

## SITE LEASE

This Site lease ("**Site Lease**") dated October 10, 2023 ("**Effective Date**"), is made and entered into by and between the **Alameda Unified School District**, as lessor ("**District**"), and **Robert A. Bothman Construction, Inc.**, as lessee ("**Contractor**") (together, the "**Parties**").

**WHEREAS**, the District currently owns a parcel or parcels of land located at:

School Site(s) or Site(s)	Address
Encinal Jr. and Sr. High School	210 Central Avenue, Alameda, CA 94501

and as more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference ("**School Site(s) or Site(s)**"); and

**WHEREAS**, the District desires to provide for the construction of improvements to the stadium and athletic fields. ("**Project(s)**"); and

**WHEREAS**, the District determines that a portion of the Site(s) are adequate to accommodate the Project, as more particularly described in **Exhibit A** ("**Project Site(s)**") attached hereto and incorporated herein by this reference; and

**WHEREAS**, District desires to have the construction of the Project completed and to lease it back, as more particularly described in the facilities lease between the Parties dated as of the Effective Date whereby the Contractor agrees to perform the work of the Project and then lease the Project Site(s) back to the District ("**Facilities Lease**"), which Facilities Lease is incorporated herein by this reference; and

**WHEREAS**, the Board of Education of the District ("**Board**") has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Project Site(s) to Contractor and by immediately entering into the Facilities Lease under which the Contractor will perform the work of the Project and the District will lease back the Project from Contractor; and

**WHEREAS**, the District further determines that it has entered into this Site Lease and the Facilities Lease pursuant to Education Code section 17406 as the best available and most expeditious means for the District to satisfy its substantial need for the facilities to be provided by the Project and to accommodate and educate District students; and

**WHEREAS**, the District is authorized under Education Code section 17406 to lease the Project Site(s) to Contractor and to have Contractor develop and cause the construction of the Project thereon and lease the Project Site(s) back to the District by means of the Facilities Lease, and the Board has duly authorized the execution and delivery of this Site Lease in order to effectuate the foregoing, based upon a finding that it is in the best interest of the District to do so; and

**WHEREAS**, Contractor as lessee is authorized and competent to lease the Project Site(s) from District and to develop and cause the construction of the Project on the Project Site(s), and has duly authorized the execution and delivery of this Site Lease; and

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

**NOW, THEREFORE**, in consideration of the promises and of the mutual agreements and covenants contained herein, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto do hereby agree as follows:

1. **Definitions.** Unless the context clearly otherwise requires, or expressly stated otherwise, all words and phrases defined in the Facilities Lease, and attachments thereto, shall have the same meaning in this Site Lease.
2. **Exhibits.** The following Exhibits are attached to and by reference incorporated and made a part of this Site Lease.

**2.1. Exhibit A: Site(s) Information and Project(s) Information**

3. **Lease of the Project Site(s).** The District hereby leases to the Contractor, and the Contractor hereby leases from the District, the Project Site(s), subject only to Permitted Encumbrances, in accordance with the provisions of this Site Lease, to have and to hold for the term of this Site Lease. This Site Lease shall only take effect if the Facilities Lease is executed by the District and Contractor within three (3) days of execution of this Site Lease.

**3.1. Work in Phases.** If the Work of the Project is to be performed in phases, then the only areas bound by the terms of this Site Lease are:

3.1.1. As indicated to be within specific phases of the Project and

3.1.2. For which portions of the Lease Payments as provided for in the Facilities Lease are still owing,

4. **Leaseback of the Project Site(s).** The Parties agree that the Project Site(s) will be leased back to the District pursuant to the Facilities Lease for the term thereof.
5. **Term.** The term of this Site Lease shall commence as of the Effective Date and shall terminate on the last day of the Term of the Facilities Lease, provided the District has paid to the Contractor, or its assignee, all payments which may be due under the Facilities Lease, and provided this Site Lease has not been terminated pursuant to the termination provisions of the Facilities Lease.
6. **Payment.** In consideration for the lease of the Project Site(s) by the District to the Contractor and for other good and valuable consideration, the Contractor shall pay One Dollar (\$1.00) per year to the District upon execution of this Site Lease until the expiration or early termination of this Site Lease and/or the Facilities Lease.
7. **Termination.** This Site Lease may be terminated only as permitted in the Facilities Lease. If the District terminates the Facilities Lease pursuant to the provisions in the Facilities Lease, then this Site Lease shall also terminate.
8. **Title to Site(s).** During the term of this Site Lease, the District shall hold fee title to the Site(s), including the Project Site(s), and nothing in this Site Lease or the Facilities Lease shall change, in any way, the District's ownership interest in the Site(s).
9. **Improvements.** Title to all improvements made on the Project Site(s) during the term hereof shall be held, vest and transfer pursuant to the terms of the Facilities Lease.
10. **No Merger.** The leaseback of the Project Site(s) by the Contractor to the District pursuant to the Facilities Lease shall not effect or result in a merger of the estates of the District in the Project Site(s), and the Contractor shall continue to have a leasehold estate in the Project Site(s) pursuant to this Site Lease

throughout the term hereof.

- 11. Right of Entry.** The District reserves the right for any of its duly authorized representatives to enter upon the Project Site(s) at any reasonable time to inspect the same, provided the District follows all safety precautions required by the Contractor.
- 12. Quiet Enjoyment.** Subject to any rights the District may have under the Facilities Lease (in the absence of an Event of Default) to possession and enjoyment of the Project Site(s), the District hereby covenants and agrees that it will not take any action to prevent the Contractor from having quiet and peaceable possession and enjoyment of the Project Site(s) during the term hereof and will, at the request of the Contractor, to the extent that it may lawfully do so, join in any legal action in which the Contractor asserts its right to such possession and enjoyment.
- 13. Waste.** The Contractor agrees that at all times that it is in possession of the Project Site(s), it will not commit, suffer or permit any waste on the Project Site(s), and that it will not willfully or knowingly use or permit the use of the Project Site(s) for any illegal purpose or act.
- 14. Further Assurances and Corrective Instruments.** The Parties shall, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Project Site(s) hereby leased or intended so to be or for carrying out the expressed intention of this Site Lease and the Facilities Lease.
- 15. Representations of the District.** The District represents, covenants and warrants to the Contractor as follows:
  - 15.1. Due Organization and Existence.** The District is a school district, duly organized and existing under the Constitution and laws of the State of California.
  - 15.2. Authorization.** The District has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Site Lease.
  - 15.3. No Violations.** To the best of the District's actual knowledge, neither the execution and delivery of this Site Lease nor the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Project Site(s), except Permitted Encumbrances.
  - 15.4. CEQA Compliance.** The District has complied with all requirements imposed upon it by the California Environmental Quality Act (Public Resource Code Section 21000 *et seq.* ("CEQA")) in connection with the Project, and no further environmental review of the project is necessary pursuant to CEQA before the construction of the Project may commence.
  - 15.5. No Litigation.** To the best of the District's actual knowledge, there is no pending or threatened action or proceeding before any court or federal, state, municipal, or other government authority or administrative agency which will materially adversely affect the ability of District to perform its obligations under this Site Lease.
  - 15.6. Condemnation Proceedings.**
    - 15.6.1.** District covenants and agrees, but only to the extent that it may lawfully do so, that so long as

this Site Lease remains in effect, the District will not seek to exercise the power of eminent domain with respect to the Project so as to cause a full or partial termination of this Site Lease and the Facilities Lease.

- 15.6.2. If for any reason the foregoing covenant is determined to be unenforceable or in some way invalid, or if District should fail or refuse to abide by such covenant, then, to the extent they may lawfully do so, the Parties agree that the financial interest of Contractor shall be as indicated in the Facilities Lease.

**15.7. Use and Zoning.** To the best of the District's actual knowledge, the Project Site(s) is properly zoned for its intended purpose and the use or activities contemplated by this Site Lease will not conflict with local, state or federal law.

**15.8. Taxes.** To the best of the District's actual knowledge, all taxes and assessments are paid current and such taxes and assessments will continue to be paid to the extent that the District is not exempt.

**15.9. Hazardous Materials.** District is not currently aware of any contamination to the Project Site(s) by Hazardous Materials, except for Hazardous Materials of which District has already informed Contractor. If District becomes aware of any act or circumstance which would change or render this representation incorrect, in whole or in part, District will give immediate written notice of such changed fact or circumstance to Contractor.

- 16. Representations of the Contractor.** The Contractor represents, covenants and warrants to the District as follows:

**16.1. Due Organization and Existence.** The Contractor is a California corporation licensed to provide such services in the state of California, duly organized and existing under the laws of the State of California, has power to enter into this Site Lease and the Facilities Lease; is possessed of full power to lease, leaseback, and hold real and personal property and has duly authorized the execution and delivery of all of the aforesaid agreements.

**16.2. Authorization.** The Contractor has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder and has duly authorized the execution of this Site Lease.

**16.3. No Violations.** Neither the execution and delivery of this Site Lease or the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Contractor is now a party or by which the Contractor is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the Contractor, or upon the Project Site(s), except for Permitted Encumbrances.

**16.4. No Bankruptcy.** Contractor is not now nor has it ever been in bankruptcy or receivership.

**16.5. No Litigation.** There is no pending or, to the knowledge of Contractor, threatened action or proceeding before any court or administrative agency which will materially adversely affect the ability of Contractor to perform its obligations under this Site Lease or the Facilities Lease.

- 17. Insurance and Indemnity.** The Contractor and the District shall comply with the insurance requirements and the indemnity requirements as indicated in the Facilities Lease.

- 18. Assignment and Subleasing.** This Site Lease may be assigned and/or the Project Site(s) subleased, as a whole or in part, by the Contractor only upon the prior written consent of the District to such assignment or sublease, which shall not be unreasonably withheld.
- 19. Restrictions on District.** The District agrees that it will not mortgage, sell, encumber, assign, transfer or convey the Project Site(s) or any portion thereof during the term of this Site Lease in any way that would interfere with or diminish Contractor's interests indicated in this Site Lease.
- 20. Liens and Further Encumbrances.** Contractor agrees to keep the Project Site(s) and every part thereof free and clear of any and all encumbrances and/or liens, including without limitation, pledges, charges, encumbrances, claims, mechanic liens and/or other liens for or arising out of or in connection with work or labor done, services performed, or materials or appliances used or furnished for or in connection with the Project Site(s) or the Project. Pursuant to the Facilities Lease, Contractor further agrees to pay promptly and fully and discharge any and all claims on which any encumbrance and/or lien may or could be based, and to save and hold District free and harmless from any and all such liens, mortgages, and claims of liens and suits or other proceedings pertaining thereto. This subsection does not apply to Permitted Encumbrances.
- 21. Notices.** All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received as indicated below and to the parties indicated below.
- 21.1.** If notice is given by personal delivery thereof, it shall be considered delivered on the day of delivery.
- 21.2.** If notice is given by overnight delivery service, it shall be considered delivered on (1) day after date deposited, as indicated by the delivery service.

**If to District:**  
**Alameda Unified School District**  
2060 Challenger Drive  
Alameda, CA 94501  
ATTN: Robbie Lyng

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**With a copy to:**  
Orbach Huff & Henderson LLP  
6200 Stoneridge Mall Rd., Ste. 225  
Pleasanton, CA 94588  
ATTN: Glenn Gould, Esq.

**If to Contractor:**  
**Robert A. Bothman Construction**  
2690 Scott Blvd.  
Santa Clara, CA 95050  
ATTN: Brian Bothman

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**With a copy to:**  
**Robert A. Bothman Construction**  
2690 Scott Blvd  
Santa Clara, CA 95050  
ATTN: Michael Mingrone

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

- 22. Binding Effect.** This Site Lease shall inure to the benefit of and shall be binding upon the Contractor and the District and their respective successors and assigns.
- 23. No Additional Waiver Implied by One Waiver.** In the event any agreement contained in this Site Lease should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive future compliance with any term hereof or any other breach hereunder.
- 24. Severability.** In the event any provision of this Site Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof, unless elimination of such invalid provision materially alters the rights and obligations embodied in this Site Lease or the Facilities Lease.
- 25. Amendments, Changes and Modifications.** Except as to the termination rights of both Parties as indicated in

the Facilities Lease, this Site Lease may not be amended, changed, modified, altered or terminated without the written agreement of both Parties hereto.

26. **Execution in Counterparts.** This Site Lease may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same instrument.
27. **Contractor and District Representatives.** Whenever under the provisions of this Site Lease approval by the Contractor or the District is required, or the Contractor or the District is required to take some action at the request of the other, such approval or such request shall be given for the Contractor by the Contractor Representative and for the District by the District Representative, and any party hereto shall be authorized to rely upon any such approval or request.
28. **Applicable Law.** This Site Lease shall be governed by and construed in accordance with the laws of the State of California, and venue shall be in the County within which the Site(s) is located.
29. **Attorney's Fees.** If either party brings an action or proceeding involving the Site(s) or to enforce the terms of this Site Lease or to declare rights hereunder, each party shall bear the cost of its own attorneys' fees.
30. **Captions.** The captions or headings in this Site Lease are for convenience only and in no way define, limit, or describe the scope or intent of any provisions or sections of this Site Lease.
31. **Prior Agreements.** This Site Lease and the corresponding Facilities Lease collectively contain all of the agreements of the Parties hereto with respect to any matter covered or mentioned in this Site Lease and no prior agreements or understanding pertaining to any such matter shall be effective for any purpose.
32. **Further Assurances.** Parties shall promptly execute and deliver all documents and instruments reasonably requested to give effect to the provisions of this Site Lease.
33. **Recitals Incorporated.** The Recitals set forth at the beginning of this Site Lease are hereby incorporated into its terms and provisions by this reference.
34. **Time of the Essence.** Time is of the essence with respect to each of the terms, covenants, and conditions of this Site Lease.
35. **Force Majeure.** A party shall be excused from the performance of any obligation imposed in this Site Lease as indicated in the Facilities Lease.
36. **Interpretation.** None of the Parties hereto, nor their respective counsel, shall be deemed the drafters of this Site Lease or the Facilities Lease for purposes of construing the provisions of each. The language in all parts of this Site Lease shall in all cases be construed according to its fair meaning, not strictly for or against any of the Parties hereto.

