GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL SERVICES

DESIGN-BUILD SERVICES
BALLOU SENIOR HIGH SCHOOL

Solicitation #: DCAM-12-CS-0152

Addendum No. 3
Issued: June 18, 2012

This Addendum Number 03 is issued by e-mail on June 18, 2012. Except as modified hereby, the Request for Proposals ("RFP") remains unmodified.

Item #1

Form of Contract: Attached to this Addendum is the Form of Contract. THE TERMS OF THE FORM OF CONTRACT SHALL PREVAIL OVER THE RFP. TO THE EXTENT THERE IS AN INCONSISTENCY BETWEEN THE FORM OF CONTRACT ISSUED HEREWITH AND THE RFP, THE FORM OF CONTRACT SHALL GOVERN.

Item #2

Architect/Engineer Agreement: A copy of the A/E agreement can be downloaded at: https://www.box.com/shared/static/12700552d87b135bd004.PDF.

Item #3

The bid date is hereby changed. Proposals are due by **June 26, 2012 at 2:00 pm EDT**. Proposals that are hand-delivered should be delivered to **Frank D. Reeves Center, 2000 14th Street, NW, 5th floor, Washington, DC 20009**.

- End of Addendum No. 3 -

DESIGN-BUILD AGREEMENT
BALLOU SENIOR HIGH SCHOOL

BY AND BETWEEN

THE DEPARTMENT OF GENERAL SERVICES
AND

[SELECTED OFFEROR]

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DESIGN-BUILD AGREEMENT
FOR BALLOU SENIOR HIGH SCHOOL

THIS AGREEMENT ("Agreement") is made by and between the **DISTRICT OF COLUMBIA GOVERNMENT**, acting by and through its **DEPARTMENT OF GENERAL SERVICES** (the "Department") and **[SELECTED OFFEROR]**, duly organized under the laws of _____, and with a place of business at _____ (the "Design-Builder").

WITNESSETH:

WHEREAS, the Department wishes to retain the Design-Builder to provide design-build services for the construction of Ballou Senior High School, located at 3401 4th Street SE, Washington, DC (the "Project"). The Project includes three phases: Preconstruction, Construction, and Demolition and Sitework;

WHEREAS, the Design-Builder wishes to provide the construction and related services necessary to complete the Project, subject to the terms and conditions set forth in the Contract;

WHEREAS, the Department has retained the Bowie Gridley Architects/Perkins + Will Joint Venture (hereinafter referred to as the "Architect/Engineer") to develop design development documents that generally describe the design of the Project and to complete the design and provide working drawings for the Project as well as Construction Administrative Services;

WHEREAS, the Department will assign the Architect/Engineer's contract to the Design-Builder once a GMP is established and from that point forward the Design-Builder shall be responsible for both the design and the construction of the Project;

WHEREAS, the Department has retained the services of a Program Manager (the "Program Manager") to advise it concerning the Project; and

WHEREAS, the Department desires that the project be completed no later than June 30, 2014.

NOW, THEREFORE, the Department and Design-Builder, for the consideration set forth herein, mutually agree as follows.

ARTICLE 1
GENERAL PROVISIONS

Section 1.1 **Relationship of Parties.** The Design-Builder accepts the relationship of trust and confidence established with the Department by this Agreement, and covenants with the Department to furnish the Design-Builder's reasonable skill and judgment and to cooperate with

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the Architect/Engineer and the Program Manager in furthering the interests of the Department. The Design-Builder shall use its best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Department. The Department shall endeavor to promote harmony and cooperation among the Department, Architect/Engineer, Design-Builder, Program Manager, and other persons or entities employed by the Department for the Project. In performing its duties under this Contract, the Design-Builder shall at all times use the standard of care used by Design-Builders that construct state-of-the-art school facilities in large, urban areas. Whenever the term "competent" is used herein to describe the Design-Builder's actions or duties, that term shall refer to the level of competence customarily possessed by those Design-Builders that construct state-of-the-art school facilities in large, urban areas.

Section 1.2 **Project Description.** As a general description, the Project consists of Preconstruction, Design, Site Work and Construction Services as well as Abatement and Demolition Services necessary to fully construct the new Ballou Senior High School into a state-of-the-art high school in accordance with the Educational Specifications attached as **Exhibit [ ]** and to demolish the existing Ballou Senior High School structure. The new Ballou Senior High School shall be designed and constructed in accordance with the United State Green Building Council's Leadership in Energy and Environmental Design (LEED) Green Building Rating System™, with the goal of achieving, at a minimum, LEED for Schools Gold Certification.

Section 1.3 **Program Manager.** At its discretion, the Department may hire a Program Manager (or "PM") to provide certain program management functions. Said Program Manager, if hired, shall, at all times, be acting solely for the benefit of the Department, not the Design-Builder. The Program Manager shall not be authorized to modify any of the rights or obligations of the Department or the Design-Builder pursuant to this Contract, or to issue Change Orders or Change Directives.

Section 1.4 **General Description of Design-Builder's Duties.** The Design-Builder shall perform the services described in Articles 2 through 4. The Design-Builder shall supply and furnish at the location where the Contract Work is to be performed all labor, materials, equipment, tools, services, and supervision, and shall bear all items of expense, necessary to complete and satisfactory perform this Contract, except such items that the Department, in this Contract, specifically agrees to supply or furnish to or for the use of Design-Builder. Any labor, materials, equipment, tools, services or supervision not specifically described in this Contract, but which may be fairly implied as required thereby or necessary to properly complete the Contract Work, shall be deemed within the scope of the Contract Work and shall be provided by Design-Builder at Design-Builder's sole expense.

The services to be provided under Article 2 constitute the preconstruction phase services to be performed by the Design-Builder (the "Preconstruction Phase Services"). Article 3 provides for the process by which the Design-Builder and the Department shall agree upon a Guaranteed Maximum Price ("GMP") for this Project. Article 4 constitutes the construction phase during which the Design-Builder shall carry-out the bulk of the construction and manage the completion of the design (the "Construction Phase Services").

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ARTICLE 2
CONTRACTOR'S PRECONSTRUCTION SERVICES

Section 2.1 **Preliminary Evaluation.** The Design-Builder shall within Thirty (30) days of a Notice to Proceed for Preconstruction Phase Services provide a preliminary evaluation of the Department's program of requirements, any preliminary design prepared by the A/E, potential early bid packages, and the Project's budget requirements, each in terms of the other. Within ten (10) days of the issuance of a Notice to Proceed for Preconstruction Phase Services, the Design-Builder shall submit to the Department for its approval a schedule of Preconstruction Phase activities.

Section 2.2 **Consultation and Analysis.** The Design-Builder shall schedule and attend regular meetings with the Department, the Program Manager and the Architect/Engineer. In cooperation with the Department, the Program Manager and the Architect/Engineer, the Design-Builder shall conduct value engineering, constructability reviews, and provide scheduling and cost analysis for each phase of design with the goal of developing an acceptable Guaranteed Maximum Price and Project Schedule, as is defined more fully in this Article. Without limiting the generality of the foregoing, the Design-Builder shall perform the following tasks:

.1 The Design-Builder shall produce a dependable construction cost estimate from the Design Development drawings. If the estimate exceeds established budgets the Design-Builder shall develop analyses and recommendations for reconciliation of the project scope and quality to budget.

.2 The Design-Builder shall consult with the Department, the Architect/Engineer and the Program Manager regarding site improvements, and the selection of materials, building systems and equipment with respect to such issues as maintainability and initial versus life-cycle costs.

.3 The Design-Builder shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction costs including estimates of alternative designs or materials, preliminary budgets and possible economies.

.4 Notwithstanding the foregoing and until such time as the design agreement is assigned to the Design-Builder, all design work shall be performed by the Architect/Engineer pursuant to its contract with the Department.

Section 2.2.1 **Construction Administration Plan**. During the design development phase, the Design-Builder shall meet with the Owner and the Architect/Engineer, and collectively, they shall develop a plan for the manner in which Construction Administration

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Services will be provided (the "Construction Administration Plan"). Among other things, The Construction Administration Plan shall include provisions addressing: (i) where construction administration services will be provided (i.e. on or off site); (ii) the staffing level that will be devoted to construction administration services; (iii) timelines for reviewing shop drawings, RFIs, etc.; and (iv) the process by which shop drawings, submittals, RFIs, etc. will be handled. Once agreed upon by the three parties, the Architect/Engineer shall provide construction administration services in accordance with the Construction Administration Plan.

Section 2.3 **GMP Basis Documents.** Within twenty one (21) days after the issuance of a notice to proceed for Preconstruction Phase Services, the Design-Builder shall work with the Architect/Engineer to develop an outline of the information (such outline, the "GMP Basis Information") that will be included in the GMP Basis Documents. It is contemplated that Architect/Engineer will have issued the structural drawings and that the MEP drawings will have reached approximately fifty percent (50%) completion by the time the GMP is executed. The Design-Builder and the Architect/Engineer shall work cooperatively to develop a mutually agreed upon understanding as to the level of detail and type of information that will be included in the GMP Basis Documents so as to permit the Design-Builder to provide a Guaranteed Maximum Price in accordance with the form of the GMP Amendment attached hereto as **Exhibit A**.

Section 2.4 **Initial Project Schedule.** Within thirty (30) days after receiving a Notice to Proceed for Preconstruction Phase Services from the Department, the Design-Builder, shall prepare and provide for the Program Manager's and the Architect/Engineer's review, and the Department's approval, a proposed project schedule for Preconstruction Phase Services and Construction Phase Services ("Project Schedule"). The Project Schedule shall be based on the Critical Path Method (CPM) and shall provide the timing of the various components of major activities to be undertaken in connection with the Project and the approximate timing for commencement and completion of such activities. The Project Schedule should be cost loaded and in appropriate level of detail to facilitate the management of the Project. The Project Schedule shall also include, without limitation, proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead time procurement, the Department's occupancy requirements showing portions of the Project having occupancy priority, and proposed dates of Substantial Completion, and Final Completion of the Project.

During the Preconstruction Phase, the Design-Builder shall monitor the Project's progress and promptly notify the Department of any delays, regardless of their cause, the causes of such delays, and the Design-Builder's best projection of the effect of such delays on the Substantial Completion, and Final Completion of the Project. The Department's receipt of, and lack of objection to, any schedule update showing Substantial or Final Completion later than the scheduled Substantial or Final Completion Date shall not be regarded as the Department's agreement that the Design-Builder may have an extension of time, or as a waiver of any of the Department's rights, but merely as the Design-Builder's representation that, as a matter of fact,

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the Project may not be completed by the applicable Substantial or Final Completion Date. The Project Schedule shall be maintained and updated during the Preconstruction Phases.

Section 2.5 **Phased Construction.** In order to complete the Project on time, it is contemplated that a fast-track process will be required. As such the Construction Documents will be released in phases. The Design-Builder shall make recommendations to the Department regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economies, time of performance, availability of labor and materials, and provisions for temporary facilities. The Design-Builder shall work with the Architect/Engineer to jointly develop a design schedule that will identify the number and timing of the packages as well as the composition of each such package. The Department's receipt of and lack of objection to any such recommendation shall not constitute the Department's acceptance of such recommendation. Such recommendations shall be accepted only in a writing signed by the Department's authorized representative.

Section 2.6 **Design Review and Initial Construction Cost Estimate.** At the time the Department issues a Notice to Proceed for Preconstruction Phase Services, it is anticipated that the Architect/Engineer will be proceeding with the design development documents. In order to ensure that the Project remains on budget, the Design-Builder shall undertake the following tasks:

.1 The Design-Builder shall conduct an independent assessment of the schematic documents prepared by the Architect. This review should include a detailed preliminary cost estimate and a constructability review. This review shall also identify any potential long-lead items that could adversely impact the schedule. Finally, the Design/Builder shall prepare and submit a preliminary project schedule. The Design-Builder shall perform a cost estimate of the schematic design documents. The cost estimate shall be broken down into a standard 16 division format and shall set forth the pertinent assumptions upon which it is based. All of these items shall be completed within 15 days after the notice to proceed is issued.

.2 [Intentionally Omitted].

.3 [Intentionally Omitted].

.4 The Design-Builder shall perform a similar cost update when the design development documents are complete. This estimate shall be broken down into a standard 16 division format and shall identify any key variances from the original schematic estimate. At the end of the Design Development process, the Department and the Design-Builder shall agree upon a design to budget broken out by division for the Project (such budget, the "Design to Budget").

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.5 Based on the Design to Budget as well as the agreed upon scope revision, if any, that were developed at the end of the design development phase, the Design/Builder shall conduct at least one "over the shoulder" review session for each major trade package with the Architect. These "over the shoulder" review sessions shall be scheduled at appropriate times for such review; however, in no event shall these reviews occur later than October 30, 2012.

From and after that point and as each design package reaches the seventy five percent (75%) completion level, the Design-Builder shall prepare a cost estimate based on the design documents for that package. Such estimate shall identify key variances from the Design to Budget. The Design-Builder shall submit this estimate to the Department for its review and shall make such recommendations as may be necessary in order to permit the Project to be completed within an amount that is consistent with Department's budget for the Project's hard costs.

Section 2.7 **Construction Bid Packages.** The Design-Builder shall review each phase of design for contractibility, clarity and completeness. The Design-Builder, in cooperation with the Architect/Engineer, shall separate construction work into appropriate bid packages in such a manner that all work categories can be bid using a single compiled set of Construction Documents. The Design-Builder shall review each package when it reaches the fifty percent (50%) completion level. The Design-Builder shall prepare bid documents and forms to distribute to potential bidders.

Section 2.8 **Subcontractors and Suppliers; Bidding Procedures.** The Design-Builder shall seek to develop subcontractor interest in the Project.

Section 2.8.1 **Potential Subcontractors and Suppliers.** The Design-Builder shall furnish to the Department for the Department's information a list of possible Subcontractors, by trade, and material suppliers, including, without limitation, suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Department will promptly reply in writing to the Design-Builder if it knows of any objection to such subcontractor or supplier. The receipt of such list shall not require the Department to investigate the qualifications of proposed Subcontractors or suppliers, nor shall it waive the right of the Department later to object to or reject any proposed Subcontractor or supplier. The Design-Builder shall also submit to the Department a list of proposed trade packages to be issued to subcontractors for bidding.

Section 2.8.2 **Bidding.** Following the Department's approval of approximately 50% complete construction documents (the "Bid Set"), the Design-Builder shall solicit bids from trade subcontractors and suppliers based on the Bid Set. The Design-Builder shall solicit a minimum of three (3) bids for each trade package unless such package has an expected value of less than One Hundred Thousand Dollars ($100,000) or the Department approves otherwise. The Design-Builder shall provide to the Department tabulations of the trade bids. Such bid tabulations shall include LSDBE Utilization information and Workforce Utilization Estimates, as

defined in Section 2.4.3. The Design-Builder shall forfeit its Preconstruction Fee in the event it fails to solicit bids or provide bid tabulations as set forth in this Section 2.8.2.

Section 2.8.3 **Workforce Utilization.** In consultation with the Design-Builder and as part of negotiating and accepting the GMP, the Department shall establish a minimum requirement of the percentage labor hours for the Project which must be performed by District of Columbia residents (such requirement, the Workforce Participation Requirement). As part of the subcontractors' bids for the work, the Design-Builder shall require that each subcontractor submit an estimate of the total number of the hours that will be required to complete the subcontracted work, and the estimated number of hours of such work that will be performed by District residents (the "Workforce Utilization Estimate"). The Design-Builder shall submit with the bid tabulations required by Section 2.8.2 of this Agreement the Workforce Utilization Estimate provided by each subcontractor. The Design-Builder shall ensure that the Workforce Utilization Estimate is considered as part of its subcontractor selection process.

Section 2.8.4 **Value Engineering and Scope Assessment.** Based on the trade bids, the Design-Builder shall prepare a written report of suggested value engineering strategies necessary to reconcile the costs of constructing the Project with the Design to Budget and programmatic requirements for the Project. The Design-Builder shall meet with the Department's representatives to discuss any value engineering and changes in scope. Based on these discussions, the Department shall cause the Architect complete any revisions to the design documents and prepare any additional drawings necessary to complete the Project.

Section 2.9 **Long-Lead Time Items.** The Design-Builder shall recommend to the Department a schedule for procurement of long-lead time items which will constitute part of the Work as required to meet the Project Schedule. If the Department so determines, it may direct the Design-Builder to purchase (including, but not limited to, placing mill orders for structural steel) such long items prior to commencement of the Construction Phase. In the event the Department issues any such directive, the Design-Builder shall make such purchases as the agent for the Department and any such subcontracts or purchase orders shall be assignable to the Department in the event the Department terminates this Agreement or the parties are unable to agree upon a GMP. Upon the Department's acceptance of the Design-Builder's Guaranteed Maximum Price Proposal, all then existing contracts for such items shall be assigned by the Department to the Design-Builder, who shall accept responsibility for such items as if procured by the Design-Builder.

Section 2.10 **Conformance with Laws.** It shall be the responsibility of the Design-Builder to perform the Contract in conformance with the Department's Procurement Regulations (5 DCMR § 3900 *et seq.*) and all statutes, laws, codes, ordinances, regulations, rules, requirements and orders of governmental bodies, including, without limitation, the U.S. Government and the District of Columbia government; and it is the sole responsibility of the Design-Builder to determine the Procurement Regulations, statutes, laws, codes, ordinances, regulations, rules, requirements and orders that apply and their effect on the Design-Builder's

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obligations thereunder. This Section 2.10 shall apply during the Preconstruction Phase, the Construction Phase and the Demolition and Site Work Phase.

Section 2.11 <u>Warranties and Representations</u>

Section 2.11.1 All disclosures, representations, warranties, and certifications the Design-Builder makes in its proposal in response to the Request for Proposals for Design Build Services for Ballou Senior High School ("RFP") shall remain binding and in effect throughout the term of the Contract. The Design-Builder reaffirms that all such disclosures, representations, warranties, and certifications are true and correct.

Section 2.11.2 If any disclosure, representation, warranty or certification the Design-Builder has made or makes pursuant to the RFP or the Contract, including, without limitation, representations concerning the Design-Builder's construction or design experience and qualifications, claims or litigation history or financial condition, is materially inaccurate, that shall constitute a material breach of the Contract, entitling the Department to all available remedies.

Section 2.11.3 The terms and conditions of Section 2.11 shall apply during the Preconstruction, Construction and Demolition and Site Work Phases.

Section 2.12 <u>Responsibility for Agents and Design-Builders.</u> The Design-Builder shall be responsible to the Department, the Program Manager and the Architect/Engineer for any and all acts and omissions of the Design-Builder's agents, employees, Subcontractors, Sub-Subcontractors, material suppliers, and laborers, and the agents and employees of the Subcontractors, Sub-Subcontractors, material suppliers, and laborers performing or supplying Work in connection with the Project. This Section 2.12 shall apply during the Preconstruction, Construction and Demolition and Site Work Phases.

