

AGREEMENT FOR TURNKEY DESIGN AND CONSTRUCTION ENERGY SERVICES

This Agreement for Turnkey Design and Construction Energy Services (“*Agreement*”) is made effective as of **December 14th, 2021** (“*Effective Date*”) by and between the **Silver Valley Unified School District, a California School District** (“*Public Agency*”), and **Schneider Electric Buildings Americas, Inc.**, a Delaware corporation (“*Design/Builder*”). Public Agency and Design/Builder may be referred to herein as the “*Parties*”, collectively, and each, individually, as a “*Party*”.

RECITALS

WHEREAS, Design/Builder is a full-service energy service contractor with the qualifications and technical capabilities to provide the design and construction services described herein;

WHEREAS, Public Agency wishes to engage Design/Builder, pursuant to the terms and conditions of this “turnkey” Agreement, to design and construct a Project (defined below) for purposes of implementing certain “energy conservation facilities”, as such term is used and defined in California Government Code Section 4217.10 *et seq.*;

WHEREAS, this Agreement constitutes an “energy service contract” within the meaning of California Government Code Section 4217.10 *et seq.*;

WHEREAS, California Government Code Section 4217.10 *et seq.* (i) authorizes public agencies to enter into energy service contracts that satisfy the requirements of California Government Code Section 4217.12, (ii) allows public agencies to award such energy services contracts on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost to the public agency, and any other relevant considerations, and (iii) expressly provides public agencies with the greatest possible flexibility in structuring such energy service contracts so that economic benefits may be maximized and financing and other costs associated with the design and construction of alternate energy projects may be minimized; and

WHEREAS, having considered the foregoing, Public Agency’s Governing Body has determined that the Project satisfies the requirements of California Government Code Section 4217.12 and has further determined, at a regularly scheduled public hearing of which public notice was given at least two weeks in advance, that the terms of this Agreement are in the best interests of the Public Agency.

NOW, THEREFORE, in consideration of the foregoing and of the respective rights and obligations of the Parties set forth herein, the Parties hereby agree as follows:

ARTICLE 0 DEFINITIONS

0.1. “Applicable Law” shall mean any applicable federal, California state or local law, constitution, treaty, ordinance, code, rule, regulation, order, injunction, judgment, decree, ruling or other similar requirement lawfully enacted, adopted, promulgated or applied by a Governmental Authority.

0.2. “Change Order” shall mean a written modification to the Agreement or any Contract Document, duly executed by Public Agency and Design/Builder, authorizing a change in the scope of the Work, the time for completion of any Work, and/or the compensation payable to Design/Builder in consideration for performance of any Work hereunder.

0.3. “Construction Amendment” shall mean an Amendment and Notice to Proceed with the Construction Phase in substantially the form reviewed by Public Agency prior to execution of this Agreement, together with all exhibits, schedules, and/or documents attached thereto and/or expressly incorporated by reference therein, including, without limitation and as applicable, each of the Exhibits to the Construction Amendment listed below. Effective as of the Construction Amendment Effective Date, the Construction Amendment (inclusive of all exhibits, schedules, and/or documents attached thereto and/or expressly incorporated by reference therein) shall become part of this Agreement and shall modify and supersede any conflicting provisions hereof.

- a. The Construction Amendment shall include the following Exhibits:
 - i. Exhibit D: Scope of Construction Work
 - ii. Exhibit E: Preliminary Construction Schedule
 - iii. Exhibit F: Project Fee

0.4. “Construction Amendment Effective Date” shall mean the date on which the Construction Amendment is duly executed by both Parties.

0.5. “Construction Phase” shall mean the portion of the Project commencing as of the Construction Amendment Effective Date and concluding upon final completion of the Project.

0.6. “Construction Schedule” shall mean the Preliminary Construction Schedule attached to the Construction Amendment as Exhibit E, as updated and/or modified from time to time in accordance with this Agreement.

0.7. “Construction Work” shall mean all labor, equipment, materials and goods necessary to complete the Scope of Construction Work set forth on Exhibit D to the Construction Amendment.

0.8. “Contract Documents” shall mean, collectively, this Agreement and all schedules, exhibits, and/or documents attached hereto and/or expressly incorporated by reference herein, each as the same may be amended, modified or supplemented from time to time in accordance with the terms and conditions of this Agreement. Without limiting the generality of the foregoing, the following Exhibits are hereby expressly incorporated by reference into the Agreement, subject to the terms and conditions hereof:

- a. Exhibits to the Agreement:
 - i. Exhibit A: Scope of Design Work
 - ii. Exhibit B: Preliminary Design Schedule
 - iii. Exhibit C: Design Fee
- b. Construction Amendment (effective as of the Construction Amendment Effective Date)

0.9. “Design/Builder” shall have the meaning set forth in the introductory paragraph to this Agreement. Design/Builder may occasionally be referred to as “ESCO” in the Contract Documents.

0.10. “Design Fee” shall mean the dollar amount set forth on Exhibit C attached hereto, which shall be payable to Design/Builder as compensation for the Design Work if Public Agency terminates this Agreement prior to the Construction Amendment Effective Date in accordance with Section 1.4.1 hereof.

0.11. “Design Phase” shall mean the portion of the Project commencing as of the Effective Date of this Agreement and concluding immediately prior to the Construction Amendment Effective Date.

0.12. “Design Work” shall mean all labor, equipment, materials and goods necessary to complete the Scope of Design Work set forth on Exhibit A to this Agreement.

0.13. “Facilities” shall mean Public Agency facilities listed under Section 3 of Exhibit A, and any additional facilities added by written agreement of the Parties.

0.14. “Governing Body” means the governing board or other governing body of the Public Agency.

0.15. “Governmental Authority” shall mean any nation, government, state or political subdivision thereof, and any entity lawfully exercising executive, legislative, judicial, regulatory or administrative powers on behalf of any of the foregoing.

0.16. “Project” shall mean the improvement to Public Agency’s Facilities to be designed and constructed by Design/Builder in accordance with and subject to the terms and conditions of this Agreement, as more specifically set forth on Exhibit A (Scope of Design Work) and Exhibit D (Scope of Construction Work) hereto. For the avoidance of doubt, notwithstanding the original scope of the Project as contemplated by Exhibit A, the Scope of Construction Work attached as Exhibit D and approved by Public Agency upon execution of the Construction Amendment shall represent the entirety of the intended and agreed upon scope for the Project.

0.17. “Project Fee” shall mean total dollar amount payable to Design/Builder under the Agreement as compensation for Design/Builder’s performance of the Work, inclusive of the Design Fee. The Project Fee shall be determined at the conclusion of the Design Phase and shall be set forth on Exhibit F to the Construction Amendment.

0.18. “Project Proposal” shall have the meaning set forth in Section 2 of Exhibit A.

0.19. “Project Site” or “Site” shall mean Public Agency property on or at which the Work is to be performed, specifically including Public Agency Facilities.

0.20. “Public Agency” shall have the meaning set forth in the introductory paragraph to this Agreement. Public Agency may occasionally be referred to as “Customer” in the Contract Documents.

0.21. “Substantial Completion” shall mean, with respect to the entirety of the Construction Work or any portion thereof, the point at which such Work has been completed in accordance with the Contract Documents, except for minor items, adjustments and/or corrections, such that it is operational and fit for use by Public Agency.

0.22. “Work” shall mean the Design Work and the Construction Work, collectively.

ARTICLE 1
DESIGN PHASE OF THE PROJECT

Section 1.1. Scope of Design Work. The scope of the design services to be performed by Design/Builder under this Agreement is described in Exhibit A attached hereto (the “*Scope of Design Work*”).

Section 1.2. Design Schedule. The “*Preliminary Design Schedule*” attached hereto as Exhibit B sets forth a preliminary schedule for the Design Phase milestones.

Section 1.3. Project Proposal. At or prior to the Design Completion Meeting described in Exhibit A, Design/Builder shall provide Public Agency with a proposal setting forth a proposed Scope of Construction Work, a proposed Project Fee, and any other information required to be included therein pursuant to Exhibit A (the “*Project Proposal*”). Unless the Project Proposal states otherwise, the pricing set forth in the Project Proposal will remain valid for sixty (60) days from the date of the Project Proposal (the “*Project Proposal Date*”).