IN WITNESS WHEREOF, the Parties have accepted and agreed to this Site Lease, as of the Effective Date, and have directed and authorized their respective officers to execute this Site Lease:

Alameda Unified School District

Robert A. Bothman Construction

Signature:

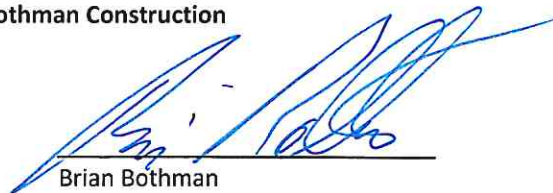


Shariq Khan (Oct 18, 2023 15:45 PDT)

10/18/2023

Shariq Khan  
Assistant Superintendent,  
Business Services

Signature:



Brian Bothman  
Vice President

EXHIBIT A  
TO SITE LEASE

(IDENTICAL TO EXHIBIT A TO THE FACILITIES LEASE)

## FACILITIES LEASE

This Facilities lease ("**Facilities Lease**"), dated October 10, 2023 ("**Effective Date**"), is made and entered into by and between the **Alameda Unified School District**, as lessor ("**District**"), and **Robert A. Bothman Construction, Inc.**, as lessee ("**Contractor**") (together, the "**Parties**").

**WHEREAS**, the District currently owns a parcel or parcels of land located at:

School Site(s) or Site(s)	Address
Encinal Jr. and Sr. High School	210 Central Avenue, Alameda, CA 94501

and as more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference ("**School Site(s) or Site(s)**"); and

**WHEREAS**, the District desires to provide for the construction of improvements to the stadium. ("**Project (s)**"); and

**WHEREAS**, the District has determined that a portion of the Site(s) are adequate to accommodate the Project, as more particularly described in **Exhibit A** ("**Project Site(s)**") attached hereto and incorporated herein by this reference; and

**WHEREAS**, District has retained the following architects (individually and collectively referred to as "**Architect**") to prepare plans and specifications ("**Plans and Specifications**") for the Site(s), and as the architects/engineers of record for the Project as follows:

- QKA Architects

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

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

**WHEREAS**, the District is authorized under Section 17406 of the Education Code of the State of California to lease the Project Site(s) to Contractor and to have Contractor develop and construct the Project on the Project Site(s) and to lease back to the District the Project Site(s) and the Project, and has duly authorized the execution and delivery of this Facilities Lease; and

**WHEREAS**, Contractor is authorized to lease the Project Site(s) as lessee and to develop the Project and to have the Project constructed on the Project Site(s) and to lease the Project and the Project Site(s) back to the District, and has duly authorized the execution and delivery of this Facilities Lease; and

**WHEREAS**, the Board of Education of the District (the "**Board**") has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Project Site(s) to Contractor and by simultaneously entering into this Facilities Lease under which the District will lease back the Project Site(s) and the Project from Contractor and make Lease Payments as indicated in **Exhibit C** attached hereto and incorporated herein by reference; and

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



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

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

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

**1.1. "Contractor" or "Lessor"** means **Robert A. Bothman Construction**, a Corporation, organized and existing under the laws of the State of California, and its successors and assigns.

**1.2. "Contractor's Representative"** means the Managing Member of Contractor, or any person authorized to act on behalf of Contractor under or with respect to this Facilities Lease.

**1.3. "Contract Documents"** are defined in **Exhibit D** to this Facilities Lease.

**1.4. "District" or "Lessee"** means the **Alameda Unified School District**, a school district duly organized and existing under the laws of the State of California.

**1.5. "District Representative"** means the Superintendent of the District, or any other person authorized by the Board of Trustees of the District to act on behalf of the District under or with respect to this Facilities Lease.

**1.6. "Permitted Encumbrances"** means, as of any particular time:

- 1.6.1. Liens for general and valorem taxes and assessments, if any, not then delinquent, or which the District may permit to remain unpaid;
- 1.6.2. The Site Lease;
- 1.6.3. This Facilities Lease,
- 1.6.4. Easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions which exist of record as of the date of this Facilities Lease.
- 1.6.5. Easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions established following the date of recordation of this Facilities Lease and to which Contractor and the District consent in writing which will not impair or impede the operation of the Project Site(s); and

**2. Exhibits.** The following Exhibits are attached to and by reference incorporated and made a part of this Facilities Lease ("Exhibit(s)"):

**2.1. Exhibit A: Site(s) Information and Project(s) Information**

**2.2. Exhibit B: [RESERVED].**

**2.3. Exhibit C: Guaranteed Project Cost and Other Project Cost(s), Funding, and Payment Provisions for**

**Each of the Leased Project Site(s):** A detailed description of the Guaranteed Project Cost and the provisions related to the payment of that amount by the District to the Contractor.

**2.4. Exhibit D: General Construction Provisions:** The provisions generally describing the Project's construction.

**2.5. Exhibit E: Memorandum of Commencement Date for the Facilities Lease for Each of the Leased Project Site(s):** The Memorandum which will memorialize the commencement and expiration dates of the Term.

**2.6. Exhibit F: Construction Schedules for each of the Project Site(s):** The Construction Schedule(s) shall be submitted in computer generated network format and shall be organized by Activity Codes representing the Contractor's intended sequencing of the Work, and with time scaled network diagrams of activities. The Preliminary Construction Schedule(s) shall include activities such as mobilization, preparation of submittals, specified review periods, procurement items, fabrication items, milestones, and all detailed construction activities.

**2.7. Exhibit G: Schedule(s) of Values for Each of the Project Site(s)**

**2.8. Exhibit H: Subcontractor Procurement Process**

**2.9. Exhibit I: Certificates and Bonds to Lease-Leaseback Documents and Division 1 Documents to Lease-Leaseback Documents**

**2.10. Exhibit J: Plans, Technical Specifications, and Drawings**

**2.11. Exhibit K: Revisions to Contract Documents**

**2.12. Exhibit L: Agreement for Preliminary Services**

**2.13. Exhibit M: Project Labor Agreement between the District and the Alameda County Building and Construction Trades Council dated February 9, 2017, with Addendum dated September 29, 2022.**

### **3. Contract Documents / Order of Precedence**

**3.1.** Questions concerning the intent, precedence, or meaning of the Contract Documents, including the Drawings or Specifications, shall be submitted to the District for interpretation. Inconsistencies in the Contract Documents shall be resolved by giving precedence in the following order:

- 3.1.1. District-approved modifications, beginning with the most recent (if any);
- 3.1.2. Exhibit K: Revisions to Contract Documents;
- 3.1.3. Exhibit D: General Construction Provisions ;
- 3.1.4. Facilities Lease;
- 3.1.5. Site Lease;
- 3.1.6. Exhibit C: GPC and Other Project Costs;
- 3.1.7. Remaining Exhibits to the Facilities Lease;
- 3.1.8. Division 1 Documents (Documents beginning with "01");
- 3.1.9. Division 2 through Division 49 documents (Technical Specifications);
- 3.1.10. Figured dimensions;
- 3.1.11. Large-scale drawings; and
- 3.1.12. Small-scale drawings.

In case of conflict, the greater quantity and/or higher standard of workmanship shall apply unless the District expressly states in writing (e.g., via a Change Order) accepting a lesser quantity or lower quality of workmanship and the Contract Price is adjusted accordingly. The decision of the District in the matter shall be final.

**3.2. Integration / Modification.** The Contract Documents and any documents specifically incorporated by reference are completely integrated as the complete and exclusive statement of the terms of the Agreement. This Facilities Lease and Site Lease supersedes all previous contracts, agreements, and / or communications, both oral and written, and constitutes the entire understanding of the District and Contractor. No extrinsic evidence whatsoever shall be admissible or used to explain or supplement the terms of the Contract, Contract Documents, or any items incorporated by reference. No changes, amendments or alterations shall be effective unless in writing, signed by both Parties, and unless provided otherwise by the Contract Documents.

#### **4. Lease of Project and Project Site(s).**

**4.1.** Contractor hereby leases the Project and the Project Site(s) to the District, and the District hereby leases said Project and Project Site(s) from Contractor upon the terms and conditions set forth in this Facilities Lease.

**4.2.** The leasing by Contractor to the District of the Project Site(s) shall not affect or result in a merger of the District's leasehold estate pursuant to this Facilities Lease and its fee estate as lessor under the Site Lease. Contractor shall continue to have and hold a leasehold estate in the Project Site(s) pursuant to the Site Lease throughout the term thereof and the term of this Facilities Lease.

**4.3.** As to the Project Site(s), this Facilities Lease shall be deemed and constitute a sublease.

#### **5. Term.**

**5.1. Facilities Lease is Legally Binding.** This Facilities Lease is legally binding on the Parties upon execution by the Parties and the District Board's approval of this Facilities Lease. The Term of this Facilities Lease for the purposes of District's occupancy shall commence after the Parties have satisfied all preconditions for the Parties execution of the Memorandum of Commencement Date as set forth in "Timing of Lease Payments" in **Exhibit C**, and then on the earlier of the following two (2) events ("**Commencement Date**"), and shall terminate **twelve (12) months** after the Commencement Date (the "**Term**");

5.1.1. The date the District takes Beneficial Occupancy of the entire Project; or

5.1.2. The date of Project Completion, as defined in **Exhibit D** to this Facilities Lease.

**5.2.** On the Commencement Date, the Parties shall execute the Memorandum of Commencement Date attached hereto as **Exhibit E** to memorialize the commencement and expiration dates of the Term. Notwithstanding this Term, the Parties hereby acknowledge that each has obligations, duties, and rights under this Facilities Lease that exist upon execution of this Facilities Lease and prior to the Commencement Date of the Term.

**5.3.** The Parties expressly agree that the District's obligation to make Tenant Improvement Payments for Work performed on the Project arises upon the Effective date of this Facilities Lease, and shall be made pursuant to the "Payment of the Guaranteed Project Cost" Provisions as indicated in **Exhibit C**.

**5.4.** The Parties expressly agree that the District's obligation to make Lease Payments, notwithstanding the Commencement Date, is conditioned on the Contractor completing and satisfying all conditions indicated in **Exhibit C**, that are required prior to the District being obligated to make the first Lease Payment.

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

- 5.5.1. An Event of Default by District as defined herein and Contractor's election to terminate this Facilities Lease as permitted herein, or
- 5.5.2. An Event of Default by Contractor as defined herein and District's election to terminate this Facilities Lease as permitted herein, or
- 5.5.3. A third-party taking of the Project under Eminent Domain, only if the Term is ended as indicated more specifically herein.
- 5.5.4. Damage or destruction of the Project, only if the Term is ended as indicated more specifically herein.

**6. Payment.** In consideration for the lease of the Project Site(s) by the Contractor back to the District and for other good and valuable consideration, the District shall make the Tenant Improvements Payments and Lease Payments pursuant to the "Payment of the Guaranteed Project Cost" Provisions as indicated in **Exhibit C**.

**7. Termination.**

**7.1. Termination Due to Default of the Contractor.**

7.1.1. The District, in its sole discretion, may terminate the Facilities Lease and/or terminate the Contractor's right to perform the work of the Contract based upon Contractor's default.

7.1.2. Default of Contractor includes, without limitation:

- 7.1.2.1. Contractor refuses or fails to execute the Work or any separable part thereof with sufficient diligence as will ensure its completion within the time specified or any extension thereof, or
- 7.1.2.2. Contractor fails to complete said Work within the time specified or any extension thereof, or
- 7.1.2.3. Contractor persistently fails or refuses to perform Work or provide material of sufficient quality as to be in compliance with Contract Documents; or
- 7.1.2.4. Contractor files a petition for relief as a debtor, or a petition is filed against the Contractor without its consent, and the petition is not dismissed within sixty (60) days; or
- 7.1.2.5. Contractor makes a general assignment for the benefit of its creditors, or a receiver is appointed on account of its insolvency; or
- 7.1.2.6. Contractor persistently or repeatedly refuses or fails, except in cases for which extension of time is provided, to supply enough properly skilled workers or proper materials to complete the Work in the time specified; or
- 7.1.2.7. Contractor fails to make prompt payment to Subcontractors, or for material, or for labor; or
- 7.1.2.8. Contractor persistently disregards laws, or ordinances, or instructions of District; or

7.1.2.9. Contractor fails to supply labor, including that of Subcontractors, that can work in harmony with all other elements of labor employed or to be employed on the Work; or

7.1.2.10. Contractor or its Subcontractor(s) is/are otherwise in breach, default, or in substantial violation of any provision of this Contract.