Section 2.13 <u>Submittals</u>. As part of the Construction Administration Plan, the Design-Builder and the Architect/Engineer shall develop a mutually agreeable, written submittal schedule for each package. The Design-Builder acknowledges that Architect/Engineer will rely on such submittal schedule to develop its staffing plan. The Design-Builder shall receive submittals from trade subcontractors and will manage the submittal process, including, but not limited to, reviewing each request for information and submittal to determine that it is in the appropriate form and that it contains the appropriate information so as to allow the Architect/Engineer to efficiently review it, monitoring adherence to the submittal schedule and keeping a log, numbering each document, and tracking the status of each submittal. The Design-Builder shall promptly forward such submittals to the Architect/Engineer. Provided that submittals are submitted in accordance with the applicable submittal schedule, the Architect/Engineer shall review and respond to each submittal within the time agreed on such schedule. The Architect/Engineer shall review and respond to requests for information (RFIs and submittals) on average within seven (7) calendar days for RFIs and fourteen (14) calendar days for submittals, of initial receipt; provided, however, that the Architect/Engineer agrees that

certain documents will require quicker processing and the Architect/Engineer shall use its reasonable best efforts to accommodate shorter timelines. Design-Builder agrees that certain documents will not be able to be processed in this timeframe and will work with the Architect/Engineer to accommodate such longer timeframe when possible. The Architect/Engineer shall review and approve or take other appropriate action upon the Design-Builder's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Architect/Engineer's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Design-Builder or separate contractors, while allowing sufficient time in the Architect/Engineer's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Design-Builder as required by the Contract Documents. The Architect/Engineer's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect/Engineer, of any construction means, methods, techniques, sequences or procedures. The Architect/Engineer's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

Section 2.14 **Design-Builder Warranty of the Construction Work.** The Design-Builder warrants to the Department that materials and equipment furnished under the Contract Documents will be of good quality and new unless otherwise required or permitted by the Contract Documents, that for the one (1) year period following the Substantial Completion Date the construction work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. The Design-Builder's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Design-Builder, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage.

ARTICLE 3
FORMATION OF GMP PROPOSAL

Section 3.1 **General.** During the Preconstruction Phase, the Department shall cause the Architect/Engineer to prepare a set of Drawings and Specifications (such Drawings and Specifications are referred to herein as the "GMP Drawings & Specifications") that contain the information described in the GMP Basis Information. Based upon the GMP Drawings & Specifications, the Design-Builder shall propose a Guaranteed Maximum Price (referred to as the "GMP Proposal"). The GMP Proposal shall be submitted in accordance with this Article. The Design-Builder acknowledges and understands that the GMP Drawings & Specifications will be incomplete at the time it submits its GMP Proposal, but that the Guaranteed Maximum Price proposed therein is intended to represent the Design-Builder's offer to Fully Complete the Project. As part of the GMP Amendment, the Design-Builder shall certify that the GMP established thereby (i) contains sufficient amounts to perform all Work necessary to Fully Complete the Project; and (ii) contains sufficient amounts to provide and construct any items or

facilities that are not contained in the GMP Drawings & Specifications but which are necessary for a fully functioning, state-of-the-art school facility incorporating sustainable design initiatives (LEED Gold). The Design-Builder will further covenant and agree in the GMP Amendment that it will perform all of the construction work necessary to Fully Complete the Project, including, without limitation, aspects of the Work that are not shown on the GMP Drawings and Specifications but which are a logical development of the design intent reflected in the GMP Drawings and Specifications, for an amount not to exceed the Guaranteed Maximum Price.

Section 3.2 **Review of GMP Drawings & Specifications.** The Department has selected the Design-Builder because of its special expertise in constructing similar projects. Before submitting its Guaranteed Maximum Price, the Design-Builder shall review the GMP Drawings & Specifications for accuracy, constructability and completeness and shall bring such deficiencies to the attention of the Department. To the extent that any such deficiencies in the GMP Drawings & Specifications could have been identified by such review by a competent Design-Builder, such deficiencies shall not be the basis for a change in the GMP or delaying the Project Schedule. To the extent that a competent Design-Builder could not have identified such deficiencies, the Department shall make an equitable adjustment in the Guaranteed Maximum Price, provided that the Design-Builder has given timely notice of the deficiencies and has taken all reasonable steps to mitigate the cost of such deficiency.

Section 3.3 **Contingency.** The Cost of the Work shall include a Contingency, a sum established by the Design-Builder to cover, among other things costs necessary to address scope expansion that is a logical development of the design, issues arising under Section 3.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order, such as costs that were not reasonably foreseeable as of the effective date of this Agreement, including such items as emergencies, unforeseeable changes in market conditions for materials or labor, or subsurface, soils or site conditions that were neither known nor reasonably discoverable as of the effective date of the Contract. The Design-Builder may draw on the Contingency by making a written request to the Department, identifying the amount requested and the reason for the request, and by obtaining the Department's written approval, which shall not be unreasonably withheld. If the Department approves a draw against the Contingency, the Design-Builder shall, in subsequent required monthly reports, show an increase in the relevant line item by the amount drawn and a decrease in the line item for the Contingency. The Design-Builder shall keep records reasonably acceptable to the Department reflecting all draws against the Contingency.

Section 3.4 **Basis of Guaranteed Maximum Price.** The Design-Builder shall include with the GMP Proposal a written statement of its basis, which shall include:

.1 A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the GMP Proposal.

.2 A list of allowances and a statement of their basis; provided, however, that only such allowances as are agreed to by the Department shall be included.

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.3 A list of the clarifications and assumptions made by the Design-Builder in the preparation of the GMP Proposal to supplement the information contained in the Drawings and Specifications. These clarifications will include specific reference to any exclusions from the building components, systems, and furniture, fixtures & equipment (FF&E) typically required for the operation of a high school facility. Such clarifications and assumptions must have been brought to the attention of Architect/Engineer, the Program Manager and the Department prior to submission of the proposal in sufficient time for any discrepancies to be reconciled.

.4 The proposed Guaranteed Maximum Price, including a statement of the detailed cost estimate organized by trade categories, allowances, Contingency, and other items and the fee that comprise the Guaranteed Maximum Price.

.5 An agreed upon design schedule that the Design-Builder has negotiated with the Architect/Engineer

.6 Any revisions to the Architect/Engineer's contract that are necessary to implement the design schedule that the Design-Builder has negotiated with the Architect/Engineer.

.7 A proposed Construction Phase Schedule which shall include, but not be limited to, the Substantial and Final Completion Dates, upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents issuance dates upon which the Substantial and Final Completion Dates are based (the "Project Schedule").

.8 An LSDBE Utilization Plan setting forth the estimated dollar volume of the work that will be perform by small, local and disadvantaged business enterprises, as certified by the Department of Small and Local Business Development, upon which the GMP is based.

.9 A Workforce Utilization Plan setting forth, by subcontractor, the percentage participation of District residents in performing the labor necessary for the Project upon which the proposed Guaranteed Maximum Price is based.

Section 3.5 **Department Review of GMP Proposal.** The Design-Builder shall meet with the Department to review the GMP Proposal and the written statement of its basis. In the event that the Department discovers any inconsistencies or inaccuracies in the information presented, such party shall promptly notify the Design-Builder, who shall make appropriate adjustments to the GMP Proposal, its basis or both.

Section 3.6 **Department Acceptance of GMP Proposal.** The Department and the Design-Builder shall meet to negotiate over the terms of the GMP Proposal. Unless the

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Department accepts the GMP Proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Design-Builder, the GMP Proposal shall not be deemed accepted by the Department.

Section 3.7 **GMP Amendment.** Upon acceptance by the Department of the GMP Proposal, the Guaranteed Maximum Price and its basis shall be set forth in the Guaranteed Maximum Price Amendment ("GMP Amendment"). The GMP Amendment shall be in substantially the form of **Exhibit A** hereto. In the event the Department and the Design-Builder are unable to agree upon a GMP and a project schedule for any reason, the Contract will be terminated and the Department will only be obligated to pay the Design-Builder fifty percent (50%) of the Preconstruction Fee. In the event the Contract is terminated pursuant to this Section 3.7, the Department shall be free to use any of the information developed during the Preconstruction Phase to retain a new contractor to complete the Project.

Section 3.8 **[Intentionally Omitted].**

Section 3.9 **Tax Exempt Status.** The Department expects that the Project will qualify as tax-exempt under the applicable laws, and such tax exemption shall be reflected in the Guaranteed Maximum Price.

Section 3.10 **Certification.** As part of the Guaranteed Maximum Price Proposal submitted in accordance with Article 3.1 of this Agreement, the Design-Builder agrees to specifically acknowledge and declare that the Contract Documents are sufficiently complete to have enabled the Design-Builder to determine the Cost of the Work therein in order to enter into the GMP Amendment and to enable the Design-Builder to agree to construct the Work outlined therein in accordance with applicable laws, statutes, building codes and regulations to the best of Design-Builder's knowledge, and otherwise to fulfill all its obligations hereunder. The Design-Builder shall further acknowledge that it has visited the site, examined all conditions affecting the Work, is fully familiar with all of the conditions thereon and affecting the same, and, has carefully examined all drawings and specifications provided to it.

Section 3.11 **Assignment of Design Contract.** Concurrent with the execution of the GMP Amendment, the Design Contract will be assigned to the Design-Builder. When the Architect/Engineer Contract is assigned, the Design-Builder shall be required to manage the design and the activities of the Architect/Engineer from the point the Architect/Engineer Contract is assigned. The Department, in its sole and absolute judgment, will determine the exact point at which the Architect/Engineer Contract will be assigned to the Design-Builder.

.1 The Design-Builder's duties in managing the Architect/Engineer contract shall include but are not limited to: (i) managing and coordinating the design work of the Architect/Engineer to ensure that the work is done on a timely manner and on schedule; (ii) directly coordinating all requests for information (RFI's) and resolving in the field where possible; (iii) ensuring that all shop drawings and

submittals are coordinated; and (iv) maintaining a timely and accurate review and return of shop drawings and submittals by the Architect/Engineer.

.2 Notwithstanding the above, the Design-Builder shall not be responsible for performing the work of the Architect/Engineer or the aesthetic elements of the Architect/Engineer's contract.

Section 3.12 <u>Extent of Responsibility and Soils Conditions</u>

Section 3.12.1 The Design-Builder does not warrant or guarantee estimates and schedules except those that are included as part of the Guaranteed Maximum Price Amendment. The recommendations and advice of the Design-Builder concerning design alternatives shall be subject to the review and approval of the Department and the Department's professional consultants. Except as provided in this Agreement, it is not the Design-Builder's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations; provided, however, that the Design-Builder shall be held to a standard of a competent Design-Builder in reviewing the Drawings and Specifications and identifying whether such Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. If the Design-Builder recognizes that a portion of the Drawings and Specifications are at variance therewith, the Design-Builder shall promptly notify the Department in writing.

Section 3.12.2 During the Preconstruction Phase, the Design-Builder shall carefully examine all information the Department has provided concerning site conditions, including, but not limited to, soils and subsurface conditions, and shall carry out any further examinations, investigations, tests, borings, analyses and/or other studies of site conditions (including, but not limited to, surface, water, subsurface and soils conditions) that the Design-Builder deems necessary.

Section 3.12.3 The Design-Builder will be held to have satisfied itself as to transportation, facilities, the kind of facilities required before and during construction of the Project, access, working space and to have become acquainted with the labor conditions, the ecological and environmental conditions to be followed in performing this Contract.

Section 3.12.4 The Department expressly disclaims any representation or warranty that any information it has provided about the site is either accurate or complete. This disclaimer applies, without limitation, to any boring logs, geotechnical studies, or other data relating to site conditions, including, without limitation, soils or subsurface conditions. The Design-Builder, by entering into the Contract, agrees to assume all risks arising from site conditions, at or above the surface, foreseeable or unforeseeable, naturally occurring or man-made. The Design-Builder, however, shall be entitled to an equitable adjustment to Differing Soils Conditions and Hazardous Materials Remediation Costs in accordance with Section 3.13 of the Agreement. (The terms "Differing Soils Conditions" and "Hazardous Materials Remediation Costs" are defined in Article 16 of this Agreement.) Except as regards Differing Soils

Conditions and Hazardous Materials Remediation Costs, the Design-Builder shall not be entitled to adjustments to the Substantial or Final Completion Date, the Guaranteed Maximum Price or the Design-Build Fee due to site condition of any kind, whether known or unknown at the time the GMP Amendment is entered into, and whether foreseeable at that time or not.

Section 3.13 <u>Unsafe Materials and Hazardous Materials</u>

Section 3.13.1 The Design-Builder shall not bring, spill or release onto the site asbestos, PCBs, or any other Hazardous Material that is not customarily used in a facility of the type and similar to the Project, and shall bring to the Department's attention any specification of such Hazardous Materials in the design documents. If the Design-Builder believes that anything in the Contract would require that it use or bring onto the site asbestos, PCBs, or any Hazardous Material that is not customarily used in a facility of the type and similar to the Project, it shall immediately inform the Department and seek direction before proceeding.

Section 3.13.2 If the Design-Builder discovers Hazardous Materials on the site, it shall immediately notify the Department, in writing, and promptly make arrangements for appropriate and lawful removal, treatment, encapsulation, passivation, and/or disposal of the Hazardous Materials by employees or Subcontractors who are fully qualified and licensed to perform such Work. If any notices to governmental authorities are required, the Design-Builder shall also give those notices at the appropriate times. The Design-Builder shall comply with all laws, including, without limitation, all laws relating to safety, health welfare, and protection of the environment, in removing, treating, encapsulating, passivating, and/or disposing of Hazardous Materials.

Section 3.13.3 The Design-Builder shall be entitled to a Change Order modifying the Guaranteed Maximum Price in an appropriate amount.

Section 3.13.4 The Design-Builder shall keep detailed records documenting Work done so that the Department may independently verify compliance with all laws, the number of units actually removed, treated, and/or disposed of, and the appropriate unit price(s) applicable to the Work.

Section 3.14 <u>Swing Plan.</u> The Design-Builder understands that the existing school population will be housed on the Project site throughout the duration of the Project. As such, the Design-Builder may need to organize its Work in such a manner so as to permit the school population to attend school on the Project site. The Design-Builder shall work with the Architect/Engineer, the Program Manager, the Department and the school community to develop a plan as to how disturbance to the school populations will be minimized (such plan, the "Swing Plan").

<u>ARTICLE 4</u>
CONSTRUCTION PHASE

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Section 4.1 **General.** The Construction Phase shall commence when the GMP Amendment is executed by the Department and the Design-Builder and the Department issues a Notice to Proceed for Construction Phase Services. The Design-Builder shall, through Subcontractors or, with the written consent of the Department, with its own forces, perform all of the Work necessary to construct the Project so that it is complete, safe, and properly built in strict accordance with the released Construction Documents and other requirements of the Contract. Without limitation, the Design-Builder shall provide all of the labor, materials, tools, equipment, demolition, site preparations, temporary services, and facilities necessary to complete the construction and installation of the Project. The Work shall be carried out in a good and workmanlike, first-class manner, and in timely fashion. All materials and equipment to be incorporated into the Project shall be new and previously unused, unless otherwise specified, and shall be free of manufacturing or other defects.

Section 4.2 **Design and Approval Process.** The Design-Builder is required to complete the design of the Project so that it (i) includes a state-of-the-art school facility that meets the requirements of the Educational Specification for Ballou Senior High School; and (ii) conforms to, and is a logical development of, the GMP Basis Documents (such requirements, the "Minimum Design Requirements" and in the event there is a conflict between the two elements of the Minimum Design Requirements, the more expensive requirement shall govern). After the Design Contract is assigned to the Design-Builder, the Design-Builder shall be required to forward copies of all construction document packages to the Department for approval. The Department shall have seven (7) days to approve the design construction document packages, and if the Department takes no action within seven (7) days, the design construction document packages shall be deemed approved. The Department can disapprove the design construction document packages for any reason; provided, however, the Design-Builder shall be entitled to an adjustment to the GMP and/or the Contract Time if the Department disapproves a package unless such a package fails to meet the Minimum Design Requirements and in such an event the Design-Builder shall be required to prepare a revised design that satisfies the Minimum Design Requirements and without any entitlement to an increase in the GMP or an adjustment of the Contract Time.

Section 4.3 **Bidding/Subcontracting and Administration**

Section 4.3.1 It is contemplated that all or substantially all of the construction of the Project will be carried out by trade Subcontractors and that those trade subcontracts will be awarded through a competitive bid process. The trade subcontractors will be under written contract with the Design-Builder. All subcontracts and agreements for the supply of equipment or materials awarded for the Project shall be fixed-price contracts unless otherwise expressly authorized by the Department, in writing; provided, however, that such subcontracts shall include unit prices or other appropriate contractual provisions designed to address coordination issues related to the fast-track nature of the Project and the fact that certain aspects of the Work will not have been fully designed when the subcontracts are purchased. The Design-Builder and its affiliates may not carry out trade work with its own forces without the Department's written

permission, which permission may be withheld or conditioned by the Department in its sole and absolute judgment. The Design-Builder shall structure the bidding process and award subcontracts in a manner that is most advantageous to the Project taking into account all factors, including, but not limited to, project cost, the local, small and disadvantaged business subcontracting goals, workforce utilization goals, and the requirements of the final Affirmative Action Plan and any other goals or objectives established by the Department for the Project.

Section 4.3.2 The Design-Builder shall be responsible for dividing the Work into suitable bid packages, so that all of the bid packages taken together provide for complete performance of the Contract, without omissions or gaps, and so that obtaining bids from suitable potential trade Subcontractors and material suppliers is facilitated. The Design-Builder shall develop and discuss with the Department lists of suitable bidders which should be invited to bid on each package; shall administer actual solicitation of bids from potential trade Subcontractors and suppliers in accordance with the Project Schedule; and, unless the Department agrees otherwise, in writing, shall comply with or meet affirmative action requirements or objectives, shall obtain bids from at least three (3) contractors for trade subcontracts or supply agreements, where the budgeted amount for the subcontract or supply contract is in excess of One Hundred Thousand Dollars ($100,000). In addition to the open book reporting requirements set forth in Section 4.10, the Design-Builder shall provide to the Department a copy of all quotes or proposals submitted by potential Subcontractors as well as a tabulation of such quotes or proposals.

Section 4.3.3 Before awarding any subcontract, the Design-Builder shall review the Construction Documents including, but not limited to, all Drawings and Specifications provided by the Architect/Engineer, for accuracy, constructability and completeness (collectively, such matters are referred to as "Design Review Issues"). The Design-Builder shall promptly inform the Department of any such Design Review Issue and shall cause the Architect/Engineer to rectify any such Design Review Issue. The Design-Builder shall not be entitled to an extension of the Contract Time or in increase in the Guaranteed Maximum Price that are the result of the time lost while the Architect/Engineer is correcting any such Design Review Issue.