Section 1.4. Option to Terminate Agreement or Proceed into Construction Phase. Within sixty (60) days of the Project Proposal Date, Public Agency shall either (i) terminate this Agreement pursuant to Section 1.4.1 below, or (ii) execute the Construction Amendment in accordance with Section 1.4.2 below.

1.4.1. Early Termination and Payment of Design Fee. If Public Agency does not wish to proceed into the Construction Phase on substantially the terms set forth in Design/Builder’s Project Proposal, Public Agency may terminate this Agreement for convenience immediately upon providing Design/Builder with written notice of termination and payment in full for the Design Fee.

1.4.2. Execution of Construction Amendment. If Public Agency does wish to proceed with the Construction Phase on substantially the terms set forth in Design/Builder’s Project Proposal, the Parties shall finalize and execute a Construction Amendment reflecting substantially the terms set forth in Design/Builder’s Project Proposal and any negotiated revisions thereto. In such event, the Design Fee and any additional costs incurred by Design/Builder in the performance of the Design Work shall be rolled into and included in the Project Fee, and such total amount shall be payable in accordance with the provisions of Section 2.4.

Section 1.5. Site Investigation. In performing the Design Work, Design/Builder shall exercise reasonable due diligence to understand the nature, location and extent of the Project, and it shall investigate the general and local conditions which are applicable to the Project Site, such as physical conditions at the Project Site, the conditions of the ground at the Project Site, and the character of equipment and materials needed for the performance of the Work at the Project Site (the “Site Investigation”).

Section 1.6. Public Agency Information. In order to facilitate the Design Work and to assist Design/Builder in recommending an appropriate Scope of Construction Work, Public Agency is responsible for providing Design/Builder with all such access, knowledge and history as may be relevant to Design/Builder’s analysis and/or design, including, without limitation, with respect to Public Agency’s Facilities, systems, and equipment, as well as its accounting, maintenance, and operation practices. Public Agency is required to disclose all known or suspected deficiencies, defects and malfunctions of or affecting the Facilities, systems, equipment and components thereof, as well as any site conditions that should be considered in planning and executing the construction services. Public Agency responsibilities are set forth in further detail on Exhibit A.

ARTICLE 2
CONSTRUCTION PHASE OF THE PROJECT

Section 2.1. Commencement of Construction Phase.

2.1.1. Execution of Construction Amendment Serves as Notice to Proceed. Unless the Construction Amendment expressly provides otherwise, execution of the Construction Amendment shall serve as Public Agency's notice to Design/Builder to commence the Construction Work.

2.1.2. Payment and Performance Bonds. Promptly following the Construction Amendment Effective Date and before commencing the Construction Work, Design/Builder shall provide payment and performance bonds, each for an amount equal to 100% of the Project Fee. Notwithstanding any provision to the contrary herein, any performance bonds and payment bonds provided in connection with this Agreement guarantee only the performance of the Construction Work and the payment of any Subcontractors engaged by Design/Builder in connection therewith, respectively, and shall not be construed to guarantee the performance of: (1) any efficiency or energy savings guarantees (if applicable pursuant to Section 2.5 hereof), (2) any support or maintenance services, or (3) any other guarantees, warranties or covenants with terms beyond one (1) year in duration from the Date of Substantial Completion.

Section 2.2. Scope of Work. The scope of the construction services to be performed by Design/Builder pursuant to this Agreement (the "*Scope of Construction Work*") shall be determined at the conclusion of the Design Phase and set forth on Exhibit D to the Construction Amendment.

Section 2.3. Construction Schedule.

2.3.1. Construction Time. The scheduled date of Substantial Completion of the Construction Work (the "*Completion Date*") and any applicable milestone dates shall be determined at the conclusion of the Design Phase and shall be set forth in the "*Preliminary Construction Schedule*" attached to the Construction Amendment as Exhibit E.

2.3.2. Substantial Completion. Upon Substantial Completion of the Construction Work (or any portion thereof, as appropriate), Design/Builder will issue to Public Agency a "*Letter of Substantial Completion*" with respect to such substantially complete Work (or portion thereof). The date on which Design/Builder issues any such Letter of Substantial Completion shall be the "*Date of Substantial Completion*" with respect to the applicable Work.

2.3.3. Delays. If Design/Builder's progress on the Project is at any point delayed due to changes in the requested scope of Work, labor disputes, fire, unusual delay in deliveries, abnormally severe weather conditions, unavoidable casualties, epidemic or pandemic conditions, quarantine restrictions, and/or any other causes which are beyond the reasonable control of Design/Builder, then the Parties agree to execute a Change Order reflecting an equitable extension of time. In the event of any suspension or delay due to the acts or omissions of Public Agency or due to Public Agency's instructions to stop Work by no fault of Design/Builder: (i) all affected dates and milestones shall be extended to reflect such period of interruption; and (ii) the Project Fee shall be equitably adjusted to cover Design/Builder's costs of demobilization, delay and remobilization related to such suspension or delay (provided, however, that Design/Builder shall cooperate with Public Agency, to the extent commercially reasonable, in mitigating such costs). If such suspension or delay continues for more than ninety (90) consecutive days, through no act or fault of Design/Builder, Design/Builder may terminate this Agreement in accordance with Article 5.

Section 2.4. Compensation, Invoicing and Payment.

- 2.4.1. Project Fee.** The Project Fee shall be determined at the conclusion of the Design Phase and shall be set forth on Exhibit F to the Construction Amendment. The Project Fee is inclusive of, and not in addition to, the Design Fee.
- 2.4.2. Schedule of Values.** Design/Builder will develop a schedule delineating the items to be completed pursuant to the Scope of Construction Work (the “*Schedule of Values*”) and shall endeavor to provide such Schedule of Values to Public Agency within ten (10) days of the Construction Amendment Effective Date.
- 2.4.3. Project Mobilization Invoice and Payment.** Within one (1) month of the Construction Amendment Effective Date, Public Agency shall make payment to Design/Builder for Project mobilization and other expenses incurred to date (“*Project Mobilization Payment*”) in an amount not to exceed twenty percent (20%) of the Project Fee. Such Project mobilization and other expenses may include, without limitation, the Design Fee and any design, engineering and/or development expenses incurred in connection with the Project, expenses relating to procurement of equipment, materials, and/or bonds, and any other Project start-up and mobilization expenses incurred to date.
- 2.4.4. Design/Builder Invoices.** Beginning on the date that is two (2) months following the Construction Amendment Effective Date, Design/Builder shall provide monthly invoices to Public Agency seeking payment for the Work performed in the prior month (based on the percentage completion of items delineated on the Schedule of Values).
- 2.4.5. Payment.** Payment is due within thirty (30) days of the date of each invoice. If any payment is over thirty (30) days late from the due date stated on the invoice, Design/Builder may impose a penalty of one percent (1%) of the amount(s) owed for each month overdue and/or may terminate the Agreement in accordance with Article 5. If applicable, Public Agency’s payments may be made from an escrow account set up in accordance with Public Agency’s financing arrangement, in which case Public Agency shall be responsible for forwarding Design/Builder’s invoices to the escrow agent and for authorizing and directing the escrow agent to timely release the invoiced amounts to Design/Builder.
- 2.4.6. Final Payment and Release of Liens.** Final payment shall not become due until Design/Builder has delivered to Public Agency a conditional release of all liens arising out of this Agreement, covering all labor, materials, and equipment for which a lien could be filed, or a bond satisfactory to Public Agency to indemnify Public Agency against such lien. The making of final payment shall constitute a waiver of claims by Public Agency except those arising from (1) unresolved liens, security interests or encumbrances arising out of the Agreement, (2) Design/Builder’s failure to perform the Construction Work in substantial compliance with the requirements of the Contract Documents, and (3) any warranties required by the Contract Documents.
- 2.4.7. Retention.** Following payment of the Project Mobilization Payment, which shall not be subject to any retention, Public Agency may retain five percent (5%) of each monthly progress payment (the “Amounts Retained”). The Amounts Retained with respect to a given portion of the Work shall be released to Design/Builder within thirty (30) days of the Date of Substantial Completion of such portion of the Work, and any Amounts Retained remaining upon Substantial Completion of the Project shall be released to Design/Builder with the final payment.