7.1.3. Upon termination, District may immediately serve written notice of tender upon Surety whereby Surety shall have the right to takeover and perform this Contract only if Surety:

7.1.3.1. Within three (3) days after service upon it of the notice of tender, gives District written notice of Surety's intention to takeover and perform this Contract; and

7.1.3.2. Commences performance of the Contract within seven (7) days from date of serving of its notice to District.

7.1.4. If Surety fails to notify District or begin performance as indicated herein, District may takeover the Work and execute the Work to completion by any method it may deem advisable at the expense of Contractor and/or its Surety. Contractor and/or its Surety shall be liable to District for any excess cost or other damages the District incurs thereby. Time is of the essence in the Contract. If the District takes over the Work as herein provided, District may, without liability for so doing, take possession of and utilize in completing the Work such materials, appliances, plan, and other property belonging to Contractor as may be on the Site of the Work, in storage, or previously paid for.

**7.2. Termination Due to Default by District.** If District defaults pursuant to the provision(s) of the Facilities Lease, the Contractor, or its assignee, will have the right, for the then remaining term of the Site Lease, to:

7.2.1. Take possession of the Project Site(s);

7.2.2. If it deems it appropriate, cause appraisal of the Project Site(s) and a study of the then reasonable uses thereof; and

7.2.3. Relet the Project Site(s).

**7.3. Termination of Contractor for Convenience.** The District in its sole discretion may terminate for convenience this Facilities Lease upon three (3) days written notice to the Contractor. In case of a termination for convenience, the Contractor shall have no claims against the District except the actual portion of the Guaranteed Project Cost expended for labor, materials, and services performed that is unpaid and can be documented through timesheets, invoices, receipts, or otherwise, up to and until the date of termination, plus necessary and reasonable documented demobilization costs.

**7.4. Lease Terminable Only as Set Forth Herein.** Except as otherwise expressly provided in this Facilities Lease and the "Termination and Suspension and Scope Reduction" section of **Exhibit D** to this Facilities Lease, this Facilities Lease shall not terminate, nor shall District have any right to terminate this Facilities Lease or be entitled to the abatement of any all necessary payments pursuant to the "Payment of Guaranteed Project Cost" Provisions as indicated in **Exhibit C** or any reduction thereof. The obligations hereunder of District shall not be otherwise affected by reason of any damage to or destruction of all or any part of the Project; the taking of the Project or any portion thereof by condemnation or otherwise; the prohibition, limitation or restriction of District's use of the Project; the interference with such use by any private person or Contractor; the District's acquisition of the ownership of the Project (other than pursuant to an express provision of this Facilities Lease); any present or future law to the contrary notwithstanding. It is the intention of the Parties Alameda Unified School District and Robert A. Bothman Construction, parties hereto that all necessary payments pursuant to the "Payment of Guaranteed Project Cost Provisions" as indicated in **Exhibit C** shall

continue to be payable in all events, and the obligations of the District hereunder shall continue unaffected unless the requirement to pay or perform the same shall be terminated or modified pursuant to an express provision of this Facilities Lease.

**7.5.** Nothing contained herein shall be deemed a waiver by the District of any rights that it may have to bring a separate action with respect to any Event of Default by Contractor hereunder or under any other agreement to recover the costs and expenses associated with that action. The District covenants and agrees that it will remain obligated under this Facilities Lease in accordance with its terms.

**7.6.** Following Project Completion, and to the extent applicable, the District will not take any action to terminate, rescind or avoid this Facilities Lease, notwithstanding the bankruptcy, insolvency, reorganization, composition, readjustment, liquidation, dissolution, winding-up or other proceeding affecting Contractor or any assignee of Contractor in any such proceeding, and notwithstanding any action with respect to this Facilities Lease which may be taken by any trustee or receiver of Contractor or of any assignee of Contractor in any such proceeding or by any court in any such proceeding. Following Project Completion, except as otherwise expressly provided in this Facilities Lease, District waives all rights now or hereafter conferred by law to quit, terminate or surrender this Facilities Lease or the Project or any part thereof.

**7.7.** District acknowledges that Contractor may assign an interest in some or all of the necessary payments pursuant to the "Payment of Guaranteed Project Cost Provisions" as indicated in **Exhibit C** to a lender in order to obtain financing for the cost of constructing the Project and that the lender may rely on the foregoing covenants and provisions in connection with such financing.

## **8. Title.**

**8.1.** During the Term of this Facilities Lease, the District shall hold fee title to the School Site(s), including the Project Site(s), and nothing in this Facilities Lease or the Site Lease shall change, in any way, the District's ownership interest.

**8.2.** During the Term of this Facilities Lease, Contractor shall have a leasehold interest in the Project Site(s) pursuant to the Site Lease.

**8.3.** During the Term of this Facilities Lease, the Contractor shall hold title to the Project improvements provided by Contractor which comprise fixtures, repairs, replacements or modifications thereto.

**8.4.** If the District makes all necessary payments under the Guaranteed Project Cost Provisions indicated in **Exhibit C**, all right, title and interest of Contractor, its assigns and successors in interest in and to the Project and the Project Site(s) shall be transferred to and vested in the District at the end of the Term. Title shall be transferred to and vested in the District hereunder without the necessity for any further instrument of transfer; provided, however, that Contractor agrees to execute any instrument requested by District to memorialize the termination of this Facilities Lease and transfer of title to the Project.

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

**10. Representations of the District.** The District represents, covenants and warrants to the Contractor as follows:

**10.1. Due Organization and Existence.** The District is a school district, duly organized and existing under the Constitution and laws of the State of California.

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

**10.3. No Violations.** Neither the execution and delivery of this Facilities Lease nor the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Project Site(s), except Permitted Encumbrances

**10.4. CEQA Compliance.** The District has complied with all requirements imposed upon it by the California Environmental Quality Act (Public Resource Code Section 21000 *et seq.* ("CEQA")) in connection with the Project, and no further environmental review of the project is necessary pursuant to CEQA before the construction of the Project may commence. Contractor shall comply with all applicable mitigation measures, if any, adopted by any public agency with respect to this Project pursuant to the California Environmental Quality Act. (Public Resources Code section 21000 *et seq.*).

**10.5. No Litigation.** Except for a validation action related to this transaction that the District may file, there is no pending or, to the knowledge of District, threatened action or proceeding before any court or federal, state, municipal, or other government authority or administrative agency which will materially adversely affect the ability of District to perform its obligations under this Facilities Lease.

**10.6. Condemnation Proceedings.**

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

10.6.2. If for any reason the foregoing covenant is determined to be unenforceable or in some way invalid, or if District should fail or refuse to abide by such covenant, then, to the extent it may lawfully do so, District agrees that the financial interest of Contractor shall be as indicated in Section 6.1 of this Facilities Lease.

**11. Representations of the Contractor.** The Contractor represents, covenants and warrants to the District as follows:

**11.1. Due Organization and Existence.** The Contractor is a California corporation licensed to provide such services in the state of California, duly organized and existing under the laws of the State of California, has the power to enter into this Facilities Lease and the Site Lease; is possessed of full power to lease, lease back, and hold real and personal property and has duly authorized the execution and delivery of all of the aforesaid agreements.

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

of this Facilities Lease.

**11.3. No Violations.** Neither the execution and delivery of this Facilities Lease and the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which Contractor is now a party or by which Contractor is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of Contractor, or upon the Project Site(s), except Permitted Encumbrances.

**11.4. No Bankruptcy.** Contractor is not now and has never been in bankruptcy or receivership.

**11.5. No Litigation.** There is no pending or, to the knowledge of Contractor, threatened action or proceeding before any court or administrative agency which will materially adversely affect the ability of Contractor to perform its obligations under this Facilities Lease.

**11.6. No Encumbrances.** Contractor shall not pledge any District payments of any kind, related to the Site Lease, this Facilities Lease, or in any way derived from the Project Site(s), and shall not mortgage or encumber the Project Site(s), except as may be specifically permitted pursuant to the provisions of this Facilities Lease related to Contractor's financing the construction of the Project.

**11.7. Continued Existence.** Contractor shall not voluntarily commence any act intended to dissolve or terminate the legal existence of Contractor, at or before the latest of the following:

11.7.1. Eighteen (18) months following Project Completion,

11.7.2. After dismissal and final resolution of any and all disputes between the Parties and/or any third-party claims related, in any way, to the Project,

Contractor shall give District sixty (60) days written notice prior to dissolving or terminating the legal existence of Contractor.

**11.8. Infectious Disease.** Contractor shall comply with all provisions related to Infectious Disease as indicated in **Exhibit D**.

## **12. Preliminary Services**

**12.1.** The terms and conditions pertaining to the performance of Preliminary Services, if any, under this Facilities Lease, are set forth in the Agreement for Preliminary Services (**Exhibit L**) to this Facilities Lease. To the extent any terms and conditions set forth therein conflict with terms and conditions in the body of the Facilities Lease, the terms and conditions contained in **Exhibit L** shall control regarding the performance of Preliminary Services.

**12.2.** The payment provisions for the Preliminary Services, if any, under this Facilities Lease, are set forth in **Exhibit C** and **Exhibit L** to this Facilities Lease.

**12.3.** Notwithstanding any provision contained in this Facilities Lease, Contractor shall not be required to perform any Preliminary Services for which a contractor is required to be licensed pursuant to Article 5 (commencing with Section 7065) of Chapter 9, Division 3 of the Business and Professions Code and/or for which DSA approval is required unless and until the District receives DSA approval for the Project.



### 13. Construction of Project

**13.1. Project Site(s) Conditions and Contract Documents.** Contractor acknowledges that it has and will perform certain special services in preparation to construct the Project.

#### 13.2. Construction of Project.

13.2.1. After the District's issuance of a Notice to Proceed, Contractor agrees to cause the Project to be developed, constructed, and installed in accordance with the terms hereof and the Construction Provisions set forth in **Exhibit D**, including those things reasonably inferable in the Construction Provisions as being within the scope of the Project and necessary to produce the stated result even though no mention is made in the Construction Documents.

#### 13.2.2. Contract Time / Construction Schedule.

13.2.2.1. The Construction shall be performed pursuant to the construction schedule(s), attached hereto as **Exhibit F ("Construction Schedule(s))**. The time period between the **Notice to Proceed** for construction of the Project and **Completion** shall be the total Contract time ("**Contract Time**").

13.2.2.2. The Construction Schedule must be approved by the District prior to execution of this Facilities Lease. District and Contractor may, if agreed to in writing, approve changes in the Construction Schedule.

13.2.3. **Schedule of Values.** The Contractor has provided a schedule of values, approved by the District, which attached hereto as **Exhibit G ("Schedule(s) of Values")**. The Schedule of Values must be approved by the District prior to the District's approval of the Contractor's first Application for Tenant Improvement Payment.

13.2.4. **Liquidated Damages:** Time is of the essence for all work Contractor must perform to obtain Project Completion. It is hereby understood and agreed that it is and will be difficult and/or impossible to ascertain and determine the actual damage that the District will sustain in the event of and by reason of Contractor's delay; therefore, pursuant to Government Code section 53069.85 and Public Contract Code section 7203, Contractor shall forfeit and pay to District the following sum(s) as liquidated damages ("**Liquidated Damages**"): **Two Thousand Dollars (\$2,000) per day** as liquidated damages for each and every day's delay beyond the Contract Time for each School Site(s).

13.2.4.1. It is hereby understood and agreed that neither the total cumulative Liquidate Damages amount nor any portion of the Liquidated Damage amount are penalties.

13.2.4.2. In the event any portion of the liquidated damages is not paid to the District, the District may deduct that amount from any money due or that may become due the Contractor under this Facilities Lease. The District's right to assess liquidated damages is as indicated herein and in the **Exhibit D**. Contractor and Surety shall be liable for and pay to District the entire amount of Liquidated Damages including any portion that exceeds the amount of the Contract Price then held, retained or controlled by District.

13.2.4.3. The time during which the construction of the Project is delayed for cause as hereinafter specified may extend the Contract Time for a reasonable time as the District may grant. This provision does not exclude the recovery of damages for delay by either party under other provisions in this Facilities Lease.

- 13.2.5. **Guaranteed Project Cost.** Contractor will cause the Project to be constructed within the Guaranteed Project Cost as set forth and defined in the Guaranteed Project Cost provisions indicated in **Exhibit C** and Contractor will not seek additional compensation from District in excess of that amount.
- 13.2.6. **Modifications.** If the DSA requires changes to the Contract Documents submitted by District to Contractor, and those changes change the construction costs and/or construction time for the Project, then those changed costs will be handled as a change in the Work pursuant to the provisions of **Exhibit D**.
- 13.2.7. Contractor shall cooperate with the District's efforts to obtain State funding for the Project by complying with any State requirements as reasonably requested by the District.
- 13.2.8. **Compliance Monitoring and Enforcement by the Department of Industrial Relations.**

13.2.8.1. District hereby provides notice of the requirements described in Labor Code section 1771.1, subdivision (a), which states the following:

"A contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work pursuant to Section 1725.5. It is not a violation of this section for an unregistered contractor to submit a bid that is authorized by Section 7029.1 of the Business and Professions Code or by Section 10164 or 20103.5 of the Public Contract Code, provided the contractor is registered to perform public work pursuant to Section 1725.5 at the time the contract is awarded."

