning Agent, the School District's Office of General Counsel and the School District's outside counsel on permitting and review processes for the Project.

(g) The Program Manager will integrate comprehensive environmental remediation requirements and building system upgrades into the scope of work for the design of the Project.

(h) The Program Manager will provide cost estimation and budgeting for the Project and will create a value engineering process that creates the opportunity for cost savings without impacting the fundamental scope of the Project.

(i) The Program Manager will assist the School District with the planning, evaluation and sequencing for the Project, including the development of a "fatal flaw" analysis to determine potential challenges in the delivery of the Project in the time frame required by the School District. The Program Manager will develop an overall Project Schedule and will evaluate construction logistics for the Project. The Program Manager will review schedules, estimates and budgets developed for the Project and will make recommendations on Project changes, adjustments, modifications and revisions to the School District.

(j) The Program Manager will 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 Project, and to ensure goals are both identified and met.

(k) The Program Manager will 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. The Program Manager will implement procedures on the Project that require quality workmanship and adherence to construction schedules.

(l) The Program Manager will develop and manage a program to ensure safety and environmental management during the Project. The Program Manager will monitor and require construction contractor compliance with all safety plans and environmental management plans for the Project.

(m) The Program Manager will maintain site personnel on the Project as necessary, manage bi-weekly construction and coordinate all communication with the construction contractors on the Project. The Project Manager will participate in regular construction update meetings as required for the Project.

(n) The Program Manager will 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 will alert the School District to any pending, known or proposed changes, conditions, or other circumstances affecting the Project construction scope, budget or schedule.

(o) The Program Manager will evaluate Project change orders attributed to design errors, omissions and deficiencies, and will render professional opinions to the School District and assist the School District in recovery efforts, if necessary.

(p) The Program Manager will review and approve all requests for payments from Project participants under their School District Contracts on the Project. The Program Manager will provide the approved requests for payments to the School District for review. All payments will be made directly by the School District.

(q) The Program Manager will determine substantial completion, coordinate completion of punch lists, and secure final guarantees, releases, warranties and certificates of occupancy on the Project.

(r) The Program Manager will collaborate with the School District's Office of General Counsel and Office of Risk Management on any legal, risk management or insurance issues or any claims or lawsuits related to design services or construction work on the Project.

(s) The Program Manager will oversee building commissioning and will 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".

(t) The Program Manager will collect and review Project close-out information for the Project, and will ensure smooth handoff at Project completion to end users.

(u) The Program Manager will determine the current status of the Project and will make reports and recommendations to the School District Director of Capital Programs regarding Project issues and problems as needed or required.

(v) The Program Manager will assist the School District in implementing the School District Project Labor Agreement (also known as the Partnership Agreement) on the Project.

(w) The Program Manager will assist the School District in application for PLANCON reimbursement for the Project from the State, as well as any other Federal/State/Local capital funding source identified. The Program Manager will attend meetings with these entities as necessary and provide Project information to them as required.

3.1.2 Limits on Authority and Responsibility. The services to be performed by the Program Manager on the Project shall not impose upon it any obligation to assume any responsibilities, duties, services or activities assumed or required to be rendered or performed by the Commissioning Agent, the Construction Contractors or any other School District Consultants employed by, or associated with, the School District on the Project. 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 Commissioning Agent, the Construction Contractors 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. Notwithstanding any provisions contained in this Contract, nothing contained in this Contract shall be construed to mean that the Program Manager is acting in a manner so as to assume responsibility or liability, in whole or in part, for the noncompliance of any Construction Contractors or their subcontractors with safety precautions and safety programs in connection with construction work on the Project, and for their noncompliance with any 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 Project, including but not limited to standards and regulations set forth in the Safety Manual established by 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 the Project which caused death, personal injury or property damage and which were caused by any Construction Contractors or their subcontractors.

3.2 Status of Commissioning Agent. The School District has engaged the Commissioning Agent as an independent contractor to carry out the Work, and neither the Commissioning Agent nor any of the Commissioning Agent's agents, employees or Subconsultants shall in any way or for any purpose whatsoever be deemed an agent or employee of the School District. Neither the Commissioning Agent nor any of its agents, employees or Subconsultants constitute employees of the School District, and these persons shall have no right to receive any School District employee benefits, or any other privileges available to School District employees.

Neither the Commissioning Agent nor its agents, employees or Subconsultants shall represent themselves in any way as agents or employees of the School District, and none of the Commissioning Agent, its agents, employees or Subconsultants has any power to bind legally the School District to any third party.

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

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

3.3.2 This Contract, when executed and delivered, shall be a valid and binding obligation of the Commissioning Agent enforceable in accordance with its terms.

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

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

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

3.3.6 The Commissioning Agent is a firm experienced and skilled in performing commissioning services for envelop, mechanical, electrical and plumbing systems and LEED commissioning for building enclosure commissioning and energy systems on school projects of comparable size and complexity to the School District's capital projects.

3.3.7 The Commissioning Agent has the necessary skills, experience, expertise, ability and available qualified, licensed or registered staff to facilitate rapid commissioning services for envelop, mechanical, electrical and plumbing systems and LEED commissioning for building enclosure commissioning and energy systems on assigned school projects, and to provide, on time and within the budget, these commissioning services on a number of assigned school projects at the same time, and to complete these commissioning services on assigned school projects within required time deadlines.

3.3.8 The Commissioning Agent will visit the site(s) of the assigned Project(s) and familiarize itself with the local conditions under which the services required hereunder are to be performed.

3.3.9 All commissioning work and other disciplines and features of the

Commissioning Agent's work shall be reviewed and approved by engineers licensed or registered to practice in the Commonwealth of Pennsylvania.

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

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

3.3.12 **Commissioning Agent's Subconsultants.** The Commissioning Agent shall engage the Subconsultants, which have been approved by the School District, to perform professional commissioning and other services required of the Commissioning Agent under this Contract, on-time and on-budget, and shall require each of its Subconsultants to place his licensed engineering stamp (with name, seal, and dated signature) on any plans, plats, specifications and reports prepared by his licensed engineers in accordance with the Pennsylvania Engineer, Land Surveyor and Geologist Registration Law, 63 P.S. §§152 & 154. The Commissioning Agent shall not employ, contract with, or use the services of any person or firm, as a subconsultant or otherwise, without the prior written approval of the School District, which approval shall not be unreasonably withheld.

3.3.13 The Commissioning Agent shall coordinate the activities of all its consultants and all other members of its commissioning team. The Commissioning Agent shall be responsible for all actions of its Subconsultants and other team members in accordance with Paragraphs 3.5, *Standard of Performance*, 3.6, *Labor, Materials, Supplies and Equipment*, and 3.12, *Subletting and Assignment*, of this Contract.

3.3.14 Any written commitment, warranty or representation by the Commissioning Agent within the scope of this Contract shall be binding upon the Commissioning Agent, whether or not incorporated into this Contract. Failure of the Commissioning Agent to fulfill any such commitment, warranty or representation, or if any commitment, warranty or representation was untrue in any material respect when made, shall constitute a default under Section 14 (*Termination*). The commitments, warranties and representations of the Commissioning Agent within the meaning of this Paragraph 3.3.14 shall include, without limitation, the following:

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

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

(c) any representation or warranty made by the Commissioning Agent concerning the characteristics of items of services described in this Paragraph 3.3.14 made in any literature, descriptions, or documents accompanying or referred to in a proposal;

(d) any modification of, or affirmation, or representation as to the characteristics of items of services described in this Paragraph 3.3.14 which is made by the Commissioning Agent in writing during the course of discussions whether or not incorporated into a formal amendment to the proposal in question; and

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

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

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

Commissioning Agent shall design to cost when performing its Services under this Contract.

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

3.5.2 Nothing in the Pennsylvania Engineer, Land Surveyor and Geologist Registration Law, 63 P.S. §§148-158.2, shall prohibit the Commissioning Agent from performing architectural design services as may be incidental to its engineering services under this Contract.

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

3.5.4 In the event the Commissioning Agent fails to comply with the standards specified in Paragraph 3.5 of this Contract, the Commissioning Agent shall perform again, at its own expense, any and all of the Services or Work that is required to be re-performed as a direct or indirect result of such failure. Notwithstanding any review, approval, acceptance, or payment for any and all of the Services by the School District, the Commissioning Agent shall remain responsible for the professional and technical accuracy of all of the Services and Deliverables, as defined herein and furnished under this Contract. This provision shall in no way be considered as limiting the rights of the School District against the Commissioning Agent either under this Contract, in law or in equity.

3.5.5 With the exception of information, data, test results and other materials provided to the Commissioning Agent by others, upon which the Commissioning Agent is entitled to rely for accuracy and completeness under this Contract, the Commissioning Agent shall be responsible for the professional quality, technical accuracy, completeness and coordination of all commissioning plans, specifications, reports, logs, checklists, documents and other services furnished by the Commissioning Agent and its Subconsultants under this Contract. Any commissioning plans, specifications, reports, logs, checklists or documents furnished by the Commissioning Agent or its Subconsultants found to be defective, solely as a result of the errors, omissions or negligence of the Commissioning Agent or its Subconsultants, shall be promptly corrected by the Commissioning Agent or its Subconsultants, at no cost to the School District.

3.6 **Labor, Materials, Supplies and Equipment.** The Commissioning Agent shall furnish all personnel, labor, materials, supplies, equipment, tools, and instruments necessary for the proper provision of the Services described in this Contract, on-time and on-budget, including but not limited to, telephone, fax machine, and similar items, at its facility. The Commissioning Agent shall furnish the personnel and a sufficient amount of materials, supplies, equipment, tools, and instruments to perform the required Services, on-time and on-budget, in a complete, accurate,

and timely manner consistent with the School District's interests or the requests of the Program Manager or the School District and the requirements of this Contract. The Commissioning Agent shall be responsible for the means, methods, techniques, sequences, and procedures to perform the Services required under this Contract. The Commissioning Agent shall perform the required Services in such a manner as to not create a risk of harm to the School District, its agents, representatives, and employees, the general public, and the environment. The Commissioning Agent shall perform the Services required under this Contract using qualified, licensed, or registered personnel at all times.

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

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

3.9 **Project Meetings.** The Commissioning Agent shall prepare for and conduct twice a month progress meetings on the assigned Project(s) with the Program Manager and the School District representatives from the Office of Capital Programs, in addition to other meetings specifically referred to herein. The Commissioning Agent shall participate in community meetings and present deliverables to the community. The Commissioning Agent must also attend school planning team ("SPT") meetings. School planning team meetings will occur once a month during the Design Phase.

3.10 **Project Minutes, Reports, Correspondence and Communications.** The Commissioning Agent shall prepare and distribute minutes of meetings, progress reports, and any other reports, correspondence and communications on the assigned Project(s) to School District representatives of the Office of Capital Programs, the Program Manager, the Commissioning Agent's Subconsultants, the Construction Contractors, and any other Project participants, in an electronic format designated by the School District or the Program Manager. Upon request or as required by this Contract, the Commissioning Agent shall provide the School District with oral or written

reports of its activities, on a monthly basis or more often as needed or required.