Section 2.5. Performance Guarantees. If Design/Builder is providing any efficiency or energy savings guarantees upon completion of the Construction Work, the terms of such efficiency or energy savings guarantees shall be set forth and/or incorporated in the Construction Amendment and the applicable Exhibits thereto. If no such terms are set forth and/or incorporated in the Construction Amendment and the applicable Exhibits thereto, then no efficiency or energy savings guarantees are being made by Design/Builder in connection with this Agreement.

ARTICLE 3 PERFORMANCE OF THE WORK

Section 3.1. Standard of Performance. Design/Builder represents and warrants that it has the professional skill, knowledge and experience necessary to perform and complete the Project in a timely and competent manner. Design/Builder shall perform, or cause to be performed, the Project using at least such degree of care as is reasonably expected of professionals providing similar services to Public Agencies within the State of California in similar circumstances (and considering Public Agency's goals and any financial or other constraints or parameters made known to Design/Builder before or after the Effective Date).

Section 3.2. Licenses. Design/Builder represents and warrants that it currently has or shall timely obtain, and that it shall maintain, all licenses, permits, qualifications and approvals of whatever nature as are legally required to permit Design/Builder to perform the Work.

Section 3.3. Regular Working Hours. Except as Public Agency, in its sole discretion, may otherwise agree, Design/Builder shall perform such portions of the Work as are to occur at or in Public Agency's Facilities only: (i) on weekdays (i.e., any day, Monday through Friday, inclusive); and (ii) commencing at or after such time, and ending by or prior to such time, as may be specified in either an applicable local ordinance or any "Mitigation Monitoring Plan" adopted by Public Agency pursuant to the California Environmental Quality Act and made available to Design/Builder, whichever is more restrictive.

Section 3.4. Employees and Subcontractors.

3.4.1. Design/Builder's Subcontractors. Design/Builder may use one or more subcontractors (each, a "Subcontractor") to perform any portion(s) of the Project as Design/Builder may deem appropriate; provided, however, that Design/Builder shall remain ultimately responsible for the performance of its obligations under this Agreement. Design/Builder shall ensure that all of its Subcontractors have the skill, knowledge and experience necessary to perform the services assigned to them, and shall further ensure that each of its Subcontractors holds all licenses legally required for the practice of its profession.

3.4.2. Design/Builder's Employees. The employees of Design/Builder shall at all times be under Design/Builder's exclusive direction and control on the Project. Design/Builder shall pay all wages, salaries, and other amounts due to such personnel in connection with their performance of services under this Agreement, as required by law. Design/Builder shall be responsible for all reports and obligations respecting such personnel, including, but not limited to: social security taxes, federal and state income tax withholdings, unemployment insurance, and workers' compensation insurance. Design/Builder shall employ only competent workers for performance of the services and shall not employ any person who is unfit or unskilled in the Work assigned to him or her.

3.4.3. Supervision by Design/Builder. Design/Builder shall at all times enforce strict discipline and good order among its Subcontractors and employees performing any portion(s) of the services. At Public Agency's request, Design/Builder shall remove from the Project and Project Site(s) any person, regardless of whether employed by the Design/Builder or any Subcontractor, who is not performing the services in a competent manner or who is a threat to the safety of persons or the Project, and Design/Builder shall not thereafter permit any such person to perform any of the services or to be present on or at the Project Site(s). In addition, during the course of performing the Construction Work, Design/Builder shall have an experienced and competent superintendent (and any necessary assistants) present on the Project Site(s) to supervise the construction services and Design/Builder's employees and Subcontractors on the Project.

3.4.4. Prohibition Against Unlawful Discrimination. Design/Builder represents and warrants that it is an equal opportunity employer and agrees that it shall not discriminate in violation of any applicable federal, state, or other law, rule or regulation, including, but not limited, to discrimination against any employee or applicant for employment on account of such person's race, religion, color, national origin, ancestry, sex, or age. Design/Builder shall apply such policy of non-discrimination in connection with all activities related to Design/Builder's employees and Subcontractors, including with respect to initial employment, promotion, demotion, transfer, recruitment or recruitment advertising, and layoff or termination.

Section 3.5. Design/Builder's Compliance with Law.

3.5.1. Compliance Generally. Design/Builder and each of its Subcontractors shall perform the Project in compliance with Applicable Law. Upon commencement of the Construction Phase, Public Agency will coordinate and conduct, and Design/Builder and each of its Subcontractors will attend, any mandatory construction conference held for purposes of ensuring that Design/Builder and its Subcontractors are aware of the Applicable Laws relevant to the Project.

3.5.2. DIR Registration. Design/Builder acknowledges that the Project will be subject to compliance monitoring and enforcement by the California Department of Industrial Relations ("DIR"). Design/Builder shall be responsible for ensuring that it and all of its Subcontractors are currently and properly registered with the DIR. Prior to commencing the Construction Work, Design/Builder and each of its Subcontractors shall: (i) complete, execute, and submit to Public Agency a "Certification Regarding Design/Builder Registration" form; and (ii) provide evidence of registration to Public Agency. Notwithstanding anything to the contrary, if at any time during the performance of the Construction Work, Design/Builder or any of its Subcontractors is not properly registered with the DIR (including, without limitation, if the registration expires or the DIR revokes the registration), such failure of registration shall constitute a material breach of this Agreement for purposes of Section 5.2 hereof (Public Agency Termination for Cause).

3.5.3. Labor Laws. Design/Builder and each of its Subcontractors shall, at no additional cost to Public Agency, comply with all applicable provisions of the California Labor Code and the regulations promulgated thereunder (collectively, the "Labor Laws"), including, without limitation, any applicable Labor Laws requiring the payment of prevailing wages in connection with the Construction Work, submission of payroll records for inspection, posting of required notices at the Project Site, and cooperation with the DIR.

(a) Prevailing Wages and Penalties for Violations. Without limiting the generality of Section 3.5.3, wages paid by Design/Builder and each of its Subcontractors in connection with the Construction Work shall be in accordance with the general prevailing rates of per diem wages determined by the DIR pursuant to Section 1770 of the California Labor Code. Wage rates

shall conform to those on file at Public Agency's principal office and posted at the Project Site. In the event that Design/Builder or any of its Subcontractors fails to pay the prevailing wages determined by the DIR: (1) Design/Builder shall, as a penalty to Public Agency in accordance with Section 1775 of the Labor Code, forfeit not more than \$200 and, subject to limited exceptions, not less than certain amounts specified by law, per calendar day, or portion thereof, for each worker paid less than the prevailing wage rate; and (2) Design/Builder and/or Design/Builder's Subcontractors (as applicable) shall pay to each worker, for each calendar day or portion thereof for which the worker was paid less than the applicable prevailing wage rate, the difference between such stipulated prevailing wage rate and the amount paid to the worker.

- (b) **Payroll Records and Penalties for Violations.** Without limiting the generality of Section 3.5.3, Design/Builder and each of Design/Builder's Subcontractors must comply with all applicable provisions of Labor Code Section 1776, which relates to preparing and maintaining accurate payroll records, and making such payroll records available for review and copying by Public Agency, the DIR's Division of Labor Standards Enforcement, and the DIR's Division of Apprenticeship Standards ("DAS"). The payroll records must be certified, maintained at Design/Builder's and its Subcontractors' principal offices (as applicable), and made available as required by labor Code Section 1776. Design/Builder and each of its Subcontractors must inform Public Agency of the location at which the payroll records are located, including the street address, city and county, and must, within five working days, provide a notice of any change of location and address. In the event that Design/Builder or any of its Subcontractors fails to timely comply with a request for certified payroll records, Design/Builder shall, as a penalty to Public Agency, forfeit \$100 per worker for each calendar day or portion thereof until strict compliance is effectuated.