13.2.8.2. Contractor acknowledges that, for purposes of Labor Code section 1725.5, this work is a public work to which Labor Code section 1771 applies. Contractor shall comply with Labor Code section 1725.5, including without limitation the registration requirements. Additionally, all "subcontractors" (as defined by Labor Code section 1722.1) shall comply with Labor Code section 1725.5 to be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of the Project. Contractor represents to the District that all "subcontractors" (as defined by Labor Code section 1722.1) are registered pursuant to Labor Code section 1725.5.

13.2.8.3. The Project is subject to compliance monitoring and enforcement by the Department of Industrial Relations. Contractor shall post job site notices, as prescribed by regulation. Contractor shall comply with all requirements of Labor Code section 1771.4, except the requirements that are exempted by the Labor Commissioner for the Project.

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

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

by District.

**16. Taxes and Other Impositions.** All ad valorem real property taxes, special taxes, possessory interest taxes, bonds and special lien assessments or other impositions of any kind with respect to the Project, the Project Site(s) and the improvements thereon, charged to or imposed upon either Contractor or the District or their respective interests or estates in the Project, shall at all times be paid by District. In the event any possessory interest tax is levied on Contractor, its successors and assigns, by virtue of this Facilities Lease or the Site Lease, District shall pay such possessory interest tax directly, if possible, or shall reimburse Contractor, its successors and assigns for the full amount thereof within thirty (30) days after presentation of proof of payment by Contractor.

## **17. Insurance**

**17.1. Contractor's Insurance.** The Contractor shall comply with the insurance requirements as indicated herein.

**17.1.1. Commercial General Liability and Automobile Liability Insurance.** Contractor shall procure and maintain, during the life of the Project, Commercial General Liability Insurance and Automobile Liability Insurance that shall protect Contractor, District, and the State, from all claims for bodily injury, property damage, personal injury, death, advertising injury, and medical payments arising from operations under the Project. Contractor shall ensure that Products Liability and Completed Operations coverage, Fire Damage Liability, and Any auto including owned and non-owned, are included within the above policies and at the required limits, or Contractor shall procure and maintain these coverages separately.

### **17.1.2. Umbrella Liability Insurance**

**17.1.2.1.** Contractor shall procure and maintain, during the life of the Contract, an Excess Liability and/or Umbrella Liability Insurance Policy. Any Umbrella Liability Insurance Policy shall protect Contractor, District, State, Construction Manager(s), Program Manager(s), and Architect(s) in the amounts indicated herein, and shall comply with all requirements for Commercial General Liability and Automobile Liability, Employers' Liability Insurance, and Sexual Molestation and Abuse Liability. This coverage shall be provided in a form at least as broad as the Insurance Services Office (ISO) standard form.

**17.1.2.2.** There shall be no gap between the per occurrence amount of any underlying policy and the start of the coverage under the Umbrella Liability Insurance Policy.

**17.1.2.3.** Whether this Excess Liability and/or Umbrella Liability Insurance Policy is written on a "follow form" or "stand alone" form, the coverages shall be equal or greater than the Contractor's Commercial General Liability and Automobile Liability, Employers' Liability Insurance, and Sexual Molestation and Abuse Liability with no exclusions that reduce or eliminate coverage items.

**17.1.3. Subcontractor:** Contractor shall require its Subcontractor(s), if any, to procure and maintain Commercial General Liability Insurance, Automobile Liability Insurance, and Umbrella Liability Insurance with minimum limits as agreed to by the District's risk manager.

### **17.1.4. Workers' Compensation and Employers' Liability Insurance**

**17.1.4.1.** In accordance with provisions of section 3700 of the California Labor Code, the Contractor and every Subcontractor shall be required to secure the payment of compensation to its employees.

17.1.4.2. Contractor shall procure and maintain, during the life of the Project, Workers' Compensation Insurance and Employers' Liability Insurance for all of its employees engaged in work under the Project, on/or at the Site of the Project. This coverage shall cover, at a minimum, medical and surgical treatment, disability benefits, rehabilitation therapy, and survivors' death benefits. Contractor shall require its Subcontractor(s), if any, to procure and maintain Workers' Compensation Insurance and Employers' Liability Insurance for all employees of Subcontractor(s). Any class of employee or employees not covered by a Subcontractor's insurance shall be covered by Contractor's insurance. If any class of employee or employees engaged in Work under the Project, on or at the Site of the Project, is not protected under the Workers' Compensation Insurance, Contractor shall provide, or shall cause a Subcontractor to provide, adequate insurance coverage for the protection of any employee(s) not otherwise protected before any of those employee(s) commence work.

17.1.5. **Sexual Molestation and Abuse Liability Insurance.** Contractor shall procure and maintain, during the life of this Contract, sexual molestation and abuse insurance. Contractor shall require its Subcontractor(s), if any, to procure and maintain sexual molestation and abuse insurance for any and all employee(s) of Subcontractor(s). Any class of employee or employees not covered by a Subcontractor's insurance shall be covered by Contractor's insurance. If any class of employee or employees engaged in Work under the Contract, on or at the Site of the Project, are not covered under the sexual molestation and abuse insurance, Contractor shall provide, or shall cause a Subcontractor to provide, adequate insurance coverage to cover any employee(s) not otherwise covered before any of those employee(s) commence work.

17.1.6. **Contractor's Risk Insurance: Contractor's Risk "All Risk" Insurance (NO Earthquake or Flood).**

17.1.6.1. Contractor (Builder) shall procure and maintain, during the life of the Project, Contractor's Builders Risk (Course of Construction), or similar first party property coverage acceptable to the District, issued on a replacement cost value basis. The cost shall be consistent with the total replacement cost of all insurable Work of the Project included within the Contract Documents.

17.1.6.2. Coverage is to insure against all risks of accidental physical loss and shall include without limitation the perils of vandalism and/or malicious mischief (both without any limitation regarding vacancy or occupancy), sprinkler leakage, civil authority, sonic disturbance, collapse, wind, fire, lightning, and smoke. Coverage shall include debris removal, demolition, increased costs due to enforcement of all applicable ordinances and/or laws in the repair and replacement of damaged and undamaged portions of the property, and reasonable costs for the Architect's and engineering services and expenses required as a result of any insured loss upon the Work and Project, including completed Work and Work in progress, to the full insurable value thereof.

17.1.6.3. **Earthquake and Flood Coverage.** The District may require the Contractor to include coverage for "earthquake(s)" and/or "flood" and Contractor shall provide the price for those additional coverages for the District's consideration prior to including or charging the District for those coverages.

17.1.6.4. Coverage shall be maintained until final payment has been made as provided under the Contract Documents or until no person or entity other than the District has an insurable interest in the property to be covered, whichever is later. This insurance shall cover as insureds the District, Contractor, all Subcontractors of every tier on the Project, and all vendors and suppliers.

17.1.6.5. **Offsite Storage.** Coverage must also be maintained for any materials stored offsite that will be incorporated into the Project.

17.1.6.6. The deductible for this insurance shall be paid by Contractor.

17.1.7. **Professional Liability Insurance.** This insurance shall cover the Contractor and his/her sub-consultant(s) for professional liability in at least the amounts set forth herein below. Additionally, the policy must contain terms or endorsements extending coverage that requires the insurer to defend and indemnify for acts which happen before the effective date of the policy provided the claim is first made during the policy period, coverage to continue through Project Completion plus "tail" coverage for two (2) years thereafter.

17.1.8. **Property of Others Insurance (if not expressly stated as part of above insurance policies).** If equipment and material are stored off-site and are in the Contractor's possession, the Contractor shall procure and maintain, during the storage of equipment and material, insurance coverage acceptable to the District that shall protect Contractor and District from all claims for Project equipment and materials stored off-site that is lost, stolen, or damaged. The District shall be named as a loss payee for this insurance coverage. The insurance coverage shall include a "loss payable endorsement" stating that all amounts payable will be paid as a joint-check to the Contractor and District. If approved in advance by District, this required insurance may be obtained by an "Employee Theft Protection Insurance Policy" or an "Employee Theft Protection Bond."

17.1.9. **Proof of Insurance and Other Requirements: Endorsements and Certificates**

17.1.9.1. Contractor shall not commence Work nor shall it allow any Subcontractor to commence Work under the Project, until Contractor and its Subcontractor(s) have procured all required insurance and Contractor has delivered in duplicate to the District all insurance certificates indicating the required coverages have been obtained, and the District has approved these documents. If the District requests copies of Contractor's insurance policies and/or endorsements from Contractor, Contractor shall provide them within fourteen (14) days.

17.1.9.2. Endorsements, certificates, and insurance policies shall include the following:

17.1.9.2.1. A clause stating:

"This policy shall not be amended, canceled or modified and the coverage amounts shall not be reduced until notice has been mailed to the District and Construction Manager stating date of amendment, modification, cancellation or reduction. Date of amendment, modification, cancellation or reduction may not be less than thirty (30) days after date of mailing notice."

17.1.9.2.2. Language stating in particular those insured, extent of insurance, location and operation to which insurance applies, expiration date, to whom cancellation and reduction notice will be sent, and length of notice period.

17.1.9.3. All endorsements, certificates and insurance policies shall state that District, its Board members, employees and agents, and the State of California, Construction Manager(s), Program Manager(s), Inspector(s) and Architect(s) are named additional insureds under all policies except Workers' Compensation Insurance, Professional Liability Insurance, and Employers' Liability Insurance. After the Project has reached Completion, the Contractor need only retain the named additional insureds on the Completed Operations Policy.

17.1.9.4. Contractor's and Subcontractors' insurance policy(s) shall be primary and non-contributory to any insurance or self-insurance maintained by District, its trustees, employees and/or agents, the State of California, Construction Manager(s), Project Manager(s), Inspector(s), and/or Architect(s).

17.1.9.5. All endorsements, except for Professional Liability, shall waive any right to subrogation against any of the named additional insureds, except Architect.

17.1.9.6. All policies shall be written on an occurrence form, except for Professional Liability which shall be on a claims-made form.

17.1.9.7. All of Contractor's insurance shall be with **ADMITTED** insurance companies with an A.M. Best rating of no less than **A: VII**. Contractor shall provide documentation to the District demonstrating this rating.

17.1.10. **Insurance Policy Limits.** The limits of insurance shall not be less than the following amounts or as per the District's standard attached:

<b>Commercial General Liability</b> (Includes: Bodily Injury, Property Damage, Personal & Advertising Injury, Product Liability and Completed Operations)	Combined Single Limit	\$2,000,000
	General Aggregate Product Liability and Completed Operations	\$4,000,000 \$2,000,000
<b>Automobile Liability – Any Auto</b>	Combined Single Limit <b>NO</b> General Aggregate	\$2,000,000
<b>Excess Liability (Umbrella)</b>		\$6,000,000 per occurrence; \$6,000,000 aggregate
<b>Workers Compensation</b>		Statutory limits pursuant to State law
<b>Employers' Liability</b>		\$2,000,000 each incident
<b>Sexual Abuse / Molestation</b>		\$1,000,000 each incident; \$2,000,000 policy limit
<b>Contractors Risk (Course of Construction)</b>		Issued for the value and scope of Work indicated herein, until the Project has reached Completion
<b>Property of Others</b>	Combined Single Limit General Aggregate	Issued for the value and scope of Work stored off-site.
<b>Professional Liability, if required by the District and either:</b> - the premium is approved by the District, or - by each subconsultant and/or designer of documents produced by Contractor.		\$1,000,000 per occurrence and annual aggregate

## **17.2. District's Insurance.**

17.2.1. Upon the execution of the Memorandum of Commencement Date, the District will include the facilities constructed as part of the Project to be thereafter a facility that the District is leasing and that will thereafter be covered by the insurance program in which the District currently participates. If requested by Contractor, District shall provide portions of the District's current insurance documents for the following. At the Contractor's request, District shall request the District's insurance administrator to include Contractor as an additional covered party on those policies, but the District will not ensure that the District's insurance administrator will agree to the request:

17.2.1.1. Property Program Liability Coverage

17.2.1.2. Interruption of Business / Extra Expense and Rental Value Coverage

## **18. Indemnification.**

### **18.1. Contractor's Indemnity Obligation.**

18.1.1. To the furthest extent permitted by California law, Contractor shall indemnify, defend with legal counsel reasonably acceptable to the District, keep and hold harmless the District and its consultants, the Architect and its consultants, the Construction Manager and its consultants, separate contractors, and their respective board members, officers, representatives, contractors, agents, and employees, in both individual and official capacities ("Indemnitees"), against all suits, claims, damages, losses, and expenses, including but not limited to attorney's fees, caused by, arising out of, resulting from, or incidental to, the performance of the Work by Contractor, its Subcontractors, vendors, or suppliers, including, without limitation, any such suit, claim, damage, loss, or expense attributable to, without limitation, bodily injury, sickness, disease, death, alleged patent violation or copyright infringement, or to injury to or destruction of tangible property (including damage to the Work itself) including the loss of use resulting therefrom, except to the extent caused by the sole negligence, active negligence, or willful misconduct of the Indemnitees, and/or to any extent that would render these provisions void or unenforceable. This agreement and obligation of Contractor shall not be construed to negate, abridge, or otherwise reduce any right or obligation of indemnity that would otherwise exist as to any party or person described herein. This indemnification, defense, and hold harmless obligation includes, without limitation:

18.1.1.1. Any failure or alleged failure by Contractor to comply with any provision of law, any failure or alleged failure to timely and properly fulfill all of its obligations under the Contract Documents in strict accordance with their terms, and without limitation, any stop payment notice actions or liens, including liens by the California Department of Labor Standards Enforcement.