3.11 **Coordination and Safety of Onsite Activities.** The Commissioning Agent shall cooperate and coordinate with the Program Manager and all other School District consultants, contractors, and vendors and with School District personnel and consultants whose services for the School District relate to the Commissioning Agent's Services, or requires them to perform activities in support of or in conjunction with the Commissioning Agent's Services; and the Commissioning Agent shall conduct its operations so that it does not interfere with the Program Manager and such other School District consultants, contractors, and vendors and School District personnel and consultants. Any difference or conflict that may arise between the Commissioning Agent and the Program Manager or other School District consultants, contractors, or vendors, or between the Commissioning Agent and the Program Manager or School District personnel or consultants, shall be decided solely by the School District. If requested by the School District or the Program Manager in writing, the Commissioning Agent shall suspend any part of its Services, or modify its Services, if necessary to facilitate the services of other School District consultants, contractors, or vendors or School District personnel or consultants. In the event of such suspension or modification, the Commissioning Agent shall have the right to submit a claim for an extension of time equivalent to the period of any delay caused by compliance with the School District's or the Program Manager's request. Any such claim(s) of the Commissioning Agent shall be submitted and resolved in accordance with Paragraph 3.15 (*Changes*). While on the premises of the School District or of any governmental or other entity other than the School District, the Commissioning Agent shall comply with all rules and regulations of the School District or such other entity, including all safety and security requirements.

3.12 **Subletting and Assignment.**

3.12.1 The Commissioning Agent shall not subcontract any Services hereunder without the School District's prior written consent, other than to the Subconsultants which have been approved by the School District under Paragraph 3.3.12 herein, nor permit any of its Subconsultants to do so. If the Commissioning Agent subcontracts any Services hereunder without the School District's prior written consent, said subcontracting shall be deemed a material breach of this Contract, thereby giving the School District the right to immediately terminate this Contract with no further obligation whatsoever on the part of the School District.

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

3.12.3 The Commissioning Agent shall submit to the School District copies of all Subcontracts prior to execution by the Commissioning Agent with the Commissioning Agent's

written request for the School District's consent. The Commissioning Agent shall not enter into any Subcontract without first obtaining the School District's written consent to the proposed subconsultant and the proposed subcontract, which consent the School District may grant, withhold, condition or deny in its sole discretion. In the event the School District does not consent to a proposed subconsultant, the Commissioning Agent shall immediately replace the proposed subconsultant with one to which the School District does consent; and if the School District does not consent to a proposed subcontract, the Commissioning Agent shall revise the subcontract as required by the School District. In no event shall the Compensation or time of performance be increased on account of the School District's exercise of any of its rights under this Paragraph 3.12.3. The School District's consent to or approval of any Subcontract or Subconsultant shall not create any obligation of the School District to any Subconsultant or in any way relieve the Commissioning Agent of its responsibility for the performance of Subconsultants and their consultants.

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

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

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

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

3.12.8 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 3.12 (*Subletting and Assignment*), an assignment includes the acquisition of the Commissioning Agent, or a controlling interest therein, through an asset sale or a corporate or other merger, the appointment of a receiver or bankruptcy trustee for the Commissioning Agent, and the transfer of this Contract or the Commissioning Agent in any bankruptcy or other insolvency-related proceeding. A receiver or trustee of or for the Commissioning Agent in any federal or state bankruptcy, insolvency or other proceeding concerning the Commissioning Agent shall comply with the requirements set forth in this Contract, including but not limited to this Paragraph 3.12 (*Subletting and Assignment*).

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

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

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

3.14.2 **Notice of Claims.** If the Commissioning Agent receives notice of a legal claim against it in connection with or in any way related to this Contract, the Commissioning Agent

shall (a) submit appropriate written notice of such claim to its insurance carrier within the time frame required for submission of claims by the applicable insurance policy and, (b) within five (5) business days of receipt of notice of the claim, give notice of such claim to the School District and the Program Manager.

3.15 **Changes.**

3.15.1 At any time during the term of this Contract, the School District or the Program Manager or the Commissioning Agent may, without invalidating this Contract, make changes in any of the Services required under this Contract, within the general scope of this Contract as set forth in Section 3 (*Commissioning Agent's Services and Responsibilities*), including, without limitation, requiring additional or different services, and changes in the time of performance; provided, however, as follows: (i) All such changes shall be made in accordance with the terms and conditions of this Paragraph 3.15 and the other provisions of this Contract, and shall be by Contract Modification, which shall be a written order or request that is accepted and agreed to by both the School District and the Commissioning Agent, as evidenced by the signatures of both the School District's Contract Administrator and the Commissioning Agent's Contract Administrator. (ii) If any such change causes an increase or decrease in the prices of services or the time required for the performance of this Contract, the Commissioning Agent shall notify the School District and the Program Manager at the earliest reasonable opportunity, and an equitable adjustment of this Contract amount or time of performance will be made, and will be incorporated as part of the Contract Modification, subject to the following condition: In no event shall the School District be liable to the Commissioning Agent for additional compensation for any alleged change to the Services for which the School District has not agreed to and signed a Contract Modification. A Contract Modification shall set forth this Contract of the Commissioning Agent and the School District on all of the following: (i) a change in the Services; (ii) the amount of adjustment in the Compensation, if any; and (iii) any adjustment in the time of performance. Any Contract Modification that increases the Compensation set forth in Paragraph 6.1.1 must be approved in writing by the School District's Director of Capital Programs to become effective.

3.15.2 All changes in the Services pursuant to this Paragraph 3.15 shall be performed, on-time and on-budget, under applicable provisions of this Contract, and the Commissioning Agent shall proceed to perform the change in accordance with the time of performance provided in the Contract Modification, or if none is provided, shall proceed promptly to avoid adverse impact to the Services.

3.15.3 **Assignment of School District's Right to File Direct Claims against the Prime Contractor for Commissioning Agent's Damages.** The Commissioning Agent agrees that in no event shall the School District or the Program Manager be liable to the Commissioning Agent for payment of additional compensation for any direct, indirect or impact damages, including but not limited to costs of acceleration or for loss of revenue, overhead or profit, or for any delay damages, costs or expenses, including but not limited to attorneys' fees, court costs and legal expenses of whatever kind or nature, arising from any changes in any of the Commissioning Agent's Services required under this Contract, including, without limitation, additional or different services, or changes in the time of performance, that are caused by or attributed to the fault, negligence, breach of contract, or willful act or omission of the Prime Contractor or any of its subcontractors or consultants on the Project, or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the Project. Instead, as

its sole right and remedy with respect to such fault, negligence, breach of contract, willful act or omission, or such delay, disruption, interference or hindrance, of the Prime Contractor or any of its subcontractors or consultants, the Commissioning Agent shall be entitled to make, assert, file or bring a direct claim, action, cause of action or lawsuit against the Prime Contractor or any of its subcontractors or consultants, as an assignee of the School District, pursuant to this Paragraph 3.15.3. For **the sole and only purposes** of making, asserting, filing or bringing direct claims, actions, causes of actions or lawsuits against the Prime Contractor or any of its subcontractors or consultants, the School District hereby assigns to the Commissioning Agent the School District's right under the Prime Contract to make, assert, file or bring direct claims, actions, causes of action or lawsuits against the Prime Contractor or any of its subcontractors or consultants for any additional compensation, damages, losses, costs and expenses of the Commissioning Agent that are caused by or attributed to the fault, negligence, breach of contract, or willful act or omission of the Prime Contractor or any of its subcontractors or consultants on the Project, or the delay, disruption, interference or hindrance of the Prime Contractor or any of its subcontractors or consultants in construction on the Project.

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

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

3.18 **Ownership and Use of Documents.**

3.18.1 **Ownership of Documents, Data and Files.** All documents in any form, data studies, computer files of any type, database records, and reports that are produced by the

Commissioning Agent under this Contract are to be the property of the School District, and shall remain the property of the School District.

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

3.18.3 **Review and Access.** Full access to the Work during the Commissioning Agent's preparation of the documents, data, records, reports, and files shall be available to the School District and the Program Manager 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*.

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

3.19 **Findings Confidential.** Information developed and obtained by the Commissioning Agent is considered confidential by the School District. The Commissioning Agent agrees to refer all inquiries by outside parties to the School District. The Commissioning Agent further agrees that it will not publish any articles, newsletters, marketing materials or other informational materials for public release or its own benefit regarding the assigned Project(s), or any information developed or obtained during the performance of Services for the assigned Project(s), without the express written approval of the School District. Employee newsletters and professional experience statements are not subject to this Paragraph 3.19. For additional requirements pertaining to confidentiality, publicity, and publication, see Section 11, *Confidentiality*, Paragraph 16.7, *Publicity*, and Paragraph 16.8, *General Publication Rights*.

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

3.21 **Deliverables.** The Commissioning Agent shall provide the Deliverables identified in Section 4, *Scope of Services*, of this Contract, on-time and on-budget, in strict conformity with the Scope for the Project and all modifications thereto, and the Project Schedule, and the Work Schedule. Partial or incomplete Deliverables may be accepted for review only when required for a specific and

well-defined purpose and when consented to in advance by the School District or the Program Manager. Such partial or incomplete Deliverables may not be considered as satisfying the specific submittal requirements as set forth herein. Partial or incomplete Deliverables shall in no way relieve the Commissioning Agent of its schedule or cost commitments hereunder.

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

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

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

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

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

within 45 days for technical site plans.

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

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

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

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

3.24 COVID-19 Protocols. The Commissioning Agent shall comply with the School District’s School year 2020-2021 Advancing Education Safety Protocols, as well as any revision to this publication, or any and all future safety and health protocols adopted by the School District related to COVID-19, including but not limited to: (i) all School District Consultants and Contractors and their Subconsultants and Subcontractors entering a School District facility must complete the health screener each day no more than three (3) hours prior to entry, which can be found on the School District’s website at their following webpage: <https://www.philasd.org/employeehealth/covid-19-pre-entry-screening-form/>; and (ii) all School District Consultants and Contractors and their Subconsultants and Subcontractors entering a School District facility must wear masks at all times and must abide by social distancing guidelines. Failure to comply with the COVID-19 Protocols shall be an automatic Event of Default under Section 14.2 of this Contract. All School District Consultants and Contractors and their Subconsultants and Subcontractors must also comply with all applicable Commonwealth of Pennsylvania, Pennsylvania Department of Health, City of Philadelphia, and Philadelphia Department of Public Health COVID-19 orders, regulations, guidances, and restrictions while performing Services under this Contract.

3.25 E-Builder Software. The Commissioning Agent shall use the Internet web-based project management communications tool, E-Builder® software, and protocols included in the E-Builder® software, on the assigned Project(s). The Commissioning Agent shall contact the School District Contracts Manager of the Office for Capital Programs for information on how to secure and pay for the necessary license(s) for themselves and their Subconsultants. The estimated cost for an annual license is \$1,301.00. The use of the project management

communications tool, E-Builder® software, does not replace or change any contractual responsibilities of the participants on the assigned Project(s). The Commissioning Agent and its Subconsultants shall comply with the Electronic Data Requirements set forth in Attachment G of the RFP for Commissioning Agent Services, which are attached as part of Exhibit B and are hereby incorporated by reference as though set forth in full.

Section 4. Scope of Services.

4.1 Schedule.

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

4.1.2 **Work Schedule.** Schedule information for the Commissioning Agent's Services will be described in the Work Schedule and the Project Schedule of the Scope and all modifications thereto for each assigned Project as appropriate. The Commissioning Agent's Services must be provided within the time schedule provided in the Scope and all modifications thereto for each assigned Project. The Commissioning Agent shall refine schedules for the assigned Project(s) utilizing scheduling software approved by the School District or the Program Manager.

4.1.2.1 The Project Schedule shall be developed for each Project and shall be included in the Scope and all modifications thereto for each assigned Project. The Project Schedule shall include conceptual milestone dates for all activities described in the Project scope of work.

4.1.2.2 The Commissioning Agent shall submit an updated Project Schedule to the School District and the Program Manager on a monthly basis for updating of the program and master schedule. The monthly Project Schedule submission shall include any reports, graphic, or electronic copies as required by the School District or the Program Manager.