- (c) **Other CA Labor Laws.** Without limiting the generality of Section 3.5.3, Design/Builder and each of its Subcontractors shall comply with the each of the following provisions of the California Labor Code, as applicable:
 - i. Section 1735 (Anti-Discrimination Requirements);
 - ii. Sections 1777.5, 1777.6 and 1777.7 (Apprenticeship Requirements);
 - iii. Sections 1810 through 1812 (Working Hour Restrictions);
 - iv. Sections 1813 and 1814 (Penalty for Failure to Pay Overtime); and
 - v. Section 1815 (Overtime Pay).

- (d) **No Disqualification.** Design/Builder represents and warrants that neither it, nor any of its Subcontractors, has been debarred by the California Labor Commissioner pursuant to Section 1777.1 of the California Labor Code or otherwise.

- (e) **Failure to Comply.** Any failure of Design/Builder or its Subcontractors to comply with applicable Labor Laws shall constitute a material breach of this Agreement for purposes of Section 5.2 hereof (Public Agency Termination for Cause). In addition, Public Agency may withhold payment to Design/Builder as necessary to satisfy any civil wage or other penalty assessment issued by the California Labor Commissioner.

3.5.4. Criminal-History Background Checks. If Public Agency is a school district and Design/Builder's (and/or its Subcontractors') employees may come into contact with pupils in the process of performing the Project, then Design/Builder and each of its Subcontractors that will have personnel at or on any Public Agency property shall comply with the requirements of Education Code Section 45125.1. For such purposes, Design/Builder, at its sole cost and expense, and without additional

compensation from Public Agency, shall comply with all California Department of Justice guidelines and requirements with respect to fingerprinting of Design/Builder's and any Subcontractors' officers, employees, agents, or other representatives who will or might be present on or at any of the Public Agency's Facilities.

Section 3.6. Reliance on Public Agency Information. In performing the Work, Design/Builder shall be entitled to rely on the accuracy and completeness of any and all information provided to Design/Builder by Public Agency, including without limitation the information required to be provided pursuant to Section 1.6 of this Agreement, except where it would be unreasonable to do so.

Section 3.7. Design/Builder's Warranties and Disclaimers. Design/Builder warrants to Public Agency that, for a period of one (1) year from the applicable Date of Substantial Completion of Work covered by a Letter of Substantial Completion (the "Warranty Period"), the materials and equipment manufactured by Design/Builder will be of good quality and new unless the Contract Documents require or permit otherwise, and further warrants that the such Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. Design/Builder's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by or on behalf of Design/Builder, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. Design/Builder shall repair or replace defective material or equipment and re-perform Work to correct any defect within the applicable Warranty Period. In the event warranty Work by the Design/Builder is necessary, the Design/Builder shall provide an additional one-year warranty on the corrected Work only from the date the corrected Work is completed or the end of the initial warranty period, whichever is later. Design/Builder does not warrant products not manufactured by Design/Builder, but it will pass on to Public Agency any manufacturer's warranty to the extent permitted. THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES AND REMEDIES, WHETHER STATUTORY, EXPRESS OR IMPLIED (INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OR TRADE).

ARTICLE 4 CHANGES

Section 4.1. Change Orders. Public Agency may at any time request any change in the Scope of Design Work and/or the Scope of Construction Work. In response to any such request, Design/Builder shall provide to Public Agency a written proposal that describes in reasonable detail: (i) the change; (ii) the impact of the change on the time required for performance of Design/Builder's obligations; (iii) the impact of the change on the compensation to be paid by Public Agency to Design/Builder; and (iv) the impact of the change on any efficiency or energy savings guarantees (if applicable pursuant to Section 2.5 hereof). No such change proposal shall be valid or binding on the Parties unless, and except to the extent, incorporated into a Change Order.

Section 4.2. Materials and Equipment Procurement. In the event a significant delay in acquiring materials or equipment or a significant increase in the price of materials or equipment occurs during the performance of the Contract by no fault of Design/Builder, the Project Fee and/or the Completion Date, as appropriate, shall be equitably adjusted by Change Order. A change in the price of an item of material or equipment will be considered significant when the price of an item increases by five percent (5)% between the Project Proposal Date and the date on which such item is due to be purchased and/or installed in accordance with the Schedule of Values or the Construction Schedule.

Section 4.3. Unforeseen Conditions. “Unforeseen Site Conditions” shall mean and include any subsurface, concealed or latent conditions, including without limitation the presence of hazardous materials, that differ materially from those conditions (i) actually known by Design/Builder, (ii) accurately reflected in available existing data, (iii) expected based on the results of Design/Builder’s Site Investigation, and/or (iv) that would have been identified, discovered and/or confirmed by the exercise of reasonable due diligence in Design/Builder’s Site Investigation. In the event Design/Builder encounters Unforeseen Site Conditions at the Project Site or that otherwise impact the Project, Design/Builder shall notify Public Agency of such conditions promptly and before such conditions are further disturbed, but in no event later than three (3) business days after observing such conditions. To the extent Design/Builder incurs additional costs or delays as a result of Unforeseen Site Conditions, the Parties shall execute a Change Order reflecting an equitable adjustment to the Project Fee and/or the Completion Date, as appropriate.

ARTICLE 5 SUSPENSION AND TERMINATION

Section 5.1. Termination for Convenience by Public Agency. Public Agency may terminate this Agreement for convenience as set forth in Section 1.4.1.

Section 5.2. Termination for Cause by Public Agency. If Design/Builder repeatedly or materially breaches this Agreement, Public Agency has provided written notice to Design/Builder detailing the alleged breach, and within thirty (30) days of Design/Builder’s receipt of such written notice Design/Builder has neither cured the alleged breach nor diligently commenced to cure such breach, Public Agency may terminate this Agreement effective immediately upon the receipt of written notice by Design/Builder. Nothing in this Agreement shall be deemed or construed as a waiver by Design/Builder of any rights it may have with respect to a wrongful suspension or termination by Public Agency.

Section 5.3. Suspension or Termination for Cause by Design/Builder. If Public Agency fails to make any payment(s) to Design/Builder as required in this Agreement or repeatedly or materially fails, refuses or neglects to fulfill any of its other obligations or responsibilities under this Agreement or the Contract Documents, Design/Builder may, after delivery of written notice and providing Public Agency thirty (30) days to cure such failure, refusal or neglect, suspend the Project or terminate this Agreement. If Design/Builder suspends the Project pursuant to this Section, the Project schedule and any anticipated completion dates shall be adjusted accordingly. If Design/Builder terminates the Agreement pursuant to this Section, Design/Builder shall be entitled to recover payment from Public Agency in accordance with Section 5.4 below. Nothing in this Agreement shall be deemed or construed as a waiver by Public Agency of any rights it may have with respect to a wrongful suspension or termination by Design/Builder.

Section 5.4. Compensation to Design/Builder Upon Termination. In the event of any termination other than a termination pursuant to Section 1.4.1 or a termination for cause by Public Agency pursuant to Section 5.2, Public Agency shall compensate Design/Builder: (i) for such portion of the Project as has been completed prior to the effective date of termination; (ii) for services in progress by Design/Builder and any of its Subcontractors at such time, including any overhead and/or anticipated profit attributable to such Work in progress, and (iii) for any costs and damages incurred by reason of the termination, including any proven loss with respect to subcontracts, materials, equipment, tools and machinery. In the event of a termination pursuant to Section 1.4.1, Public Agency shall pay the Design Fee to Design/Builder on the date of such termination.

Section 5.5. Design/Builder to Provide Copies of Project Documents. Not later than sixty days following the effective date of a termination pursuant to this Article 5, Design/Builder shall provide to Public Agency copies of all Project Documents (defined in Section 8.4).

Section 5.6. Effect of Termination. Termination of this Agreement and/or any of the Contract Documents shall release Design/Builder of all remaining obligations under the Agreement and the Contract Documents as of the effective date of termination, including, without limitation, any efficiency or energy savings guarantees (if applicable pursuant to Section 2.5 hereof).