Section 4.3.3 The Design-Builder understands that the Work will be purchased in a fast-track manner and that as such it will not be possible to fully coordinate the various bid packages. The Design-Builder shall develop a purchasing strategy to address this condition and shall include appropriate provisions in the subcontracts to minimize the cost impact of the fast-track purchasing. Such strategies may include, but are not limited to (i) obtaining from subcontractors unit price quotes for typical coordination items; (ii) setting aside allowances for coordination work; and (iii) such other techniques as may be employed by the Design-Builder.

Section 4.3.4 The Design-Builder shall carefully document its procedures for making available bid packages to potential bidders, the contents of each bid package, discussions with bidders at any pre-bid meetings, bidders' compliance with bid requirements, all bids received, the Design-Builder's evaluations of all bids, and the basis for the Design-Builder's recommendation as to which bidders should be chosen. The Department shall be afforded access

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to all such records at all reasonable times so that, among other things, it may independently confirm the Design-Builder's adherence to all Contract requirements including, without limitation, affirmative action requirements and subcontracting requirements.

Section 4.3.5 The Department may, in its sole discretion, reject any or all bids and proposals received for any bid package, and may require the Design-Builder to obtain new or revised bids or proposals.

Section 4.3.6 The Department may, in its sole discretion, direct the Design-Builder to accept a bid from a qualified bidder other than the bidder to whom the Design-Builder recommends award of a subcontract or supply agreement. If the Department chooses this option, it shall issue a Change Order to the Design-Builder for any difference between the cost of the subcontract or supply agreement awarded and the bid price of the Subcontractor or supplier recommended by the Design-Builder, but without any adjustment to the Design-Build Fee.

Section 4.3.7 The Department must approve all Subcontractors and suppliers. The Department may elect to review the form of any subcontract or agreement with a material supplier to insure that such contract incorporates the contractual provisions required by this Agreement.

Section 4.3.8 The Design-Builder must contract for provision of all services and materials for the Project (other than Self-Performed Work) via written subcontracts or, for contracts requiring provision of materials or equipment only, and not labor, via written supply agreements. All subcontracts and supply agreements shall include the following provisions:

.1 that, to the extent of the Work or supply within the agreement's scope, the Subcontractor or supplier is bound to the Design-Builder for the performance of all obligations which the Design-Builder owes the Department under the Contract;

.2 that the Subcontractor or supplier is not in privity with the Department and shall not seek compensation directly from the Department on any third-party beneficiary, quantum meruit, or unjust enrichment claim, or otherwise, except as may be permitted by any applicable mechanic's lien law;

.3 that the Department is a third-party beneficiary of the subcontract or supply agreement, entitled to enforce any rights thereunder for its benefit;

.4 that the Subcontractor or supplier consents to assignment of its agreement to the Department, at the Department's sole option, if the Design-Builder is terminated for default;

.5 that the Subcontractor or supplier shall comply immediately with a written order from the Department to the Design-Builder to suspend or stop work;

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.6 that the Subcontractor or supplier shall maintain records of all Work it is requested or authorized to do on a time and material or cost-plus basis, or with respect to claims that it has asserted on a time and materials or cost-plus basis, during the Project and for at least three (3) years after the Project is substantially complete and requiring the Subcontractor or supplier to make those records available for review or audit by the Department during that time;

.7 that the Subcontractor and Sub-subcontractors, at all tiers, have reviewed the Construction Documents including, but not limited to, all Drawings and Specifications provided by the Architect/Engineer, for accuracy, constructability and completeness and will bring any deficiency to the attention of the Department before the Subcontractor enters into a subcontract with the Design-Builder;

.8 that the Subcontractor shall obtain and maintain, throughout the Project, workers' compensation insurance in accordance with the laws of the District of Columbia (This provision is not applicable to supply agreements.);

.9 that, if the Department terminates the Contract for convenience, the Design-Builder may similarly terminate the subcontract or supply agreement for convenience, upon seven (7) days' written notice to the Subcontractor or supplier, and that the Subcontractor or supplier shall, in such a case, be entitled only to the costs set forth in the Termination for Convenience provisions of this Agreement;

.10 that the Department shall have the right to enter into a contract with the Subcontractor or supplier for the same price as its subcontract or supply agreement price less amounts already paid, if the Design-Builder files a voluntary petition in bankruptcy or has an involuntary petition in bankruptcy filed against it;

.11 that, if it comes to the Department's attention that a Subcontractor or supplier has not been paid in timely fashion (other than for disputed amounts), and if the Design-Builder fails to cure the problem within five (5) calendar days after the Department gives it written notice of the problem, the Department may make payments to the Subcontractor or supplier and Design-Builder by joint check;

.12 that the Subcontractor or supplier shall not be entitled to payment for defective or non-conforming work, materials or equipment, and shall be obligated promptly to repair or replace non-conforming work, materials or equipment at its own cost;

.13 a provision substantially similar to Section 4.3.8 of this Agreement, requiring that Subcontractors and suppliers promptly pay Subcontractors and suppliers at lower tiers, imposing upon the Subcontractors and suppliers a duty to pay interest on late payments, and barring reimbursement for interest paid to lower tier Subcontractors or suppliers due to a Subcontractor’s or supplier’s failure to pay them in timely fashion;

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.14 a provision requiring that all Subcontractors at all tiers comply with the provisions of Article 11 (Economic Inclusion Goals); provided, however, that the Design-Builder may, in its reasonable discretion impose a different LSDBE subcontracting goal on some or all of its Subcontractors; provided, further, however, that nothing in this provision shall be deemed to excuse the Design-Builder from using its best efforts to achieve the LSDBE subcontracting goal on an aggregate basis for the Project;

.15 a provision which allows the Design-Builder to withhold payment from the Subcontractor if the Subcontractor does not meet the requirements of the Subcontract;

.16 lien and claim release and waiver provisions substantially identical to those in this Agreement.

Section 4.3.9 Within seven (7) days of receiving any payment from the Department including amounts attributable to Work performed, or materials or equipment supplied, by a Subcontractor or supplier, the Design-Builder shall either pay the Subcontractor or supplier for its proportionate share of the amount paid to the Design-Builder for the Subcontractor's or supplier's Work or materials or equipment, or notify the Department and the Subcontractor or supplier, in writing, of the Design-Builder's intention to withhold all or part of the payment and state the reason for the withholding. All monies paid to the Design-Builder under the Contract shall be used first to pay amounts due to Subcontractors or suppliers supplying labor or materials for the Project and only money remaining after such payments are made may be used for other items such as the Cost of the General Conditions or the Design-Build Fee. Monies paid by joint check shall be deemed to have been paid fully to the Subcontractor or supplier named as a joint payee, unless the Department agrees otherwise in writing. Any interest paid to Subcontractors or suppliers because the Design-Builder has failed to pay them in timely fashion shall not be reimbursable as part of the Cost of the Work.

Section 4.3.10 The Design-Builder shall not enter into any profit sharing, rebate, or similar arrangement with any Subcontractor or supplier at any tier with respect to the Project or the Work to be carried out for the Project.

Section 4.3.11 The Design-Builder shall not substitute or replace any Subcontractor or supplier approved by the Department without the Department's prior written consent.

Section 4.3.12 The Department has the right to contact Subcontractors or suppliers at all tiers or material or equipment suppliers directly to confirm amounts due and owing to them or amounts paid to them for Work on the Project, and to ascertain from the Subcontractors or suppliers at all tiers their projections of the cost to complete their Work or to supply their material or equipment, or the existence of any claims or disputes. In doing so the Department shall not issue any directions to Subcontractors or Suppliers at any tier.

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Section 4.3.13 If it comes to the Department's attention that a Subcontractor or supplier has not been paid in timely fashion (other than for disputed amounts), and if the Design-Builder fails to cure the problem within five (5) calendar days after the Department gives it written notice of the failure to pay, the Department may make payments to the Subcontractor or supplier and Design-Builder by joint check.

Section 4.4 **Progress Meetings.** The Design-Builder shall schedule and conduct at a minimum bi-weekly progress meetings at which the Department, the Architect/Engineer, the Program Manager, the Design-Builder and appropriate Subcontractors can discuss the status of the Work. The Design-Builder shall prepare and promptly distribute meeting minutes.

Section 4.5 **Written Reports.** The Design-Builders shall provide monthly written reports to the Department, the Program Manager and the Architect/Engineer on the progress of the entire Work in accordance with Section 4.9. The Design-Builder shall also maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, major equipment on the site, Work accomplished, problems encountered and other similar relevant data as the Department may reasonably require. The log shall be available to the Department, the Architect/Engineer and the Program Manager.

Section 4.6 **Cost Control System.** The Design-Builder shall develop a system of cost control for the Work in a format consistent with the Specifications and approved by the Department, which shall include, without limitation, regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Design-Builder shall identify variances between actual and estimated costs and report the variances to the Department, the Architect/Engineer and the Program Manager at regular intervals.

Section 4.7 **Key Personnel.** To carry out its duties, the Design-Builder shall provide at least the key personnel identified in **Exhibit [_]** to this Agreement, who shall carry out the functions identified in the Exhibit. Among other things, the Key Personnel shall include the project managers that will be responsible for managing the Work related to the Project's structural, mechanical, electrical and special systems. It is contemplated that these project managers will work from the design stage, purchasing and throughout the bulk of the field work. The Design-Builder's obligation to provide adequate staffing is not limited to providing the key personnel, but is determined by the needs of the Project. The Design-Builder shall not replace any of the key personnel without the Department's prior written approval, which shall not be unreasonably withheld. If any of the key personnel become unavailable to perform services in connection with the Contract due to death, illness, discharge or resignation, then the Design-Builder shall promptly appoint a replacement acceptable to the Department. The Department shall be entitled to complete information on each such replacement, including a current resume of his or her qualifications and experience.

Section 4.8 **Qualified Personnel/Cooperation.** The Design-Builder shall employ on the Project only those employees and Subcontractors who will work together in harmony and

who will cooperate with one another on the Project. The Design-Builder shall enforce strict discipline, good order and harmony among its employees and its Subcontractors and shall remove from the site any person who is unfit for the work or fails to conduct himself in a proper and cooperative manner. If the Department requests removal of any person as unfit or as having behaved inappropriately, the Design-Builder shall promptly comply.

Section 4.9 **Monthly Reports.** On the fifth (5th) day of each month, from Notice to Proceed until Final Completion of the Project, the Design-Builder shall deliver to the Department and the Program Manager a written report including the following elements:

.1 **Schedule Update.** Each monthly update shall reflect actual conditions of Project progress as of the date of the update. The update shall reflect the actual progress of construction, identify developing delays, regardless of their cause, and reflect the Design-Builder's best projection of the actual date by which Substantial Completion and Final Completion of the Project will be achieved. Via a narrative statement (not merely a critical path method schedule), the Design-Builder shall identify the causes of any potential delay and state what, in the Design-Builder's judgment, must be done to avoid or reduce that delay. The Design-Builder shall point out, in its narrative, changes that have occurred since the last update, including those related to major changes in the scope of work, activities modified since the last update, revised projections of durations, progress and completion, revisions to the schedule logic or assumptions, and other relevant changes. Any significant variance from the previous schedule or update shall also be identified in a narrative, together with the reasons for the variance and its impact on Project completion. All schedule updates shall be in a form reasonably acceptable to the Department. The Department may make reasonable requests during the Project for changes to the format or for further explanation of information provided. Submission of updates showing that Substantial Completion or Final Completion of the Project will be achieved later than the applicable scheduled completion date shall not constitute requests for extension of time and shall not operate to change the scheduled completion date. The Department's receipt of, and lack of objection to, any schedule update showing Substantial Completion or Final Completion later than the dates agreed upon in the Project Schedule shall not be regarded as the Department's agreement that the Design-Builder may have an extension of time, or as a waiver of any of the Department's rights, but merely as the Design-Builder's representation that, as a matter of fact, Substantial Completion or Final Completion of the Project may not be completed by the agreed upon date in the Project Schedule. Changes to the scheduled completion dates may be made only in the circumstances and only by the methods set forth in this Agreement.

.2 **Cost Update.** The monthly update shall reflect, by Guaranteed Maximum Price line item, the original line item amount, approved, pending, and projected Change Order amounts, the cost incurred to date, the projected cost to complete the Work of the line item, and any variance between the actually approved budgeted

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balance of the line item and the projected cost to complete. A clear distinction must be made between approved Change Orders and those merely requested or anticipated. The report shall explain all variances including "buy-outs" or final actual costs including those below their respective Guaranteed Maximum Price line item. In addition, the report must disclose any instances in which the Design-Builder has transferred amounts from one line item to another, or from the Contingency to any other line item. Neither submission of, nor the Department's failure to reject, an update reflecting that the projected cost to complete the Project will exceed the Guaranteed Maximum Price will operate to increase the Guaranteed Maximum Price or waive the Department's right to enforce the Guaranteed Maximum Price; nor shall such submission or failure to reject by the Department constitute approval of the expenditure of contingency funds or the transfer of funds from one line item to another. If the report reflects budget overruns, it must also include a recovery plan.

.3 **Economic Inclusion Report.** The monthly report shall include a detailed summary of the Design-Builder's efforts and results with respect to the economic inclusion goals set forth in this Agreement. Such report shall be in a format acceptable to the Department and shall include, at a minimum (i) the Design-Builder's overall performance with respect to the goals; (ii) a listing of subcontracts and agreements with material suppliers let by the Design-Builder and its Subcontractors during the month and the percentage of those subcontracts and agreements with material suppliers awarded to LSDBEs; (iii) a listing of subcontracts let by the Design-Builder and its Subcontractors during the month and the estimated percentage of the labor hours to be worked by District of Columbia residents pursuant to those subcontracts; and (iv) a description of the major subcontracting and supply opportunities that will be solicited during the next three (3) months and the actions being undertaken to meet the subcontracting goals.

.4 **Cash Flow Update.** If there have been any changes to the anticipated cash flow for the Project, they shall be disclosed and explained in the monthly report. If there are no such changes, the report shall so state.

.5 **Quality Assurance Report.** The monthly report shall include a detailed summary of the steps that are being employed in order to ensure quality construction and workmanship. Each report should specifically address issues that were raised by the Department and/or its Program Manager during the prior month and outline the steps that are being taken to address such issues.

.6 **Progress Photos.** The monthly report shall include updated progress photos that shall detail changes in the Work during the month.

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Section 4.10 **Open Book Reporting.** The Design-Builder shall maintain an open book reporting system with the Department, allowing the Department or its consultants access to the Design-Builder's Subcontractors and material suppliers, invoices, purchase orders, Change Order estimates, records for Self-Performed Work, and other relevant documentation and sources of information concerning the Work or costs. The Department shall not use its access to the Subcontractors to give instructions or directions to them. All instructions or directions shall be given only to the Design-Builder.

Section 4.11 **Claims for Additional Time**

Section 4.11.1 Time is of the essence of this Contract.

Section 4.11.2 The Design-Builder will perform the Work so that it shall achieve Substantial Completion by the Substantial Completion Date. Unless the failure to achieve Substantial Completion by the Substantial Completion Date is a result of an Excusable Delay, as defined in Section 4.11.3, the delay shall be deemed Non-Excusable and the Design-Builder shall not be entitled to an extension of time. Without limiting the generality of the foregoing, delays for the following reasons shall be regarded as Non-Excusable and shall not entitle the Design-Builder to an extension of time:

.1 Delays due to job site labor disputes, work stoppages, or suspensions of work;

.2 Delays due to adverse weather, unless the Design-Builder establishes that the adverse weather was of a nature and duration in excess of averages established by data from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration for the Project locale for the ten (10) years preceding the effective date of the Contract;

.3 Delays due to the failure of the Design-Builder or Subcontractors or material suppliers at any tier to perform in timely or proper fashion, without regard to concepts of negligence or fault; or

.4 Delays due to Site conditions whether known or unknown as of the effective date of the Contract, foreseeable or unforeseeable at that time, naturally occurring or man-made; provided, however, that delays due to Differing Soils Conditions or Hazardous Materials Remediation shall be deemed an Excusable Delay.

Section 4.11.3 The Design-Builder shall be entitled to an adjustment in the Substantial Completion Date due to an Excusable Delay. The term "Excusable Delay" shall mean:

.1 Delays due to adverse weather other than those that are classified as a Non-Excusable delay;

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.2 Delays due to acts of God, war, unavoidable casualties, civil unrest, and other similar causes of delay that are beyond the control of the Design-Builder; provided, however, that in no event shall a Non-Excusable delay or the action of the Design-Builder, or any of its employees, agents, Subcontractors or material suppliers be deemed an Excusable Delay; or

.3 Delays caused by Differing Soils Conditions or Hazardous Materials Remediation.

In addition to the forgoing, a delay shall be deemed to be an Excusable Delay only to the extent that such delay (i) warrants an extension in the Substantial or Final Completion Date; (ii) has not been caused by the Design-Builder or any of its employees, agents, Subcontractors or material suppliers; (iii) is of a duration of not less than three (3) days; (iv) is on Project's critical path; and (v) is in addition to any time contingency periods set forth in the critical path.

Section 4.11.4 If the Design-Builder wishes to make a claim for an increase in the Contract time, written notice as provided herein shall be given. The Design-Builder's claim shall include an estimate of the cost and of the probable effect of delay on the progress of the Work. In the case of continuing delay, only one claim is necessary.

Section 4.11.5 In no event shall the Design-Builder be entitled to an increase in the GMP or the Design-Build Fee as a result of either an Excusable or Non-Excusable Delay.

Section 4.12 Site Safety and Clean-Up.

Section 4.12.1 The Design-Builder will be required to provide a safe and efficient site, with controlled access.

Section 4.12.2 The Design-Builder shall be required to provide wheel washing stations on site so as to prevent the accumulation of dirt and other refuse on the streets surrounding the Project site.

Section 4.12.3 The Design-Builder shall be responsible for site security and shall be required to provide such watchman as are necessary to protect the site from unwanted intrusion.

Section 4.12.4 The Design-Builder shall be responsible for the cost of temporary power used during the construction of the Project, including, but not limited to, the cost of installing such temporary wiring as may be required to bring power to the site. The Design-Builder shall also be responsible for the cost of all temporary construction necessary on the site.

Section 4.13 Close-out & FF&E.

Section 4.13.1 The Design-Builder shall be responsible for purchasing and providing FF&E. Unless otherwise approved by the Department, all loose FF&E shall be purchased from

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the Department's preferred vendor. A detailed list of FF&E requirements will be developed during the preconstruction phase.

Section 4.13.2 The Design-Builder shall be required to prepare and submit at close-out a complete set of product manuals, warranties, etc. The Design-Builder shall also provide the Department with a complete set of its Project files, including, but not limited to, shop drawings, etc., at close out so as to assist the Department and/or DCPS in operating the building.

