

OFFICE OF PUBLIC EDUCATION FACILITIES MODERNIZATION

**BRIDGING ARCHITECTURAL SERVICES
PHASE 1 ELEMENTARY SCHOOLS**

Solicitation #: GM-09-M-0915-FM

**Addendum No. 4
Issued: October 1, 2009**

This Addendum Number 04 is issued by e-mail on October 1, 2009. Except as modified hereby, the Request for Proposals (“RFP”) remains unmodified.

Item #1

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

Item #2

The bid date remains unchanged. Proposals are due by **Tuesday, October 6, 2009 at 5 pm EDT**. Proposals that are hand-delivered should be delivered to OPEFM’s new office space in RFK stadium, located through the Lot 4, Gate F entrance.

- End of Addendum No. 4 -

FORM OF CONTRACT

**AGREEMENT BETWEEN OWNER AND ARCHITECT FOR
BRIDGING ARCHITECTURAL SERVICES PHASE 1 ELEMENTARY
SCHOOLS**

BY AND BETWEEN

**THE OFFICE OF PUBLIC EDUCATION FACILITIES MODERNIZATION
AND**

[SELECTED OFFEROR]

**AGREEMENT BETWEEN OWNER AND ARCHITECT FOR
BRIDGING ARCHITECTURAL SERVICES PHASE 1 ELEMENTARY SCHOOLS**

THIS AGREEMENT (“Agreement”) is made as of the ___ day of October 2009, by and between the **DISTRICT OF COLUMBIA GOVERNMENT**, acting by and through its **OFFICE OF PUBLIC EDUCATION FACILITIES MODERNIZATION** (the “Owner” or the “Office”) and **[SELECTED OFFEROR]**, duly organized under the laws of **[INSERT STATE]**, and with a place of business at **[INSERT ADDRESS]** (the “Architect”).

WITNESSETH:

WHEREAS, the Office wishes to retain the Architect to develop a schematic design for the modernization of **[INSERT SCHOOL]** Elementary School (the “Project School”), located at **[ADDRESS]**, and also develop a phasing plan and provide related project support (the "Project");

WHEREAS, the Architect wishes to provide the services necessary to develop the schematic design, phasing plan and other related services as more fully described herein for the Project;

WHEREAS, the Office has retained the services of a Program Manager (the “Program Manager”) to advise it concerning the Project; and

WHEREAS, the Office desires that the Final Schematic Design and Phase 1 Description be completed no later than January 12, 2010.

NOW, THEREFORE, the Office and Architect, for the consideration set forth herein, mutually agree as follows.

ARTICLE 1
GENERAL PROVISIONS

Section 1.1 Relationship of Parties. The Architect accepts the relationship of trust and confidence established with the Office by this Agreement, and covenants with the Office to furnish the Architect’s reasonable skill and judgment and to cooperate with the Program Manager in furthering the interests of the Office. The Architect shall use its best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Office. The Office shall endeavor to promote harmony and cooperation among the Office, Architect/Engineer, Design-Builder, Program Manager, and other persons or entities employed by the Office for the Project.

Section 1.2 Project Description. As a general description, the modernization of the Project School will be conducted in three (3) phases over a period of years. The three (3) phases are generally divided as follow: (i) Phase I will involve modernization of Academic Components of the

school, which primarily include the classroom areas; (ii) Phase II will involve modernization of Support Components, which may include bathrooms, art and music rooms, gymnasiums, and health suites; and (iii) Phase III will involve modernization the school's Systems Components, including HVAC systems, plumbing systems and fixtures, electrical systems, the building's exterior envelopes, including roof and windows, as well as technology systems. The Architect shall develop a schematic design depicting the intended condition of the Project School after all three (3) of modernization are complete.

Section 1.3 Program Manager. At its discretion, the Office may hire a Program Manager (or "PM") to provide certain program management functions. The Program Manager shall, at all times, be acting solely for the benefit of the Office, not the Architect. The Program Manager shall not be authorized to modify any of the rights or obligations of the Office or the Architect pursuant to this Agreement, or to issue Change Orders or Change Directives.