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

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

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

4.2 **Statement of Services.** The Commissioning Agent shall perform various commissioning services assignments for envelope, mechanical, electrical and plumbing systems and LEED commissioning for building enclosure commissioning and energy systems that are

assigned by the School District Director of Capital Programs or his designee on the School District's projects under the CIP, in strict accordance with the Scope of Services section of the RFP, which is attached as part of Exhibit B and incorporated by reference into this Contract; and the Letters of Understanding, written Scopes or Scopes of Work, and Task Orders, which are attached collectively as Exhibit D and incorporated by reference into this Contract; and the Proposal as outlined in the approved Scope incorporated by reference into this Contract; and on the terms and conditions set forth in this Contract, within the time deadlines set forth in Paragraph 4.1, *Schedule*, of this Contract and within budget requirements. The Commissioning Agent shall perform commissioning services for assigned Projects at various schools in compliance with the International Energy Conservation Code, as adopted by the City of Philadelphia. The Commissioning Agent shall place strict emphasis on quality, schedule, and budget. The Commissioning Agent shall employ competent personnel as required to properly perform these commissioning services in a timely and professionally competent manner as per the RFP and in accordance with Paragraph 3.4, *Standard of Performance*.

4.2.1 The Commissioning Agent shall report directly to the Program Manager. The Program Manager shall directly administer the work of the Commissioning Agent, emphasizing on-time and on-budget performance.

4.2.2 Individual Project assignments made under this Contract shall be ratified by a written Letter of Understanding for each Project (hereinafter called "Project Letter of Understanding"). The Project Letter of Understanding must describe, attach, incorporate, or explain the Scope or Scope of Work, the Project Schedule or Work Schedule, the basis of the applicable Fee method not to exceed the total Fee, if applicable, the Task Order, and any other requirements for the Project assignment. Upon its receipt of the Project assignment, the Commissioning Agent shall promptly execute the Project Letter of Understanding and shall submit the executed Project Letter of Understanding to the Director of Capital Programs for the School District's execution. All fully executed Project Letters of Understanding, together with accompanying written documents, for Project assignments shall be attached as exhibits to this Contract or subsequent amendments to this Contract, and shall be incorporated by reference into this Contract or subsequent amendments to this Contract.

4.2.3 For the purposes of this Section 4, "commissioning" is defined as "the process of ensuring that systems are installed, functionally tested, and capable of being operated and maintained to perform in conformity with their design, the specifications in the construction contract documents, and for the purpose intended".

4.2.4 **Summary of Commissioning Services.** Services under this Contract shall be predominately engineering in nature. Commissioned Systems shall include: (a) Mechanical, including HVAC&R equipment and operating digital controls; (b) Domestic hot water systems, pumps, and controls; (c) Lighting controls including daylighting controls; and (d) Photovoltaic Systems (renewable energy systems).

The specific commissioning tasks performed by the Commissioning Agent for envelope, mechanical, electrical and plumbing systems for assigned Projects shall include the following:

(1) Review the Owner's Project Requirements (OPR) and Basis of Design documents (BoD) including Drawings and Specifications.

(2) Conduct a Commissioning Charrette with project stakeholders.

(3) Develop the commissioning plan.

(4) Perform a design review and provide comments on the interim construction documents, and back check for inclusion in the construction documents.

(5) Provide a building enclosure focused review of the design documents, OPR, and BOD documents when applicable.

(6) Develop and provide the commissioning specifications in the Bid Documents including participation of the contractor in the commissioning process.

(7) Review applicable contractors' submittals.

(8) Schedule and hold a commissioning kick-off meeting.

(9) Conduct bi-weekly Commissioning Meetings during construction.

(10) Attend selected job construction meetings.

(11) Hold regularly scheduled commissioning meetings.

(12) Witness select duct and piping pressure testing.

(13) Observe building enclosure mock-ups when applicable.

(14) Construction observation and witness equipment start-up.

(15) Witness Building automation system (BAS) checkout with controls contractor.

(16) Develop pre-functional and functional performance testing for systems to be commissioned. Utilize sampling approach of like equipment during functional testing.

(17) Provide a base overview of the BAS PID Loop logic framework.

(18) Verify execution of Pre-functional Tests and coordinate with contractors to execute Functional Tests.

(19) Review completed TAB reports.

(20) Monitor Building Automation System trends for 2 months after HVAC system is deemed operable.

- (21) Develop and maintain a Commissioning Issue Log.
- (22) Compile a comprehensive Systems Manual.
- (23) Review and verify training.
- (24) Seasonal commissioning and end of warranty period review.
- (25) Provide complete Commissioning Report.

The Commissioning Agent shall also perform building enclosure commissioning functional performance testing for building enclosure commissioning and energy systems. The following testing shall be provided by the Commissioning Agent:

(1) General Air/Water/Adhesion Functional Performance Testing including: AAMA 501.2; ASTM E1105; ASTM E783; ASTM E1186; ASTM D4541; and a variety of other tests typically conducted in the field.

(2) Dynamic Water Penetration Field Performance Testing: AAMA 501.1 "Standard Test Method for Water Penetration of Windows, Curtain Walls and Doors Using Dynamic Pressure" testing for water penetration resistance performance.

(3) Whole Building Airtightness Testing, when applicable: ASTM E779 "Standard Test Method for Determining Air Leakage Rate by Fan Pressurization" Testing.

4.2.5 The Commissioning Agent shall have staff available to service the assigned Projects in an expeditious manner to comply with the Project Schedule to be provided by the School District or the Program Manager.

4.2.6 The Commissioning Agent may be called upon to provide services on a number of these assigned Projects at the same time.

4.2.7 It is anticipated that the construction cost of most assigned Projects will be between \$300,000 to \$5,000,000. Design and documentation durations will be based on the scope and complexity of the assigned Projects ranging from 2-8 months.

4.2.8 The Commissioning Agent shall provide basic Construction Administration for the bulk of the assigned Projects in accordance with the requirements listed in this Contract and as required by the School District or the Program Manager. The scope of Construction Administration services shall include, but may not be limited to, the following: (a) Reviewing submittals and obtaining approvals by the City of Philadelphia governing authorities; (b) Performing construction site observations; (c) Participating in construction meetings and preparing and distributing meeting minutes; (d) Responding to submittals and Requests for Information (RFIs); (e) Issuing Requests for Proposals; (f) Reviewing Proposals; (g) Reviewing Change Orders; and (h) Providing recommendations for Change Orders and Modifications.

4.2.9 **Limits On Authority and Responsibility.**

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

(2) Nothing contained in this Contract shall be construed to mean that the Commissioning Agent assumes any of the contractual program management services or any of the program management duties, responsibilities, or liabilities of the Program Manager in its contract for program management services with the School District, or any of the customary program management services or program management duties, responsibilities, or liabilities of a program manager on a construction project.

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

(4) Notwithstanding the provisions of Paragraph 3.22, *Safety Responsibilities*, and any other provisions contained in this Contract, the Commissioning Agent is not acting in any manner so as to assume responsibility, in whole or in part, for noncompliance of any Construction Contractors and their subcontractors with applicable federal, state, and local safety laws, statutes, ordinances, codes, rules, regulations, orders and decrees, including but not limited to, OSHA, or with safety standards and regulations established by the School District for the assigned Project(s), including but not limited to standards and regulations set forth in the Safety Manual established for the School District of Philadelphia, or with federal, state, and local health laws, regulations and building codes, or for any accidents arising out of or in connection with safety precautions and safety programs in connection with the construction work on School District construction projects which caused death, personal injury or property damage and which were caused by any Construction Contractors or their subcontractors. Nothing contained in this Contract shall be construed to mean that the Commissioning Agent is acting in a manner so as to assume the Construction Contractors' and their subcontractors' responsibilities or liabilities, in whole or in part, for safety precautions and safety programs in connection with construction work on School District construction projects. Nothing contained in the Safety Manual established for the School District of Philadelphia shall be construed to mean that the Program Manager or the School District or the Commissioning Agent are responsible for the jobsite safety of the construction means, methods, techniques, sequences, or procedures utilized by the Construction Contractors and their subcontractors in connection with construction work on School District construction projects. The Construction Contractors and their subcontractors are fully and solely responsible for the jobsite safety of the construction means, methods, techniques, sequences, and procedures utilized by the Construction Contractors and their subcontractors in connection with construction work on the assigned Project(s). The Construction Contractors and their subcontractors are responsible for maintaining and supervising all safety precautions and programs in connection with construction work on School District construction projects, and for any violations of the safety precautions and programs in connection with construction work on School District construction projects. The Construction Contractors and their subcontractors are also responsible for complying with all

applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property, or their protection from damage, injury or loss, in connection with construction work on School District construction projects, and for taking all necessary precautions to protect the safety and health of their employees and others on the jobsites of School District construction projects, including compliance with all applicable federal, state and local safety and health laws, regulations, and building codes, and for adhering to and enforcing the safety regulations set forth in the Bid Documents and in the Safety Manual established for the School District of Philadelphia.

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

Section 5. School District’s Services and Responsibilities.

5.1 **Summary of Services and Responsibilities.** The School District, through the Program Manager, will supervise and manage the Commissioning services for the assigned Projects. The School District’s services, duties and responsibilities, through the Program Manager, will include, but not be limited to, the following: (a) developing and preparing Scopes of Work for the assigned Projects; (b) directly supervising and managing the Commissioning Agent’s services for the assigned Projects, emphasizing on-time and on-budget performance; (c) verifying or monitoring the Commissioning Agent’s compliance with contract terms and the requirements incorporated into the RFP and the Contract; (d) notifying the Commissioning Agent of any non-compliance with contract terms and the requirements incorporated into the RFP and the Contract; (e) overseeing the processing and approval of invoice payments for the Commissioning Agent; and (f) reviewing and evaluating the Commissioning Agent’s commissioning recommendations and documents for the assigned Projects.

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

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

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

Section 6. Compensation and Payment.

6.1 **Compensation.** The School District has established a “general pool” of shared funds in the amount of _____ Dollars and 00/00 Cents (\$ _____) out of the authorized Capital Fund from which professional commissioning agent services will be expended. The total contract award for professional commissioning agent services shall be for a maximum-not-to-exceed aggregate amount of _____ Dollars and 00/00 Cents (\$ _____). Pursuant to the attached RFP for Commissioning Agent Services, the School District reserves its option to award a Contract for Commissioning Agent Services to more than one (1) professional consulting services firm (Commissioning Agent) for the Capital Improvement Program. It is the intent of the School District to make work assignments as the needs of the Capital Improvement Program and the availability and capability of specified firms dictate, without guarantee of any particular number or dollar value of work assignments to any specific professional consulting services firm, and to pay for all work out of the \$ _____ “general pool” of shared funds of the Capital Fund. The Commissioning Agent acknowledges and agrees that the School District does not promise the Commissioning Agent _____ Dollars and 00/00 Cents worth of work assignments, and that the School District reserves the right to limit the number of work assignments to the Commissioning Agent under this Contract and the amount of the Contract award. The School District does not guarantee the assignment of the complete scheduled Capital Improvement Program, or any of the complete scheduled annual Capital Budget programs, or the complete program of commissioning agent services to the Commissioning Agent.

6.1.1 **Project Compensation.** The School District agrees to pay the Commissioning Agent Project Compensation out of a “general pool” of shared funds up to a total amount not to exceed _____ Dollars and 00/00 Cents (\$ _____) as compensation for the Services performed and Reimbursable Expenses incurred by the Commissioning Agent under this Contract during the Initial Term of this Contract. No funds have currently been authorized for an Additional Term of this Contract. The School District reserves the option, at its sole discretion, of requesting that Commissioning Agent’s work on each individual project be performed based on the percentage of construction cost method provided herein, or an hourly rates method provided herein, or a negotiated fixed fee method provided herein. The School District’s payment of Project Compensation to the Commissioning Agent on each individual project shall be determined by the School District, at its sole option, on one of the following compensation methods: (1) the percentage of construction cost method set forth in Paragraph 6.1.2 herein; (2) the hourly rates method set forth in Paragraph 6.1.3 herein; or (3) the negotiated fixed fee method set forth in Paragraph 6.1.4 herein. The Commissioning Agent shall not have the right to decline the compensation method determined by the School District.