Section 4.13.3 An allowance of [AMOUNT] for cleaning and other move-in services as directed by the Department shall be included in the GMP. This allowance is in addition to cleaning services that would otherwise be required by the Design-Builder, including, but not limited to, the obligation to deliver a broom clean building at the end of construction.

Section 4.14 Control of the Site. The Design-Builder shall take control of the site and shall install the necessary construction fences and other devices to properly secure the site in accordance with the Swing Plan.

Section 4.15 Salvaged and Stored Items. The Design-Builder shall be responsible for salvaging and storing all items as identified by the Department.

Section 4.16 Sediment and Erosion Control. The Design-Builder shall be responsible for installing sediment and erosion control measures, inclusive of, but not limited to: silt fencing, inlet protection, stabilized construction entrances, and other control measures.

Section 4.17 Quality Control. The Design-Builder shall be responsible for all activities necessary to manage, control, and document work to ensure compliance with Contract Documents. The Design-Builder's responsibility includes ensuring adequate quality control services are provided by the Design-Builder's employees and its subcontractors at all levels. The work activities shall include safety, submittal management, document reviews, reporting, and all other functions related to quality construction.

The Design-Builder shall implement a Quality Control Plan for the Project. A draft of such plan shall be submitted to the Department no later than [DATE], and a final plan shall be agreed upon and approved by the Department's Program Manager prior to commencing of the Work in the field. The Quality Control Plan shall be tailored to the specific products/type of construction activities contemplated by the GMP Basis Documents, and in general, shall include a table of contents, quality control team organization, duties/responsibilities of quality control personnel, submittal procedures, inspection procedures, deficiency correction procedures, documentation process, and a list of any other specific actions or procedures that will be required for key elements of the Work.

During the construction phase, the Design-Builder shall perform daily quality control inspections and create reports based on such inspections. The daily quality control reports shall be provided to the Department on a weekly basis. The Design-Builder shall incorporate a quality

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control section in the progress meetings to discuss outstanding deficiencies, testing/inspections, and upcoming Work. The monthly report shall include a detailed summary of the steps that are being employed to provide quality construction and workmanship. The monthly report should specifically address issues raised during the month and outline the steps that are being used to address such issues.

ARTICLE 5
OFFICE'S RESPONSIBILITIES

Section 5.1 **Information and Services**

Section 5.1.1 The Department shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Department's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

Section 5.1.2 In the Preconstruction Phase, the Department shall furnish the following with reasonable promptness and at the Department's expense:

1 Reports, surveys, drawings and tests concerning the conditions of the site that are required by law.

.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage, rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a Project benchmark.

Section 5.2 **Department's Designated Representative.** The Department designates the individual(s) identified in **Exhibit [_]** as its representative with express authority to bind the Department with respect to all matters requiring the Department's approval or authorization. Subject to the limitations on their authority specified in **Exhibit [_]**, these representative(s) shall have the exclusive authority to make decisions on behalf of the Department concerning estimates and schedules, construction budgets, changes in the Work, and execution of Change Orders or Change Directives, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Design-Builder.

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In order for the Department to effectively manage the Project and assure that the Design-Builder does not receive conflicting instructions regarding the Work, the Design-Builder shall promptly notify the Department's representative upon receiving any instructions or other communication in connection with the Design-Builder's Work from any employee of the Department or other purported agent of the Department other than the Department's representative.

Section 5.3 **Design-Builder's Designated Representative.** The Design-Builder designates the individual(s) identified in **Exhibit [_]** as its representative with express authority to bind the Design-Builder with respect to all matters requiring the Design-Builder's approval or authorization. In addition, the Department retains the right to approve candidates for key on-site personnel in accordance with their experience with similar projects and local marketplace conditions. Once approved, individuals cannot be changed without the Department's prior approval. During the entire term, it is agreed that the Design-Builder's designated representative will devote his time exclusively to the Project, unless the Department consents to a reduction in time. All services provided by the Design-Builder shall be performed in accordance with the highest professional standards recognized and adhered to by Design-Builders that construct school facilities in large, urban areas.

ARTICLE 6
COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

Section 6.1 **Compensation**

Section 6.1.1 The Department shall compensate and make payments to the Design-Builder for Preconstruction Phase Services in accordance with this Article 6 and Article 9. For Preconstruction Phase Services, the Design-Builder's compensation shall be [AMOUNT] (the "Preconstruction Fee").

Section 6.1.2 The Preconstruction Fee shall be the Design-Builder's sole compensation for Preconstruction Phase Services. The Preconstruction Fee shall include, but not be limited to, amounts necessary to compensate the Design-Builder for:

- Profit
- Home Office Overhead
- Cost of preconstruction staff
- Fringe Benefits associated with staff costs
- Payroll taxes associated with staff costs
- Staff costs associated with obtaining permits and approvals during the Preconstruction Phase
- Out-of-house consultants
- Travel, Living and Relocation expenses
- Job vehicles

- Office equipment including but not limited to:
    - Computer hardware and software
    - Fax machines
    - Copying machines
- Office supplies
- Telephone
- Local delivery and overnight delivery costs

Section 6.2 **Payments**

Section 6.2.1 Payments for Preconstruction Phase Services shall be made monthly following presentation of the Design-Builder's invoice and shall be in proportion to services performed. In no event, however, will the aggregate of the Design-Builder's monthly invoices for Preconstruction Phase Services exceed the Preconstruction Fee.

Section 6.2.2. Payments are due and payable in accordance with Article 9 of this Agreement. Amounts unpaid after the date of which payments due shall bear interest in accordance with the Prompt Payment Act.

ARTICLE 7
COMPENSATION FOR CONSTRUCTION PHASE SERVICES

Section 7.1 **Compensation**

Section 7.1.1 The Department shall compensate and make payments to the Design-Builder for Construction Phase Services in accordance with this Article 7 and Article 9. For Construction Phase Services, the Design-Builder's compensation shall be [AMOUNT] (the "Design-Build Fee").

Section 7.1.2 Subject to the terms and conditions of this Agreement, the Design-Build Fee shall be increased by Ten Percent (10%) if both of the objectives set forth below are met and shall be decreased by Ten Percent (10%) if either or both of the objectives set forth below are not met. The objectives are as follows:

.1 **On-Time Completion.** Substantial Completion is achieved on or before June 30, 2014; provided, however, that the demolition of the existing structure and construction of the athletic facilities shall be completed on or before December 31, 2014.

.2 **Cost Control.** The total amount paid to the Design-Builder for Work performed under this Contract is less than or equal to the GMP (as established in the GMP Amendment and regardless of any increases authorized by subsequent Change order) plus Fifty Percent (50%) of the project contingency included in the

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Department's budget for this Project.

In determining whether these objectives have been met, the Department will evaluate whether the stated objectives have, in fact, been achieved. This decision shall be made regardless of the reason why the objectives have or have not been met, and the Design-Builder acknowledges and agrees that ten Percent of the Design-Build Fee is put at-risk by virtue of this provision and that the Design-Builder can lose entitlement to such portion of the Design-Build Fee even if objectives are not met due to the fault of the Department, the Architect/Engineer, the Code Official, events of force majeure or otherwise. In addition, the Design-Build Fee shall be increased by Five Percent (5%) if the Design-Builder achieves the Workforce Utilization Requirement established by the Department in the GMP Amendment. The Department shall also pay each subcontractor an incentive payment equal to Ten Percent (10%) of the payroll that is paid by the subcontractor to District residents who are employed on the Project. These calculations would be based the certified payrolls required to be submitted under the Davis Bacon Act as set forth in Section of this Agreement.

Section 7.1.3 The Design-Build Fee, as adjusted in accordance with Section 7.1.2 shall be the Design-Builder's sole compensation for Construction Services. The Design-Build Fee shall include, but not be limited to, amounts necessary to compensate the Design-Builder for:

- Profit
- Home office overhead
- Home office staff

Section 7.2 **Initial Not-to-Exceed Amount.** Unless and until the GMP Amendment is executed and approved by the Council for the District of Columbia, this Contract has a not-to-exceed amount of [AMOUNT]. In no event shall the Design-Builder be entitled to recover more than such amount unless the Design-Builder is authorized to exceed such amount by the Department in advance and in writing.

Section 7.3 **Maximum Cost of General Conditions.** The Design-Builder shall not be entitled to recover more than [AMOUNT] for the Cost of General Conditions (such amount, the "Maximum Cost of General Conditions"). The Design-Builder understands and agrees that the Maximum Cost of General Conditions shall not be increased or decreased as a result of Change Orders or Change Directive unless such Changes (i) extend the duration for the Construction Phase for the base building beyond August 31, 2014 or the Demolition and Sitework Phase beyond March 31, 2015; and (ii) the Design-Builder can demonstrate to the satisfaction of the Department that such additional Cost of General Conditions are reasonable. To the extent the Design-Builder incurs General Conditions costs in excess of the Maximum Cost of General Conditions, the Design-Builder shall not be entitled to reimbursement for such amounts. Nonetheless, in such an event, the Design-Builder exceeds the Maximum Cost of General Conditions, the Design-Builder shall be required to adequately staff the Project.

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Section 7.4 Changes in The Work

Section 7.4.1 Changes Authorized. The Department may, without invalidating the Contract, and without notice to or approval of any surety, order changes in the Work, including additions, deletions or modifications. Any such change must be conveyed by the Department to the Design-Builder via written Change Directive or Change Order.

Section 7.4.2 Executed Change Directive/Change Order Required. Only a written Change Directive or Change Order, executed by the Department, may make changes to the Contract. In particular, but without limitation, a written Change Directive or Change Order executed by the Department is the only means by which changes may be made to the Substantial or Final Completion Date, the Preconstruction Fee, the Design-Build Fee or the Guaranteed Maximum Price.

Section 7.4.3 Department-Initiated Changes

.1 If the Department wishes to make a change in the Work or to accelerate the Work, it will execute and issue to the Design-Builder a written Change Directive, either directing the Design-Builder to proceed at once with the changed Work or directing it to not to proceed, but to inform the Department, in writing, of the amount, if any, by which the Design-Builder believes that Substantial or Final Completion Date and/or the Guaranteed Maximum Price should be adjusted to take the Change Order or Change Directive into account.

.2 Within ten (10) days of receiving a Change Directive, the Design-Builder shall provide the Department with a written statement of all changes in the Contract, including, without limitation, any changes to the Substantial or Final Completion Date or the Guaranteed Maximum Price to which it believes it is entitled as a result of the Change Directive. If additional time is sought, a schedule analysis supporting the requested extension should be included. The schedule analysis should include a written narrative explanation. If a change in the Guaranteed Maximum Price is sought (or if the Department has requested a deduct change), the statement should include a breakdown, by line item, of the estimated cost changes attributable to the proposed change. The Department may request, and the Design-Builder shall provide, further cost breakdowns, clarifications, documentation or back-up if the Department reasonably believes such additional information is needed to understand and evaluate the request. The additional information required may include cost and pricing data in accordance with the Department's regulations. Any requested adjustment to the Guaranteed Maximum Price shall be limited to increased Cost of the Work due to the Change Directive. The Design-Builder is not entitled to any markup on any kind of change orders. All deductive Change Orders shall include a corresponding reduction in the Design-Build Fee.

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.3 If the Department has not yet directed the Design-Builder to proceed with the Change described by a Change Directive, the Department may rescind it. If the Department wishes to proceed, or has already directed the Design-Builder to proceed, the Design-Builder shall immediately proceed with the changed Work and, the Department and the Design-Builder shall use their good faith best efforts to reach an agreement upon the modifications to the Substantial or Final Completion Date, and/or the Guaranteed Maximum Price that are justified by the Change Directive. If they reach agreement, the agreement shall be set forth in a Change Order and the Design-Builder shall also execute it, at which point it will become binding on both parties.

.4 If the parties fail to reach an agreement within sixty (60) days after the Department receives the Design-Builder's detailed statement pursuant to Subparagraph 7.4.3.2, and such other documentation as the Department may request, the Design-Builder may assert a claim in accordance with this Agreement. In such a case, and subject to adjustment via the claims and disputes process, the Department shall unilaterally grant the Design-Builder such adjustments, if any, to the Substantial or Final Completion Date, the Guaranteed Maximum Price, and/or the Preconstruction or Design-Build Fee as the Department has judged to be appropriate.

Section 7.4.4 **Notice of Change Event.** The Design-Builder must give the Department written notice of any Change Event within ten (10) calendar days of the date on which the Design-Builder knew, or reasonably should have known, of the Change Event. To the extent available, the notice must state the nature of the Change Event and describe, generally, all changes in the Contract to which the Design-Builder believes it is entitled. Such notice is an express condition precedent to any claim or request for adjustment to the Substantial or Final Completion Date, or the Guaranteed Maximum Price arising from the Change Event and, if the notice is not given within the required time, the Design-Builder will have waived the right to any adjustment to the Substantial or Final Completion Date, or the Guaranteed Maximum Price arising from the Change Event.

Section 7.4.5 **Detailed Change Request.** Within twenty (20) days after giving notice of a change event, the Design-Builder shall submit a written change request describing, in reasonable detail, all adjustments it seeks to the Substantial or Final Completion Date or the Guaranteed Maximum Price as a result of the Change Event. The change request shall include the same information as described in Subparagraph 7.4.3 with respect to any Contract changes the Design-Builder seeks due to the Change Event, and the amount of any requested adjustment to the Guaranteed Maximum Price shall be limited in accordance with that Subparagraph.

Section 7.4.6 **Changes to GMP.** Subject to the condition precedent that the Design-Builder have complied with the notice and documentation provisions of this Article, and subject to the limitations stated in this Agreement, the Design-Builder is entitled to an adjustment to the Guaranteed Maximum Price in the following cases:

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.1 If the Department issues a Change Directive or Change Order that directs the Design-Builder to proceed with work which is beyond the scope of Work included within the Guaranteed Maximum Price Amendment; or

.2 The Design-Builder encounters Differing Soil Conditions or Hazardous Materials not identified in the Preconstruction Phase.

Section 7.4.7 <u>Deductive Change Orders.</u> The Department is likewise entitled to issue deductive Change Orders (reducing the Guaranteed Maximum Price or the Substantial or Final Completion Date) when changes are effected, by Change Directive or otherwise, which will decrease the cost of completing the Work or the time within which it can be completed.

Section 7.4.8 <u>No Adjustments to Fee.</u> The Design-Builder understands and agrees that the Preconstruction Fee and Design-Build Fee shall not be increased or decreased as a result of any such Change Orders or Change Directive. In furtherance of this understanding, the Design-Builder agrees that it shall not be entitled to an increase in the Preconstruction Fee, or the Design-Build Fee by virtue of changes authorized by the Department unless such changes fall outside the general scope of work contemplated by this Agreement. The term general scope of work shall mean a state-of-the-art school facility that is consistent with the Program of Requirements and incorporates sustainable design initiatives (LEED Gold). Without limiting the generality of the foregoing, it is understood and agreed that changes that, individually or in the aggregate, are less than ten percent (10%) of the GMP shall conclusively be deemed to be within the Project's general scope, and thus, shall not entitle the Design-Builder to an increase in the Preconstruction Fee, Design-Build Fee.

Section 7.4.9 <u>Executed Change Orders Final.</u> The Design-Builder agrees that any Change Order executed by the Department and Design-Builder constitutes its full and final adjustment for all costs, delays, disruptions, inefficiencies, accelerations, schedule impacts, or other consequences arising from the change in question, whether a Change Directive, or a Change Event, or from any claimed cumulative effect of changes made to the date of the Change Order, and that no further adjustments in compensation or time shall be sought or made with respect to the Change Directive or the Change Event giving rise to the Change Order. Although the parties anticipate that most Change Orders will not require an adjustment to the Cost of General Conditions, if the Work described in a Change Order requires an increase or decrease in the Maximum Cost of General Conditions established in Section 7.3 (i.e. because such a Change requires additional field staff or other equipment that would be classified as General Conditions), the Change Order shall contain a separate line item adjusting such amount. The cost of processing a Change Order shall not, normally, be considered an event that will require an increase in the Maximum Cost of General Conditions.

Section 7.4.10 <u>Failure to Agree.</u> If the Design-Builder claims entitlement to a change in the Contract, and the Department does not agree that any action or event has occurred to justify any change in time or compensation, or if the parties fail to agree upon the appropriate amount of

the adjustment in time or compensation, the Department will unilaterally make such changes, if any, to the Contract, as it determines are appropriate pursuant to the Contract. The Design-Builder shall proceed with the Work and the Department's directives, without interruption or delay, and shall make a claim as provided in Article 12. Failure to proceed due to a dispute over a change request shall constitute a material breach of the Contract and entitle the Department to all available remedies for such breach, including, without limitation, termination for default.

Section 7.4.11 **Mark-Up on Trade Work.** The maximum mark up for change order work shall be as follows:

.1 For Work performed by a Subcontractor with its own forces, the Subcontractor shall be entitled to a mark-up of not more than fifteen percent (15%) (covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on the Direct Costs of the Work. For Work that the Owner permits the Design-Builder to self-perform, the Design-Builder shall also be entitled to a mark-up of not more than fifteen percent (15%) of the Direct Cost of the Work. With regard to any such Work that is self-performed by the Design-Builder, the markup contemplated in this Section 7.4.11.1 shall be the Design-Builder's exclusive compensation and it shall not be entitled to the markup contemplated in Section 7.4.11.3;

.2 Intervening tier Subcontractors shall be entitled to a mark-up of five percent (5%) (covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on Work Performed by lower-tier Subcontractors;

.3 To the extent permitted by Section 7.4.8, the Design-Builder shall be entitled to an increase in its Design-Build Fee at a rate of [DESIGN-BUILDER'S FEE AS PERCENTAGE OF ESTIMATED COST OF WORK] on work perform by Subcontractors. Such markup shall cover the same cost elements that were included in the Design-Build Fee;

.4 In no event shall the maximum mark-up on the Direct Cost of the Work exceed twenty five percent (25%).

Direct Cost of the Work shall mean labor, material and other costs reasonably and necessarily incurred in the proper performance of the Work as approved by the Owner. Such costs do not include, however, home office overhead, field supervision, general conditions or profit of either the Subcontractor or the Design-Builder. No personnel above the level of a working foreman shall be considered a Direct Cost of the Work.