Section 1.4 General Description of Architect's Duties. The Architect shall provide those services described in Articles 2 and 3, including those necessary to develop and submit any deliverables set forth therein. Generally, these duties include (i) development of a schematic design which is consistent with the Owner's Program, attached as **Exhibit A**, and that describes the intended final condition of the Project School, i.e. after all three (3) phases of the modernization are complete; (ii) development of a phasing plan which divides the modernization of the Project School into three phases as described in Section 1.2, above; and (iii) review of the various design submissions developed and submitted to the Office by the Design-Builder which is selected to progress and implement the Phase I aspect of the work so as to ensure that the proposed designs are consistent with the design intent reflected in the schematic design and the phasing of such work.

The services to be provided under Article 2 constitute the design phase services to be performed by the Architect (the "Design Phase Services"). The services to be provided under Article 3 constitute the construction phase services to be provided by the Architect (the "Construction Phase Services").

Section 1.5 Delivery Method. The Owner intends to use a Bridging Design/Build delivery method for this Project. The Architect understands and agrees that the Owner intends to engage a Design-Builder immediately after the completion of the schematic design and phasing submission. The Design-Builder will continue to develop the Architect's schematic design into design development documents and construction documents. The Architect will be precluded from working with the Design-Builder on this Project (i.e. all phases of the Project school's modernization).

Section 1.6 Schedule. The Architect shall provide the Design Phase Services and Construction Phase Services in accordance with the schedule set forth below.

Section 1.6.1 Design Phase Schedule. During the Design Phase, the Architect shall provide those services and deliverables set forth in Article 2 in accordance with the schedule set forth below:

- .1 Submission of Preliminary Concept Plan: November 13, 2009;
- .2 Submission of Final Concept Design: November 20, 2009;
- .3 Submission of Draft Schematic Design: December 18, 2009;
- .4 Submission of Draft Phasing Plan: January 4, 2010; and
- .5 Submission of Final Schematic and Phase 1 Description: January 12, 2010.

Section 1.6.2 Construction Phase Schedule. During the Design Phase, the Architect shall provide those services set forth in Sections 3.

Section 1.7 Owner's Representative. The Owner's representative for this Project shall be:

Allen Y. Lew
Executive Director
Office of Public Education Facilities Modernization
2400 East Capitol Street, SE
Washington, D.C. 20003
Phone: (202) 698-7762
Facsimile: (202) 698-7790

Although day-to-day communications with the Architect shall be routed through the Program Manager, only the individual specified in this Section 1.7 shall have the authority to alter the terms of this Agreement. Without limiting the generality of the foregoing, it is understood and agreed that the Program Manager shall not have the authority to increase the fee or the not-to-exceed amount established herein.

Section 1.8 Architect's Representative. The Architect representative for this Project shall be:

[INSERT NAME AND CONTACT INFO]

The Architect hereby represents and agrees that the representative specified in this Section 1.8 has the full legal authority to bind the Architect and to agree to changes to the terms of this Agreement.

ARTICLE 2 **DESIGN PHASE SERVICES**

Section 2.1 The Architect shall provide the professional services as set forth in this Agreement. The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project. The Architect shall review laws, codes, and regulations applicable to the Architect's services. The Architect shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project.

Section 2.1.1 Key Personnel. Attached as **Exhibit C** is a list of the key personnel and the role played by each that will be assigned by the Architect and its principal consultants to this Project. The Architect understands that the Owner selected the Architect based in large part on the key personnel proposed to staff this Project, and as such, the Architect agrees that the Architect will not be permitted to reassign any of the key personnel unless the Owner approves the proposed reassignment and the proposed replacement. In the event that any of the key personnel become unavailable to the work on this Project for reasons beyond the control of the Architect or its principal consultants (i.e. due to retirement, resignation, etc.), the Architect shall propose a substitute for any such individual and obtain the Owner's consent to such substitute.

Section 2.2 Except with the Owner's knowledge and consent, the Architect shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project.

Section 2.3 The Architect shall manage the Architect's services, consult with the Owner, research applicable design criteria, attend Project meetings, communicate with members of the Project team and report progress to the Owner. The Architect shall review the Owner's Program and other information furnished by the Owner, and shall review laws, codes, and regulations applicable to the Architect's services.