18.1.1.2. Any claim arising (including protests) from any errors or mistakes in Contractor's documents provided to Subcontractors.

18.1.2. Contractor shall give prompt notice to the District in the event of any injury (including death), loss, or damage included herein. Without limitation of the provisions herein, if Contractor's agreement to indemnify, defend, and hold harmless the Indemnitees as provided herein against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of any of the Indemnitees shall to any extent be or be determined to be void or unenforceable, it is the intention of the parties that these circumstances shall not otherwise affect the validity or enforceability of Contractor's agreement to indemnify, defend, and hold harmless the rest of the Indemnitees, as provided herein, and in the case of any such suits, claims, damages, losses, or expenses caused in part by the default, negligence, or act or omission of Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, and in part by any of the Indemnitees, Contractor shall be and remain fully liable on its agreements and obligations herein to the

full extent permitted by law.

18.1.3. In any and all claims against any of the Indemnitees by any employee of Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, Contractor's indemnification obligation herein shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Contractor or any Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

18.1.4. The defense and indemnification obligations hereunder shall survive the Completion of Work, including the warranty/guarantee period, and/or the termination of the Contract.

## **18.2. District's Indemnity Obligation.**

18.2.1. District shall indemnify, but shall not be obligated to defend, Contractor from and against any claims, damages, expenses or liabilities connected with this Facilities Lease, only:

18.2.1.1. If those claims, damages, expenses or liabilities relate to District's status as a sublessee under this Facilities Lease;

18.2.1.2. To the extent that those claims, damages, expenses or liabilities arise from the negligence or willful acts or omissions of District, its officers, agents or employees; and

18.2.1.3. If those claims, damages, expenses or liabilities are unrelated to District's obligations to pay the Guaranteed Project Cost.

18.2.2. After the Commencement Date, the District shall also indemnify and defend Contractor from and against any claims, damages, expenses or liabilities including third-party tort or contract claims that arise from the District's use of the Facilities and that are not caused by the Contractor's Work on the Project or are not covered by Contractor's warranty(s) or guarantee(s) and.

18.2.3. Under no circumstances does the District's indemnity obligation herein include any obligation to indemnify the Contractor from any claims, damages, expenses or liabilities connected in any way with a third-party's challenge to the validity of the Site Lease and/or the Facilities Lease.

**18.3.** The Parties understand and acknowledge that the indemnity obligations stated herein may be mutual, comparative or contributory depending on the facts of specific circumstances.

## **19. Eminent Domain.**

**19.1. Total Taking After Project Delivery.** If, following delivery of possession of the Project by Contractor to District, all of the Project and the Project Site(s) is taken permanently under the power of eminent domain, the Term shall cease as of the day possession shall be so taken.

19.1.1. The financial interest of Contractor shall be limited to the amount of principal payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** that are then due or past due together with all remaining and succeeding principal payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** for the remainder of the original Term.

19.1.2. The balance of the award, if any, shall be paid to the District.

**19.2. Total Taking Prior to Project Delivery.** If all of the Project and the Project Site(s) is taken



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

**19.3. Partial Taking.** If, following delivery of possession of the Project by Contractor to District, less than all of the Project and the Project Site(s) is taken permanently, or if all of the Project and the Project Site(s) or any part thereof is taken temporarily, under the power of eminent domain:

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

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

**20. Damage and Destruction.** If, following delivery of possession of the Project by Contractor to District, the Project is totally or partially destroyed due to fire, acts of vandalism, flood, storm, earthquake, Acts of God, or other casualty beyond the control of either party hereto, the Term shall end and District shall no longer be required to make any payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** that are then due or past due or any remaining and succeeding principal payments pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** for the remainder of the original Term. The Contractor shall still be due any funds, payments, or disbursements from the District's rental interruption insurance to pay for the amounts that would otherwise have been due and owing from the District under **Exhibit C**.

**21. Abatement.**

**21.1.** If, after the Parties have executed the Memorandum of Commencement Date attached hereto as **Exhibit E**, the Project becomes destroyed or damaged beyond repair, the District may determine its use of the Project abated. Thereafter, the District shall have no obligation to make, nor shall the Contractor have the right to demand, any future Lease Payments as indicated in the Guaranteed Project Cost Provisions indicated in **Exhibit C** to this Facilities Lease. The Term shall cease at that time.

**21.2.** The Parties hereby agree that the net proceeds of the District's rental interruption insurance that the District must maintain during the Term, as required herein, shall constitute a special fund for the payment of the Lease Payments indicated in the Guaranteed Project Cost Provisions indicated in **Exhibit C**.

**21.3.** The District shall as soon as practicable after such event, at its discretion, apply the net proceeds of its insurance policy intended to cover that loss ("**Net Proceeds**"), either to:

21.3.1. Repair the Project to full use;

21.3.2. Replace the Project, at the District's sole cost and expense, with property of equal or greater value of the Project immediately prior to the time of the destruction or damage, with that replacement, once completed, shall be substituted in this Facilities Lease by appropriate endorsement; or

**21.4.** The District shall notify the Contractor of which course of action it desires to take within thirty (30)

days after the occurrence of the destruction or damage. The Net Proceeds of all insurance payable with respect to the Project shall be available to the District and shall be used to discharge the District's obligations under this Section.

## **22. Access**

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

**22.2. By District.** The District shall have the right to enter upon the Project Site(s) at all times. District shall comply with all safety precautions and procedures required by Contractor.

## **23. Assignment, Subleasing**

**23.1. Assignment and Subleasing by the District.** Any assignment or sublease by District shall be subject to all of the following conditions:

23.1.1. This Facilities Lease and the obligation of the District to make the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** shall remain obligations of the District; and

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

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

## **24. Events of Default of District**

**24.1. Events of Default by District Defined.** "Events of Default" of the Contractor shall be those items identified in section 6.1.2 of this Facilities Lease.

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

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

24.2.1.1. An amount determined by a mutually-agreed upon appraiser, or

24.2.1.2. If an appraiser cannot be agreed to, an amount equal to the mean between a District appraisal and a Contractor appraisal for the Project Site(s), both prepared by an MAI-

certified appraiser.

24.2.2. District's obligation to make the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** shall be:

24.2.2.1. Increased by the amount of costs, expenses, and damages incurred by the Contractor in re-renting the Project Site(s), and

24.2.2.2. Decreased by the amount of rent Contractor receives in reletting the Project Site(s).

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

**24.3. District's Continuing Obligation.** Unless there has been damage, destruction, a Taking as described above, or the Contractor is in Default as indicated herein, the District shall continue to remain liable for the payments required pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C** and those amounts shall be payable to Contractor at the time and in the manner as therein provided.

**24.4. No Remedy Exclusive.** No remedy herein conferred upon or reserved to Contractor is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Facilities Lease or now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle Contractor to exercise any remedy reserved herein, it shall be necessary to give notice, as indicated in this Facilities Lease and by law.

## **25. Events of Default of Contractor**

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

25.1.1. Contractor unreasonably refuses or fails to prosecute the work on the Project with such reasonable diligence as will accomplish Project Completion within the Contract Time or any extension thereof;

25.1.2. Prior to Project Completion, Contractor is adjudged a bankrupt, or files for bankruptcy, or if it should make a general assignment for the benefit of its creditors, or if a receiver should be appointed on account of its insolvency;

25.1.3. Contractor persistently disregards applicable law as indicated in **Exhibit D**, or otherwise be in violation of **Exhibit D**.

25.1.4. Failure by the Contractor to perform any material covenant, condition or agreement in this Facilities Lease and that failure continues for a period of seven (7) days after District provides Contractor with written notice specifying that failure and requesting that the failure be remedied; provided, however, if the failure stated in the notice cannot be corrected within the applicable period, District shall not unreasonably withhold its consent to an extension of such

time if corrective action is instituted by the Contractor within the applicable period and diligently pursued until the default is corrected.

**25.2. Remedies on Contractor's Default.** If there has been an Event of Default on the Contractor's part, the District may, without waiver of or prejudice to any other right or remedy, terminate the Site Lease and Facilities Lease.

25.2.1. If District terminates the Site Lease and the Facilities Lease pursuant to this section, the Project Site(s) and any improvements built upon the Project Site(s) shall vest in District upon termination of the Site Lease and Facilities Lease, and District shall thereafter be required to pay only the principal amounts then due and owing pursuant to the Guaranteed Project Cost Provisions indicated in **Exhibit C**, less any damages incurred by District due to Contractor's Default.

25.2.2. The District shall retain all rights it possesses as indicated in **Exhibit D** including, without limitation,

25.2.2.1. The right to assess liquidated damages due as permitted herein;

25.2.2.2. All rights the District holds to demand performance pursuant to the Contractor's required performance bond;

**26. Notices.** All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received as indicated below and to the persons indicated below:

**26.1.** If notice is given by personal delivery thereof, it shall be considered delivered on the day of delivery.

**26.2.** If notice is given by overnight delivery service, it shall be considered delivered on (1) day after date deposited, as indicated by the delivery service.

**If to District:**  
**Alameda Unified School District**  
2060 Challenger Drive  
Alameda, CA 94501  
ATTN: Robbie Lyng

**With a copy to:**  
Orbach Huff & Henderson LLP  
6200 Stoneridge Mall Rd., Ste. 225  
Pleasanton, CA 94588  
ATTN: Glenn Gould, Esq.

**If to Contractor:**  
**Robert A. Bothman Construction**  
2690 Scott Blvd.  
Santa Clara, CA 95050  
ATTN: Brian Bothman

**With a copy to:**  
**Robert A. Bothman Construction**  
2690 Scott Blvd.  
Santa Clara, CA 95050  
ATTN: Michael Mingrone

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

**27. Binding Effect.** This Facilities Lease shall inure to the benefit of and shall be binding upon Contractor and the District and their respective successors, transferees and assigns.

**28. No Additional Waiver Implied by One Waiver.** In the event any agreement contained in this Facilities Lease should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

**29. Severability.** In the event any provision of this Facilities Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision

hereof, unless elimination of such invalid provision materially alters the rights and obligations embodied in this Facilities Lease or the Site Lease.

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

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

**32. Contractor and District Representatives.** Whenever under the provisions of this Facilities Lease the approval of Contractor or the District is required, or Contractor or the District is required to take some action at the request of the other, such approval or such request shall be given for Contractor by Contractor's Representative and for the District by the District's Representative, and any party hereto shall be authorized to rely upon any such approval or request.

**33. Applicable Law.** This Facilities Lease shall be governed by and construed in accordance with the laws of the State of California, and venue for any action arising therefrom shall be in the County within which the School Site(s) is located.

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

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

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

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

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

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

**40. Force Majeure.** A party shall be excused from the performance of any obligation imposed in the Contract for any period and to the extent that a party is prevented from performing those obligation(s), in whole or in part, as a result of a Force Majeure Event consistent with the provisions of **Exhibit D**. A Force Majeure event shall not be a basis for a default hereunder or a ground for termination of the Facilities Lease.

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

**IN WITNESS WHEREOF**, the Parties have accepted and agreed to this Facilities Lease, as of the Effective Date, and have directed and authorized their respective officers to execute this Facilities Lease:

**Alameda Unified School District**

Signature:



[Shariq Khan \(Oct 18, 2023 15:45 PDT\)](#)

10/18/2023

Shariq Khan  
Assistant Superintendent,  
Business Services

**Robert A. Bothman Construction**

Signature:



Brian Bothman  
Vice President

**EXHIBIT A  
TO FACILITIES LEASE**

**SITE INFORMATION  
AND  
PROJECT INFORMATION**

**DESCRIPTION OF DISTRICT SITE(S):**

Encinal Jr. and Sr. High School, 210 Central Avenue, Alameda, 94501

**DESCRIPTION OF THE LEASED PREMISES**

**Project Site(s) Description:** APN No. 74-1310-1-2 constitutes the leased premises. The legal description of the parcel is maintained by the District in the District Office and is incorporated into this Exhibit A as though fully set forth.

**PROJECT(S) DESCRIPTION:**

**Preliminary Services.** The Scope of Services for Preliminary Services for the Project is generally as follows:

- Review existing site conditions to better understand the scope of work.
- Perform a constructability review based on current project drawings.
- Propose Value Engineering opportunities.
- Advise the District of any potential cost and schedule impacts/savings.

**Construction.**

- **Scope of Services**
  - New synthetic turf athletic field, 60 x 100 yards, for soccer, football and lacrosse
  - 8-lane, all-weather, 400-meter track
  - Facilities for discus, high-jump, pole vault, jump pits and shot-put
  - 1,200-seat bleachers with ADA accessibility, announcer's booth and PA system
  - New LED field lighting with path and bleacher lighting
  - New fencing, flagpole and relocated scoreboard
  - Storage areas
  - Relocated and improved blacktop with basketball and volleyball courts
  - New drinking fountains and bottle filling stations
- **Construction Schedule**
  - **Preliminary Services.** Preliminary services shall be for three to six months (3 to 6) commencing as soon as the District's Board awards the Contract.
  - **Construction Services.** It is hereby understood and agreed that the District anticipates issuing a Notice to Proceed for construction of the Project on or before June 2024, and the Project duration is anticipated to be one year. PLEASE BE ADVISED: THESE DATES ARE SUBJECT TO CHANGE AT THE TIMES THE DISTRICT AND CONTRACTOR FINALIZE THE CONTRACT. ONCE A GPC HAD BEEN DETERMINED, THE CONTRACT SHALL BE AMENDED TO SET FORTH THE DATES ON WHICH THE DISTRICT SHALL HAVE BENEFICIAL OCCUPANCY AND CONTRACTOR SHALL COMPLETE

THE PROJECT.