Section 5.7. Survival of Obligations. The Parties' respective rights and obligations pursuant to this Article 5, Article 7 (subject to Section 7.9), and Article 8 shall survive termination of this Agreement.

ARTICLE 6 INSURANCE

Section 6.1. Required Insurance. Design/Builder shall, at its sole cost and expense, maintain in effect the following policies of insurance for the applicable period(s) set forth in Section 6.2:

- (i) **Commercial General Liability Insurance.** A policy of commercial general liability insurance, written on an "occurrence" basis, with a limit of not less than two million dollars (\$2,000,000) per occurrence ("*General Liability Policy*").
- (ii) **Automobile Liability Insurance.** A policy of automobile liability insurance, written on an "occurrence" basis, with a combined single limit of not less than one million dollars (\$1,000,000) per accident for bodily injury and property damage ("*Auto Liability Policy*"). The Auto Liability Policy must include coverage for owned, hired and non-owned automobiles.
- (iii) **Workers' Compensation and Employer's Liability Insurance.** Workers' compensation insurance as required by California law, and employer's liability insurance, written on an "occurrence" basis, with a limit of not less than two million dollars (\$2,000,000).
- (iv) **Professional Liability Insurance.** Professional liability insurance, written on a claims made (and reported) basis, with a limit of not less than two million dollars (\$2,000,000) per claim ("*Professional Liability Policy*").

Section 6.2. Duration of Insurance. The insurance required pursuant to this Article 6 shall be procured by Design/Builder prior to Design/Builder's commencement of the Project and shall be maintained in effect by Design/Builder at least until the date that is one year following the earlier of the termination of this Agreement or the Date of Substantial Completion of the Project. Notwithstanding the foregoing, Design/Builder shall maintain the Professional Liability Policy in effect at least until the date that is three years following the earlier of the termination of this Agreement or the Date of Substantial Completion of the Project.

Section 6.3. Insurer Rating Standards. The insurance policies required pursuant to this Article 6 must be issued by one or more insurers that are (i) licensed to do business in the State of California and (ii) have an A.M. Best Company rating of not less than "A-" and a financial size category of not less than "VII."

Section 6.4. Additional Insureds. Public Agency, members of Public Agency's Governing Body, and Public Agency's other officers, employees, and agents (collectively, including the Governing Body, the "*Public Agency Agents*"), shall all be named as additional insureds on Design/Builder's General Liability Policy and Auto Liability Policy. The additional insured endorsements will be provided on the most current versions of ISO Form CG 2010 and ISO Form CG 2037 or their substantial equivalents.

Section 6.5. Waiver of Subrogation. Each of the General Liability Policy and the Auto Liability Policy shall provide a waiver of transfer of rights of recovery in favor of Public Agency.

Section 6.6. Design/Builder Insurance is Primary. The General Liability Policy and the Auto Liability Policy must be endorsed to provide that they are primary and non-contributory.

Section 6.7. Premiums, Deductibles and Self-Insured Retentions. Design/Builder shall be solely responsible for paying any and all deductibles and self-insured retentions applicable to any of the insurance policies that Design/Builder is required to have in effect pursuant to this Article 6.

Section 6.8. Evidence of Coverage. Prior to commencing the Work, Design/Builder must provide to Public Agency duly authorized and executed certificates of insurance evidencing that the insurance policies required to be maintained by Design/Builder pursuant to this Article 6 are in effect (each a “*Certificate of Insurance*”) As applicable, the Certificates of Insurance must identify those who are additional insureds in accordance with this Article 6. Not less than thirty days prior to the expiration of any insurance policy that Design/Builder is required to maintain pursuant to this Article 6, Design/Builder must provide an updated Certificate of Insurance to Public Agency evidencing the renewal of such policy.

Section 6.9. Notice of Change in Policies. Design/Builder shall notify Public Agency within thirty (30) days of its receipt of written notice from an applicable insurer that a policy required hereunder will expire without renewal or will be canceled, terminated, or materially reduced in coverage.

Section 6.10. Review of Coverage. Public Agency’s failure to identify any non-compliance by Design/Builder with the requirements of this Article 6 shall not be deemed or construed to relieve Design/Builder from any of its obligations hereunder.

Section 6.11. Subcontractor Insurance. Design/Builder shall require that each of its Subcontractors comply with substantially the same requirements as are set forth in this Article 6 for Design/Builder, except to the extent Public Agency has approved any different standards or requirements applicable to any particular Subcontractor.

ARTICLE 7 INDEMNIFICATION AND LIABILITY

Section 7.1. Indemnification of Public Agency. To the extent allowed under Applicable Law, Design/Builder shall indemnify, defend and hold harmless Public Agency and Public Agency Agents from and against any and all third-party claims, demands, actions, judgments, damages, losses, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) to the extent caused by the negligence or misconduct of Design/Builder any Subcontractor, or any officers, employees, or agents of Design/Builder or any Subcontractor (collectively, not including Design/Builder, the “*Design/Builder Agents*”) in connection with this Agreement.

Section 7.2. Defense of Public Agency. Design/Builder shall control the defense and handling of any claims for which Design/Builder is required to indemnify Public Agency and/or Public Agency Agents pursuant to Section 7.1, at Design/Builder’s sole cost and expense, using qualified and appropriately experienced legal counsel selected and retained by Design/Builder. Design/Builder’s obligations under Section 7.1 shall not apply to any claim that is settled or otherwise resolved by Public Agency and/or any Public Agency Agent without Design/Builder’s prior written consent.

Section 7.3. Limitation on Design/Builder Obligations. Design/Builder shall not be obligated to indemnify or hold harmless Public Agency or any Public Agency Agent pursuant to this Article 7 to the extent any claim, demand, action, judgment, damage, loss, cost or expense results from the negligence or misconduct of Public Agency or any of Public Agency Agents. Design/Builder shall be reimbursed for any costs and expenses incurred in the defense or handling of any claim to the extent such claim is determined by a court or arbitrator of competent jurisdiction to be attributable to the negligence or misconduct of Public Agency or any Public Agency Agent.

Section 7.4. Applicability of Civil Code Section 2782.8. To the extent Design/Builder or any Subcontractor will provide "design professional services" in connection with this Agreement, this Article 7 shall be interpreted consistent with, and shall be limited by, California Civil Code Section 2782.8 as in effect on the Effective Date, and any obligation to indemnify Public Agency and/or Public Agency Agents shall apply only to the extent arising from the negligence, recklessness, or willful misconduct of Design/Builder or any of the Design/Builder Agents.

Section 7.5. Notice; Cooperation. Public Agency and Public Agency Agents shall promptly provide written notice to Design/Builder of any claims, demands, actions, judgments, damages, losses, costs and/or expenses for which Design/Builder may be responsible pursuant to this Article 7. Public Agency and Public Agency Agents shall fully cooperate with Design/Builder, at Design/Builder's cost and expense, to the extent reasonably necessary or appropriate in connection with the performance of Design/Builder's obligations pursuant to this Article 7.

Section 7.6. Insurance Not a Limitation. The obligations of Design/Builder pursuant to this Article 7 shall not be deemed or construed to be conditioned upon, limited by or expanded by the existence of any insurance coverage maintained by a Party or other person or entity.

Section 7.7. Subcontractor Indemnity. Design/Builder shall require each of its Subcontractors to comply with the requirements of this Article 7 related to indemnifying, holding harmless, and defending Public Agency, except to the extent Public Agency agrees in writing to apply a different set of standards or requirements to a particular Subcontractor.