Section 2.4 The Architect shall coordinate its services with those services provided by the Owner and the Owner's consultants. The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and the Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information.

Section 2.5 Upon request of the Owner, the Architect shall make periodic presentations to explain the design of the Project to representatives of the Owner and to others in support of the Owner's efforts for the Project. The Architect understands and agrees that this obligation will require the Architect to participate in briefings of the affected Parent Teacher Association, neighbors, community organization, community leaders and District government officials as identified by Owner.

Section 2.6 Concept Design.

Section 2.6.1 The Architect shall develop a concept design for the Project School which is consistent with the Owner's Program and which shall present the condition of the Project School in its fully modernized condition after all three (3) phases of work. At a minimum, the concept design shall include a conceptual site plan and floor plan for the school.

Section 2.6.2 The Architect shall be required to meet with the Office's Program Manager within one (1) of its appointment in order to discuss the manner in which this project will proceed and the requirements applicable to the Project School. The Architect shall further be required to submit a preliminary concept plan to OPEFM's Program Manager no later than November 13, 2009. The Architect will also be required to meet with school personnel and other stakeholders to better understand the needs and requirements of the Project School.

Section 2.6.3 The Architect will also be required to inspect the existing school and to document the currently existing conditions.

Section 2.7 Schematic Design.

Section 2.7.1 Based on the concept design prepared by the Architect as well as written and oral feedback from Office and its Program Manager, the Architect shall develop a schematic design that meets the requirements of the Owner's Program. Such Schematic Design shall contain such detail as is typically required for schematic design under the standard AIA contract. At a minimum, the schematic design shall include the following:

- .1 site plan;
- .2 preliminary building plans showing adjacencies and room locations;
- .3 sections and elevations; and
- .4 description of the proposed HVAC systems.

Section 2.7.2 In addition to the services described in Section 2.4.1, above, the Architect shall prepare and submit to the Office the following deliverables. All such deliverables shall be subject to review and approval by the Office. The Architect shall be required to revise these documents to address concerns raised by the Office and/or other project stakeholders.

- .1 digital floor plans and site plan;
- .2 preliminary building elevations and sections;
- .3 plan-to-program comparison;
- .4 design narrative;
- .5 updated Project Budget and Schedule;
- .6 renderings; and
- .7 finishes package

Section 2.8 Phasing Plan.

Section 2.8.1 The Architect shall work with the Office and its Program Manager to divide the work contemplated in the schematic design into phases. In general, the phases shall correspond with the phases described in OPEFM's Master Facilities Plan and as outline in Section 1.2 above. In developing the phasing plan, the Architect must consider the Office's budget constraints as well as schedule issues. The phasing plan shall also give consideration to: (i) avoiding and/or minimizing to the extent possible and practical the need for rework and or inefficiencies that would occur in the subsequent phases of work; (ii) avoiding and/or minimizing to the extent possible and practical a "patchwork" of systems when all three phases have been completed; and (iii) the need to address certain critical public areas such as bathrooms and the main entrances in Phase 1.

Section 2.8.2 The A/E shall develop both a preliminary and final cost estimate of the construction cost of the work required by the schematic design. The preliminary cost estimate shall be submitted along with the draft schematic design submission. The final cost estimate shall be submitted within 2 weeks after the final phasing plan is developed.

ARTICLE 3
CONSTRUCTION PHASE SERVICES

Section 3.1 Upon review and approval of the Final Schematic Design and the Final Phasing Plan, the Office intends to procure a design-builder to advance and implement the design developed by the Architect. The Architect shall provide support to Office and its Program Manager as needed to engage and manage the design-builder. This may include, but shall not be limited to, assisting in the negotiation of the final scope to be included within the design-build agreements, reviewing designs submitted by the design-builder to verify that they are consistent with design intent reflected in the schematic design and the phasing of such work, and such other matters as may be requested by OPEFM.

Section 3.2 The Architect hereby acknowledges and agrees that it will not team with a design-builder who seeks to advance and implement the design for the Project School. The Architect will be permitted to team with builders for similar projects at schools other than the Project School.