**CONTRACTOR SHALL NOT BEGIN WORK ON THE CONSTRUCTION PHASE OF THE PROJECT UNTIL THE PARTIES HAVE AMENDED THE AGREEMENT TO INCLUDE A GUARANTEED PROJECT COST, AND THE DISTRICT HAS ISSUED A NOTICE TO PROCEED FOR CONSTRUCTION TO THE CONTRACTOR.**



**EXHIBIT L  
TO FACILITIES LEASE**

**AGREEMENT FOR PRELIMINARY SERVICES**

This Agreement for Preliminary Services ("**Agreement**") dated October 10, 2023 ("**Effective Date**"), is made and entered into by and between the **Alameda Unified School District** ("**District**") and **Robert A. Bothman Construction** ("**Contractor**") (together, the "**Parties**").

**WHEREAS**, the District's Governing Board, in order to enable the District to utilize the lease-leaseback delivery method for future construction projects, adopted procedures for a fair and impartial solicitation process to evaluate qualifications and proposals to determine which proposer provides the "best value" pursuant to Education Code section 17406(a)(2) ("**Lease-Leaseback Procedures**"); and

**WHEREAS**, Education Code section 17406(a)(1) permits the District to utilize the lease-leaseback delivery method to enter into a lease whereby the District leases the project site to the contractor to construct the project, and the contractor then leases the project site back to the District; and

**WHEREAS**, prior to entering into the lease to construct the project, Education Code section 17406(b)(1) permits the District to enter into a contract for the performance of preliminary services before the Division of the State Architect ("**DSA**") approves the plans and specifications for a project so long as the contractor does not perform any services for which a contractor's license is required; and

**WHEREAS**, consistent with the Lease-Leaseback Procedures, the District issued a request for qualifications and proposals ("**RFQ/P**") to solicit proposals from qualified firms to perform both preliminary services and construction services for the District's demolition of the former site of Donald D. Lum Elementary School and construction of a new Wood Middle School campus ("**Project**"), and through the RFQ/P the District intended to award both the performance of preliminary phase services and construction phases services to the successful contractor; and

**WHEREAS**, after receiving and scoring the proposals, the District determined that the Contractor presented the District the "best value" to the District and the District's Governing Board awarded the Project to the Contractor; and

**WHEREAS**, the District seeks to have the Contractor perform preliminary services as more fully described in **Attachment A** attached hereto ("**Preliminary Services**") pursuant to Education Code section 17406(b)(1), and the Contractor represents that it is able and qualified to perform Preliminary Services for the Lease-Leaseback Project prior to the Contractor providing construction phase services; and

**WHEREAS**, after the Contractor performs Preliminary Services, the Parties acknowledge that Contractor shall procure subcontractors, propose a Guaranteed Maximum Price / Guaranteed Project Cost ("**GMP**" or "**GPC**"), and the Parties shall enter into a Site Lease and Facilities Lease for the construction of the Lease-Leaseback Project based on the Contractor's response to the RFQ/P.

**AGREEMENT**

**NOW, THEREFORE**, for good and sufficient consideration, receipt of which is acknowledged, the Parties agree as follows:

1. **One Project.** The Parties agree and acknowledge that consistent with the RFQ/P and relevant law, the District's intention is to award this Agreement and then the Lease-Leaseback Contract for the Project to the Contractor, all as one continuous project. Even so, if the Parties cannot agree on a GPC for the Lease-Leaseback Contract at the conclusion of the Preliminary Services, the District reserves the right to contract

with another contractor to construct the Project.

2. **Part of the Facilities Lease.** The Parties acknowledge that this Agreement is **Exhibit L** to the Facilities Lease for the Project. The Facilities Lease was part of the RFQ/P for the Project and Contractor agreed to the Facilities Lease as to Form. The Facilities Lease and this Agreement shall be read collectively as one and document. Any reference herein to a term, provision, or exhibit in the Facilities Lease shall be read as incorporating that provision herein by reference, including, without limitation, the Subcontractor Procurement Process in **Exhibit H**, even if the Parties have yet to execute the Facilities Lease. If the Parties agree to a GPC, this Agreement shall become **Exhibit L** to the Facilities Lease.

3. **Services.**

- 3.1. The Contractor shall provide the services as described in **Attachment A**, attached hereto and incorporated herein by this reference ("**Services**" or "**Work**"). The scope of services will generally consist of the following:

**Contractor shall perform Preliminary Services for the Project upon the District's issuance of a Notice to Proceed consistent with the Schedule.**

- 3.2. Notwithstanding any provision contained in the Facilities Lease or this Agreement, Contractor shall not perform any Preliminary Services for which a Contractor is required to be licensed pursuant to Article 5 (commencing with Section 7065) of Chapter 9, Division 3 of the Business and Professions Code and/or for which DSA approval is required unless and until the District receives DSA approval for the Project.

**Project.** The "Project" as used in this Agreement is Contractor's performance of Services at or in connection with the construction of improvements to the stadium at Encinal Jr. and Sr. High School, as further described in the Scope of Work for Preliminary Services attached hereto as **Attachment A**.

4. **Term.** Unless terminated or otherwise cancelled as permitted herein, the term of this Agreement shall be for the duration of the Services provided under this Agreement consistent with the Schedule.

- 4.1. **Notice to Proceed.** Within a reasonable time after the Parties execute this Agreement, the District shall issue a Notice to Proceed to Contractor at which time Contractor shall commence the performance of the Services.

**Schedule.** If the District issues a Notice to Proceed for this phase of the Project on or before **September 30, 2023**, then Contractor shall complete the Work no later than **May 31, 2024**. Dates are subject to change by the District, including when and if the District and selected Contractor finalize the Contract.

**Submittal of Documents.** The Contractor shall not commence the Work under this Agreement until the Contractor has submitted and the District has approved the certificate(s) and affidavit(s), and the endorsement(s) of insurance required as indicated below:

<u>      X      </u>	Signed Agreement
<u>      X      </u>	Workers' Compensation Certification
<u>      X      </u>	Fingerprinting/Criminal Background Investigation Certification
<u>      X      </u>	Insurance Certificates and Endorsements
<u>      X      </u>	W-9 Form
<u>          </u>	Bonds (as required or requested by District)

1. **Compensation.** The District shall pay Contractor for Contractor's performance of Preliminary Services a total fee **not to exceed Twenty-Five Thousand One Hundred Dollars (\$25,100)** based on the amount of Work satisfactorily performed and approved by the District pursuant to the scope and provisions in **Attachment A** attached hereto and as indicated herein ("**Fee**"):

Task	Amount
Review of Design Documents	\$1,500
Value Engineering	\$2,000
Constructability Review	\$2,000
Confirm Modification to Design Drawings	\$1,600
Review of Budget for Project Costs	\$3,500
Preparation of Construction Schedule and Phasing Plan	\$2,850
Construction Planning and Bidding	\$11,650
<b>Total</b>	<b>\$25,100</b>

- 1.1. The Fee includes all costs and expenses for all time and materials required and expended to provide the specific Preliminary Services including but not limited to the costs of hiring sub-consultants, contractors and other professionals, review of the Lease-Leaseback Project, Plans and Specifications, review and preparation of necessary documentation relating to the development of the Lease-Leaseback Project, all travel-related expenses, as well as for meetings with District and its representatives, long distance telephone charges, copying expenses, salaries of Contractor staff and employees working on the Project, overhead, and any other reasonable expenses incurred by Contractor in performance of the Preliminary Services.
- 1.2. The Contractor shall submit a monthly itemized statement of Service charges and expenses to the District on the fifth (5<sup>th</sup>) day of each month. The itemized statement shall reflect the hours spent, or scopes of work performed, by the Contractor in performing its Services, and, if applicable, the statements shall reflect expenses and materials. The itemized statement shall show the days and hours worked each workday Contractor performs Services for the previous month. District will permit a one (1) month grace period beyond this time for the Contractor to submit its invoice for a particular month's work. No amounts shall be due or owing to the Contractor if it fails to submit an invoice to the District at or before the end of that grace period.
- 1.3. Payment for the Work shall be made for all undisputed amounts in monthly installment payments within forty-five (45) Days after the Contractor submits an itemized statement to the District for Work actually completed and after the District's written approval of the Work, or the portion of the Work for which payment is to be made.
2. **Expenses.** District shall not be liable to Contractor for any costs or expenses paid or incurred by Contractor in performing the Services, except as expressly provided for in this Agreement.
3. **Independent Contractor.** Contractor, in the performance of this Agreement, shall be and act as an independent contractor. Contractor understands and agrees that it and all of its employees shall not be considered officers, employees, agents, partner, or joint venture of the District, and are not entitled to benefits of any kind or nature normally provided employees of the District and/or to which District's employees are normally entitled, including, but not limited to, State Unemployment Compensation or Worker's Compensation. Contractor shall assume full responsibility for payment of all federal, state and local taxes or contributions, including unemployment insurance, social security and income taxes with respect to Contractor's employees. In the performance of the work herein contemplated, Contractor is an independent contractor or business entity, with the sole authority for controlling and directing the performance of the details of Contractor's Work, District being interested only in the results obtained.

**4. Contractor and Subcontractor Registration and Compliance.**

4.1. Contractor acknowledges that, for purposes of Labor Code section 1725.5, all or some of the Work is a public work to which Labor Code section 1771 applies and that the Project is subject to compliance monitoring and enforcement by the Department of Industrial Relations. Contractor shall comply with Labor Code section 1725.5, including without limitation the registration requirements for itself and its subcontractors. Contractor represents that all of its subcontractors are registered pursuant to Labor Code section 1725.5.

4.2. Labor Code section 1771.1(a) states the following:

"A contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work pursuant to Section 1725.5. It is not a violation of this section for an unregistered contractor to submit a bid that is authorized by Section 7029.1 of the Business and Professions Code or by Section 10164 or 20103.5 of the Public Contract Code, provided the contractor is registered to perform public work Contractor to Section 1725.5 at the time the contract is awarded."

4.3. Contractor shall comply with the registration and compliance monitoring provisions of Labor Code section 1771.4, including furnishing its CPRs to the Labor Commissioner of California and complying with any applicable enforcement by the Department of Industrial Relations.

4.4. Contractor shall post job site notices, as required by law, including without limitation Labor Code section 1771.4.

4.5. Contractor shall comply with all requirements of Labor Code section 1771.4, except the requirements that are exempted by the Labor Commissioner for the Project.

5. **Designated Representatives.** Contractor shall coordinate with District personnel and/or its designated representatives as may be requested and desirable, including with other professionals employed by the District for the design, coordination or management of other work related to the Project.

6. **Materials.** Contractor shall furnish, at its own expense, all labor, materials, equipment, supplies and other items necessary to complete the services to be provided pursuant to this Agreement, except as expressly provided for in this Agreement.

**7. Performance of Services.**

**7.1. Standard of Care.**

7.1.1. Contractor represents that Contractor has the qualifications and ability to perform the Services in a professional manner, without the advice, control or supervision of District. Contractor's Services will be performed, findings obtained, reports and recommendations prepared in accordance with generally and currently accepted principles and practices of its profession for services to California school districts. Contractor's Services will be performed with due care and in accordance with applicable law, code, rule, regulation, and/or ordinance.

7.1.2. Contractor hereby represents, to the extent applicable, that it possesses the necessary professional capabilities, qualifications, licenses, skilled personnel, experience, expertise, and

financial resources, and it has available and will provide the necessary equipment, materials, tools, and facilities to perform the Services in an efficient, professional, and timely manner in accordance with the terms and conditions of the Agreement.

7.1.3. Contractor shall be responsible for the professional quality, technical accuracy, completeness, and coordination of the Services, and Contractor understands that the District relies upon such professional quality, accuracy, completeness, and coordination by Contractor in performing the Services.

7.1.4. Contractor shall ensure that any individual performing work under the Agreement requiring a California license shall possess the appropriate license required by the State of California. All personnel shall have sufficient skill and experience to perform the work assigned to them.

7.2. **Meetings.** In addition to all public hearings and meetings, Contractor agrees to participate in coordination meetings to discuss District strategies, timetables, implementations of Services, and any other issues deemed relevant to the Project.

7.3. **District Approval.**

7.3.1. The District has the right to inspect and supervise to secure satisfactory completion of the Services.

7.3.2. Prior to any documents being made public, Contractor shall provide in draft form to District staff and District legal counsel, all documents that it or its subcontractors prepare.

## **8. Information.**

8.1. **Furnished by District.** Upon request by Contractor, District shall furnish Contractor any information and documents readily available to District that the Contractor determines may be of use to the Contractor in the performance of the Services. District shall rely upon Contractor to determine which information and documents may be of use to the Contractor in performance of the Services. District makes no representations with respect to the reliability, accuracy, or completeness of any information or documents furnished by the District. Contractor shall determine if it is appropriate to rely on the District furnished information or documents. Contractor shall determine if clarification, additional information, or additional data is needed, and if so, to seek it out.

8.2. **Furnished by Others.** Contractor is to obtain, utilizing its own personnel, any required information that has been developed by other public or private entities that are not under contract to District. Contractor shall determine if it is appropriate to rely on the information or data developed by these other public or private entities. Contractor shall determine if clarification, additional information, or additional data is needed.