ARTICLE 8
COST OF THE WORK FOR CONSTRUCTION PHASE

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Section 8.1 **Cost of the Work.** The term "Cost of the Work" shall mean the costs necessarily incurred by the Design-Builder in the proper performance of the Work and shall include only the following:

.1 Payments made by the Design-Builder to Subcontractors and suppliers, but only in accordance with the subcontracts and supply agreements ("Subcontractor Costs");

.2 The Cost of General Conditions, subject however to the Maximum Cost of General Conditions;

.3 All amounts due to the Design-Builder under the terms of the Department's written authorization for the Design-Builder to perform any portion of the Work as Self-Performed Work. If an authorization for the Design-Builder to engage in Self-Performed Work is not on a fixed-price basis, then, as to that Work, the following costs shall be within the Cost of the Work:

(a) **Labor.** Properly documented wages actually paid to Project superintendents, foremen, construction workers, and other personnel in the direct employ of the Design-Builder, while engaged in approved Self-Performed Work, together with contributions, assessments, payroll taxes, or fringe benefits required by the laws or applicable collective bargaining agreements, charged at the rates stated in **Exhibit [ ]** to this Agreement.

(b) **Incorporated Materials.** The cost, net of trade discounts, of all materials, products, supplies and equipment incorporated into the Self-Performed Work, including, without limitation, costs of transportation and handling.

(c) **Unincorporated Materials.** The cost of materials, products, supplies and equipment not actually installed or incorporated into the Self-Performed Work, but required to provide a reasonable allowance for waste or spoilage, subject to the Design-Builder's agreement to turn unused excess materials over to the Department at the completion of the Project or, at the Department's option, to sell the material and pay the proceeds to the Department or give the Department a credit in the amount of the proceeds against the Cost of the Work.

.4 Royalty and license fees paid for use of a design, process or product, if its use is required by this Contract or has been approved in advance by the Department;

.5 Fees for obtaining all required approvals or permits;

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.6 Cost of the Architect/Engineer's contract assigned to the Design-Builder, reimbursed at cost and without markup, subject to the limits of the GMP; and

.7 All fees and other costs necessarily incurred to carry out testing and inspection required by the Contract or applicable laws, or otherwise to maintain proper quality assurance. The costs the Design-Builder incurs to schedule and coordinate any additional testing and inspections the Department may decide to conduct itself shall be within Cost of the Work unless the additional testing establishes that the Work tested was defective or otherwise failed to satisfy Contract requirements, in which case the Design-Builder shall pay the costs, without reimbursement.

Section 8.2 **Cost of General Conditions.** Items included in the Cost of General Conditions are all items necessary to perform Construction Phase Services described herein including, but not limited to:

.1 Cost of construction staff (only staff stationed in the field is reimbursable; however, exceptions will be made for scheduling, cost estimating and accounting services if such functions are normally provided by the Design-Builder's regional and/or home office personnel)

.2 Fringe Benefits associated with field staff costs

.3 Payroll taxes and payroll insurance associated with field staff costs

.4 Staff costs associated with obtaining permits and approvals

.5 Out-of-house consultants

.6 Travel, Living and Relocation expenses

.7 Job vehicles

.8 Field office for CM including but not limited to: (i) trailer purchase and/or rent; (ii) field office installation, relocation and removal; (iii) utility connections and charges during the Construction Services Phase; (iv) furniture: (v) office supplies;

.9 Office equipment including but not limited to: (i) computer hardware and software; (ii) fax machines; (iii) copying machines; (iv) telephone installation, system and use charges: (v) job radios

.10 Local delivery and overnight delivery costs

.11 Field computer network

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.12 Watchmen

.13 First aid facility

.14 Progress photos

.15 Consumption charges for utility service during construction

Section 8.3 **Costs Not to Be Reimbursed.** All costs not specifically listed in Paragraph 8.1 as being within the Cost of the Work are excluded from the Cost of the Work. In particular, but without limitation, the Cost of the Work does not include any of the following:

.1 Any personnel or labor costs other than those set forth in **Exhibit [_]**. Without limiting the generality of the foregoing, Cost of the Work excludes salaries or other compensation of the Design-Builder 's personnel at the Design-Builder's home office or Project-responsible offices or any branch offices.

.2 Fees for any permits or licenses the Design-Builder requires to conduct its general business operations.

.3 Capital expenses and interest on capital employed for the Work.

.4 Direct or indirect costs of any kind, except those expressly included in Paragraph 8.1.

.5 Sales or use taxes, unless the Design-Builder establishes that applicable law required payment of such taxes.

.6 Costs due to the errors or omissions of the Design-Builder or its Subcontractors or suppliers at all tiers, negligent or otherwise.

.7 Costs dues to breach of Contract by the Design-Builder or its Subcontractors or material suppliers at all tiers, including, without limitation, costs arising from defective or damaged Work or its correction, disposal of materials or equipment erroneously supplied, and repairs to property damaged by the Design-Builder or its Subcontractors or material suppliers at all tiers.

.8 Any costs incurred in performing work of any kind before Notice to Proceed, unless specifically authorized by the Department.

Section 8.4 **Discounts, Rebates And Refunds**

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Section 8.4.1 Cash discounts obtained on payments made by the Design-Builder shall accrue to the Department if (i) before making the payment, the Design-Builder included them in an Application for Payment and received payment therefor from the Department, or (ii) the Department has deposited funds with the Design-Builder with which to make payments; otherwise cash discounts shall accrue to the Design-Builder. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Department, and the Design-Builder shall make provisions so that they can be secured.

Section 8.4.2 Amounts that accrue to the Department in accordance with the provisions of Subparagraph 8.4.1 shall be credited to the Department as a deduction from the Cost of the Work.

Section 8.5 **Facilitating Tax Exempt Purchases.** The Department expects that the Project will qualify as tax-exempt under applicable laws. The Department will provide the Design-Builder with the necessary information relating to the tax exemption. In the event any savings are attributable to the tax-exempt status of the Project, the Design-Builder shall not be entitled to share in such savings.

Section 8.6 **Accounting Records.** The Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under the Contract, the accounting and control systems shall be satisfactory to the Department. The Department, its representatives, and the Department's accountants shall be afforded access to the Design-Builder's records, books, correspondence, instruction, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Project, and the Design-Builder shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

ARTICLE 9
CONSTRUCTION PHASE PAYMENTS

Section 9.1 **Progress Payments.** The Design-Builder shall be paid its compensation in a series of progress payments and a final payment, for Work completed in accordance with the Contract, and for which proper Applications for Payment have been submitted and approved. The amount of each progress payment shall be as follows:

The Costs of Work Completed to Date

Plus $\frac{\text{Cost of Work for Pay Period}}{\text{Current approved estimated Cost of Work through completion}}$ x Design-Build Fee

Minus Applicable Retainage

Minus Amounts previously paid by the Department

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Section 9.2 **Retention.** The Department shall withhold from each progress payment an amount equal to ten percent (10%) of the payment related to: (i) each Subcontract and supply agreement, (ii) the Design-Build Fee, (iii) the Cost of General Conditions, and (iv) the Cost of the Work related to each item of Self-Performed Work, until such time as fifty percent (50%) of the then currently budgeted cost associated with each such an item has been invoiced at which point the Department may cease retaining against such item. The Department may elect to increase the retention on any trade subcontractor up to ten percent (10%) in the event the Department determines that the situation so warrants. The Department, in its sole and absolute discretion, may elect to reduce the retainage relating to a particular trade Subcontractor, the Cost of General Conditions, or the Cost of the Work related to a specific item of Self-Performed Work to zero upon: (x) satisfactory completion of such Work; (y) submission of all required warranties, certifications, and operating or maintenance instructions with respect to that Work; and (z) execution of appropriate waivers of lien and releases of claims. However, in no event shall the total retainage held by the Department be reduced to an amount that is less than two and one-half percent (2.5%) of the GMP.

Section 9.3 **Documents Required with Application for Payment.** Each Application for Payment shall be accompanied by the Design-Builder's job cost ledgers in a form satisfactory to the Department, the Subcontractors' and Suppliers' Applications for Payment on AIA Documents G702 and G703 or other form acceptable to the Department, and such other supporting documentation as the Department may reasonably request. Each Application for Payment shall include detailed documentation of costs as a condition to approving progress payments, but the Design-Builder shall nevertheless maintain complete documentation of the costs.

Section 9.4 **Stored Materials.** The Department shall not be required to pay for materials stored at the site or stored at other locations, absent its express agreement to do so, which may be withheld at the Department's sole discretion. If the Department expressly agrees to pay for materials stored at the site but not yet incorporated into the Work, the Application for Payment may also include a request for payment of the cost of such materials, if the materials have been delivered to the site, and suitably stored. Such requests shall be documented by appropriate invoices and bills of sale. Payment for stored materials shall be conditioned also on the Design-Builder's representation that it has inspected the material and found it to be free from defect and otherwise in conformity with this Contract, and on satisfactory evidence that the materials are insured under the builder's risk policy. Further, if the Design-Builder requests the Department to allow payments for storage of materials offsite, the Design-Builder shall be required, inter alia, to agree to execution of proper documentation to afford the Department a secured interest in the materials upon payment.

Section 9.5 **Design-Builder's Certification.** Each Application for Payment shall be accompanied by the Design-Builder's signed certification that all amounts paid to the Design-Builder on the previous Application for Payment that were attributable to Subcontractor Work or to materials or equipment being supplied by any supplier has been paid over to the appropriate

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Subcontractors and suppliers; that all amounts currently sought for Subcontractor Work or supply of materials or equipment are currently due and owing to the Subcontractors and material or equipment suppliers; and that all Work, materials or equipment for which payment is sought is, to the best of the Design-Builder's knowledge, free from defect and meets all of the Contract requirements. The Design-Builder shall not include in an Application Payment amounts for Work for which the Design-Builder does not intend to pay.

Section 9.6 **Lien Waivers.** Each Application for Payment shall be accompanied by written waivers of the right to file a mechanic's lien and all other claims, in a form substantially similar to **Exhibit [_]** for the Design-Builder and all Subcontractors and material suppliers at all tiers who have supplied labor or material or both for which payment is requested, subject only to receipt of payment. If the Department so requests, the Design-Builder shall also submit unconditional waivers of liens for itself and all Subcontractors and material suppliers at all tiers with respect to Work or materials or equipment for which payment has been previously made, and additional forms of waiver acknowledging receipt of final payment under the Contract, and providing final release of such liens.

Section 9.7 **Warranty of Title.** By submitting an Application for Payment, the Design-Builder warrants to the Department that title to all Work for which payment is sought will pass to the Department, without liens, claims, or other encumbrances, upon the receipt of payment by the Design-Builder. The Department may require execution of appropriate documents to confirm passage of clear title. Passage of title shall not operate to pass the risk of loss with respect to the Work in question. Risk of loss remains with the Design-Builder until Substantial Completion, unless otherwise agreed by the Department, in writing.

Section 9.8 **Submission.** On the twenty-fifth day of each month the Design-Builder shall submit to the Department (with a copy to the Program Manager) an Application for Payment, which Application for Payment shall cover the entire month during which the Application for Payment is submitted. All amounts formally submitted via Application for Payment and not disputed by the Department shall be due and payable on the last day of the month following submission or, if that is not a business day, on the following business day. If the Design-Builder and Department are unable to agree on the amounts properly due and owing, the Department shall pay in accordance with its good faith determination and the Design-Builder may protest and pursue a claim as provided in this Agreement.

Section 9.9 **Right to Withhold Payments.** The Department will notify the Design-Builder within fifteen (15) days after receiving any Application for Payment of any defect in the Application for Payment or the Design-Builder's performance which may result in the Department's declining to pay all or a part of the requested amount. The Department may withhold payment from the Design-Builder, in whole or part, as appropriate, if:

.1 the Work is defective and such defects have not been remedied; or

.2 the Department has determined that the Design-Builder's progress has fallen behind the Project Schedule, and the Design-Builder fails, within ten (10) calendar days of the Department's written demand, to provide the Department with a realistic and acceptable plan to recover the delays; or

.3 the Design-Builder's monthly schedule update reflects that the Design-Builder has fallen behind the Project Schedule, and the Design-Builder fails to include, in the same monthly report, a realistic and acceptable plan to recover the delays; or

.4 the Design-Builder has failed to provide the monthly report in full compliance with Section 4.9 of this Agreement; or

.5 the Design-Builder has failed to pay Subcontractors or suppliers promptly or has made false or inaccurate certifications that payments to Subcontractors or suppliers are due or have been made; or

.6 any mechanic's lien has been filed against the Department, the site or any portion thereof or interest therein, or any improvements on the site, even though the Department has paid all undisputed amounts due to the Design-Builder, and the Design-Builder, upon notice, has failed to remove the lien, by bonding it off or otherwise, within ten (10) calendar days; or

.7 the Department has reasonable evidence that the Work will not be completed by the Substantial Completion Date, as required, that the unpaid balance of the Guaranteed Maximum Price would not be adequate to cover actual or liquidated damages arising from the anticipated delay; or

.8 the Department has reasonable evidence that the Work cannot be completed for the unpaid balance of the Guaranteed Maximum Price; or

.9 the Design-Builder is otherwise in substantial breach of this Contract (including, without limitation, failures to comply with economic inclusion requirements in Article 11).

Section 9.10 **Payment Not Acceptance.** Payment of any progress payment or final payment shall not constitute acceptance of Work that is defective or otherwise fails to conform to the Contract, or a waiver of any rights or remedies the Department may have with respect to defective or nonconforming Work.

Section 9.11 **Department Not Obligated to Others.** The Department shall have no obligation to pay or be responsible in any way for payments to a consultant or subcontractor performing portions of the Work. The Department shall have no obligation, after assignment of the Design Contract to the Design-Builder, to pay or be responsible in any way for payments to the Architect/Engineer.

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Section 9.12 **<u>Final Payment.</u>** Final payment shall be made by the Department to the Design-Builder when (i) Final Completion has been achieved; and (ii) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Design-Builder and reviewed by the Department's accountants. The Department shall make such final payment not more than thirty (30) days after the Department receives such report from its accountants.

Section 9.12.1 The amount of the final payment shall be calculated as follows:

.1 Take the sum of the Cost of the Work substantiated by the Design-Builder's final accounting and the Preconstruction Fee and the Design-Build Fee with additional Incentives, if any; but not more than the Guaranteed Maximum Price.

.2 Subtract amounts, if any, for which the Department withholds pursuant to the Contract.

.3 Subtract the aggregate of previous payments made by the Department. If the aggregate of previous payments made by the Department exceeds the amount due the Design-Builder, the Design-Builder shall promptly reimburse the difference to the Department.

.4 The final payment shall take into account any savings accruing to the Department or the Design-Builder.

Section 9.12.2 The Department's accountants will review and report in writing on the Design-Builder's final accounting within 30 days after delivery of the final accounting to the Department by the Design-Builder. Based upon such Cost of the Work as the Department's accountants report to be substantiated by the Design-Builder's final accounting, and provided the other conditions of Subparagraph 9.12.1 have been met, the Department will, within seven days after receipt of the written report of the Department's accountants, shall notify the Design-Builder of any amount that the Department will withhold and the reasons therefor. The time periods stated in this Paragraph 9.12 supersede those for typical progress payments.

Section 9.12.3 If the Department's accountants report the Cost of the Work as substantiated by the Design-Builder's final accounting to be less than claimed by the Design-Builder, the Design-Builder shall be entitled to proceed in accordance with Article 12 without a further decision of the Department. Unless agreed to otherwise, the Design-Builder shall make a demand for mediation or arbitration pursuant to Article 12 of the disputed amounts within 60 days after the Design-Builder's receipt of the Department's final payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Department's accountants becoming binding on the Design-Builder. Pending a final resolution of the disputed amount, the Department shall pay the Design-Builder the amount that the Department determines to be appropriate.

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Section 9.13 **Liquidated Damages.** If the Design-Builder fails to achieve Substantial Completion by the Substantial Completion Date, the parties acknowledge and agree that the actual damage to the Department for the delay will be impossible to determine, and in lieu thereof, the Design-Builder shall pay to the Department, as fixed, agreed and liquidated delay damages in the amount of Ten Thousand Dollars ($10,000) per day for each calendar day of delay for failure to meet the Substantial Completion Date. The Design-Builder and the Department agree that the liquidated damages set forth in this Section 9.13 do not constitute, and shall not be deemed, a penalty but represent a reasonable approximation of the damages to the Department associated with a delay in the Project. Notwithstanding anything to the contrary in this Agreement, in no event shall the liquidated damages, or the amount be assessed against the Design-Builder for late delivery, exceed Nine Hundred Thousand Dollars ($900,000).

Section 9.14 **Early Completion.** In the event the Design-Builder achieves Substantial Completion of the Project prior to the Substantial Completion Date, the Design-Builder shall maintain the completed Project, at its own expense, until such time that the Department agrees to occupy and use the Project for its intended use.

ARTICLE 10
INSURANCE AND BONDS

Section 10.1 **Insurance Required by the Project**

Section 10.1.1 The Design-Builder will be required to maintain the following types of insurance throughout the life of the contract.

.1 Commercial general public liability insurance ("Liability Insurance") against liability for bodily injury and death and property damage, such Liability Insurance to be in an amount not less than Five Million Dollars ($5,000,000) for liability for bodily injury, death and property damage arising from any one occurrence and Five Million Dollars ($5,000,000) from the aggregate of all occurrences within each policy year. The policy should include completed operations coverage.

.2 Workers' compensation and Employers Liability coverage providing statutory benefits for all persons employed by the Design-Builder, or its contractors and subcontractors at or in connection with the Work.

.3 Automobile Liability, including Hired and Non-Owned Auto Liability in the amount of at least One Million Dollars ($1,000,000) for each occurrence for bodily injury and property damage.

.4 Excess umbrella liability coverage (on at least a follow form basis) having an aggregate limit of at least Twenty Million dollars ($25,000,000).

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.5 Builder's risk insurance written on an "all risk" basis and covering the value of the improvements being constructed. This coverage does not need to be maintained until such time as construction operations begin.

Section 10.1.2 Each insurance policy shall be issued in the name of the Design-Builder and shall name as additional insured parties the Department and the District of Columbia, and the officers, agents and employees of each. Such insurance shall not be cancelable or reduced without thirty (30) days prior written notice to the Department.

Section 10.1.3 All such insurance shall contain a waiver of subrogation against the Department and the District of Columbia, and their respective agents.

Section 10.1.4 All such insurance policies shall be written by a company that is rated at least A- by A.M. Best and having a surplus size rating of at least XV and is licensed/approved to do business in the District of Columbia.