6.1.2 **Percentage of Construction Cost Method.** The rate of the percentage of construction cost on an individual project shall be determined as follows:

| <u>Project Construction Value</u> | <u>Proposed Fee</u> |
|-----------------------------------|---------------------|
| Under \$1,000,000 | _____% |
| \$1,000,000 - \$3,000,000 | _____% |
| Over \$3,000,000 | _____% |

The Commissioning Agent’s percentage of construction cost on an individual project shall be all-inclusive. The Commissioning Agent shall be entitled to payment on an individual project for the authorized Reimbursable Expenses provided in Paragraph 6.8 herein under the percentage of construction cost method.

6.1.3 **Hourly Rates Method.** The hourly rates on an individual project shall be determined by using the hourly billable wage rates of the Key Personnel of the Commissioning Agent and its Subconsultants that are listed in the Commissioning Agent’s Proposal, and attached collectively as part of Exhibit E to this Contract and incorporated by reference into this Contract. The hourly rates on an individual project shall not exceed the hourly billable wage rates listed in the attached Exhibit E to this Contract. These hourly billable wage rates shall be fully loaded, and shall include all labor, benefits, taxes, insurances, fees, overhead costs, administrative costs, reimbursable costs, and profit costs, and shall be firm and fixed priced for the entire duration of this Contract. These hourly billable wage rates shall be all-inclusive wage rates for all personnel listed as Key Personnel on the Commissioning Agent’s Key Personnel Team List and all personnel of its Subconsultants listed on the Subconsultants Personnel Lists. Charges for Principals of the Commissioning Agent and its Subconsultants shall be for minimal hours only. The Commissioning Agent shall be entitled to payment on an individual project for the authorized Reimbursable Expenses provided in Paragraph 6.8 herein under the hourly rates method.

6.1.4 **Negotiated Fixed Fee Method.** The negotiated fixed fee on an individual project shall be determined by the parties’ agreement to a mutually negotiated amount which shall include all costs, including labor, overhead, profit, and other charges, for performance of work on the project. The Commissioning Agent shall be entitled to payment on an individual project for the authorized Reimbursable Expenses provided in Paragraph 6.8 herein under the negotiated fixed fee method.

6.2 **Payment.** Payments for Basic Services on an individual project shall be made as outlined below:

6.2.1 **Percentage of Construction Cost Method.** The School District agrees to pay the Commissioning Agent for Services actually performed on the assigned Project(s) according to the following Project phase time schedule:

| <u>Project Phase</u> | <u>Payment Amount</u> |
|---|--|
| <u>Phase I:</u> through to preparation of Project bid documents | 55% of fee based on detailed cost estimate of Project; estimated cost shall be reviewed and certified by the School District before billing can be processed |
| <u>Phase II:</u> at Project bid opening | 10% of fee based on the lowest responsible bid (total to 65% of the adjusted fee) |
| <u>Phase III:</u> at completion of all Project shop drawings and submittals | 10% of fee based on the lowest responsible bid (total to 75% of the adjusted fee) |
| <u>Phase IV:</u> at Project construction completion | 25% of balance of agreed-to fee |

through to Project commissioning program
completion and resolution of all project change
orders

(1) Payment for Termination of Project Upon Phase Completion. The School District reserves the right, at its sole discretion, to terminate the assigned Project(s) upon completion of a Project phase. The School District shall pay the Commissioning Agent for its Services in accordance with the percentages and agreed-to rates as established in Paragraph 6.2.1 herein.

6.2.2 **Hourly Rates Method.** The School District agrees to pay the Commissioning Agent its staffing related costs for Services actually performed on the assigned Project(s), on a monthly basis, up to the lump sum fee that is set forth in Paragraph 6.1.1, in accordance with the hourly billable wage rates for its Key Personnel that are set forth on the Commissioning Agent'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.

6.2.3 **Negotiated Fixed Fee Method.** The School District agrees to pay the Commissioning Agent, on a monthly basis, in proportion to the actual services performed on the assigned Project(s) based upon the hourly billable wage rates for its Key Personnel that are set forth on the Commissioning Agent'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.

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

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

6.3.3 All Applications for Payment or Professional Services Invoices must be submitted in a form acceptable to the School District, and shall, at a minimum, include the

following: (1) amount of payment applied for; (2) if payment is determined by the percentage of construction cost method, the description of all Services actually performed for which payment is sought and the rate of the percentage of construction cost; (3) if payment is determined by the hourly rates method or the negotiated fixed fee method, an itemized description of all Services actually performed during the previous calendar month for which payment is sought and their associated costs and total charges based upon the hourly billable wage rates of the Commissioning Agent's Key Team Members and its Subconsultants Personnel, attached as Exhibit E and incorporated by reference into this Contract; (4) the total charges; (5) whether the Services performed were Basic or Additional Services; and (6) School District SCS number (where applicable) and Contract number, and shall attach such supporting evidentiary documents as the School District may require.

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

6.3.7 No payment shall be due to the Commissioning Agent before the School District's receipt of a properly itemized Application for Payment or Professional Services Invoice for the Project assignment, together with written summary of Project activities, from the Commissioning Agent.

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

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

6.3.10 **Subconsultant Payment Confirmation.** The Commissioning Agent shall pay each Subconsultant performing Services promptly, after receipt of payment from the School District, out of the amount paid to the Commissioning Agent on account of the Services of such Subconsultant the amount to which such Subconsultant is entitled. Together with each monthly Application for Payment or Professional Services Invoice, exclusive of the first monthly Application for Payment or Professional Services Invoice, the Commissioning Agent shall submit, to the School District administrator named in Paragraph 7.1, *Contract Administrators*, of this Contract, a written release or affidavit or payment confirmation from each Subconsultant that such Subconsultant has received from the Commissioning Agent full payment of the amount to which such Subconsultant was entitled to receive from the Commissioning Agent the previous calendar

month. No payment shall be due to the Commissioning Agent by the School District before the School District's receipt of all required Subconsultant Payment Confirmations from the Commissioning Agent.

6.4 **Withholding of Payments.**

6.4.1 **Withholding of Payments.** Notwithstanding any other payment terms or conditions to the contrary, the School District, after consultation with the Program Manager, reserves the right to withhold promised payments for the Commissioning Agent's substantial failure to perform as agreed. Substantial failure to perform includes, but is not limited to, incomplete or incorrect or late submission of documents required under this Contract. However, before withholding payment under this Contract, the School District shall notify the Commissioning Agent in writing of such failure and grant the Commissioning Agent the opportunity to remedy same within fourteen (14) working days of said written notice. The School District, after consultation with the Program Manager, may extend such remedial period, at its sole discretion, if there is evidence of the Commissioning Agent's good faith effort to remedy the failure. The School District will pay pro rata for the Commissioning Agent's partial performance, provided such performance is acceptable to the School District and the Program Manager and is rendered satisfactorily.

6.4.2 **Reducing of Payments.** Notwithstanding any other payment terms or conditions to the contrary, the School District, after consultation with the Program Manager, reserves the right to reduce promised payments for the Commissioning Agent's incomplete or incorrect or late submission of documents required under this Contract. However, before reducing payment under this Contract, the School District shall notify the Commissioning Agent in writing of such failure and grant the Commissioning Agent the opportunity to remedy same within fourteen (14) working days of said written notice. The School District, after consultation with the Program Manager, may extend such remedial period, at its sole discretion, if there is evidence of the Commissioning Agent's good faith effort to remedy the failure. The School District, at its sole discretion, may accept an incomplete or incorrect or late submission of required documents from the Commissioning Agent, after consultation with the Program Manager. If the School District decides, at its sole discretion, to accept an incomplete or incorrect or late submission of required documents from the Commissioning Agent, then the School District will pay the Commissioning Agent a pro rata amount of the fee for the incomplete or incorrect or late submission.

6.5 **Final Payment.** Final payment, including any unpaid balances and unpaid Reimbursable Expenses to date, shall not be issued to the Commissioning Agent until the Commissioning Agent has satisfactorily completed all Services on the Project, and the Program Manager and the School District have received all deliverables required under this Contract, and have approved all deliverables required under this Contract as being in compliance with the Contract requirements.

6.6 **Basic Services.** All services that the Commissioning Agent is required to perform for the assigned 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 Commissioning Agent shall not be compensated as Additional Services if the delay, disruption, interference or hindrance in construction on the assigned

Project(s) is (are) due (1) to the fault, negligence, failure to act, error, omission or breach of contract of the Commissioning Agent, or (2) to a Force Majeure Condition as provided in Paragraph 3.15, *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 Commissioning Agent's Work shall not constitute Additional Services. Changes or corrections to the Commissioning Agent's Work, requested by the School District and made after the School District's previous final approval of such Work, shall constitute Additional Services.

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

6.7.3 The School District agrees to pay the Commissioning Agent for its identified and approved Additional Services in accordance with the hourly billable wage rates for its Key Personnel that are set forth on the Commissioning Agent'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 Commissioning Agent for Additional Services performed by persons not listed on the Commissioning Agent's Key Personnel Team List and the Subconsultants Personnel Lists or additional key personnel added to the Services, provided the persons not listed or the additional key personnel, together with their hourly billable wage rates, have both been approved in advance by the School District.

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

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

6.8.1 Analyses, investigations, surveys and reports described in Section 5 above as Reimbursable Services;

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

6.8.3 The Commissioning Agent shall not be entitled to any other Reimbursable Expenses, except with the prior written consent of the School District.

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

6.8.5 The cost of normal progress prints requested by the School District for its review or record shall not be considered a Reimbursable Expense.

6.8.6 The cost of each of the Deliverables listed in the Commissioning Agent's Fee Proposal shall be included in the total Compensation amount set forth in Paragraph 6.1 of this Contract and shall not be considered Reimbursable Expenses.

6.8.7 The total amount of approved Reimbursable Expenses are included in the total Compensation amount set forth in Paragraph 6.1 of this Contract.

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

6.10 **Non-Authorization of Funds.** The Commissioning Agent acknowledges that payments under this Contract may not exceed the amount that the School District's Auditing Services 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 Commissioning Agent agrees that the School District shall not be obligated to fund this Contract except out of funds certified by the School District's Auditing Services 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 Commissioning Agent, the scope of the Services required under this Contract and the amount of the Compensation, consistent with the nature, amount, and circumstances of the loss of funding; or

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

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

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

6.13 **Audits; Records and Payments; Inspectors General.**

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 Commissioning Agent’s performance under this Contract, including but not limited to its billings and applications for payment or invoices and payments received.

6.13.2 Inspection. If requested by an Auditor or the School District, the Commissioning Agent shall submit to the Auditor and the School District, for review or inspection, all vouchers and applications or invoices presented for payment pursuant to this Contract, all cancelled checks, Materials, invoices, vouchers, reports, work product, work papers, books, records and accounts (whether in electronic, paper, or other form or medium) upon which the vouchers or applications or invoices are based, and any and all documentation and justification in support of expenditures or fees incurred pursuant to this Contract. The Commissioning Agent acknowledges and agrees that any Auditor may inspect or review all of its Work and Materials, and all of its sites, locations and facilities related to its performance under this Contract. Inspection and review of Work and Materials shall take place at the offices of the Commissioning Agent in the City, or in another location with the Auditor’s consent. The Commissioning Agent shall cooperate with all School District, City, Commonwealth of Pennsylvania and federal inspections and reviews conducted in accordance with the provisions of this Contract. The scope of such inspection and review of the Work and Materials, and sites, locations and facilities, including, without limitation, programs, lies in the sole discretion of the Auditor. Such inspection or review may include, without limitation, meetings with persons receiving services under this Contract, review of staffing ratios and job descriptions, and meetings with any of the Commissioning Agent’s staff members who either directly or indirectly participate or participated in carrying out any of the Work, including preparing, delivering or installing any Materials.