Section 7.8. Limitations of Liability. NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT OR THE CONTRACT DOCUMENTS TO THE CONTRARY, IN NO EVENT SHALL EITHER PARTY, ITS OFFICERS, DIRECTORS, AFFILIATES OR EMPLOYEES BE LIABLE FOR ANY FORM OF INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF USE, LOSS OF PRODUCTION, LOSS OF PRODUCT, LOSS OF REVENUE, LOSS OF PROFITS OR LOSS OF DATA DAMAGES, WHETHER SUCH DAMAGES ARISE IN CONTRACT OR TORT AND IRRESPECTIVE OF FAULT, NEGLIGENCE OR STRICT LIABILITY OR WHETHER SUCH PARTY HAS BEEN ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT OR THE CONTRACT DOCUMENTS AND TO THE EXTENT PERMITTED BY APPLICABLE LAW, THE MAXIMUM LIABILITY OF DESIGN/BUILDER FOR DAMAGES UNDER THIS AGREEMENT AND THE CONTRACT DOCUMENTS SHALL NOT EXCEED THE AMOUNTS ACTUALLY PAID BY PUBLIC AGENCY FOR THE SERVICE(S) GIVING RISE TO THE CLAIM. THE PRECEDING SENTENCE SHALL NOT APPLY TO ANY CLAIM FOR BODILY INJURY, OR TO ANY OTHER CLAIM TO THE EXTENT OF DESIGN/BUILDER'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

Section 7.9. Survival of Obligations. With respect to acts, omissions or incidents occurring prior to completion of the Project and/or termination of this Agreement, the Parties' respective rights and obligations pursuant to this Article 7 shall survive completion of the Project and/or termination of this Agreement for the applicable statute of limitations.

ARTICLE 8
MISCELLANEOUS

Section 8.1. Relationship of the Parties. Design/Builder is, for any and all purposes of or related to this Agreement, an independent contractor to Public Agency. In no event shall Design/Builder or any of its Subcontractors, or any officer, employee or agent of either, be deemed or construed to be an officer, employee or agent of Public Agency on account of this Agreement. Nothing herein shall be deemed to establish a relationship of principal and agent between Design/Builder and Public Agency, or any of their respective agents or employees, and neither this Agreement nor any of the Contract Documents may be construed as creating any form of legal association or arrangement that would impose liability upon one Party for the act or failure to act of the other Party.

Section 8.2. Taxes. The Project Fee shall be deemed and construed to include compensation to Design/Builder for any and all duties, sale, use, excise or other similar taxes required by federal, state or local laws in effect as of the Effective Date or promulgated thereafter and payable in connection with the Project.

Section 8.3. Project Records. Design/Builder shall keep and maintain all such books and records as are necessary for proper administration and performance of the Agreement and/or as are required by law and/or this Agreement to be maintained (to the extent exclusively related to the performance of the Agreement, "Project Records"), including, but not limited to, plans and specifications, Change Orders, submittals, cut-sheets, projected energy-savings calculations, requests for information, written notices, permits, testing and inspection reports, and safety records. Pursuant to Government Code Section 8546.7, the California State Auditor has the right, for a period of three years after final payment is made under this Agreement, to examine and audit this Agreement at the request of Public Agency or as part of any audit of Public Agency. To the extent required by Government Code Section 8546.7 during such three-year period, Design/Builder shall allow the California State Auditor and Public Agency to examine and/or audit this Agreement and the relevant Project Records at Design/Builder's offices during normal business hours and upon reasonable advanced notice.

Section 8.4. Ownership and Use of Documents. Any and all conceptual, preliminary, working, and final documents (both originals and reproductions), presentations, computations, analyses, and other documents, in whatever format or storage medium, that have been obtained or prepared for Public Agency by Design/Builder pursuant to this Agreement and that have been paid for by Public Agency in accordance with this Agreement (each a "Project Document") shall be deemed and construed to be and remain the property of Public Agency. Assuming Public Agency has paid in full for the Project Documents, Public Agency shall have the unconditional right to use the Project Documents, for their intended purposes and, at Public Agency's sole discretion, for any other purpose, with no additional compensation due to Design/Builder. Except as expressly agreed in writing, Public Agency shall not be required to employ Design/Builder in connection with any future use of the Project Documents. However, notwithstanding anything to the contrary, Public Agency acknowledges and agrees that the Project Documents are prepared with the expectation and intent that the Project is to be performed and completed by or on behalf Design/Builder; in the event Public Agency terminates this Agreement pursuant to Section 1.4.1, Public Agency acknowledges and agrees that the Project Documents are not intended to be, and shall not be, relied upon by Public Agency or any third party in performing or completing any aspect of the Project. Public Agency shall indemnify and hold Design/Builder harmless for any liabilities caused by Public Agency's use of the Project Documents other than in connection with Design/Builder's completion of the Project.

Section 8.5. Intellectual Property Rights. Nothing in this Agreement shall be deemed or construed to result in Public Agency acquiring any interest or rights in any intellectual property owned, possessed or developed by Design/Builder or any third parties ("Design/Builder Intellectual Property"), including without limitation any Design/Builder Intellectual Property in or underlying the Project Documents. However,

Design/Builder hereby grants Public Agency a perpetual, paid-up, worldwide license to make use of Design/Builder Intellectual Property to the extent that such Design/Builder Intellectual Property is necessary for the proper use, operation and/or maintenance of the Project Documents and/or any other products, services or deliverables provided by Design/Builder pursuant to this Agreement. Design/Builder shall indemnify, defend and hold harmless Public Agency and Public Agency Agents for any infringement of third-party intellectual property rights caused by Design/Builder or any of its Subcontractors in connection with this Agreement.

Section 8.6. Force Majeure. Notwithstanding anything to the contrary, Design/Builder shall not be held responsible (whether by actual or liquidated damages, termination for default, or otherwise) for any delay or non-performance that is caused by circumstances beyond Design/Builder's reasonable control (such as, for example, acts of God or the public enemy, acts of Governmental Authorities, fires, floods, epidemics and/or pandemics, quarantine restrictions, strikes, unusually severe weather, unusually severe shortages in the available supply of materials or equipment needed for performance of the Work, Unforeseen Site Conditions, and delays of common carriers). In the event that Design/Builder's performance hereunder is impacted by such force majeure circumstances, then upon Design/Builder's reasonable request (with appropriate supporting documentation), the Parties shall execute a Change Order reflecting such equitable changes to this Agreement as may be necessary or appropriate under the circumstances.

Section 8.7. Export Control. The products, software, services, information, other deliverables and/or the technologies embedded therein (hereinafter referred to as "*Deliverables*") provided by Design/Builder under this Agreement contain or may contain components and/or technologies from the United States of America ("*US*"), the European Union ("*EU*") and/or other nations. Public Agency acknowledges and agrees that the assignment and/or usage of Deliverables under this Agreement shall fully comply with applicable US, EU and other national and international export control laws and/or regulations. Unless any applicable export licenses have been obtained from the relevant authority and the Design/Builder has approved, the Deliverables shall not (i) be exported and/or re-exported to any destination or party (including without limitation to any individual, group and/or legal entity) restricted by the applicable export control laws and/or regulations; or (ii) be used for those purposes and fields restricted by the applicable export control laws and/or regulations. Public Agency also agrees that the Deliverables will not be used either directly or indirectly in any rocket systems, unmanned air vehicles, and/or nuclear weapons delivery systems, nor will they be used in any design, development, production or use for any weapons (which may include, without limitation, chemical, biological or nuclear weapons). If any necessary or advisable licenses, authorizations or approvals are not obtained, whether arising from inaction by any relevant government authority or otherwise, or if any such licenses, authorizations or approvals are denied or revoked, or if the applicable export control laws and/or regulations would prohibit Design/Builder from fulfilling any order, or would in Design/Builder's judgment otherwise expose Design/Builder to a risk of liability under the applicable export control laws and/or regulations if it fulfilled the order, Design/Builder shall be excused from all obligations under such order and/or this Agreement.

Section 8.8. Ethics and Compliance with Laws. Each Party shall comply in all respects with all Applicable Law governing the duties, obligations, and business practices of that Party. Neither Party shall take any action in violation of any Applicable Law that could result in liability being imposed on the other Party. In the event Public Agency has concerns related to ethics, compliance or Design/Builder's Principles of Responsibility, and/or any potential violations of these policies, Public Agency is welcome to make use of Design/Builder's GreenLine. The GreenLine is Design/Builder's global helpline for external stakeholders. It is a confidential channel through which Public Agencies can ask questions and raise concerns. Reports can be made using the following link: <https://secure.ethicspoint.eu/domain/media/en/gui/104677/index.html>

Section 8.9. Cybersecurity.