Section 10.2 **Performance Bond and Payment Bond.** The Design-Builder shall, before commencing the Construction Phase, provide to the Department a payment bond and performance bond, each with a penal sum equal to the full value of the GMP. Such bond shall remain in full force and effect until Final Completion is achieved and the Department shall be able to draw upon such bond regardless of the amount paid by the Department to the Design-Builder, even if such amount exceeds the penal value of such bond. Unless otherwise directed by the Department, the Design-Builder shall require all Subcontractors whose Subcontract prices exceed One Hundred Thousand Dollars ($100,000) to provide payment and performance bonds, with a penal sum equal to one hundred percent (100%) of the subcontract price. All bonds must be in a form acceptable to the Department, its lenders or bond trustee, and issued by a surety included on the Department of Treasury's Listing of Approved Sureties, authorized to do business in the District of Columbia and reasonably acceptable to the Department. All subcontractors' bonds must include a dual obligee rider, naming the Design-Builder and the Department as dual obligees. If the Guaranteed Maximum Price is increased pursuant to the terms of the Contract, the Department may require that the amount of the bonds be increased in the amount of one hundred percent (100%) of the increase, and the Design-Builder shall promptly comply. The Design-Builder shall furnish a copy of its bonds to any potential beneficiary of the bonds, or permit that person or company to make a copy. If the bonds provided become unacceptable to the Department, the Design-Builder shall promptly provide substitute security acceptable to the Department. If the Design-Builder intends to exercise its rights as dual obligee under any trade Subcontractor's bond, it shall first give the Department twenty (20) days written notice, so that the Department may lodge any objection it may reasonably have to the proposed action.

ARTICLE 11
ECONOMIC INCLUSION REQUIREMENTS

Section 11.1 **LSDBE Utilization**

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Section 11.1.1 The Design-Builder shall ensure that Local, Small and Disadvantages Business Enterprises will participate in at least 50% of the Contract. Of this amount, thirty-five percent (35%) must be awarded to entities that are certified as either Small or Disadvantaged Business Enterprises by the District of Columbia Local Business Opportunity Office and twenty percent (20%) to entities that are certified as Disadvantaged Business Enterprises. The LSDBE certification shall be, in each case, as of the effective date of the subcontract. Supply agreements with material suppliers shall be counted toward meeting this goal.

Section 11.1.2 The Design-Builder has developed an LSDBE Utilization Plan that is attached hereto as **Exhibit [_]**. The Design-Builder shall comply with the terms of the LSDBE Utilization Plan in making purchases and administering its Subcontractors and Supply Agreements.

Section 11.1.3 Neither the Design-Builder or a Subcontractor may remove a Subcontractor or tier-Subcontractor if such Subcontractor or tier-Subcontractor is certified as an LSDBE company unless the Department approves of such removal. The Department may condition its approval upon the Design-Builder developing a plan that is, in the Department's sole and absolute judgment, adequate to maintain the level of LSDBE participation on the Project.

Section 11.2 Equal Employment Opportunity and Hiring of District Residents

Section 11.2.1 The Design-Builder shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

Section 11.2.2 The Design-Builder shall ensure that at least fifty-one percent (51%) of the Design-Builder's Team and every subconsultant's and subcontractor's employees hired after the effective date of the Contract, or after such subconsultant or subcontractor enters into a contract with the Design-Builder, to work on the Project shall be residents of the District of Columbia. This percentage shall be applied in the aggregate, and not trade by trade.

Section 11.2.3 Workforce Incentive Program. In addition to the requirement imposed by Section 11.2.2, the Department shall establish a Workforce Utilization Goal for the performance of labor hours on the Project. The Design-Builder shall ensure that the Workforce Utilization Goal is met. It is understood and agreed that: (i) the Design-Builder shall be entitled to an incentive payment as described in Section 11.2.3.2 if the Project's Workforce Goal is met; and (ii) each Trade Subcontractor shall receive an incentive payment as described in Section 11.2.3.1.

.1 Each Trade Subcontractor shall be paid an amount equal to Ten Percent (10%) of the Bare Salary paid to employees who are (i) a bona fide resident of the District of Columbia; and (ii) working on the Project. Bare Salary shall mean wages paid

to employees for work performed on the job site and excludes the cost of benefits or taxes associated with such employees. Only those employees who are directly employed on the job site shall count toward this calculation. Employees who work in home or regional offices and who support multiple projects shall not be eligible for this incentive. In calculating this incentive payment, the certified payrolls collected and maintained as part of the Davis-Bacon Act shall be used.

.2 The Department shall established a goal as to the percentage of all hours worked on the Project that shall be worked by District residents (such goal, the "Workforce Utilization Goal"). It is understood that the Workforce Utilization Goal shall not be less than forty percent (40%). In the event the Project's Workforce Utilization Goal is met or exceeded, the Design-Builder's Design-Build Fee, as set forth in this Agreement, shall be increased as set forth in Section 7.1.2.

.3 The GMP shall include an allowance to fund payments required under Section 11.2.3.1. Such allowance shall only be used to pay the incentive fees established by those Sections. To the extent there are any funds remaining in the allowance at the end of the Project, such amounts shall revert to the Department. In the event the allowance is insufficient to cover such costs, the Department shall issue a change order increasing the allowance by the necessary amount

Section 11.3 <u>Economic Inclusion Reporting Requirements</u>

Section 11.3.1 Upon execution of the Contract, the Design-Builder and all its member firms, if any, and each of its Subcontractors shall submit to the Department a list of current employees and apprentices that will be assigned to the Contract, the date they were hired and whether or not they live in the District of Columbia.

Section 11.3.2 The Design-Builder and its constituent entities shall comply with subchapter III of Chapter 11 Title 1, and subchapter II of Chapter 11 of Title 1 of the D.C. Code, and all successor acts thereto, and any implementing regulations, as the same may be amended from time to time. Without limiting the generality of the foregoing, the Design-Builder shall use commercially reasonable best efforts to comply with the recently adopted amendments to such law, including, but not limited to, the workforce percentage goals set forth in such amendments. The Design-Builder and all member firms and Subcontractors shall execute a First Source Agreement with the District of Columbia Department of Employment Services ("DOES") prior to beginning Work at the Project site.

Section 11.3.3 The Design-Builder shall maintain detailed records relating to the general hiring of District of Columbia and community residents.

Section 11.3.4 The Design-Builder shall be responsible for: (i) including the provisions of this Section 11.3 in all subcontracts; (ii) collecting the information required in this Section 11.3

from its Subcontractors; and (iii) providing the information collected from its Subcontractors in the reports required to be submitted by the Design-Builder pursuant to Section 11.3.

Section 11.4 **Compliance with the Apprenticeship Act.** The Design-Builder agrees to comply with the requirements of the Apprenticeship Act of 1946, D.C. Code §§ 32-1401, *et seq*. It is understood and agreed that thirty five percent (35%) of all apprentice hours for the Project must be District residents. If the Design-Builder or any of its subcontractors fail to use its best efforts to meet this goal, the Design-Builder or the subcontractor shall be subject to a penalty of five percent (5%) of the labor costs associated with the Contract.

Section 11.5 **Subcontractor Support and Mentoring Program.** [PROVISIONS REGARDING SUBCONTRACTOR SUPPORT AND MENTORING PROGRAM DEVELOPED PURSUANT TO SECTION A.6 OF THE DEPARTMENT'S REQUEST FOR PROPOSAL TO BE DEVELOPED AND INSERTED HERE].

ARTICLE 12
ALTERNATIVE DISPUTE RESOLUTION

Section 12.1 **Notice of Claim.** If the Design-Builder has complied with all provisions in Section 7.4 regarding changes, and the Department has denied the changes requested in a written Change Proposal, or has failed to respond to a written Change Proposal within thirty (30) days, and the Design-Builder wishes to pursue a claim over the disputed item, it shall inform the Department, in writing, of its claim. The notice must be delivered to the Department within fifteen (15) days of the Department's decision, or within thirty (30) days of the written request for a Change Order, if the Department has failed to respond to the request. If the Design-Builder wishes to assert a claim over a dispute not arising from matters related to a Change Event, Change Order or Change Directive, the written notice of claim must be delivered within fifteen (15) days of the date the Design-Builder knew or should reasonably have known of the events giving rise to the claim or dispute.

Section 12.2 **Contents of Notice.** The notice of claim shall state the nature of the claim, the events or circumstances giving rise to the claim, the type of relief requested, and the amount of time or additional compensation, or other damages sought. If the amount of time, compensation, or other damages sought is not reasonably ascertainable at the time, the Design-Builder shall so state, explain why, and provide whatever estimates it can reasonably provide. The notice shall state clearly that the Design-Builder intends to assert a claim in arbitration with respect to the claimed items.

Section 12.3 **Mediation.** Unless the parties hereafter otherwise agree, all disputes arising from or in connection with this Agreement or its breach, or relating to the Project, whether framed in contract, tort or otherwise, shall first be referred to non-binding mediation in accordance with the American Arbitration Association's Construction Industry Mediation Rules. Within a reasonable time following the execution of the Agreement, the Department, subject to

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the Design-Builder's reasonable approval, shall appoint an independent mediator(s), which will be charged with overseeing the mediation process.

Section 12.4 **Procedures.** Unless the parties hereafter otherwise agree, all disputes arising under or in connection with the Agreement or its breach, or relating to the Project, whether framed in contract, tort or otherwise, and which are not resolved by mediation, shall be resolved by the District of Columbia Board of Contract Appeals in accordance with Title X of the *Procurement Practices Reform Act of 2010* (PPRA). However, if a third party brings any claim against the Department, including, without limitation, claims of infringement of patents, copyrights or other intellectual property rights, the Department may bring an action for defense or indemnification against the Design-Builder in the court in which such claim is being litigated.

ARTICLE 13
MISCELLANEOUS PROVISIONS

Section 13.1 **Extent of Contract.** The Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Department and Design-Builder and supersedes all prior negotiations representations or agreements, either written or oral. The Contract may be amended only by written instrument signed by both the Department and Design-Builder. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

Section 13.2 **Ownership And Use of Documents.** The Drawings, Specifications and other documents prepared by the Architect/Engineer, and copies thereof furnished to the Design-Builder, are for use solely with respect to this Project. They are not to be used by the Design-Builder, Subcontractors, Sub-subcontractors or suppliers on other projects, or for additions to this Project outside the scope of the Work, without the specific written consent of the Department, and the Architect/Engineer.

Section 13.3 **Governing Law.** The Contract shall be governed by and construed in accordance with the laws of the District of Columbia, without regard to its conflict of laws principles.

Section 13.4 **Assignment.** The Department and Design-Builder respectively bind themselves, their partners, members, joint venturers, constituent entities, successors, assigns and legal representative to the other party hereto and to partners, members, joint venturers, constituent entities, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contact Documents. Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

Section 13.5 **Retention of Records and Inspections and Audits**

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Section 13.5.1 The Design-Builder shall maintain books, records, documents and other evidence directly pertinent to performance under the Contract in accordance with generally accepted professional practice and appropriate accounting procedures and practices consistently applied in effect on the date of execution of the Contract.

Section 13.5.2 The Design-Builder shall also maintain the financial information and data used in the preparation and support of the costing and cost summary submitted to the Department and the required cost submissions in effect on the date of execution of the Department.

Section 13.5.3 The Department, the District of Columbia government, the District of Columbia Financial Responsibility and Management Assistance Office, the Comptroller General of the United States, the U.S. Department of Labor and any of their authorized representatives shall have access to the books, records, documents and other evidence held, owned or maintained by the Design-Builder for the purpose of inspection, audit and copying during normal business hours and upon advance written notice to the Design-Builder. The Design-Builder shall provide proper facilities for such access and inspection.

Section 13.5.4 The Design-Builder agrees to include the wording of this Section in all its subcontracts in excess of five thousand dollars ($5,000.00) that directly relate to Project performance.

Section 13.5.5 Audits conducted pursuant to this Section will be in accordance with generally acceptable auditing principles and established procedures and guidelines of the applicable reviewing or audit agency.

Section 13.5.6 The Design-Builder agrees to the disclosure of all information and reports, resulting from access to records, to any authorized representative of the Department. Where the audit concerns the Design-Builder, the auditing agency will afford the Design-Builder an opportunity for an audit exit conference and an opportunity to comment on the pertinent portions of the draft audit report. The final audit report will include the written comments, if any, of the audited parties.

Section 13.5.7 The Design-Builder shall preserve all records described herein from the effective date of the Contract completion and for a period of seven (7) years after a final settlement. In addition, those records which relate to any dispute, appeal or litigation, or the settlement of claims arising out of such performance, or costs or items to which an audit exception has been taken, shall be maintained and made available until seven (7) years after the date of resolution of such dispute, appeal, litigation, claim or exception.

Section 13.6 <u>Inspection For Supplies And Services</u>

Section 13.6.1 To the extent applicable or appropriate, the Department may, in its sole discretion, enter the place of business of the Design-Builder or the place of business of any

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Subcontractor in order to inspect or test supplies or services for acceptance by the Department. If inspections and tests are performed at the place of business of the Design-Builder or any Subcontractor, the inspections and tests shall be performed in a manner so as to not unduly delay the Work. Inspections and tests by the Department shall not relieve the Design-Builder or any Subcontractor of responsibility for defects or other failures to meet Contract requirements, and shall not constitute or imply acceptance.

Section 13.6.2 Notwithstanding the Department's acceptance of or payment for any product or service delivered by Design-Builder, the Design-Builder shall remain liable for latent defects, fraud, gross mistakes amounting to fraud and the Department's rights under any warranty or guarantee.

Section 13.6.3 The Department shall have the right to enter the place of business of the Design-Builder or the place of business of any Subcontractor in order to investigate any contractor or offeror with respect to a debarment or suspension of the Design-Builder or any such Subcontractor.

Section 13.7 **Laws And Regulations Incorporated by Reference.** All federal and District of Columbia laws and regulations, and all Department procedures now or hereafter in effect, whether or not expressly provided for or referred to in the Contract, are incorporated by reference herein and shall be binding upon the Design-Builder and the Department. It shall be the responsibility of the Design-Builder to perform the Contract in conformance with the Department's procurement regulations and all statutes, laws, codes, ordinances, regulations, rules, requirements, and orders of governmental bodies, including, without limitation, the U.S. Government and the District of Columbia government; and it is the sole responsibility of the Design-Builder to determine the procurement regulations, statutes, laws, codes, ordinances, regulations, rules, requirements, and orders that apply and their effect on the Design-Builder's obligations thereunder. However, if the application of a future law or regulation requires the Design-Builder to undertake additional work that is materially different in scope than that presently contemplated or required, the Design-Builder shall be entitled to an equitable adjustment for such additional work.

Section 13.8 **Tax Exemption Provision.** Any tax exemptions applicable to the District of Columbia, including the gross receipts sales tax exemption for the sale of tangible personal property to the District, codified in D.C. Code § 47-2005, shall apply to the performance of the Contract.

Section 13.9 **Anti-Competitive Practices and Anti-kickback Provisions**

Section 13.9.1 The Design-Builder recognizes the need for markets to operate competitively and shall observe and shall comply with all applicable law, rules, and regulations prohibiting anti-competitive practices. The Design-Builder shall not engage, directly or indirectly, in collusion or other anti-competitive practices that reduces or eliminates competition or restrains trade. The Department shall report to the appropriate authority any activity that

evidences a violation of the antitrust laws, and take such other further action to which it is entitled or obligated under the law.

Section 13.9.2 The Design-Builder shall observe and comply with all applicable law, rules, and regulations prohibiting kickbacks and, without limiting the foregoing, Design-Builder shall not (i) provide or attempt to provide or offer to provide any kickback; (ii) solicit, accept, or attempt to accept any kickback; or (iii) include, directly or indirectly, the amount of any kickback in the contract price charged by Design-Builder or a Subcontractor of the Design-Builder to the Department. The Design-Builder shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in this subparagraph in its own operations and direct business relationships. The Department may take any recourse available to it under the law for violations of this anti-kickback provision.

Section 13.9.3 The Design-Builder represents and warrants that it did not, directly or indirectly, engage in any collusive or other anti-competitive behavior in connection with the bid, negotiation or award of the Contract.

Section 13.10 [Intentionally Omitted]

Section 13.11 <u>Ethical Standards For Department's Employees And Former Employees.</u> The Department expects the Design-Builder to observe the highest ethical standards and to comply with all applicable law, rules, and regulations governing ethical conduct or conflicts of interest. Neither the Design-Builder, nor any person associated with the Design-Builder, shall provide (or seek reimbursement for) any gift, gratuity, favor, entertainment, loan or other thing of value to any employee of the District or the Department not in conformity with applicable law, rules or regulations. The Design-Builder shall not engage the services of any person or persons in the employment of the Department or the District for any Work required, contemplated or performed under the Contract. The Design-Builder may not assign to any former Department or District employee or agent who has joined the Design-Builder's firm any matter on which the former employee, while in the employ of the Department, had material or substantial involvement in the matter. The Design-Builder may request a waiver to permit the assignment of such matters to former Department personnel on a case-by-case basis. The Design-Builder shall include in every subcontract a provision substantially similar to this section so that such provisions shall be binding upon each Subcontractor or vendor.

Section 13.12 <u>Gratuities and Officers Not to Benefit Provisions</u>

Section 13.12.1 If it is found, after notice and hearing, by the Department that gratuities (in the form of entertainment, gifts, payment, offers of employment or otherwise) were offered or given by the Design-Builder, or any agent or representative of the Design-Builder, to any official, employee or agent of the Department or the District with a view toward securing the Contract or any other contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of the Contract, the Department may, by written notice to the Design-Builder, terminate the right of the Design-

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Builder to proceed under the Contract and may pursue such other rights and remedies provided by law and under the Contract.

Section 13.12.2 In the event the Contract is terminated as provided in Section 13.12.1, the Department shall be entitled:

.1 to pursue the same remedies against the Design-Builder as it could pursue in the event of a breach of the Contract by the Design-Builder; and

.2 as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Department) which shall be not less than ten times the costs incurred by the Design-Builder in providing any such gratuities to any such officer or employee.

Section 13.12.3 No member of, nor delegate to Congress, Mayor or City Council Member, nor officer nor employee of the District, nor officer nor employee of the Department shall be admitted to any share or part of the Contract or to any benefit that may arise therefrom, and all agreements entered into by the authorized representative of the Department in which he or any officer or employee of the Department shall be personally interested as well as all agreements made by the Department in which the Mayor or City Council Member or officer or employee of the District shall be personally interested shall be void and no payments shall be made on any such contracts by the Department or by any officer thereof; but this provision shall not be construed or extend to the agreement if the share of or benefit to the member of, or delegate to Congress, Mayor or City Council Member, or officer or employee of the District is de minimus.

Section 13.13 <u>Covenant Against Contingent Fees Provisions.</u> The Design-Builder warrants that no person or selling agency has been employed or retained to solicit or secure the Contract upon an agreement or understanding for a Commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Design-Builder for the purpose of securing business. For breach or violation of this warranty, the Department shall have the right to terminate the Contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of the Department, percentage, brokerage of contingent fee.

Section 13.14 <u>Non-Discrimination in Employment Provisions</u>

Section 13.14.1 The Design-Builder agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, or physical handicap. The affirmative action shall include, but not be limited to, the following:

.1 Employment, upgrading, or transfer;

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.2 Recruitment or recruitment advertising;

.3 Demotion, layoff, or termination;

.4 Rates of pay, or other forms of compensation; and

.5 Selection for training and apprenticeship.