6.13.3 Retention and Availability of Records. The Commissioning Agent shall retain all records, books of account and documentation pertaining to this Contract for the greater of (i) the period required by Applicable Law, or (ii) six (6) years following expiration or termination of this Contract; provided that if, however, any litigation, claim or audit commences prior to expiration of said six (6) year period, then the Commissioning Agent shall retain the records until all litigation, claims or audit findings have been completely terminated or resolved without right of further appeal. The Commissioning Agent shall make available, within the School District or in the City or at the Commissioning Agent’s offices during regular business hours, at reasonable times during the term of this Contract and for the period set forth above in this Paragraph 6.13, all records (whether in electronic, paper, or other form or medium) pertaining to this Contract for the purpose of inspection, audit or reproduction by any Auditor. The Commissioning Agent shall provide such records without unreasonable delay when requested by an Auditor. The Commissioning Agent shall include this Paragraph 6.13 in all Subcontracts for Services required by this Contract.

6.13.4 Inspector General; Inspectors General. The School District’s Inspector General shall enjoy all the rights, powers and privileges of an Auditor under this Contract, and any and all additional rights, powers and privileges as provided by Applicable Law and by delegation from the Board of Education or other duly constituted authority having jurisdiction, *e.g.*, a commission. The Commissioning Agent shall cooperate and comply with any audit or investigation by the School District’s Inspector General, or by any City, Commonwealth or federal inspector general having jurisdiction, and any joint investigation. The Commissioning Agent and its partners, members, shareholders, directors, officers, employees, agents, contractors and Subconsultants shall cooperate fully with the School District’s Inspector General by providing

true, correct and complete information and records, as well as all necessary or appropriate assistance in any matter investigated by the Inspector General. In any investigation the School District's Inspector General shall have and enjoy complete and unimpeded access to all papers, workpapers, books, records, documents, information, personnel, processes, *e.g.*, meetings, data, computer hard drives and networks, e-mail, text or instant messages, facilities and other assets owned, leased, licensed or used by or for the School District, including but not limited to information regarding the Commissioning Agent or other School District contractors, or any other person involved in any way with the School District, as deemed necessary in performing investigative or audit activities pertaining in any way to the business, operations or public functions of the School District or the Board of Education, and in the custody of the Commissioning Agent or any Subconsultant.

6.13.5 "Materials" as used in this Paragraph 6.13 means any and all reports, records, documents, documentation, information, supplies, plans, original drawings, specifications, computations, sketches, renderings, arrangements, videos, pamphlets, advertisements, statistics and other data, computer tapes, computer programs, software, and other tangible work product, materials or goods prepared, supplied or developed by the Commissioning Agent as part of or in connection with the Work, or for the Commissioning Agent by a Subconsultant in connection with the Work, and deliverable or delivered to the School District by the Commissioning Agent or its Subconsultants pursuant to this Contract.

Section 7. Contract Management.

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

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

Telephone number: _____

Facsimile number: _____

Email address: _____

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

Ahmed Sultan, Director of Capital Programs
or Nicole Ward, Design Manager of Capital Programs
The School District of Philadelphia
Office of Capital Programs

440 North Broad Street, Suite 371
Philadelphia, PA 19130-4015
Telephone number: (215) 400-4730
Facsimile number: (215) 400-4731
Email address: asultan@philasd.org or nward@philasd.org

7.1.3 The Program Manager's initial Contract Administrator shall be:

Craig Hinton, PMP, Program Manager
Johnson, Mirmiran & Thompson, Inc.
1600 Market Street, Suite 520
Philadelphia, PA 19103
Telephone number: (267) 256-0300
Facsimile number: (267) 256-0395
Email address: chinton@jmt.com

Section 8. Employment Practices.

8.1 Key Personnel.

8.1.1 Key personnel are defined as, but not limited to, the following positions:

- Principal
- Project Manager
- Construction Administrator
- Envelop Consultant
- Mechanical Engineer
- Plumbing Engineer
- Electrical Engineer

8.1.2 Upon Contract award, the Commissioning Agent shall assign the Key Personnel as noted in Exhibit C (Proposal, Organizational Chart) and Exhibit E (Commissioning Agent Key Personnel List) to perform the services of the Commissioning Agent required under this Contract. The Commissioning Agent and its Subconsultants shall not reassign or replace any Key Personnel in Exhibit C or Exhibit E, without the School District's prior written consent, which shall not be unreasonably withheld. All Key Personnel must participate in the assigned Project(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 Commissioning Agent to remove any Key Personnel from the Services provided under this Contract upon material reason therefore given in writing, and to review and approve the replacement of Key Personnel. If removal is for cause, any cost of such removal shall be borne by the Commissioning Agent.

8.2 **Subconsultants.** Subconsultants of the Commissioning Agent shall look only to the Commissioning Agent for payment, satisfaction, or legal redress in the event of any dispute arising out of this Contract, and hereby waive any claim or cause of action against the School District arising

out of a Subcontract or other transaction with the Commissioning Agent. The School District shall have no obligation to pay nor to see to the payment of any monies to any Subconsultant of the Commissioning Agent, except as may otherwise be required by law. Nothing contained in Paragraph 6.3, *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 Commissioning Agent. 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 Commissioning Agent nor its Subconsultants can make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the prompt payment provisions of the Award and Execution of Public Contracts Law (repealed), or the prompt payment provisions of the Commonwealth Procurement Code, General Procurement Provisions. The School District of Philadelphia is also a “school district” and a “political subdivision” of the Commonwealth of Pennsylvania, and therefore the Contractor and Subcontractor Payment Act, Act of February 17, 1994, P.L. 73, No. 7 (73 P.S. §501 *et seq.*), does not apply to the School District of Philadelphia and its contracts for work or improvements on its real properties. Neither the Commissioning Agent nor its Subconsultants can make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the Contractor and Subcontractor Payment Act.

8.3 **Equal Opportunity.**

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

8.3.2 All parties hereto agree that in the performance of this Contract there shall be no discrimination against any employee or other person on account of age, race, color, sex, sexual orientation, creed, ancestry or national origin, disabled or Vietnam era veteran status. The School District, upon receipt of evidence of such discrimination by the Commissioning Agent or its agents, employees, representatives, or Subconsultants, shall have the right, at its sole discretion, to terminate

this Contract. The Commissioning Agent agrees to include this Paragraph 8.3, with appropriate adjustments for the identity of the parties, in any Subcontracts that are entered into for Services to be performed under this Contract.

8.3.3 The Commissioning Agent shall not discriminate nor permit discrimination against any person because of race, color, 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 Commissioning Agent or its agents, employees or representatives, the School District shall have the right to terminate this Contract. In the event of the continued refusal on the part of the Commissioning Agent to comply with this anti-discrimination provision, the Commissioning Agent may be removed from the list of approved bidders of the School District. The Commissioning Agent agrees to include this Paragraph 8.3, with appropriate adjustments for the identity of the parties, in all Subcontracts which are entered into for work to be performed pursuant to this Contract.

8.3.4 The Commissioning Agent shall ensure that minority-owned business enterprises (“MBEs”), and women-owned business enterprises (“WBEs”) have the maximum opportunity to participate in the performance of this engagement, and shall make a good-faith effort to achieve the goals. [The Commissioning Agent represents and certifies that it is a minority-owned business enterprise (MBE) firm or a woman-owned business enterprise (WBE) firm or a dual minority-owned and woman-owned business enterprise (MWBE) firm.] The Commissioning Agent [further] represents and certifies that it will employ the services of Subconsultant(s), as necessary, to achieve 15%-20% participation with either a minority-owned business enterprise (MBE) or a woman-owned business enterprise (WBE) in the performance of this School District Contract. [The Commissioning Agent [further] represents and certifies that it is a minority-owned business enterprise (MBE) or a woman-owned business enterprise (WBE) or a dual minority-owned and woman-owned business 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 its M/WBE Participation Plan.] The Commissioning Agent [further] represents and certifies that it will use the MBE and WBE firms as Subcontractors under this Contract in the percentages listed as set forth in its M/WBE Participation Plan. The M/WBE Participation Plan, which is a part of the Proposal of the Commissioning Agent, is attached as Exhibit F, and is incorporated by reference into this Contract. The Commissioning Agent’s M/WBE Participation Plan shall be enforceable as any other contractual term or condition of this Contract. Sanction for breach of the Commissioning Agent’s M/WBE Participation Plan may include suspension, cancellation of this Contract and/or debarment from future contracting opportunities with the School District.

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

Commissioning Agent: (a) replaces or substitutes the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent's M/WBE Participation Plan; or (b) increases or decreases the contract MBE/WBE percentages for the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent's M/WBE Participation Plan; or (c) changes the scopes of work for the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent's M/WBE Participation Plan; or (d) increases or decreases the dollars amounts, if applicable, for the MBE/WBE firms identified in Paragraph 8.3.4 and the Commissioning Agent's M/WBE Participation Plan.

8.4 **Non-Discrimination.**

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

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

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

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

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

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

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

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

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

(4) That in the event apprentices are hired in any skilled craft area, the Commissioning Agent will endeavor to hire equal numbers of culturally diverse male and female trainees in each skill area.

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

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

8.4.4 **Penalties for Failure to Comply.**

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

(2) In the event that the School District determines, after investigation, that the Commissioning Agent or any Subconsultant has failed to comply with any provision of this Paragraph 8.4 and to demonstrate a good faith effort to comply, the School District may, in its

sole discretion, invoke the termination provisions of this Contract or move to disqualify, suspend, or debar the Commissioning Agent or any Subconsultant pursuant to Board Policy No. 621.

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

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

Section 9. Indemnification.

9.1 Indemnification.

9.1.1 The Commissioning Agent agrees to assume liability for and does specifically agree to indemnify, save, protect, and hold harmless the School District, its officers, employees, agents and members of the School Reform Commission and the Board of Education, and the Program Manager and its officers, employees, and Subconsultants on the Project, 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 or the Program Manager or its Subconsultants on the Project, and arising out of or in any way related to or resulting from the Commissioning Agent's carrying out the provisions of this Contract, including, but not limited to, any claim for actual or alleged loss of life, bodily injury, personal injury, or damage to property, alleged to have been caused, in whole or in part, by the negligent acts, errors, omissions, breaches of contract, intentional acts or omissions, or employment discrimination of the Commissioning Agent, its officers, agents, employees, servants, or Subconsultants acting pursuant to this Contract; or arising out of this Contract with the School District and related to any claim whatsoever brought by or against any agent, servant, employee, or Subconsultant of the Commissioning Agent for any alleged negligence or condition caused or contributed to, in whole or in part, by the School District; and from any claim for license fees or taxes for which the Commissioning Agent is or may become responsible, **and any and all claims of illness, disability, or death regarding the transmission of infectious and communicable diseases, whether arising from the negligence of the Commissioning Agent or its Subconsultants or otherwise.** The Commissioning Agent agrees that in the event that any employee of the Commissioning Agent makes any claim or files a lawsuit against the School District for any alleged injury on School District property or in connection with services being performed by the Commissioning Agent under this Contract that the Commissioning Agent shall fully defend, indemnify and hold harmless the School District for all damages, losses and expenses which may result therefrom (including attorneys' fees, court costs and legal expenses of whatever kind or nature). This indemnity provision is expressly intended to waive the statutory immunity afforded to the Commissioning Agent as an employer pursuant to §481(b) of the Pennsylvania Workers' Compensation Act, 77 P.S. §481(b), and to permit the School District to seek contribution or indemnity from the Commissioning Agent in the event that the School District is sued by an employee of the Commissioning Agent. The parties further intend

that this waiver satisfy the judicial requirements applicable to an express waiver as articulated by the Superior Court of Pennsylvania in Bester v. Essex Crane Rental Corp. v. Russell Construction Co., 619 A.2d 304 (Pa.Super. 1993).