8.9.1. Public Agency's Obligations for Its Systems. Public Agency is solely responsible for the implementation and maintenance of a comprehensive security program ("*Security Program*") that contains reasonable and appropriate security measures and safeguards to protect its computer network, systems, machines, and data (collectively, "*Systems*"), including those Systems on which it runs the Deliverables provided by Design/Builder, against Cyber Threats. "*Cyber Threat*" means any circumstance or event with the potential to adversely impact, compromise, damage, or disrupt Public Agency's Systems or that may result in any unauthorized access, acquisition, loss, misuse, destruction, disclosure, and/or modification of Public Agency's Systems, including through malware, hacking, or similar attacks. Without limiting the foregoing, Public Agency shall at a minimum:

- (i) have qualified and experienced personnel with appropriate expertise in cybersecurity maintain Public Agency's Security Program, and have such personnel regularly monitor cyber intelligence feeds and security advisories applicable to Public Agency's Systems or Public Agency's industry;
- (ii) promptly update or patch its Systems or implement other appropriate measures based on any reported Cyber Threats and in compliance with any security notifications or bulletins, whether publicly disclosed on Design/Builder's security notification webpage at <https://www.se.com/ww/en/work/support/cybersecurity/security-notifications.jsp> or otherwise provided to Public Agency;
- (iii) regularly monitor its Systems for possible Cyber Threats;
- (iv) regularly conduct vulnerability scanning, penetration testing, intrusion scanning, and other cybersecurity testing on its Systems; and
- (v) meet the recommendations of Design/Builder's Recommended Cybersecurity Best Practices, available at <https://www.se.com/us/en/download/document/7EN52-0390/>, as may be updated by Design/Builder from time to time, and then-current industry standards.

8.9.2. Public Agency's Use of the Deliverables. Design/Builder may release Updates and Patches for its Deliverables from time to time. Public Agency shall promptly install any Updates and Patches for such Deliverables as soon as they are available in accordance with Design/Builder's installation instructions and using the latest version of the Deliverables, where applicable. An "*Update*" means any software that contains a correction of errors in a Deliverable and/or minor enhancements or improvements for a Deliverable, but does not contain significant new features. A "*Patch*" is an Update that fixes a vulnerability in a Deliverable. Public Agency understands that failing to promptly and properly install Updates or Patches for the Deliverables may result in the Deliverables or Public Agency's Systems becoming vulnerable to certain Cyber Threats or result in impaired functionality, and Design/Builder shall not be liable or responsible for any losses or damages that may result.

8.9.3. Identification of Cyber Threats. If Public Agency identifies or otherwise becomes aware of any vulnerabilities or other Cyber Threats relating to the Deliverables for which Design/Builder has not released a Patch, Public Agency shall promptly notify Design/Builder of such vulnerability or other Cyber Threat(s) via the Design/Builder Report a Vulnerability page (<https://www.se.com/ww/en/work/support/cybersecurity/report-a-vulnerability.jsp#PublicAgencies>) and further provide Design/Builder with any reasonably requested information relating to such vulnerability (collectively, "*Feedback*"). Design/Builder shall have a non-exclusive, perpetual and irrevocable right to use, display, reproduce, modify, and distribute the Feedback (including any confidential information or intellectual property contained therein) in whole or part, including to analyze and fix the vulnerability, to create Patches or Updates for its Public Agencies, and to otherwise modify its Deliverables, in any manner without restrictions, and without any

obligation of attribution or compensation to Public Agency; provided, however, Design/Builder shall not publicly disclose Public Agency's name in connection with such use or the Feedback (unless Public Agency consents otherwise). By submitting Feedback, Public Agency represents and warrants to Design/Builder that Public Agency has all necessary rights in and to such Feedback and all information it contains, including to grant the rights to Design/Builder described herein, and that such Feedback does not infringe any proprietary or other rights of third parties or contain any unlawful information.

Section 8.10. Notices.

Section 8.11. General Requirements. Any and all demands and notices required or permitted to be given pursuant to this Agreement (each a "Notice") must be in writing and must be given or served in accordance with this Section 8.10.

Section 8.12. Methods of Delivery. Each Notice must be sent via: (i) personal delivery, with the name and signature of the recipient obtained upon delivery; (ii) registered or certified United States mail, with postage prepaid and return receipt requested; (iii) FedEx, U.P.S. or other reliable, private delivery service, with the name and signature of the recipient obtained upon delivery; or (iv) electronic mail, with the reference line indicating that it is a "Notice Pursuant to Agreement for Turnkey Design and Construction Services", with confirmation of transmission from the sender's machine or device retained in the sender's files (a copy of which shall be provided to the recipient upon request), and with the original Notice deposited for delivery pursuant to clauses (ii) or (iii) above within 12 hours after electronic transmission. Neither Party may unreasonably refuse to accept delivery of any Notice in an attempt to avoid the giving or service of the Notice, and any such refusal by a Party shall be deemed and construed as a material breach of such Party's obligations pursuant to this Agreement.

Section 8.13. Effect of Receipt. A Notice shall be deemed given or served only upon actual receipt by the addressee. In the case of electronic mail, "actual receipt" must be confirmed by a "Read Receipt" or other confirmation of receipt by the recipient. Notwithstanding the foregoing, if any Notice (including, without limitation, any Notice sent by electronic mail) is delivered after 4:00 p.m. on any weekday, on a weekend (Saturday or Sunday), on any federal or State of California holiday, or on any Public Agency furlough day mandated by the State of California or the Governing Body, the Notice shall be deemed to have been given or served as of 9:00a.m. on the next business day.

Section 8.14. Applicability of Notice Requirements. The requirements of this Section 8.10 shall not be deemed or construed to apply to: (i) communications between Public Agency and/or Design/Builder necessary for day-to-day administration of this Agreement or performance of the Project; or (ii) service of process in accordance with any Applicable Law or court rule.

Section 8.15. Contact Information; Changes. Notice must be addressed and delivered to a Party at the address set forth below, with attention to such Party's representative named below. A Party must give Notice, in accordance with this Section 8.10, of each change in such Party's address, person to whom attention should be directed, or e-mail address. If any such information applicable to a Party changes and such Party does not give Notice of such change, any subsequent Notices addressed and delivered based on such Party's prior contact information shall be deemed and construed to have been properly given or served in accordance with this Section 8.10, regardless of whether "actual receipt" has occurred.

Public Agency:
Silver Valley Unified School District
35320 Daggett-Yermo Road
Yermo, CA 92398
Attention: Jesse Najera

Design/Builder:
Schneider Electric Buildings Americas Inc.
1650 West Crosby Rd
Carrollton, TX 75006
Attention: Tammy Fulop

Section 8.16. Governing Law. This Agreement shall be governed by and interpreted in accordance with California law, regardless of any conflict-of-laws provisions applicable in California or any other jurisdiction.

Section 8.17. Dispute Resolution. To the extent allowed by Applicable Law, any controversy or claim arising out of or relating to this Agreement or the Contract Documents, or any breach thereof, shall be resolved by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration proceeding location shall be in the county in which the Project is located.

Section 8.18. Interpretation of Agreement.

Section 8.19. Fair and Reasonable Interpretations. Prior to execution and delivery of this Agreement, each Party has received, or had unqualified opportunities to receive, independent legal advice from its legal counsel with respect to the advisability of executing this Agreement and the meaning of the provisions herein. Therefore, the provisions of this Agreement shall be construed based on their fair and reasonable meaning, and not for or against any Party based on whether such Party or its legal counsel was primarily responsible for drafting this Agreement or any particular provision herein.

Section 8.20. Headings and Captions. The headings and captions set forth in this Agreement are for the convenience of the reader only and shall not be deemed or construed to establish, define or limit the meaning of any Article, Section or other provision herein.