Section 13.14.2 Unless otherwise permitted by law and directed by the Department, the Design-Builder agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Department setting forth the provisions of this Section concerning non-discrimination and affirmative action.

Section 13.14.3 The Design-Builder shall, in all solicitations or advertisements for employees placed by or on behalf of the Design-Builder, state that all qualified applicants will receive consideration for employment pursuant to the non-discrimination requirements set forth in this Section.

Section 13.14.4 The Design-Builder agrees to send to each labor union or representative of workers with which it has a collective bargaining agreement, or other contract or understanding, a notice to be provided by the Department, advising each labor union or workers' representative of the Design-Builder's commitments under this Section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

Section 13.14.5 The Design-Builder agrees to permit access by the Department to all books, records and accounts pertaining to its employment practices for purposes of investigation to ascertain compliance with this Section, and shall post copies of the notices in conspicuous places available to employees and applicants for employment.

Section 13.14.6 The Design-Builder shall include in every subcontract the equal opportunity clauses of this Section so that such provisions shall be binding upon each Subcontractor or vendor.

Section 13.14.7 The Design-Builder shall take such action with respect to any Subcontractor as the Contracting Officer may direct as a means of enforcing these provisions, including sanctions for non-compliance.

Section 13.15 **Buy American Act Provision.** The Design-Builder shall comply with the provisions of the Buy American Act (41 U.S.C. § 10a), including, but not limited to, the purchase of steel.

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Section 13.16 **Contract Work Hours And Safety Standards Act Provision.** The Design-Builder agrees that the construction work performed under this Contract shall be subject to the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333).

Section 13.17 **Davis-Bacon Act Provision.** The Design-Builder agrees that the construction work performed under this Contract shall be subject to the Davis-Bacon Act (40 U.S.C. §§ 276a-276a-7). The wage rates applicable to this Project are attached as **Exhibit [_]**. The Design-Builder further agrees that it and all of its subcontractors shall comply with the regulations implementing the Davis-Bacon Act and such regulations are hereby incorporated by reference.

Section 13.18 **False Claims Act.** Design-Builder shall be governed by all laws and regulations prohibiting false or fraudulent statements and claims made to the government, including the prescriptions set forth in District of Columbia Code § 22-2514.

Section 13.19 **Interpretation of Contract.** All of the documents comprising the Contract should be read as complementary, so that what is called for by one is called for by all. Ambiguities should be construed in favor of a broader scope of work for the Design-Builder, as the intent of the Contract is, with specific identified exceptions, to require the Design-Builder to assume entire responsibility for construction of the Project. If there is any inconsistency among the documents comprising the Contract, the order of precedence among them is as follows, with the first listed document having the highest priority: this Agreement and its Exhibits, the Construction Documents released by the Department, and the GMP Amendment. Any Change Order issued and executed by the Department shall supersede those portions of earlier dated contract documents to which it pertains.

Section 13.20 **Independent Design-Builder.** In carrying out all its obligations under the Contract, the Design-Builder shall be acting as an independent contractor, and not as an employee or agent of the Department, or joint venturer or partner with the Department. The Design-Builder shall have exclusive authority to manage, direct, and control the Work, and shall be responsible for all construction means, methods, techniques, sequences, and procedures, as well as for Project safety.

Section 13.21 **Confidential Information.** In the course of the Design-Builder's performance of the Work, the Department may make available to the Design-Builder information that the Department designates as trade secrets or other confidential engineering, technical and business information. As long as, and to the extent that, such information remains confidential and available to others only with the consent of the Department, or is not generally available to the public from other sources, the Design-Builder shall maintain such information in strict confidence and shall not disclose any such information to others (including its employees or Subcontractors), except to the extent necessary to enable the Design-Builder to carry out the Project. The Design-Builder shall similarly obligate any and all persons to whom such information is necessarily disclosed to maintain the information in strict confidence. The Design-Builder agrees that, in the event of any breach of this confidentiality obligation, the

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Department shall be entitled to equitable relief, including injunctive relief or specific performance, in addition to all other rights or remedies otherwise available.

Section 13.22 <u>No Third-Party Beneficiary Rights.</u> Nothing in this Agreement shall be construed as creating third-party beneficiary rights in any person or entity, except as otherwise expressly provided in this Agreement.

Section 13.23 <u>Media Releases.</u> Neither the Design-Builder, its employees, agents or Subcontractors or material suppliers shall make any press release or similar media release related to the Project unless such press release have been discussed with the Department prior to its issuance.

Section 13.24 <u>Construction.</u> This Agreement shall be construed fairly as to all parties and not in favor of or against any party, regardless of which party prepared the Agreement.

Section 13.25 <u>Notices.</u> All notices or communications required or permitted under the Contract shall be in writing and shall be hand delivered or sent by telecopier or by recognized overnight carrier to the intended recipient at the address stated below, or to such other address as the recipient may have designated in writing. Any such notice or communication shall be deemed delivered as follows: if hand delivered, on the day so delivered, if sent by telecopier, on confirmation of successful transmission, and if sent by recognized overnight carrier, the next business day.

If to the Department:	If to the Design-Builder:
Mr. Brian J. Hanlon	[NAME]
Acting Director	[TITLE]
Department of General Services	[COMPANY]
2000 14th Street, NW	[ADDRESS]
Washington, D.C. 20009	[ADDRESS]

This Paragraph shall be read as imposing minimum requirements for distribution of required notices, and not as displacing distribution requirements with regard to design documents, construction submittals, periodic reports, and other documents.

Section 13.26 <u>Limitations.</u> The Design-Builder agrees that any statute of limitations applicable to any claim or suit by the Department arising from this Contract or its breach shall not begin to run, or shall be deemed to be tolled, until Final Completion or, with respect to latent defects or nonconformities, such later time as the Department knew or should have known of the defect or nonconformity.

Section 13.27 <u>Binding Effect; Assignment.</u> The Contract shall inure to the benefit of, and be binding upon and enforceable by, the parties and their respective successors and permitted assigns. The Design-Builder acknowledges that, in entering into the Contract, the

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Department is relying on the particular qualifications of the Design-Builder, and the Design-Builder therefore shall not delegate or assign any of its duties or obligations under the Contract, except in accordance with the Contract's provisions relating to subcontracting, or pursuant to the Department's prior written consent. The Design-Builder shall not assign its rights under the Contract, including the right to all or a portion of its compensation, without the Department's prior written consent. Any delegation or assignment made contrary to the provisions of this Paragraph shall be null and void.

Section 13.28 Survival. All agreements warranties, and representations of the Design-Builder contained in the Contract or in any certificate or document furnished pursuant to the Contract shall survive termination or expiration of the Contract.

Section 13.29 No Waiver. If the Department waives any power, right, or remedy arising from the Contract or any applicable law, the waiver shall not be deemed to be a waiver of the power, right, or remedy on the later recurrence of any similar events. No act, delay, or course of conduct by the Department shall be deemed to constitute the Department's waiver, which may be effected only by an express written waiver signed by the Department.

Section 13.30 Remedies Cumulative. Unless specifically provided to the contrary in the Contract, all remedies set forth in the Contract are cumulative and not exclusive of any other remedy the Department may have, including, without limitation, at law or in equity. The Department's rights and remedies will be exercised at its sole discretion, and shall not be regarded as conferring any obligation on the Department's to exercise those rights or remedies for the benefit of the Design-Builder or any other person or entity.

Section 13.31 Headings/Captions. The headings or captions used in this Agreement or its table of contents are for convenience only and shall not be deemed to constitute a part of the Contract, nor shall they be used in interpreting the Contract.

Section 13.32 Entire Agreement; Modification. The Contract supersedes all contemporaneous or prior negotiations, representations, course of dealing, or agreements, either written or oral. No modifications to the Contract shall be effective unless made in writing signed by both the Department and the Design-Builder, unless otherwise expressly provided to the contrary in the Contract.

Section 13.33 Severability. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and in lieu of each such invalid, illegal or unenforceable provision, there shall be added automatically as a part of this Agreement a provision as similar in terms to such invalid, illegal or unenforceable provision as may be possible and be valid, legal and enforceable; each part of this Agreement is intended to be severable.

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Section 13.34 **Anti-Deficiency Act**. The Department's obligations and responsibilities under the terms of the Contract and the Contract Documents are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§1341, 1342, 1349, 1350, 1351, (ii) the D.C. Code 47-105, (iii) the District of Columbia Anti-Deficiency Act, D.C. Code §§ 47-355.01 - 355.08, as the foregoing statutes may be amended from time to time, and (iv) Section 446 of the District of Columbia Home Rule Act. Neither the Contract nor any of the Contract Documents shall constitute an indebtedness of the Department, nor shall it constitute an obligation for which the Department is obligated to levy or pledge any form of taxation, or for which the Department has levied or pledged any form of taxation. **IN ACCORDANCE WITH § 446 OF THE HOME RULE ACT, D.C. CODE § 1-204.46, NO DISTRICT OF COLUMBIA OFFICIAL IS AUTHORIZED TO OBLIGATE OR EXPEND ANY AMOUNT UNDER THE CONTRACT OR CONTRACT DOCUMENTS UNLESS SUCH AMOUNT HAS BEEN APPROVED, IS LAWFULLY AVAILABLE AND APPROPRIATED BY ACT OF CONGRESS.**

ARTICLE 14
TERMINATION OR SUSPENSION

Section 14.1 **Cancellation Before Notice to Proceed.** The Department may cancel the Contract at any time before issuance of a Notice to Proceed, in the Department's sole discretion. Such a cancellation shall not be a breach of the Contract, and the Design-Builder shall not be entitled to any compensation or damages if cancellation occurs.

Section 14.2 **Failure to Agree Upon GMP.** The Department may terminate this Contract in the event that the Department and the Design-Builder are unable to agree upon a GMP for the Project. The Department's decision to terminate under this clause shall be made in the Department's sole and absolute judgment and shall not be subject to review by any reviewing body, including, but not limited to, arbitrators appointed under this Contract or any court of competent jurisdiction. In the event the Department so terminates this Contract, the Department shall pay the Design-Builder an amount equal to fifty Percent (50%) of the total Preconstruction Fee and shall take sole and absolute title to and have the right to use any documents, schedules, bid packages, estimates or other materials prepared during the Preconstruction Phase and shall have the right to assume any Subcontracts or Supply Agreements entered into by the Design-Builder. If the Department has paid the Design-Builder an amount in excess of Fifty Percent (50%) of the Preconstruction Fee in such an event, the Design-Builder shall promptly refund any portion of the Preconstruction Fee that was received by the Design-Builder in excess of Fifty Percent (50%) of such fee.

Section 14.3 **Termination for Default.** The Department may terminate the Contract for default if the Design-Builder fails materially to perform any of its duties or obligations under the Contract. In particular, but without limitation, the Department may terminate the Contract if:

.1 the Design-Builder fails to prosecute the Work diligently, in accordance with the Project Schedule or to make such progress in the Work as the Department

reasonably believes is necessary to complete the Project within the time required by the Contract; or

.2 the Design-Builder fails to perform the Work in a good and workmanlike manner or to correct defects in the Work promptly upon notice by the Department; or

.3 the Department reasonably determines that the Design-Builder has abandoned the Work, or has failed to pay laborers, mechanics, materialmen, Subcontractors or suppliers when payment is due; or

.4 becomes insolvent, makes an assignment for the benefit of creditors, files a voluntary petition under any chapter of the Bankruptcy Code or has an involuntary petition filed against it under any chapter of the Bankruptcy Code, or has a receiver appointed, or files for dissolution or otherwise is dissolved; or

.5 the Design-Builder fails to pay its debts in a timely manner or becomes insolvent, or the Department reasonably determines that the Design-Builder does not have the financial ability to carry out its obligations under the Contract and the Design-Builder fails to give the Department prompt and reasonable assurances of its ability to perform.

.6 The Department must provide the Design-Builder with written notice of its intent to terminate the Contract under this provision seven (7) days before actually putting the termination into effect. If the Design-Builder has begun its curative action and has made progress satisfactory to the Department within the seven days, the Department may so notify the Design-Builder and the termination will not take effect. Otherwise, the termination shall take effect after seven days without further notice or opportunity to cure.

.7 If the Department terminates the Contract for default, the Department will have the right to take over the Work, to accept assignment of some or all Subcontracts or agreements with material suppliers, to take possession of the Project, to take and use all tools, equipment and supplies then being used in connection with the Work, and to finish the Project by whatever method it deems expedient, including accepting assignment of all outstanding Subcontracts and Supply Agreements.

Section 14.4 <u>Termination for Convenience</u>

Section 14.4.1 The Department may, upon seven (7) days written notice to the Design-Builder, terminate the Contract in whole or specified part, for its convenience, whether the Design-Builder is in breach of Contract or not. The notice of termination shall state the effective date of termination, the extent of the termination, and any specific instructions.

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Section 14.4.2 After receiving notice of termination for convenience, the Design-Builder shall (1) stop work on the terminated portion of the Project as of the effective date of the termination and stop placing subcontracts or supply agreements thereunder; (2) consult with the Department regarding the disposition of existing orders and subcontracts, and use its best efforts to terminate them on terms favorable to the Department; (3) consult with the Department to decide what actions should be taken to protect work in place and equipment that has been delivered and not yet installed, and to render the site safe, and proceed to take such actions as may be agreed upon or, absent agreement, as may be reasonable; (4) take necessary or directed action to protect and preserve property in the Design-Builder's possession in which the Department has or may acquire an interest and, as directed by the termination notice or other order from the Department, deliver the property to the Department; and (5) promptly deliver to the Department all computer files it has prepared relating to the Project. The Design-Builder shall also promptly notify the Department, in writing, of any legal proceeding arising from any subcontract or supply agreement related to the terminated portion of the Project, and, in consultation with the Department, settle outstanding liabilities arising out of the terminated portion of the Project on the best terms reasonably possible.

Section 14.4.3 The Design-Builder shall be entitled to receive only the following with respect to the terminated portion of the Project: (1) Cost of Work performed up to the date of termination; (2) reasonable costs of terminating outstanding subcontracts and supply agreements and other similar wind-up costs in a reasonable amount; (3) a fair and reasonable portion of the Design-Build Fee attributable to the Work performed on the terminated portion of the Project, up to the time of termination. The Design-Builder shall not be entitled to recover the Design-Build Fee or overheads or profits on unperformed portions of the Work. Further, if it appears to the Department that the Cost of Work, added to the Design-Build Fee and Preconstruction Fee, would have exceeded the GMP, the Department shall have the right to adjust the settlement figure downward in an appropriate amount. In no case shall the Design-Builder be entitled to receive an amount in settlement for termination for convenience that would exceed the percentage value of the Work actually performed in accordance with the Contract, multiplied by the GMP, and reduced by any damages, liquidated or otherwise, the Design-Builder may owe the Department.

Section 14.4.4 Payment of such amounts shall be the Design-Builder's sole remedy for termination for convenience.

Section 14.4.5 The Design-Builder shall, promptly after termination, submit a proposal for settlement of the amounts due to it as a result of the termination for convenience. The proposal shall be consistent with the requirements of Subparagraphs 14.4.2 through 14.4.4, and shall be accompanied by such documentation of costs as the Department may reasonably require. Such documentation may include cost and price data in accordance with the Department's Regulations.

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Section 14.5 **Effect of Wrongful Termination.** Any termination for cause which is later determined to have been improperly effected shall be deemed to have been a termination for convenience pursuant to Paragraph 14.4 and shall be governed by that Paragraph.

Section 14.6 **Continued Responsibility After Termination.** If the Design-Builder is terminated, either for default or otherwise, the Design-Builder shall remain responsible for defects or non-conformities in all Work performed to the date of the termination.

Section 14.7 **Suspension**

Section 14.7.1 **Suspension at the Convenience of the Department.** The Department may at any time, with or without cause, suspend, delay, reduce or interrupt performance of all or any portion of the Work for such period or periods as the Department elects by giving the Design-Builder written notice specifying which portion of the Work is to be suspended and the effective date of such suspension. Such suspension, delay or interruption shall continue until the Department terminates such suspension, delay or interruption by written notice to the Design-Builder. No such suspension, delay, interruption or reduction by the Department shall constitute a breach or default by the Department under the Contract Documents. The Design-Builder shall continue to diligently perform any remaining Work that is not suspended, delayed, reduced or interrupted and shall take all actions necessary to maintain and safeguard all materials, equipment, supplies and Work in progress affected by the suspension, delay, reduction or interruption.

Section 14.7.2 **Payment Upon Suspension For Convenience.** In the event of suspension, delay, reduction or interruption for convenience by the Department, the Department shall pay the Design-Builder and the Guaranteed Maximum Price shall be increased by such amounts (subject to the payment and related requirements of the Contract Documents) as follows:

Section 14.7.2.1 Additional Costs of the Work, if any, which are incurred by the Design-Builder, its Subcontractors and Vendors as a result of continuing to maintain dedicated personnel, materials and equipment at the Site at the Department's request during any suspension, delay or interruption period, including for the purpose of safeguarding all material, equipment, supplies and the Design-Builder's Work in progress caused solely by such suspension, delay or interruption ordered by the Department for convenience, but the Guaranteed Maximum Price shall be increased only if and to the extent such delay, suspension or interruption exceeds a period of thirty (30) consecutive days following commencement of the Work; and

Section14.7.2.2 Other reasonable and unavoidable Costs of the Work, if any, which are directly related to any subsequent re-mobilization of the suspended, delayed or interrupted the Design-Builder's Work caused solely by such suspension, delay or interruption ordered by the Department for convenience, but the Guaranteed Maximum Price shall be increased only if and to the extent such delay, suspension or interruption exceeds a period of thirty (30) consecutive

days following commencement of the Work.

Section 14.7.2.3 Provided, however, that no adjustment shall be made to the extent that performance was otherwise subject to suspension, delay or interruption by another cause for which the Design-Builder is responsible. Furthermore, the Design-Builder shall not be entitled to an increase in its Design-Build Fee for a suspension ordered by the Department.

ARTICLE 15
OTHER CONDITIONS AND SERVICES

This Contract and the rights and obligations of the Department and Design-Builder herein are subject to the approval of the Council for the District of Columbia.

ARTICLE 16
DEFINITIONS

Section 16.1 **Agreement.** This Agreement and any attachments or Exhibits hereto. The term Agreement shall not include the Drawings and Specifications, and any other Contract Document.

Section 16.2 **Change Directive.** A written direction signed and issued by the Department ordering the Design-Builder either to provide pricing and schedule impact information for a described change to the Work or to proceed with a described change and provide pricing and schedule impact information after beginning the changed Work.

Section 16.3 **Change Event.** Any condition, event, act, omission or breach, other than the issuance of a Change Directive, which the Design-Builder believes entitles it to a change in the Guaranteed Maximum Price, the Preconstruction Fee, the Design-Build Fee, or the Substantial or Final Completion Date.