9.1.2 This indemnity provision is intended, *inter alia*, to protect the School District, its commission members, board directors, officers, agents, representatives and employees from all claims that are asserted by employees, agents, or workers of any contractors or consultants who are injured on or by School District real property, 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 negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or persons described in this Contract, and is independent of whether or not the Commissioning Agent has insurance.

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

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

Section 10. Insurance.

10.1 **Insurance.** Prior to the commencement of any of the Services under this Contract and until the latest of completion of the Services, final payment by the School District, or final acceptance of the Services, the Commissioning Agent (including but not limited to Architects or Engineers) shall provide and maintain, in full force and effect, the following minimum levels of insurance, at its sole cost and expense, covering the performance of the Services required under this Contract. The Commissioning Agent shall include in its proposal or quote its cost of the required insurance, and the Parties shall make no adjustment to the Compensation on account of these insurance costs. The term “Commissioning Agent” shall include Subcontractors and Sub-Subcontractors at every tier. The Commissioning Agent shall require its Subcontractors under this Contract to maintain the required minimum levels of insurance. The Commissioning Agent shall deliver to the School District a Certificate or Certificates of Insurance evidencing and reflecting the effective date of coverage, as set forth below in Subparagraph 10.1e. In no event shall the Commissioning Agent commence or permit commencement of any of the Services (or continue Services, in the case of an Additional Term) unless and until the Commissioning Agent delivers and the School District has approved the required evidence of insurance in conformity with this Contract. If the School District finds the Commissioning Agent’s evidence of insurance non-compliant, the School District shall have the right, but not the duty, at its discretion, to purchase the required insurance coverage or coverages, at the sole cost and expense of the Commissioning Agent, by set-off against Compensation accrued or accruing, or through the Commissioning Agent’s direct payment or reimbursement to the School District. The School District by notice or other communication may require additional coverage or coverages, or higher coverage limits, aggregate limits or sub-limits, at any time during the term of this Contract if, in the School District’s sole judgment, a risk or risks warrant such additional coverage or limits.

a. **Rating.** The Commissioning Agent shall procure all insurance from insurers permitted to do business in the Commonwealth of Pennsylvania and having an A.M. Best Rating of at least “A-, Class VIII”.

b. **Self-Insured Retention.** The Commissioning Agent shall not have a Self-Insured Retention (“SIR”) on any policy greater than \$50,000; any and all SIRS shall remain the Commissioning Agent’s responsibility. If the Commissioning Agent’s policy or policies has or have a SIR exceeding this amount, the Commissioning Agent must obtain the School District’s approval of the SIR prior to starting Services. In the event any policy includes an SIR, the Commissioning Agent is solely responsible for payment within the SIR of the policy or policies, and the Commissioning Agent shall provide the Additional Insured requirements specified herein within the SIR.

c. **Occurrence Basis.** The Commissioning Agent shall ensure that its insurer or insurers write all insurance required hereunder, with the exception of the Professional Liability Insurance, on an “occurrence” basis. Claims-Made coverage must include:

- i. a retroactive date on or prior to the start of Services under this Contract; and
- ii. “tail coverage/an extended reporting period” or coverage for a period of three (3) years subsequent to the later of completion of the Services or final payment.

d. Notice of Cancellation or Non-Renewal. The Commissioning Agent's insurance carrier or carriers each shall agree to provide at least thirty (30) calendar days prior written notice to the School District in the event of any cancellation or non-renewal of any coverage. In the event of cancellation or non-renewal of any coverage or coverages, the Commissioning Agent shall replace any such coverage or coverages so as to comply with the insurance requirements set forth in this Contract, with no lapse of coverage for any time period. In the event the Commissioning Agent's insurance carrier or carriers do not issue or endorse their policy or policies to comply with this Subparagraph 10.1d., the Commissioning Agent shall give notice to the School District of its receipt of any notice of cancellation or non-renewal at least thirty (30) calendar days prior to the effective date of the proposed cancellation or non-renewal.

e. Certificates. The Commissioning Agent shall deliver to the School District the required original Certificate or Certificates of Insurance, evidencing the insurance coverages required under this Contract, at least ten (10) calendar days prior to the start of the Services, and again at least ten (10) calendar days before an Additional Term, and thereafter promptly before or on renewal or replacement of each coverage. The Commissioning Agent shall not begin any Services until the School District has reviewed and, in its discretion, approved the Certificate or Certificates of Insurance. The required insurance shall not contain any exclusions or Endorsements unacceptable to the School District. Certificates of Insurance and Endorsements must specifically reference the School District Contract number for which they are being submitted. The Commissioning Agent shall send all Certificates of Insurance to:

The School District of Philadelphia
Office of Risk Management
440 North Broad Street, Suite 325
Philadelphia, PA 19130-4015
Attn.: Riccardo Zucaro, Director of Risk Management
E-mail: rzucaro@philasd.org and crollins@philasd.org

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
E-mail: jejones@philasd.org

Failure of the School District to demand these Certificates or other evidence of full compliance with these insurance requirements or failure of the School District to identify a deficiency from evidence that is provided shall not constitute a waiver of the Commissioning Agent's obligation to maintain such insurance.

With respect to insurance maintained after final payment in compliance with a requirement below, an additional Certificate(s) evidencing such coverage shall be provided to the School District with final application for payment and thereafter upon renewal or replacement of such insurance until the expiration of the time period for which such insurance must be maintained.

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.

The School District reserves the right to require the Commissioning Agent to furnish certified copies of the original policies of all insurance required under this Contract at any time upon (10) calendar days' written notice to the Commissioning Agent.

f. Additional Insured. The Commissioning Agent shall add the School District of Philadelphia and the Program Manager, Johnson, Mirmiran and Thompson, Inc., and the Program Manager's Subconsultants on the Project, as Additional Insureds on all liability policies, except Workers' Compensation and Professional Liability Policy, where applicable, for ongoing operations and completed operations, using ISO Endorsements CG 2010 and CG 2037, or their equivalents, on a primary noncontributory basis. Coverage shall include ongoing and completed operations. Each of the Additional Insured's respective directors, officers, board members, employees, agents and representatives shall also constitute Additional Insureds. The Commissioning Agent and its insurer or insurers shall provide coverage for a period of three (3) years subsequent to the later of completion of Services or final payment. The School District reserves the right to require the Commissioning Agent to name other parties as Additional Insureds. There shall be no "Insured versus Insured Exclusion" on any policies (other than "Named Insured versus Named Insured"); all policies will provide for "cross liability coverage", per standard ISO policy forms. The Commissioning Agent shall procure and maintain an endorsement or endorsements stating that: (i) the coverage afforded the School District and its board members, 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 board members, officers, employees and agents shall invalidate the coverage, other than an act or omission that would constitute willful misconduct or gross negligence.

g. Waiver of Rights of Subrogation. The Commissioning Agent shall waive all rights of recovery against the School District and all of the Additional Insureds for loss or damage covered by any of the insurance maintained by the Commissioning Agent.

h. No Limitation of Liability. Neither the Parties nor any tribunal or adjudicatory body shall or may construe the amount of insurance set forth in the insurance coverages required in this Section 10 (*Insurance*), as a limitation of the liability of the Commissioning Agent. The carrying of insurance as set forth in this Section 10 (*Insurance*) shall not relieve the Commissioning Agent of any duty or liability under the Contract, except to the extent of insurance proceeds paid. Any type of insurance, or any increase in limits of liability, not described above, which the Commissioning Agent requires for its own protection or on account of statute shall be its own expense.

i. Notice of Accidents, Claims and Suits. The Commissioning Agent shall promptly notify the School District and the appropriate insurance company(ies) in writing of any accident(s) as well as any claim, suit or process received by the Commissioning Agent arising in the course of operations under the Contract. The Commissioning Agent shall forward such documents received to its insurance company(ies), as soon as practicable, or as required by their insurance policy or policies. The Commissioning Agent shall advise the School District in writing, within ten (10) calendar days upon notification of a claim or lawsuit based upon the

Commissioning Agent's services, omission or breach, that it will abide fully by Paragraph 9.1 (*Indemnification*) and Section 10 (*Insurance*) of this Contract, and that the applicable insurance carrier(s) has (have) been advised to defend, indemnify, and hold harmless the School District in accordance with the provisions of Paragraph 9.1 (*Indemnification*) and Section 10 (*Insurance*) of this Contract. The Commissioning Agent shall not decline to provide the School District with full protection and coverage under Paragraph 9.1 (*Indemnification*) and Section 10 (*Insurance*) of this Contract because some other contractor or consultant may, in whole or in part, be responsible for the occurrence, death, injury, damage, or loss to persons or property, or economic loss, damage, or expense, or because the School District may be a co-insured or an additional insured on some other contractor's or consultant's policy of insurance. The Commissioning Agent agrees that any violation of this Paragraph 10.1i. of Section 10 (*Insurance*) shall be deemed a material breach of this Contract.

j. **Self-Insurance.** The Commissioning Agent may not self-insure any of the coverages required under this Contract without the prior written approval of the School District Director of Risk Management. In the event that the Commissioning Agent desires to self-insure any of the coverages listed below, it shall submit to the School District's Contract Administrator and School District Director of Risk Management, prior to the commencement of Services hereunder, a certified copy of the Commissioning Agent's most recent audited financial statement, and such other evidence of its qualifications to act as a self-insurer (e.g., State approval) as may be requested by the School District's Contract Administrator or School District Director of Risk Management. In the event such approval is granted, it is understood and agreed that the School District, its board members, officers, employees and agents shall be entitled to receive the same coverages and benefits under the Commissioning Agent's self-insurance program that they would have received had the insurance requirements been satisfied by an insurer or insurers permitted to do business in the Commonwealth of Pennsylvania or otherwise acceptable to the School District Director of Risk Management. If at the time of commencement of this Contract, the Commissioning Agent self-insures its professional liability or workers' compensation and employers' liability coverage, the Commissioning Agent may, in lieu of the foregoing, furnish to the School District Director of Risk Management and School District a current copy of the State certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate. The insurance (including self-insurance) requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made in this Contract by the Commissioning Agent to the School District, or to limit the Commissioning Agent's liability under this Contract to the limits of the policies of insurance (or self-insurance) required to be maintained by the Commissioning Agent hereunder.

10.2 **Required Coverages.** The following may be provided through a combination of primary and excess policies in order to meet the minimum limits set forth below.

a. **Workers' Compensation and Employer's Liability:** Provided in the State in which the Commissioning Agent performs the Services and elsewhere as required, and shall include:

- (1) Workers' Compensation Coverage: Statutory Requirements.
- (2) Employers' Liability Limits not less than:

- (i) Bodily Injury by Accident: \$100,000 Each Accident
- (ii) Bodily Injury by Disease \$100,000 Each Employer
- (iii) Bodily Injury by Disease \$500,000 Policy Limit

(3) USL&H, Maritime Liability, FELA, and DBA Coverage, if applicable.

(4) Includes coverage for sole proprietors, partners, members or officers who will be performing the Services.