9. **Originality of Services.** Except as to standard generic details, Contractor agrees that all technologies, formulae, procedures, processes, methods, writings, ideas, dialogue, compositions, recordings, teleplays and video productions prepared for, written for, or submitted to the District and/or used in connection with this Agreement, shall be wholly original to Contractor and shall not be copied in whole or in part from any other source, except that submitted to Contractor by District as a basis for such services.

10. **Copyright/Trademark/Patent.** Contractor understands and agrees that all matters produced under this Agreement shall become the property of District and cannot be used without District's express written permission. District shall have all right, title and interest in said matters, including the right to secure and maintain the copyright, trademark and/or patent of said matter in the name of the District. Contractor

consents to use of Contractor's name in conjunction with the sale, use, performance and distribution of the matters, for any purpose and in any medium.

11. **Audit.** Contractor shall establish and maintain books, records, and systems of account, in accordance with generally accepted accounting principles, reflecting all business operations of Contractor transacted under this Agreement. Contractor shall retain these books, records, and systems of account during the Term of this Agreement and for five (5) years thereafter. Contractor shall permit the District, its agent, other representatives, or an independent auditor to audit, examine, and make excerpts, copies, and transcripts from all books and records, and to make audit(s) of all billing statements, invoices, records, and other data related to the Services covered by this Agreement. Audit(s) may be performed at any time, provided that the District shall give reasonable prior notice to Contractor and shall conduct audit(s) during Contractor's normal business hours, unless Contractor otherwise consents. For a period of three (3) years after final payment under this Agreement, all expenditures of public funds in excess of ten thousand dollars (\$10,000) shall be subject to examination and audit by the State Auditor. The audit shall be confined to those matters connected with the performance of this Agreement, including, but not limited to, the costs of administering the Agreement.

12. **Termination.**

- 12.1. **Without Cause by District.** District may, at any time, with or without reason, terminate this Agreement and compensate Contractor only for the Services satisfactorily rendered to the date of termination. Written notice by District shall be sufficient to stop further performance of Services by Contractor. Notice shall be deemed given when received by the Contractor or no later than three (3) Days after the day the notice was mailed, whichever is sooner.

- 12.2. **Without Cause by Contractor.** Contractor cannot terminate this Agreement without cause.

- 12.3. **With Cause by District.** District may terminate this Agreement upon giving of written notice of intention to terminate for cause. Cause shall include:

12.3.1. material violation of this Agreement by the Contractor; or

12.3.2. any act by Contractor exposing the District to liability to others for personal injury or property damage; or

12.3.3. Contractor is adjudged a bankrupt, Contractor makes a general assignment for the benefit of creditors or a receiver is appointed on account of Contractor's insolvency.

Written notice by District shall contain the reasons for such intention to terminate and unless within three (3) Days after that notice the condition or violation shall cease, or satisfactory arrangements for the correction thereof be made, this Agreement shall upon the expiration of the three (3) Days cease and terminate. In the event of this termination, the District may secure the Services from another Contractor. If the expense, fees, and/or costs to the District exceeds the cost of providing the Services pursuant to this Agreement, the Contractor shall immediately pay the excess expense, fees, and/or costs to the District upon the receipt of the District's notice of these expense, fees, and/or costs. The foregoing provisions are in addition to and not a limitation of any other rights or remedies available to District.

- 12.4. **With Cause by Contractor.** Contractor may only terminate this Agreement after giving written notice of intention to terminate for cause and the expiration of the time to cure. Cause shall only include:

12.4.1. Material violation of this Agreement by the District, or

12.4.2. Failure of the District to timely pay undisputed Contractor invoices.

Written notice by Contractor shall contain the reasons for such intention to terminate and unless within thirty (30) Days after that notice the condition or violation shall cease, or satisfactory arrangements for the correction thereof be made, this Agreement shall upon the expiration of the thirty (30) Days cease and terminate. During the thirty (30) Days the Inspector shall continue providing Services to the District until the Agreement ceases and terminates. In the event of this termination, the District may secure the Services from another Contractor.

- 12.5. **Ownership of Records.** It is mutually agreed that all materials prepared by Contractor under this Agreement shall become the property of the District and Contractor shall have no property right therein whatsoever. Contractor hereby assigns to District any copyrights associated with the materials prepared pursuant to the Agreement. Immediately upon termination and upon written request, the District shall be entitled to, and Contractor shall deliver to the Contractor, all data, drawings, specifications, reports, estimates, summaries and such other materials and commissions as may have been prepared or accumulated to date by the District in performing the Agreement which is not Contractor privileged information, as defined by law, or Contractor's personnel information.

13. **Indemnification.** The Contractor shall indemnify, defend with legal counsel reasonably acceptable to the District, keep and hold harmless the District, and their respective board members, officers, representatives, and employees, in both individual and official capacities ("Indemnitees"), against all suits, claims, damages, losses, and expenses, caused by, arising out of, resulting from, or incidental to, the performance of the Work under this Contract by the Contractor or its subcontractors to the full extent allowed by the laws of the State of California, and not to any extent that would render these provisions void or unenforceable, including, without limitation, any such suit, claim, damage, loss, or expense attributable to, without limitation, bodily injury, sickness, disease, death, alleged patent violation or copyright infringement, or to injury to or destruction of tangible property, except to the extent caused by the negligence or willful misconduct of the Indemnitees. This agreement and obligation of the Contractor shall not be construed to negate, abridge, or otherwise reduce any right or obligation of indemnity that would otherwise exist as to any party or person described herein.

14. **Insurance.**

- 14.1. The Contractor shall procure and maintain at all times it performs any portion of the Services the following insurance with minimum limits equal to the amount indicated below. In addition to the information below, see the Facilities Lease for explanations for the scopes and types of coverages.

14.1.1. **Commercial General Liability and Automobile Liability Insurance.** Commercial General Liability Insurance and Any Auto Automobile Liability Insurance that shall protect the Contractor, the District, and the State from all claims of bodily injury, property damage, personal injury, death, advertising injury, and medical payments arising performing any portion of the Services. (Form CG 0001 and CA 0001, or forms substantially similar, if approved by the District.)

14.1.2. **Workers' Compensation and Employers' Liability Insurance.** Workers' Compensation Insurance and Employers' Liability Insurance for all of its employees performing any portion of the Services. In accordance with provisions of section 3700 of the California Labor Code, the Contractor shall be required to secure workers' compensation coverage for its employees. If any class of employee or employees engaged in performing any portion of the Services under this Agreement are not protected under the Workers' Compensation Statute, adequate insurance coverage for the protection of any employee(s) not otherwise protected must be obtained before any of those employee(s) commence performing any portion of the

Services.

**14.1.3. Sexual Molestation and Abuse Liability Insurance.** Contractor shall procure and maintain, during the life of this Contract, sexual molestation and abuse insurance. Contractor shall require its Subcontractor(s), if any, to procure and maintain sexual molestation and abuse insurance for any and all employee(s) of Subcontractor(s). Any class of employee or employees not covered by a Subcontractor's insurance shall be covered by Contractor's insurance. If any class of employee or employees engaged in Work under the Contract, on or at the Site of the Project, are not covered under the sexual molestation and abuse insurance, Contractor shall provide, or shall cause a Subcontractor to provide, adequate insurance coverage to cover any employee(s) not otherwise covered before any of those employee(s) commence work.

**14.1.4. Professional Liability (Errors and Omissions).** This insurance shall cover the Contractor and his/her subcontractors(s) for two million dollars (\$2,000,000) aggregate limit subject to no more than twenty-five thousand dollars (\$25,000) per claim deductible, coverage to continue through completion of construction plus two years thereafter. The policy must contain terms or endorsements extending coverage that requires the insurer to defend and indemnify for acts which happen before the effective date of the policy provided the claim is first made during the policy period.

<b>Commercial General Liability</b> (Includes: Bodily Injury, Property Damage, Personal & Advertising Injury, Product Liability and Completed Operations)	Combined Single Limit	\$2,000,000
	General Aggregate Product Liability and Completed Operations	\$4,000,000 \$2,000,000
<b>Automobile Liability – Any Auto</b>	Combined Single Limit <b>NO</b> General Aggregate	\$2,000,000
<b>Excess Liability (Umbrella)</b>		\$6,000,000 per occurrence; \$6,000,000 aggregate
<b>Workers Compensation</b>		Statutory limits pursuant to State law
<b>Employers' Liability</b>		\$2,000,000 each incident
<b>Sexual Abuse / Molestation</b>		\$1,000,000 each incident; \$2,000,000 policy limit
<b>Property of Others</b>	Combined Single Limit General Aggregate	Issued for the value and scope of Work stored off-site.
<b>Professional Liability</b>		\$2,000,000 per occurrence and annual aggregate

**14.2. Proof of Carriage of Insurance.** The Contractor shall not commence performing any portion of the Services until all required insurance has been obtained and certificates indicating the required coverage have been delivered in duplicate to the District and approved by the District. Certificates and insurance policies shall include the following:

14.2.1. A clause stating: "This policy shall not be canceled or reduced in required limits of liability or amounts of insurance until notice has been mailed to the District, stating date of cancellation



or reduction. Date of cancellation or reduction shall not be less than thirty (30) Days after date of mailing notice."

14.2.2. Language stating in particular those insured, extent of insurance, location and operation to which insurance applies, expiration date, to whom cancellation and reduction notice will be sent, and length of notice period.

14.2.3. An endorsement stating that the District and the State and their agents, representatives, employees, trustees, officers, consultants, and volunteers ("Additional Insureds") are named Additional Insureds under all policies except Workers' Compensation Insurance, Professional Liability, and Employers' Liability Insurance. The coverage shall contain no special limitations on the scope of protection afforded to the Additional Insureds. An endorsement shall also state that Contractor's insurance policies shall be primary to any insurance or self-insurance maintained by District.

14.2.4. All policies except the Professional Liability Policy shall be written on an occurrence form.

14.3. **Acceptability of Insurers.** Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VII, unless otherwise acceptable to the District.

15. **Assignment.** The obligations and liabilities of the Contractor pursuant to this Agreement shall not be assigned voluntarily by the Contractor nor assigned by operation of law, without express written consent of the District.

16. **Binding Contract.** This Agreement shall be binding upon the Parties hereto and upon their successors and assigns and shall inure to the benefit of the Parties and their successors and assigns.

17. **Compliance with Laws.** Contractor shall observe and comply with all rules and regulations of the governing board of the District and all federal, state, and local laws, ordinances and regulations. Contractor shall give all notices required by any law, ordinance, rule and regulation bearing on conduct of the Work as indicated or specified. If Contractor observes that any of the Work required by this Agreement is at variance with any such laws, ordinance, rules or regulations, Contractor shall notify the District, in writing, and, at the sole option of the District, any necessary changes to the scope of the Work shall be made and this Agreement shall be appropriately amended in writing, or this Agreement shall be terminated effective upon Contractor's receipt of a written termination notice from the District. If Contractor performs any work that is in violation of any laws, ordinances, rules or regulations, without first notifying the District of the violation, Contractor shall bear all costs arising therefrom.

18. **Certificates/Permits/Licenses.** Contractor and all Contractor's employees or agents shall secure and maintain in force such certificates, permits and licenses as are required by law in connection with the furnishing of the Services. Except for any license or permits furnished by District, Contractor shall be fully responsible for identifying and obtaining all necessary licenses and permits for the timely prosecution of the Services.

19. **Anti-Discrimination.** It is the policy of the District that in connection with all work performed under contracts there be no discrimination against any employee engaged in the work because of race, color, ancestry, national origin, religious creed, physical disability, medical condition, marital status, sexual orientation, gender, or age and therefore the Contractor agrees to comply with applicable Federal and California laws including, but not limited to the California Fair Employment and Housing Act beginning with Government Code Section 12900 and District policy. Contractor and each subcontractor shall comply with Chapter 1 of Division 2, Part 7 of the Labor Code, beginning with § 1720, and including §§ 1735, 1777.5 and 1777.6, forbidding discrimination, and §§ 1776, 1777.5 and 1777.6 concerning the employment of apprentices by Contractor or subcontractors. Willful failure to comply may result in penalties, including loss of the right to bid on or receive public works contracts. In addition, the Contractor agrees to require like compliance by all its

subcontractor(s).