Section 16.4 **Change Order.** A written document, executed by the Department and the Design-Builder, setting forth the agreed terms upon which a change to the Contract has been made.

Section 16.5 **Construction Documents.** The final Drawings and Specifications, as prepared, sealed by the Architect/Engineer's design professional in accordance with the law, and issued by the Design-Builder for the purpose of obtaining bids from potential trade Subcontractors and material suppliers for use in constructing the Project.

Section 16.6 **Cost of General Conditions.** Those portions of the Cost of the Work that are reimbursable under Article 6 and which relate to the Design-Builder's general conditions.

Section 16.7 **Contract.** The entire, integrated agreement between the Department and the Design-Builder with respect to the Project, consisting of this Agreement and the Exhibits to

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the Agreement, the Construction Documents released for the Design-Builder's use and any Change Directives or Change Orders that have been executed by the Department.

Section 16.8 Contract Documents. The Contract Documents consist of the Agreement between the Department and the Design-Builder, including any modifications or changes thereof, the Drawings and Specifications, and any addenda issued thereto.

Section 16.9 Differing Soils Conditions. The term Differing Soils Conditions shall mean subsurface conditions on or adjacent to the Project site which differ materially from those indicated in the geotechnical reports prepared by the Architect/Engineer and its subconsultants. It shall be the responsibility of the Design-Builder to work with the Architect/Engineer during the Preconstruction Phase to review the reports prepared by the Architect/Engineer. The GMP Amendment shall identify the geotechnical reports upon which it is based. The term Differing Soils Conditions shall also include unknown physical conditions at the site of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering to work of the character provided for in this Contract. During the Preconstruction Phase, the Design-Builder shall be required to conduct a thorough review of the Project site and the surrounding area and shall document its findings. In the event the Design-Builder fails to undertake and document such a thorough review, the Design-Builder shall be deemed to have known of those conditions which a thorough review would have detected.

Section 16.10 Drawings. The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and wherever issued, showing the design, locations and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

Section 16.11 Final Completion. The point at which Substantial Completion has been achieved, all punch list items noted at Substantial Completion have been completed and all documents the Design-Builder is required to deliver to the Department as a condition to receiving final payment.

Section 16.12 Final Completion Date. The date established in the GMP Amendment by which the Design-Builder shall achieve Final Completion. The Final Completion Date may be modified only by Change Order or Change Directive in accordance with the Agreement.

Section 16.13 Fully Complete. To undertake all of the Work necessary to fully construct and complete the Project and execute all tasks necessary to obtain the final Certificate of Occupancy for the Project from the District of Columbia; submit final lien releases from the Design-Builder and Subcontractors and material suppliers; complete all punch list items to the Department's approval and sign-off; and cause all representations, warranties and guarantees to be honored and otherwise fulfill all of the requirements set forth in the Contract.

Section 16.14 Guaranteed Maximum Price or GMP. The maximum amount, including, but not limited to, the Preconstruction Fee, the Design-Build Fee and the Cost of the

Work, that will be paid the Design-Builder to Fully Complete the Project. The GMP may be modified only by Change Order or Change Directive in accordance with the Agreement. The GMP shall be established in the GMP Amendment.

Section 16.15 Hazardous Material. Any toxic substance or hazardous chemical defined or regulated pursuant to federal, state or local laws relating to pollution, treatment, storage or disposal of waste, or protection of human health or the environment. Such laws include, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and Recovery Act, the Clean Water Act, the Clean Air Act and laws relating to emission, spills, leaks, discharges, releases or threatened releases of toxic material. The term Hazardous Materials shall also include petroleum and petroleum bi-products

Section 16.16 Hazardous Materials Remediation Costs. The direct Costs (excluding, however, the Cost of General Conditions) incurred by the Design-Builder in connection with the removal, remediation, passivation or encapsulation of Hazardous Materials.

Section 16.17 Notice to Proceed. A written notice to proceed, signed by the Department, directing the Design-Builder to proceed with the Project or any portion of the Project.

Section 16.18 Project Schedule. The schedule for the project agreed to by the Department and the Design-Builder as part of the GMP Amendment. Such schedule shall not be changed except by a Change Order or Change Directive issued by the Department. The schedule shall be in a form and contain such detail as may be agreed upon by the parties.

Section 16.19 Self-Performed Work. Trade work performed by employees of (1) the Design-Builder; (2) any entity that is a partner or member of the entity comprising the Design-Builder; (3) any entity that controls, is controlled by, or is under common control with the Design-Builder; or (4) any entity that controls, is controlled by, or is under common control with any entity that is part of the Design-Builder. Self-Performed Work is distinguished from trade work performed by Subcontractors unaffiliated with the Design-Builder or the entities of which the Design-Builder is comprised.

Section 16.20 Specifications. The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards and workmanship for the Work, and performance of related services.

Section 16.21 Subcontractor. Any person, natural or legal, to whom the Design-Builder delegates performance of any portion of the Work required by the Contract. The term "Subcontractor," used without a qualifier, shall mean a subcontractor in direct privity with the Design-Builder. "Subcontractors at all tiers" shall mean not only those Subcontractors in direct privity with the Design-Builder, but also those performing Work pursuant to sub-subcontracts, subsubsubcontracts, and so on. "Subcontractors" shall include both those who are retained to perform labor only and those who are retained both to perform labor and to supply material or

equipment. "Subcontractors" shall also include design professionals who are not the Design-Builder's employees and to whom the Design-Builder delegates any part of its responsibilities under the Contract, except that references to "trade Subcontractors" shall exclude design professionals.

Section 16.22 Substantial Completion. Substantial Completion shall mean that all of the following have occurred: (1) the construction and installation work have been completed with only minor punch list items remaining to be completed; (2) a permanent certificate of occupancy and all other required permits or approvals have been obtained; (3) all operating and maintenance manuals, training videotapes and warranties required by the Contract have been delivered to the Department; (4) any supplemental training session required by the Contract for operating or maintenance personnel have been completed; (5) all clean-up required by the Contract has been completed; and (6) the Project is ready for the Department to use it for its intended purpose. "Minor punch list items" are defined for this purpose as items that, in the aggregate, can be completed within ninety (90) days without interfering with the Department's normal use of the Project.

Section 16.23 Substantial Completion Date. The date established in the GMP Amendment by which the Design-Builder shall achieve Substantial Completion. The Substantial Completion Date may be modified only by Change Order or Change Directive in accordance with the Agreement.

Section 17 RFP and Proposal. Reference is made to the Request for Proposals issued by the Department and the proposal submitted by the Design-Builder in response thereto. Copies of the cover pages of those documents are attached as **Exhibit [_]**. Those documents are subordinate to the terms of this Agreement. To the extent that either of those documents is inconsistent with the terms of the Agreement, the terms of the Agreement shall prevail. Reference is also made to **Exhibit [_]** which sets forth certain clarifications and assumption as to the costs that are included within the Maximum Cost of General Conditions.

Section 18 General Conditions. To the extent that this Agreement is silent on an action or requirement of the Design-Builder, and the edition of the AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement speaks to such action or requirement, such AIA Document 201 shall govern Design-Builder's obligations with respect to such action or requirement under this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

DEPARTMENT OF GENERAL SERVICES, an agency within the executive branch of the Government of the
District of Columbia

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By: _____
Name: _____
Title: _____
Date: _____

[COMPANY NAME]

By: _____
Name: _____
Its: _____
Date: _____

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EXHIBIT A

Form of

GUARANTEED MAXIMUM PRICE AMENDMENT

THIS GUARANTEED MAXIMUM PRICE AMENDMENT ("Amendment") is entered into this _____ day of _____ by and between the **DISTRICT OF COLUMBIA GOVERNMENT**, acting by and through its **DEPARTMENT OF GENERAL SERVICES** (the "Department") and [SELECTED CONTRACTOR] (the "Contractor") pursuant to the Agreement, dated _____, 2012, between the District of Columbia government, by and through the Department and the Contractor, for the Ballou Senior High School Project and to establish a Guaranteed Maximum Price and Contract Time for the Work as set forth below.

ARTICLE I
GUARANTEED MAXIMUM PRICE

Section 1.1 **Guaranteed Maximum Price**. Subject to additions and deductions which may be made only in accordance with the Agreement, the Contractor represents, warrants and guarantees to the Department that the total maximum cost to be paid by the Department for Contractor's complete performance under the Agreement, including, but not limited to, Final Completion of all Work, all services of Contractor under the Agreement, and all fees, compensation and reimbursements to Contractor, shall not exceed the total amount of [INSERT AMOUNT] Dollars ($[INSERT AMOUNT]) ("*Guaranteed Maximum Price*"). Costs which would cause the Guaranteed Maximum Price (as may be adjusted pursuant to the Contract Documents) to be exceeded shall be paid by the Contractor without reimbursement by the Department.

Section 1.2 **Guaranteed Maximum Price Components**. The Guaranteed Maximum Price is comprised of the maximum amount payable by the Department for:

1.2.1 the Cost of the Work for full and complete performance of the Work in strict accordance with the Contract Documents;

1.2.2 a Pre-Construction Fee for the Contractor, as defined in the Agreement, in the amount of [INSERT AMOUNT];

1.2.3 a Design-Build Fee for the Contractor, as defined in the Agreement, in the amount of [INSERT AMOUNT];

1.2.4 Allowances for Incentive Payments set forth in Section 7.1.2, if earned by the Contractor, in the amount of [INSERT AMOUNT];

1.2.5 The Guaranteed Maximum Price is further broken down into line items and categories on Exhibits ____ attached hereto.

Section 1.3 **Basis for the GMP.** The GMP is for the performance of the Work in accordance with the Contract Documents listed and attached to this Amendment and marked Exhibits ____ through ____, as follows:

1.3.1 Exhibit ____: List of Drawings, Specifications, addenda and General, Supplementary and other Conditions of the Contract on which the Guaranteed Maximum Price is based.

1.3.2 Exhibit ____: A list of Unit Price Allowance items.

1.3.3 Exhibit ____: Assumptions and Clarifications made in preparing the Guaranteed Maximum Price, noting in particular any exclusions. The Assumptions and Clarifications shall take precedence over the Drawings and Specifications, but shall be subordinate to the Agreement and the terms of this Amendment.

1.3.4 Exhibit ____: The proposed Guaranteed Maximum Price, including a statement of the detailed cost estimate organized by trade categories, allowances, Contingency, and other items and the fee that comprise the Guaranteed Maximum Price.

1.3.5 Exhibit ____: A Construction Phase Schedule which shall include, but not be limited to, the Substantial and Final Completion Dates, upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents issuance dates upon which the Substantial and Final Completion Dates are based (the "Project Schedule").

1.3.6 An LSDBE Utilization Plan setting forth the names and estimated dollar volume of the work that will be perform by small, local and disadvantaged business enterprises, as certified by the Department of Small and Local Business Development, upon which the GMP is based.

1.3.7 A Workforce Utilization Plan setting forth, by subcontractor, the percentage participation of District residents in performing the labor necessary for the Project upon which the proposed Guaranteed Maximum Price is based.

Section 1.4 **Incomplete Drawings and Specifications.** Contractor and the Department acknowledge that the Drawings and Specifications are not complete and, as of the date hereof, that such Drawings and Specifications have reached the level of approximately 50% complete construction documents. The Contractor, however, has been actively involved in the design process and hereby represents that it has a sufficient understanding of the Project to agree

to a Guaranteed Maximum Price to Fully Complete the Project. The Contractor hereby acknowledges that the GMP Drawings and Specifications provides sufficient detail and information to provide a firm Guaranteed Maximum Price and that the Guaranteed Maximum Price proposed therein is intended to represent the Contractor's offer to Fully Complete the Project. The Contractor and the Department agree to work together to complete the Drawings and Specifications as provided in this Agreement, consistent with the Guaranteed Maximum Price premises and assumptions and Project Schedule.

Section 1.5 **Design Intent; Inferable Work.** Contractor agrees that the Guaranteed Maximum Price is based on the current state of the design, which represents construction documents that are approximately Fifty percent complete. The GMP Drawings and Specifications include various clarifications and assumptions that are intended to further define the scope of Work that will be required to complete design. The Contractor has included within the Guaranteed Maximum Price sufficient amounts to cover aspects of the Work that are not shown on the GMP Drawings and Specifications. If the Department does not approve any such scope increase, the Contractor shall cause the Architect to develop a design that is consistent with the original design intent and shall complete the Work for an amount that does not exceed the GMP.

Section 1.6 **Cost Overruns.** Subject to additions or deductions which may be made in accordance with the Contract, the Contractor shall be solely liable and responsible for and shall pay any and all costs, fees and other expenditures in excess of the Guaranteed Maximum Price for and/or relating to the Work, without entitlement to reimbursement from the Department. Contractor shall not be entitled to any fee, payment, compensation or reimbursement under this Agreement or relating to the Work or Project other than as expressly provided in the Agreement.

Section 1.7 **Allowances.** The Guaranteed Maximum Price includes specific "Unit Price Allowance Amounts" for certain items as shown on the Schedule of Values and budgeted in the Guaranteed Maximum Price ("*Allowance Items*"). The only Allowance Items shall be those specifically identified as such in the Schedule of Values and in the Guaranteed Maximum Price. The Allowance Amounts represent all Costs of the Work of the Allowance Items, including, without limitation, costs of materials, labor, handling, transportation, loading and unloading and installation, as determined by Contractor.

ARTICLE 2
Intent, Interpretation and Correlation

Section 2.1 **Intent of the Contract.** The intent of the Contract is for the Contractor to perform and supply, and the Department hereby engages Contractor to and Contractor hereby agrees to perform and supply, the Work, including all necessary design services, scheduling, procurement, supervision, construction, and construction management services and supply all necessary labor, materials, equipment and related work and services necessary to fully complete the Work and obtain the intended results of the Contract Documents, including, but not limited to the requirements of the Project Schedule and the Guaranteed Maximum Price requirements set forth in Article 1 above. The enumeration of particular items in the Specifications and/or

Drawings shall not be construed to exclude other items. The Contract Documents are complementary, and what is required by any one of the Contract Documents (including either a Drawing or Specification) as being necessary to produce the intended results shall be binding and required as a part of the Work as if required by all Contract Documents.

Section 2.2 **Contractor's Compliance with Contract Documents**. Contractor agrees, accepts and assumes that the Department's decision will require implementation of the most stringent requirements among any conflicting provisions of the Contract Documents as being part of the Work. The Contractor agrees to be bound by all decisions by the Department to implement the most stringent of any conflicting requirements within the Contract Documents. Any failure by Contractor to seek such clarifications shall in no way limit the Department's ability to require implementation, including replacement of installed Work at a later date at Contractor's sole expense, to achieve compliance with the more stringent requirements. Without limiting the generality of the foregoing, the Contractor hereby agrees as follows:

2.2.1 The failure of the Department to insist in any one or more instances upon a strict compliance with any provision of this Contract, or to exercise any option herein conferred, shall not be construed as a waiver or relinquishment of the Department's right thereafter to require compliance with such provision of this Contract, or as being a waiver of the Department's right thereafter to exercise such option, and such provision or option will remain in full force and effect.

2.2.2 If there is any inconsistency in the Drawings or any conflict between the Drawings and Specifications, Contractor shall provide the better quality or greater quantity of Work or materials, as applicable, unless the Department directs otherwise in writing.

2.2.3 Contractor shall be responsible for dividing the Work among the appropriate Subcontractors and Vendors. No claim will be entertained by the Department based upon the organization or arrangement of the Specifications and/or the Drawings into areas, sections, subsections or trade disciplines.

2.2.4 Detail drawings shall take precedence over scale drawings, and figured dimensions on the Drawings shall govern the setting out of the Work.

2.2.5 Unless the Specifications expressly state otherwise, references to documents and standards of professional organizations shall mean the latest editions published prior to the Effective Date.

2.2.6 Technical words, abbreviations and acronyms in the Contract Documents shall be used and interpreted in accordance with customary usage in the construction industry.

2.2.7 Whenever consent, permission or approval is required from any party pursuant to the provisions of the Contract Documents, such consent, permission or approval

shall, unless expressly provided otherwise in this Agreement, be given or obtained, as applicable, in writing.

ARTICLE 3
[intentionally omitted]

ARTICLE 4
OTHER PROVISIONS

Section 4.1 **Contractor's Responsibilities.** The Contractor also expressly acknowledges that this Project and the Work will proceed on a "fast-track" method of construction, i.e., construction will commence without final Drawings and Specifications in place. More specifically, while Drawings and Specifications are complete for certain portions of Work, the design process will continue for other portions during construction based on the Guaranteed Maximum Price premises and assumptions. The Contractor has been, and will continue to be, an active participant in the design process. Given such participation, the Contractor represents that it is familiar with the scope and quality of those aspects of the Project that have not yet been fully designed, and has taken such scope and quality matters into consideration in preparing each component of the Guaranteed Maximum Price. The Contractor agrees to work with the Department in managing the construction and design work to complete the design process. The Contractor shall manage the Project, including coordinating redesign or value engineering necessary or advisable for certain aspects of the Project at any stage of the design process in order to bring the cost of such Work within or below, but not in excess of, the respective allowances or the budgeted or allocated amounts for other items contained in the Guaranteed Maximum Price. Once the Drawings and Specifications are complete, it is recognized by the Contractor and the Department that the scope of the Guaranteed Maximum Price may include Work not expressly indicated on the Contract Documents, but which is reasonably inferable from the Contract Documents, and such Work shall be performed without any increase in the Guaranteed Maximum Price or extension of Contract Time, except if and to the extent otherwise expressly provided in this Agreement.

ARTICLE 5
MISCELLANEOUS PROVISIONS

Section 5.1 **Prior Agreement Unaffected.** Except as expressly agreed to herein, all of the terms, conditions, representations and warranties set forth in the Agreement shall remain unaffected and in full force and affect.

Section 5.2 **Integrated Agreement.** This Amendment and any attachment hereto set forth the entire agreement and understanding of the parties regarding the transactions contemplated hereby and supersede all prior oral and written agreements, arrangements and understandings relating to the subject matter hereof. There are no oral or written agreements or understandings, representations or warranties among the parties other than those set forth herein.

Section 5.3 **Counterparts.** This Amendment may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which shall be considered one and the same instrument.

Section 5.4 **Construction.** This Agreement shall be construed fairly as to all parties and not in favor of or against any party, regardless of which party prepared the Agreement.

IN WITNESS WHEREOF, each of the parties to this Amendment has caused it to be executed by its duly authorized representative on the date set forth above.

DISTRICT OF COLUMBIA GOVERNMENT,
by and through its **DEPARTMENT OF GENERAL SERVICES**

By: _____
Name: _____
Title: _____
Date: _____

[SELECTED CONTRACTOR]

By: _____
Name: _____
Its: _____
Date: _____