(5) Where applicable, if the Commissioning Agent is lending or leasing its employees to the School District for the Services under this Contract (e.g., crane rental with operator), it is the Commissioning Agent's responsibility to provide the Workers' Compensation and Employers' Liability coverage and to have their policy endorsed with the proper Alternate Employer Endorsement in favor of the School District.

b. **Commercial General Liability:** Provided on ISO form CG 00 01 04 13 or an equivalent form including Premises – Operations, Independent Contractors, Products/Completed Operations, Broad Form Property Damage, Contractual Liability, and Personal Injury and Advertising Injury.

(1) Occurrence Form with the following limits:

- (i) General Aggregate: \$2,000,000
- (ii) Products/Completed Operations Aggregate: \$2,000,000
- (iii) Each Occurrence: \$1,000,000
- (iv) Personal and Advertising Injury: \$1,000,000

(2) Products/Completed Operations Coverage must be maintained for a period of at least three (3) years after final payment/completion of the Services (including coverage for the Additional Insureds as set forth in this Section 10 (*Insurance*)).

(3) The General Aggregate Limit must apply on a Per Project basis.

(4) Coverage for “Resulting Damage”.

(5) No sexual abuse or molestation exclusion.

(6) No amendment to the definition of an “Insured Contract”.

(7) 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.

c. **Automobile Liability:**

(1) Coverage to include All Owned, Hired and Non-Owned Vehicles, or “any Auto”. If the Commissioning Agent does not have any Owned Vehicles, the

Commissioning Agent shall nevertheless maintain coverage for Hired and Non-Owned Vehicles as either a stand-alone policy or endorsed onto the Commercial General Liability policy above.

(2) Per Accident Combined Single Limit: \$1,000,000

d. **Commercial Umbrella Liability:**

(1) Policy or policies to apply on a Following Form Basis of the following:

- (i) Commercial General Liability,
- (ii) Automobile Liability, and
- (iii) Employers' Liability Coverage.

(2) Minimum Limits of Liability:

- (i) Occurrence Limit: \$10,000,000
- (ii) Aggregate Limit (where applicable) \$10,000,000

e. **Architects and Engineers Professional Liability Policy:**

(1) Covering Architectural errors and omissions, including liability assumed under this Contract. Also covering losses caused by professional incidents that arise from the operations of the Architect and Engineer and/or their Subcontractors of any tier.

(2) The definition of "Covered Services" shall include the services required in the scope of this Contract.

(3) Minimum Limits of Liability:

- (i) Per Claim Limit: \$2,000,000
- (ii) Aggregate Limit: \$2,000,000
- (iii) Deductible Not to Exceed: \$50,000

(4) Insurance to be maintained for the duration of the Services and for a period of three (3) years after completion of the Services/final payment.

f. **Valuable Papers and Records Coverage:**

(1) 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 Project.

Section 11. Confidentiality.

11.1 **Confidential and Proprietary Information.** The Commissioning Agent acknowledges that it will be exposed to confidential and proprietary information of the School

District and that such confidential and proprietary information will be contained in papers, records, documents and materials belonging to the School District or stored on equipment owned and operated by the School District. The Commissioning Agent shall keep in strictest confidence all information relating to this Contract and all information that may be acquired in connection with or as a result of this Contract, which the School District designates as confidential or proprietary. The School District hereby designates the School District Data listed in Paragraph 11.3 as “Confidential and Proprietary Information”. During the term of this Contract and at any time thereafter, without the prior written consent of the School District, the Commissioning Agent shall not publish, disclose or use 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 Commissioning Agent 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 Commissioning Agent shall return to the School District all of the Confidential and Proprietary Information designated by the School District in Paragraphs 11.1 and 11.3 at the termination or expiration of this Contract.

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

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

- (a) financial data, records, and information related to the assigned Project(s);
and
- (b) any Data provided by the School District to the Commissioning Agent in connection with the Services provided by the Commissioning Agent; and

(c) any and all other records, documents, computer software (whether owned by the School District or licensed or otherwise furnished to the School District by third parties), and data furnished by the School District to the Commissioning Agent in relation to the Services required under this Contract; and

(d) all records, documents, data, information, programs, and items of Services created by the Commissioning Agent for the School District as part of the Services required under this Contract.

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

(a) was known to the Commissioning Agent prior to the commencement of its performance of this Contract, free of any obligation to keep it confidential, or is proprietary to the Commissioning Agent; or

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

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

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

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

Section 12. Disputes.

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

| | | |
|---|---------------------|---------------------------|
| School District | Commissioning Agent | Time After Dispute Notice |
| Program Manager | Project Manager | 15 days |
| Program Manager | 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 or the Program Manager may order the Commissioning Agent, in writing, to stop or abandon all or any part of its Services for the assigned Project(s), for the convenience of the School District, or for work stoppages beyond the control of the School District or the Program Manager or the Commissioning Agent. Any increased costs incurred as a result of the stoppage or abandonment of the assigned Project(s) shall be an equitable amount determined by the School District and the Commissioning Agent in view of all the facts and circumstances. If, however, the assigned Project(s) is(are) abandoned, the School District shall pay the Commissioning Agent for all Services performed and Reimbursable Expenses incurred to the date of abandonment in accordance with Paragraph 14.1, *Termination for Convenience*, of this Contract.

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

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

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

13.2.3 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 Commissioning Agent. Such termination for convenience shall be, at the School District's sole discretion, and without penalty, cost, or liability to the School District.

14.1.2 Effect of Termination for Convenience or Similar Grounds.

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

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

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

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

14.2 Termination for Default.

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

(a) Failure by the Commissioning Agent or any Subconsultant to comply with any material provision, term, or condition of this Contract;

(b) The Commissioning Agent's (i) filing for bankruptcy, (ii) making any assignment for the benefit of creditors, (iii) consent to the appointment of a trustee or receiver or custodian to take possession of all or substantially all the assets of the Commissioning Agent

for the benefit of creditors, (iv) insolvency, as defined by Applicable Law, (v) taking any action under any federal or state insolvency, bankruptcy, reorganization, moratorium or other debtor relief act or statute, or (vi) the filing of an involuntary petition against the Commissioning Agent under the Federal Bankruptcy Code or any similar state or federal law which remains undismissed for a period of forty-five (45) days;

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

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

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

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

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

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

(i) Failure by the Commissioning Agent to comply with any term, covenant or condition set forth in Paragraph 16.18, *Tax Compliance*, or the breach of any of the Commissioning Agent's representations and warranties set forth in Paragraph 3.3, *Commissioning Agent's Representations, Warranties and Commitments*.

14.2.2 **Notice and Cure**. If the Commissioning Agent commits or permits an Event of Default, the School District shall notify the Commissioning Agent in writing of its

determination that an Event of Default has occurred, and shall specify in reasonable detail the nature of the Default. Except for the breaches set forth in subparagraphs (b) through (i) of this Paragraph 14.2, the Commissioning Agent shall have ten (10) business days from receipt of that notice to correct the Event of Default. If the Event of Default is not cured within that time period, the School District, after consultation with the Program Manager, may terminate this Contract by providing the Commissioning Agent with written notice of Termination for Default. The School District, after consultation with the Program Manager, may extend such time period, at its sole discretion, if there is evidence of the Commissioning Agent's good faith effort to cure the Event of Default within such time period. No notice from the School District or period of cure shall be required before invoking the remedies described in Paragraph 14.5, *Additional Remedies of the School District*, of this Contract if: (1) the Commissioning Agent has temporarily or permanently ceased performing the Work; (2) an emergency has occurred relating to the Work, and that emergency requires immediate exercise of the School District's rights or remedies, as determined by the School District in its sole discretion; (3) the School District has previously notified the Commissioning Agent more than once in the preceding twelve (12) month period of any Event of Default under this Contract; (4) an Event of Default occurs as described in Paragraphs 14.2.1(e), (f), or (h); or (5) the Commissioning Agent breaches any of its obligations under 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 Commissioning Agent shall take immediate action toward the orderly discontinuation of Services under this Contract. The Commissioning Agent shall exercise due care and caution to protect and secure completed Work. Upon expiration or termination of this Contract, the Commissioning Agent shall be responsible for taking all actions necessary to accomplish an orderly discontinuation of performance of Services, and for collecting, assembling, and transmitting to the School District or the Program Manager, at the Commissioning Agent's sole expense, all plans, specifications, materials, reports, data, and other documentation which were obtained, prepared or developed as part of the Services required under this Contract. Plans, specifications, materials, reports, data and documentation shall be clearly labeled and indexed, to the satisfaction of the School District or the Program Manager, and delivered to the School District or the Program Manager by the Commissioning Agent, 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 Commissioning Agent does not cure the Event of Default within the period allowed by the School District, or if the Commissioning Agent commits or permits an Event of Default for which Paragraph 14.2.2 above provides no notice or period of cure, then the School District, after consultation with the Program Manager, may, in its sole discretion, without further notice or demand to the Commissioning Agent, and without waiving or releasing the Commissioning Agent from any of its obligations under this Contract, invoke, exercise, and pursue one or more of the following remedies in addition to or in lieu of the termination remedy provided in Paragraph 14.1:

- (a) terminate this Contract in part only, in which case the Commissioning Agent shall be obligated to perform this Contract to the extent not terminated; or
- (b) perform (or cause a third party to perform) the Services and this Contract,

in whole or in part, including, without limitation, obtaining or paying for any required insurance or performing other acts capable of performance by the School District. The Commissioning Agent shall be liable to the School District, as damages, for all sums paid by the School District and all expenses incurred by the School District (or a third party) pursuant to this Paragraph 14.4, together with interest at the prime rate of interest as published from time to time by the Wall Street Journal, plus five percentage points (5.0%), or interest at the statutory legal rate of 6% permitted in the Commonwealth of Pennsylvania thereon from the date of the School District's incurring of such costs, whichever is greater. The School District shall not in any event be liable for inconvenience, expense, loss of profits or other damage incurred by the Commissioning Agent due to the School District's performance or paying such costs or expenses, and the obligations of the Commissioning Agent under this Contract shall not be altered or affected in any manner by the School District's exercise of its rights under this Section 14; or

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

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

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

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

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

14.5 **Concurrent Pursuit of Remedies; No Waiver or Duty to Exercise.** The School District may exercise any or all of the remedies set forth in this Section 14, each of which may be pursued separately or in connection with such other remedies as the School District, in its sole discretion, shall determine. The School District may in its sole discretion elect not to exercise any of the remedies set forth in Section 14 and may permit the Commissioning Agent to continue to

perform the Work. No extension or indulgence granted by the School District to the Commissioning Agent shall operate as a waiver of any of the School District's rights in connection with this Contract. The rights and remedies of the School District as described in this Section 14 and elsewhere in this Contract shall not be exclusive and are in addition to any other rights or remedies available to the School District under this Contract, at law, or in equity. Nothing contained in this Section 14 shall create a duty on the part of the School District to exercise any rights granted to it hereby for the benefit of the School District, or for the benefit of the Commissioning Agent, or any person or entity other than the School District.

Section 15. Certification Regarding Debarment, Suspension and Ineligibility.

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

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

15.3 **Notice.** The Commissioning Agent 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 Commissioning Agent learns that the above certification was erroneous when the Commissioning Agent signed this Contract or subsequently became erroneous by reason of changed circumstances.

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

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

Commissioning Agent because of the unavailability of Federal government or Commonwealth of Pennsylvania funds, in which event the School District shall not be liable to the Commissioning Agent for the balance of the compensation.

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

Section 16. Miscellaneous Provisions.