20. **Fingerprinting of Employees.** The Fingerprinting/Criminal Background Investigation Certification must be completed and attached to this Agreement prior to Contractor's performing of any portion of the Services.
21. **Disabled Veteran Business Enterprises.** Section 17076.11 of the Education Code requires school districts using funds allocated pursuant to the State of California School Facility Program for the construction or modernization of a school building to have a participation goal of at least three percent (3%), per year, of the overall dollar amount expended each year by the school district, for disabled veteran business enterprises (DVBE). In accordance therewith, the Contractor must submit, upon request by District, appropriate documentation to the District identifying the steps the Contractor has taken to solicit DVBE participation in conjunction with this Agreement, if applicable.
22. **Interaction with the Media and Public.** Contractor shall promptly refer all inquiries from the news media or public to District and shall not make any statements to the media or the public relating to the Services. If Contractor receives a complaint from a citizen or the community, Contractor shall promptly inform the District about the complaint.
23. **Taxes.** Contractor shall be liable and solely responsible for paying all required taxes and other obligations, including but not limited to federal and state income taxes and social security taxes payable in connection with the Services and this Agreement. Contractor agrees to release, indemnify, defend, and hold District harmless from and against any worker's compensation or any tax liability which District may incur to any Federal or State governments with jurisdiction as a consequence of this Agreement. All payments made to Contractor may be reported to the Internal Revenue Service.
24. **No Rights in Third Parties.** This Agreement does not create any rights in, or inure to the benefit of, any third party except as expressly provided herein.
25. **District's Evaluation of Contractor and Contractor's Employees and/or Subcontractors.** The District may evaluate the Contractor in any way the District is entitled pursuant to applicable law. The District's evaluation may include, without limitation:
  - 25.1. Requesting that District employee(s) evaluate the Contractor and the Contractor's employees and subcontractors and each of their performance.
  - 25.2. Announced and unannounced observance of Contractor, Contractor's employee(s), and/or subcontractor(s).
26. **Limitation of District Liability.** Other than as provided in this Agreement, District's financial obligations under this Agreement shall be limited to the payment of the compensation provided in this Agreement. Notwithstanding any other provision of this Agreement, in no event, shall District be liable, regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but not limited to, lost profits or revenue, arising out of or in connection with this Agreement for the services performed in connection with this Agreement.
27. **Disputes.** In the event of a dispute between the Parties as to performance of Work, Agreement interpretation, or payment, the Parties shall attempt to resolve the dispute by negotiation and/or mediation, if agreed to by the Parties. Pending resolution of the dispute, Contractor shall neither rescind the Agreement nor stop performing the Services.
28. **Confidentiality.** The Contractor and all Contractor's agents, personnel, employee(s), and/or subcontractors(s) shall maintain the confidentiality of all information received in the course of performing the Services.

Contractor understands that student records are confidential and agrees to comply with all state and federal laws concerning the maintenance and disclosure of student records. This requirement to maintain confidentiality shall extend beyond the termination of this Agreement.

29. **Employment with Public Agency.** Contractor, if an employee of another public agency, agrees that Contractor will not receive salary or remuneration, other than vacation pay, as an employee of another public agency for the actual time in which Services are actually being performed pursuant to this Agreement.
30. **Notice.** Any notice required or permitted to be given under this Agreement shall be deemed to have been given, served, and received if given in writing and either personally delivered or sent by overnight delivery service, addressed as follows:

**Alameda Unified School District**  
2060 Challenger Drive  
Alameda, CA 94501  
ATTN: Robbie Lyng

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**With a copy to:**  
Orbach Huff & Henderson LLP  
6200 Stoneridge Mall Rd., Ste. 225  
Pleasanton, CA 94588  
ATTN: Glenn Gould, Esq.

**Robert A. Bothman Construction**  
2690 Scott Blvd.  
Santa Clara, CA 95050  
ATTN: Brian Bothman

---

**With a copy to:**  
**Robert A. Bothman Construction**  
2690 Scott Blvd.  
Santa Clara, CA 95050  
ATTN: Michael Mingrone

Any notice personally given shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the Business Day next following delivery thereof to the overnight delivery service.

31. **Integration/Entire Agreement of Parties.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior discussions, negotiations, and agreements, whether oral or written. This Agreement may be amended or modified only by a written instrument executed by both Parties.
32. **California Law.** This Agreement is entered into in California and shall be governed by and the rights, duties and obligations of the Parties, and shall be determined and enforced in accordance with the laws of the State of California. The Parties further agree that any action or proceeding brought to enforce the terms and conditions of this Agreement shall be maintained in the county in which the District's administrative offices are located. Contractor waives any claim or right to remove an action on this Agreement to federal court.
33. **Waiver.** The waiver by either Party of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, condition, or any subsequent breach of the same or any other term, covenant, or condition herein contained.
34. **Severability.** If any term, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will nevertheless continue in full force and effect, and shall not be affected, impaired or invalidated in any way.
35. **Authority to Bind Parties.** Neither Party in the performance of any and all duties under this Agreement, except as otherwise provided in this Agreement, has any authority to bind the other to any agreements or undertakings.
36. **Attorney Fees/Costs.** Should litigation be necessary to enforce any terms or provisions of this Agreement, then each Party shall bear its own litigation and collection expenses, witness fees, court costs and attorney's fees.
37. **Captions and Interpretations.** Paragraph headings in this Agreement are used solely for convenience and

shall be wholly disregarded in the construction of this Agreement. No provision of this Agreement shall be interpreted for or against a Party because that Party or its legal representative drafted such provision, and this Agreement shall be construed as if jointly prepared by the Parties.

38. **Calculation of Time.** For the purposes of this Agreement, "days" refers to Days unless otherwise specified.
39. **Signature Authority.** Each Party has the full power and authority to enter into and perform this Agreement, and the person signing this Agreement on behalf of each Party has been properly authority and empowered to enter into this Agreement.
40. **Counterparts.** This Agreement and all amendments and supplements to it may be executed in counterparts, and all counterparts together shall be construed as one document.
41. **Incorporation of Recitals and Attachments.** The Recitals and each attachment attached hereto are hereby incorporated herein by reference.
42. **Provisions Required by Law Deemed Inserted.** Each and every provision of law and clause required by law to be inserted in this Agreement shall be deemed to be inserted herein and this Agreement shall be read and enforced as though it were included herein.
43. **Incorporation of RFQ/RFP & Proposal and Interpretation of Documents.** If the Parties enter into this Agreement as a result of a Request for Qualifications and/or a Request for Proposal ("RFQ/RFP"), the RFQ/RFP is incorporated into this Agreement, except that if there is any conflict between the RFQ/RFP and any provision of this Agreement, the Agreement shall prevail.

IN WITNESS WHEREOF, the Parties have accepted and agreed to this Agreement, as of the Effective Date, and have directed and authorized their respective officers to execute this Agreement:

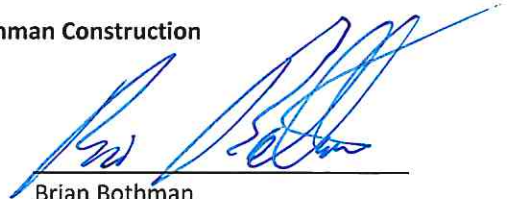
**Alameda Unified School District**

**Robert A. Bothman Construction**

Signature: \_\_\_\_\_

Shariq Khan  
Associate Superintendent,  
Business Services

Signature: \_\_\_\_\_

  
Brian Bothman  
Vice President

## **Attachment A to Agreement for Preliminary Services**

### **Scope of Services**

1. **Scope of Contractor's Preliminary Services.** Contractor is authorized to perform the following services by applicable law and agrees to perform the services described herein. Contractor shall perform management and coordination services, plan and specification constructability reviews, provide value-engineering reviews and recommendations and other reviews as necessary to verify that the drawings and specifications are clear and reasonably accurate to minimize the need for changes during the construction phase of the project, including but not limited to the following ("Preliminary Services"):

#### **1.1. General Services.**

- 1.1.1. Contractor shall attend regular meetings during Project development between the Architect, the District, District site personnel, and any other applicable consultants of the District as required to discuss the Project, including budget, scope and schedule.
- 1.1.2. Contractor shall assist Architect with the making of a written record of all meetings, conferences, discussions and decisions made between or among the District, Architect and Contractor.
- 1.1.3. Contractor shall assist the Architect with making formal presentations to the governing board of District.
- 1.1.4. Contractor shall prepare and update the preliminary Project schedule.
- 1.1.5. Contractor shall prepare and update the components of the Guaranteed Project Cost and shall be primarily in control of ensuring that the Project can and is constructed for no more than that amount.
- 1.1.6. Contractor shall assist District with City land use issues;
- 1.1.7. Contractor shall assist District with DSA review, input, and timeframe for same;
- 1.1.8. Contractor shall provide review and comment upon geotechnical / soils investigation and report;
- 1.1.9. Contractor shall provide review and comment upon survey of the Project site;
- 1.1.10. Contractor shall provide review and comment upon any environmental impact report ("EIR") or other required California Environmental Quality Act ("CEQA") documents with District's CEQA consultant.

#### **1.2. Review of Design Documents.**

- 1.2.1. Contractor shall review Project design and budget with the District and the Architect **four (4)** times: during the Schematic Design Phase, the Design Development Phase, at 50% Construction Documents Phase, and at 100% Construction Documents Phase to:
  - 1.2.1.1. Contractor shall provide recommendations on site use and improvements, selection of materials, building systems and equipment and methods of Project delivery;
  - 1.2.1.2. Contractor shall provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction of the Project and subparts thereof if requested, and factors relating to cost including, but not limited to, construction costs of alternate designs of materials, preliminary budgets and possible economics

that could be achieved through alternate methods or substitutions;

**1.2.1.3.** Contractor shall provide interim design phase estimates to establish and maintain the Project budget and scheduled costs; and

**1.2.1.4.** Contractor shall provide plan review.

**1.2.1.5. Value-engineering.**

**1.2.1.5.1.** "Value Engineering" or "VE" as used herein shall mean an organized effort to analyze the functions of systems, equipment, facilities, services, and supplies depicted in the Plans and Specifications prepared by Architect ("Design Documents") for the Project to identify equipment, materials or systems which provide for comparable function at reduced initial or life-time cost consistent with required performance, reliability, quality, and safety for similar types of school construction projects. Value Engineering shall include, without limitation, proposed changes to the Design Documents, or other contract requirements, consistent with industry practice in the construction of public schools.

**1.2.1.5.2.** Value Engineering is intended to enable a contractor to construct the Project more efficient and economically consistent with the Project's goals and objectives, without sacrificing quality.

**1.2.1.5.3.** The Contractor shall perform Value Engineering for the Project as set forth herein at the 100% Design Development Phase and the 50% Construction Document Phase, to the extent applicable. Contractor shall perform Value Engineering concurrently with, and without delay to, the schedule attached to the applicable.

**1.2.1.5.4. General Value Engineering Requirements**

**1.2.1.5.4.1.** In performing Value Engineering, the Contractor shall, without limitation:

**1.2.1.5.4.1.1.** Identify all documents necessary for Contractor to fully understand the background and decisions that have influenced the design up to Design Development.

**1.2.1.5.4.1.2.** Coordinate with the District and Architect to obtain any further documentation necessary to develop this understanding.

**1.2.1.5.4.1.3.** Review relevant meeting minutes, master plans, District design guidelines, Design Documents and all other necessary documents related to the Project.

**1.2.1.5.4.1.4.** Analyze and understand key functional issues governing the Project, Project design, and Project systems so that Contractor understands how to best approach Value Engineering.

**1.2.1.5.4.1.5.** Develop an understanding of the District's key criteria, objectives, and budgetary constraints with respect to the development of the Project.

**1.2.1.5.4.1.6.** The Contractor shall coordinate with the District and the Design Team as necessary in the performance of Value Engineering to ensure that the Contractor's recommendations are consistent with the District's criteria, objectives, and budgetary constraints

**1.2.1.5.4.1.7.** The Contractor shall consider all ways to provide function within the Project at a lesser initial or life-cycle-cost representing improved value to the District without sacrificing quality.

**1.2.1.5.4.1.8.** The Contractor shall coordinate with the Design Team to ensure that any recommendation is compliant with any authority having jurisdiction over the Project, including, without limitation, DSA.

**1.2.1.5.5. Value Engineering Workshop**

**1.2.1.5.5.1.** As part of the Value Engineering for each phase, the Contractor shall organize and conduct a value engineering workshop ("**Workshop**").

**1.2.1.5.5.2.** The Contractor shall invite the Architect to participate in the Workshop.

**1.2.1.5.5.3.** Prior to the Workshop, the Contractor and the Architect will provide all participants with a preliminary list of Value Engineering items for discussion and order of magnitude estimates of cost both for design and construction.

**1.2.1.5.5.4.** The Workshop will consist of an initial Project design review related to that phase of development, research of alternative solutions, and evaluations of alternatives. The Workshop will conclude with a review of design and construction costs, benefits of various items selected, and selection of items to be incorporated into the Project design.

**1.2.1.5.5.5.** The Contractor will incorporate the Workshop findings into the VE Report (as defined below) for that phase. Although the Workshop findings may include Value Engineering recommendations, Contractor shall perform its own, independent Value Engineering and provide any recommendations that are different or in addition to the Workshop findings.

**1.2.1.5.6. VE Report**

**1.2.1.5.6.1.** At the conclusion of Value Engineering for each phase of design, Contractor shall prepare a report ("**VE Report**") and submit the VE Report to the District. Each VE Report shall include recommendations for alternatives, deletions, or amendments to the Design Documents for the Project that pertain to the anticipated construction costs, useful life, maintenance and operational costs and efficiencies.

**1.2.1.5.6.2.** The VE Report shall contain as an attachment the Workshop findings.

**1.2.1.5.6.3.** At a minimum, Contractor shall include the following in the VE Report:

**1.2.1.5.6.3.1.** Recommendation Narrative. A narrative describing the difference between the existing Design Documents and any change to the Design Documents, the comparative advantages and disadvantages of each, to the extent applicable, a justification if an item's function is being altered, and the effect of the change on system and facility performance.

**1.2.1.5.6.3.2.** Changes to Design Documents. A list and analysis of design criteria or specifications that must be changed if the District accepts the recommendation.

**1.2.1.5.6.3.3.** Hard Costs. A detailed estimate of the impact on Project cost of the recommendation, if accepted and implemented by the District.

**1.2.1.5.6.3.4.** Soft Costs / Maintenance Costs. A description and estimate of costs the District may incur in implementing the recommendation, including, without limitation, design costs, additional testing and inspections, and ongoing maintenance costs.