Section 8.21. Applicable Law Deemed Included. Each and every provision required by any Applicable Law to be included in this Agreement is hereby deemed to be so included, and this Agreement shall be construed and enforced as if all such provisions are so included. If, for any reason, any provision required by any Applicable Law is not expressly included herein, or is not correctly included herein, then, upon request of either Public Agency or Design/Builder, the Parties shall amend this Agreement to include or incorporate, or to correctly include or incorporate, such provision.

Section 8.22. Severability. If any provision of this Agreement is determined to be invalid, illegal, or unenforceable as written, such provision shall be construed consistent with and to the fullest extent permitted under Applicable Law, and any such determination shall not affect or impair the validity, legality and enforceability of the remaining provisions.

Section 8.23. Entire Agreement. This Agreement, together with the Contract Documents, constitutes the entire understanding and agreement between the Parties pertaining to the performance by Design/Builder of the services required by this Agreement, and all prior and contemporaneous agreements, representations and

understandings of the Parties relating to such subject matter, whether oral or written, are hereby superseded and replaced.

Section 8.24. Modifications of Agreement. This Agreement may be amended or otherwise modified only by means of a written instrument duly approved, signed, and delivered by both Parties.

Section 8.25. Waiver. A waiver by a Party of any provision of this Agreement shall be binding only if the waiver is set forth in writing and has been duly approved and signed by the waiving Party. Unless so specified in the written waiver, a waiver by a Party of any provision of this Agreement shall not constitute a waiver of any other provision(s) herein, similar or not, and shall not be construed as a continuing waiver. Except as waived in accordance with this Section, a Party's failure to require performance of any requirement of this Agreement shall not, in any manner, affect the Party's right to enforce the same or any other provision of this Agreement at a later time.

Section 8.26. Successors and Assigns. Neither Party may assign this Agreement without the express written consent of the other Party, and any attempt to do so shall be null and void. Subject to the foregoing, this Agreement shall inure to the benefit of, and be binding on, the Parties' authorized successors and assigns.

Section 8.27. Third-Party Beneficiaries. The Parties have entered into this Agreement solely for their own purposes, and this Agreement shall not be deemed or construed to: (i) benefit any third party; (ii) create any right for any third party; or (iii) except as provided by law, provide a basis for any claim, demand, action or other proceeding by any third party.

Section 8.28. Agreement is Public Record. Subject to any legally permissible exceptions, this Agreement is a public record which Public Agency may disclose in accordance with California law.

Section 8.29. Execution of Agreement.

Section 8.30. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which, taken together, shall constitute one and the same instrument. Signature pages may be detached from counterpart originals and combined to physically form one or more copies of this Agreement having original signatures of both Parties.

Section 8.31. Due Authority of Signatories. Each person signing this Agreement represents and warrants that he or she has been duly authorized by appropriate action of the Party he or she represents to *execute*, and thereby bind such Party to, this Agreement.

In Witness Whereof, the Parties have executed this Agreement as evidenced by the signatures of their authorized representatives below.

Silver Valley Unified School District

Schneider Electric Buildings Americas, Inc.

By: _____

By: _____

Print Name: _____

Print Name: _____

Print Title: _____

Print Title: _____

Date Signed: _____

Date Signed: _____

Fed. Tax ID No: _____

Exhibit A
Scope of Work - Design Phase of the Project

1. Responsibilities

Public Agency Will:

- A. Provide Design/Builder with all such access, knowledge and history as may be relevant to Design/Builder's analysis and/or design, including, without limitation:
 - (i) access to Public Agency's Facilities, systems and equipment, including remote network access, as necessary or appropriate to facilitate Design/Builder's analysis and design (i.e. enabling Design/Builder to take equipment inventory, determine operating schedules, evaluate known operational deficiencies, perform an energy efficiency analysis, measure actual energy use, etc.);
 - (ii) access to key personnel to discuss operating requirements, maintenance practices, and other information relevant to Design/Builder's analysis;
 - (iii) information relating to any and all known or suspected deficiencies, defects and malfunctions of or affecting the Facilities, systems, equipment and components thereof;
 - (iv) information relating to any site conditions that should be considered in planning and executing the construction services;
 - (v) twenty-six (26) months of electric, gas, and water data, including utility billings on meters for all premises owned by Public Agency; and
 - (vi) access to copies or loans of such documentation as may be relevant to Design/Builder's analysis, including, as applicable and without limitation, Facility plans, equipment lists, and/or other utility invoices.
- B. Meet with Design/Builder to establish Project criteria and make Project decisions in a timely manner.
- C. Promptly inform Design/Builder if at any point Public Agency becomes aware of any portions of scope that will not be included or funding that will not be available for final Project implementation.

Design/Builder Will:

- A. Conduct a Project programming meeting, Facility walk-through(s) and personnel interview(s) to gain an understanding of Facility operations, concerns, needs, and desired performance criteria.
- B. Work with Public Agency to refine performance requirements, financial criteria, and Project scope.
- C. Provide Public Agency a water, energy, revenue, and cost savings analysis demonstrating the simple ROI effect of project finances and operations.
- D. Provide an energy analysis report sufficient to demonstrate that the anticipated cost to Public Agency of the recommended project developed will be less than the anticipated marginal cost to Public Agency of thermal, electrical, or other energy that would have been consumed by Public Agency in the absence of the Project in accordance with Government Code section 4217.10 *et seq.*
- E. Provide Public Agency with a Project Proposal setting forth the following:
 - (i) Proposed Scope of Construction Work
 - (ii) Proposed Preliminary Construction Schedule
 - (iii) Proposed lump-sum Construction Fee

2. Phases of Design

The Design Scope of Work shall consist of two phases: Conceptual Development (Up to Mid-Term Design Meeting) and Design Development (up to Design Completion Meeting).

A. Conceptual Development (Project Scoping)

- i. At the Mid-term meeting, Design/Builder shall demonstrate for Public Agency whether recommended improvement measures are viable and whether financial benefits can be derived by their implementation in an amount sufficient to cover costs associated with the Project.
- ii. Scope of work includes a description of the Energy Conservation Measures (ECM), Energy Generation Measures (EGM) and/or Facility Improvement Measures (FIM), calculation of energy and operational savings, and preliminary costs for the construction of the scope.

B. Design Development (Design Completion)

- (i) At the Design Completion Meeting, Design/Builder shall provide Public Agency with a Project Proposal setting forth:
 - A proposed final Scope of Construction Work (detailing any included ECMs, EGMs and/or FIMs);
 - A proposed Preliminary Construction Schedule;
 - The proposed Project Fee.

3. Facilities Included

The Design Services will be performed in Public Agency’s following facilities. Any additional facilities to be added in the future must be by mutual agreement between Public Agency and Design/Builder:

Facilities
Silver Valley High School - 35484 Daggett-Yermo Rd, Yermo, CA 92398

Exhibit B

Preliminary Schedule – Design Phase of the Project

Following is the preliminary schedule for the Design Phase. A firm development schedule will be developed and presented for acceptance by Public Agency once Design/Builder has discussed development requirements and timing with Public Agency.

Item	Target Schedule
Public Agency approves selection of Design/Builder and to move forward with Project at regularly scheduled Board Meeting.	December 14, 2021
Public Agency signs Agreement for Turnkey Design and Construction Energy Services authorizing Design/Builder to proceed with design services	December 15, 2021
Public Agency provides complete utility information, building plans, etc.	January 2022
Design/Builder and Public Agency conduct a Kick-Off Meeting.	January 2022
Mid-term Meeting (Preliminary scope of Work, budgetary costs, and budgetary savings).	TBD
Design Completion Meeting.	TBD
Public Agency and Design/Builder complete negotiations of construction services scope and pricing and iron out all details for the Board package.	TBD
Public Agency posts public notice 2 weeks prior to Board Meeting of approving going forward with the Construction Phase.	TBD
Public Agency approves resolution authorizing of Construction Amendment at regularly scheduled Board Meeting.	TBD
Construction Amendment is executed and serves as NTP allowing Design/Builder to proceed with the Construction Work.	TBD
A construction kick-off meeting is held to prepare for the Construction Phase.	TBD

EXHIBIT C
Design Fee

Design Fee:

The "Design Fee" shall be: \$27,000.