16.1 **Notices.** Any notice or communication required or permitted to be given under this Contract shall be given in writing, and shall be personally delivered by hand with receipt obtained, by a national overnight express carrier (e.g., Federal Express, Express Mail), by facsimile (with copy by registered or certified United States mail, return receipt requested, postage prepaid), or by registered or certified United States mail, return receipt requested, postage prepaid, addressed to the Contract Administrators of the School District, the Commissioning Agent, and the Program Manager listed in Subparagraphs 7.1.1, 7.1.2, and 7.1.3 of this Contract. 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 School Reform Commission and the Board of Education retain their statutory governmental, official and any other immunity as provided pursuant to the Applicable Law, including 42 Pa C.S.A. §§8501 and 8541 et seq., and do not waive the defenses of governmental and official immunity derived from such laws. The Commissioning Agent acknowledges that the School District:

- (a) Is a local agency, as defined in 42 Pa. C.S.A. §8501, §8541, and,

- (b) Does not waive, for itself or for its officers, employees, or agents, or for the members of the School Reform Commission and Board of Education, the defenses of statutory governmental or official immunity or any other defenses or immunities available to it or any of them.

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

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

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

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

16.9 **Conflict of Interest.**

16.9.1 **Disclosure of Conflict of Interest.** The Commissioning Agent represents,

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

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

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

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

16.12 **Assignment of Commissioning Agent's Employees.** The Commissioning Agent agrees not to assign any person dismissed from School District employment to perform services under this Contract. The Commissioning Agent further agrees to reassign immediately any person the School District finds unacceptable or incapable of performing contractual requirements.

16.13 **Background Checks.**

16.13.1 **Required Background Checks.** In accordance with 24 P.S. §1-111, as amended, and 23 Pa. C.S.A. §§6303, 6344 and 6354-6358, as amended, before starting any Services under this Contract, the Commissioning Agent shall submit to the School District for the

Commissioning Agent, if the Commissioning Agent is an individual, and for each of the Commissioning Agent's and any of its Subconsultant's employees, officers, agents, servants, or Subconsultants who may have direct contact with children, as defined by 23 Pa. Cons. Stat. Ann. §6303(a), as amended, while performing any of the Services under this Contract, copies, true, correct, complete and current, of all of the following: (i). the Pennsylvania State Police criminal history record information report; (ii) the child abuse history official certification; (iii) the report of the Federal Bureau of Investigations federal criminal history record information; and (iv) a sexual misconduct/abuse disclosure release required by Act 168 of 2014 (24 Pa. Stat. §1-111.1, Employment History Review, as amended) and all relevant matters and materials disclosed.

16.13.2 Current; Direct Contact; Failure to Provide. For purposes of Subparagraph 16.13.1, "current" means processed by the issuing agency or organization within one (1) year for paid individuals (including employees, officers, agents, servants, and Subcontractors) prior to the later of the individual's hiring or engagement by the Contractor or Subcontractor, or the commencement of the Term, or the commencement of the Term, in both cases unless the School District has in the preceding five (5) years received and properly reviewed the individual's checks, in which case the Parties may rely on the individual's prior submission provided that all individuals relying on prior submitted checks must submit an arrest or conviction report and certification form in a form acceptable to the School District. For an individual who has direct contact with children, the School District shall have the right, at any time and in its sole discretion, to require the Commissioning Agent to deliver new reports, certifications, clearances or certificates as required by the more restrictive of School District policies, or Applicable Law, and the Commissioning Agent shall comply promptly with any such request. If the Commissioning Agent fails to deliver any such report, clearance, certification or certificate on behalf of the Commissioning Agent, if an individual, or on behalf of any individual officer, employee, director or Subconsultant, then each such individual may not and shall not carry out any of the Services unless and until the Commissioning Agent delivers that individual's report, clearance, certification or certificate to the School District.

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

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

16.14 Successors and Assigns. The School District and the Commissioning Agent, respectively, bind themselves, their heirs, executors, administrators, successors, permitted assigns and legal representatives to the other party to this Contract, and to the heirs, executors, administrators, successors, permitted assigns and legal representatives of such other party with respect to all covenants of this Contract. The parties hereto bind themselves, their heirs, executors,

administrators, successors, permitted assigns and legal representatives for the faithful performance of this Contract.

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

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

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

16.17 **Taxes.**

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

16.17.2 **Sales and Use Tax.** The Commissioning Agent agrees to execute all documents requested by the School District or its representative, and to provide prompt access to the School District or its representative, to all documents of the Commissioning Agent and its Subconsultants related to the Services performed on the Project, to assist the School District in making a claim or filing a petition for a refund of sales and/or use tax. The Commissioning Agent hereby assigns to the School District all of its right, title and interest in any sales or use tax paid or reimbursed by the School District that may be refunded as a result of any documentation, services,

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

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

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

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

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

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

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

16.18.3 **Proof of Tax Compliance.**

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

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

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

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

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

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

(B) In addition to any other rights or remedies available to the School District at law or in equity, the Contractor acknowledges and agrees that the School District may set off or offset the amount of any City or School District tax or taxes or other indebtedness owed to the City or the School District against any School District payment or payments due under any School District contract if the Contractor breaches the tax indebtedness representation, warranty and covenant, and such breach is not resolved, to the School District’s satisfaction, within a reasonable time frame specified by the School District in writing.

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

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

City or the School District.

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

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

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

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

16.18.7 **Good Faith Contest.**

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

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

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

16.18.8 **Termination of Contract.**

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

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

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

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

(iv) the Contractor is in default of any satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of 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 **Whistleblower Protection.** Anything set forth elsewhere in this Contract to the

contrary notwithstanding, neither Party shall construe this Contract or any term, covenant or condition in this Contract to prohibit either Party or any of its employees, Subcontractors, grantees, or subgrantees from filing a charge with, reporting possible violations to, or participating or cooperating with any governmental agency or entity having jurisdiction, including but not limited to a member or committee of Congress, an Inspector General, the Government Accountability Office, a federal employee responsible for contract or grant oversight, a law enforcement agency, a court or grand jury, or a management official or other employee who has responsibility to investigate, discover, or address misconduct, or making other disclosures protected under the whistleblower, anti-discrimination or anti-retaliation provisions of Applicable Law, including but not limited to 41 U.S.C. §4712, for the purpose of reporting or investigating a suspected violation of law.

16.20 **Right-to-Know Requests.** The Commissioning Agent acknowledges and agrees that this Contract and records related to or arising out of this Contract remain subject to requests made pursuant to the Pennsylvania Right-to-Know Law, 65 Pa. Stat. §§67.101 to 67.3104. If the Commonwealth of Pennsylvania or the School District need the Commissioning Agent's assistance in any matter arising out of the Pennsylvania Right-to-Know Law related to this Contract, the Commonwealth of Pennsylvania or the School District shall notify the Commissioning Agent using the contact information provided in the Contract. The Commissioning Agent, at any time, may designate a different contact for such purpose upon reasonable prior notice to the Commonwealth of Pennsylvania and the School District.

16.21 **Act 126 Child Abuse Recognition, etc., Training.** Before starting any Services, the Commissioning Agent shall submit to the School District for the Commissioning Agent, if the Commissioning Agent is an individual, and for each of the Commissioning Agent's employees, officers, agents, servants, and Subcontractors, if any, who may have direct contact with children, as defined by 23 Pa. Cons. Stat. Ann. §6303(a), as amended, while performing any of the Services, a copy of the certificate of completion of Mandated Reported Training as required by Act 126 of 2012, codified at 24 Pa. Stat. §12-1205.6.

16.22 **Contract Reporting.** The Commissioning Agent shall comply promptly with the School District's reporting requirements for contracts, including electronic or other reporting of Commissioning Agent and contract data.

16.23 **Disaster Recovery; Business Continuity.** The Commissioning Agent shall maintain appropriate disaster recovery/business continuity and contingency plans providing for continued operation in the event of an adverse event or circumstance affecting the Commissioning Agent's business operations so as to minimize any interruption of the Services to the School District.

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

16.25 **No Third Party Beneficiaries.** Nothing in this Contract, express or implied, is intended or shall be construed to confer upon or give to any person, firm, corporation, or legal entity, other than the Commissioning Agent and the School District or the Program Manager, 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 or the Commissioning Agent. The Parties do not intend to create, and no Party, court, tribunal or person shall construe anything set forth in this Contract to create any contractual relationship with, or to give a claim, right, cause of action or remedy in favor of, any third party against either Party. The Parties do not intend that anything in this Contract benefit any third party. The Commissioning Agent's Subconsultants and the Prime Contractor(s) and its(theirs) subcontractors and consultants are not intended third-party beneficiaries of this Contract.

16.26 No Waiver.

16.26.1 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. No breach shall be excused, unless the agreement to excuse that breach is in writing signed by the non-breaching party. 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.

16.26.2 No one shall or may find, hold or determine that a Party has waived any term, covenant or condition set forth in this Contract, any Event of Default, or any remedy set forth in this Contract, unless that Party has set forth its waiver in a writing signed by that Party.

16.27 Counterparts; Electronic Signatures. The Parties may execute and deliver this Contract in any number of counterparts, each of which the Parties shall deem an original, and all of which shall constitute, together, one and the same agreement. A signed copy of this Contract delivered by facsimile, e-mail or other means of electronic transmission shall have the same legal effect as delivery of an original signed copy of this Contract. This Contract and any true, correct, and complete counterpart thereof may be executed either (a) on paper with an ink signature or (b) by due, secure electronic method, and any true, correct, and complete counterpart may be transmitted by e-mail or other electronic means. For avoidance of doubt, any true, correct, and complete counterpart may be converted from paper to electronic form, or from electronic form to paper, and such converted true, correct, and complete counterpart shall be deemed an original for transmission, execution, delivery and retention under the Electronic Signatures in Global and National Commerce Act, Title 15, United States Code, Sections 7001 *et seq.*

16.28 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.

16.29 Severability and Partial Invalidity.

16.29.1 The provisions of this Contract shall be severable. If a Court holds, to any extent, any provision(s) of this Contract (or the application thereof), for any reason or circumstance, invalid or unenforceable, such holding shall not affect or impair the validity or enforceability of 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; and each provision of this Contract shall be valid and enforceable to the fullest extent permitted by law.

16.29.2 If a Court holds any term, covenant, condition or provision of this Contract invalid, such holding shall not affect or impair the validity of any other terms, conditions, covenants or provisions of this Contract, which the Parties hereby deem severable and which shall remain in full force and effect.

16.30 **Entire Contract.** This Contract includes all Exhibits referred to herein, all of which the Parties hereby incorporate by reference, unless otherwise specified herein. This Contract constitutes the entire agreement between the Parties and supersedes all prior and contemporaneous oral and written agreements and statements concerning the subject matter of this Contract, all of which the Parties have fully integrated herein. This Contract supersedes any prior or contemporaneous negotiations, representations, course of conduct, performance or dealing between the Parties. The Commissioning Agent has not, does not, and shall not rely on any statement or representation of the School District other than those expressly set forth in this Contract. This Contract cannot be changed, modified or amended except by contract in writing signed by both parties. No amendment or modification changing this Contract's scope or terms shall have any force unless executed and delivered in writing and signed by both Parties. This Contract shall not be superseded by any provision of the documents for construction.

REMAINDER OF THIS PAGE IS LEFT INTENTIONALLY BLANK.

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

By: _____
Name: _____
Title: _____

SCHOOL DISTRICT OF PHILADELPHIA

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

Approved as to Form:

Dawn Renee Chism
Attorney for
SCHOOL DISTRICT OF PHILADELPHIA

Pre-Audit Approval

EXHIBIT A

12/20 Edition

EXHIBIT B

12/20 Edition

EXHIBIT C

12/20 Edition

EXHIBIT D

12/20 Edition

EXHIBIT E

12/20 Edition

EXHIBIT F

12/20 Edition