ARTICLE 4
COMPENSATION

Section 4.1 Compensation For Design Phase Services. The Architect shall be paid a fixed fee of [INSERT AMOUNT] (\$NUMBER) for all Design Phase Services. Monthly payments shall be made to the Architect on the percentage complete basis.

Section 4.2 Compensation For Construction Phase Services. For Construction Phase Services, the Architect shall be reimbursed at the hourly rates set forth in **Exhibit B**. Such rates shall be fixed and not subject to further adjustment for the expected period of this Agreement. Compensation for such Construction Phase services shall be computed by multiplying the number of hours directly spent on the Project by the applicable hourly billing rate listed below. To the extent the Architect's principals or employees are required to work more than 40 hours a week, the Architect shall be entitled to adjust such rates to reflect the additional cost of overtime only to the extent that the Architect (i) is required by law or agreement to pay its principals or employees a higher hourly rate that would otherwise be the case; and (ii) the Architect does, in fact, pay such principals or employees a higher hourly rate.

Section 4.3 Compensation For Reimbursable Expenses. Reimbursable Expenses are in addition to compensation for Design and Construction Phase Services and include expenses incurred by the Architect and the Architect's consultants directly related to the Project. Such expenses shall be reimbursed without markup of any kind and records of Reimbursable Expenses and services performed on the basis of hourly rates shall be available to the Owner at mutually convenient times. Reimbursable expenses shall include the following:

- .1 Transportation and authorized out-of-town travel and subsistence, provided, however, that local transportation costs (i.e. taxis, parking, etc.) shall not be reimbursable;
- .2 Fees paid for securing approval of authorities having jurisdiction over the Project;
- .3 Reproductions, plots, standard form documents;
- .4 Postage, handling and delivery;
- .5 Expense of overtime work requiring higher than regular rates, if authorized in advance by the Owner, provided, however, that such expenses shall only be reimbursable to the extent that they were caused by the failure of the Owner to act within timeframes agreed to by the parties in advance and in writing;
- .6 Additional renderings, models, and mock-ups, requested by the Owner;
- .7 Any other similar expenditures directly related to the Project and reasonably incurred after first receiving written approval of the Owner.

Section 4.4 Retention. An amount equal to five percent of all fees (but not expenses) shall be withheld as retention from all progress payments that are due to the Architect. The Architect shall forfeit such retention if the Guaranteed Maximum Price for the Phase 1 work exceeds the estimated costs for that Phase by more than 5%.

Section 4.5 Payments. Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payments are due and payable upon presentation of the Architect's invoice. Amounts unpaid forty five (45) days after the invoice date shall bear interest at a rate of Wall Street Journal Prime plus one percent (1%).

Section 4.6 Payment Disputes. Disputes or questions regarding a portion of an invoice shall not be cause for withholding payment for the remaining portion of the invoice.

ARTICLE 5 **INSURANCE**

Section 5.1 Insurance. The Architect shall maintain the following insurance for the duration of this Agreement. If any of the requirements set forth below exceed the types and limits the Architect normally maintains, the Owner shall reimburse the Architect for any additional cost.

Section 5.1.1 Comprehensive General Liability with policy limits of not less than Two Million Dollars (\$2,000,000) for each occurrence and in the aggregate for bodily injury and property damage.

Section 5.1.2 Automobile Liability covering owned and rented vehicles operated by the Architect with policy limits of not less than Two Million Dollars (\$2,000,000) combined single limit and aggregate for bodily injury and property damage.

Section 5.1.3 The Architect may use umbrella or excess liability insurance to achieve the required coverage for Comprehensive General Liability and Automobile Liability, provided that such umbrella or excess insurance results in the same type of coverage as required for the individual policies.

Section 5.1.4 Workers' Compensation at statutory limits and Employers Liability with a policy limit of not less than One Million Dollars (\$1,000,000).

Section 5.1.5 Professional Liability covering the Architect's negligent acts, errors and omissions in its performance of professional services with policy limits of not less than Two Million Dollars (\$2,000,000) per claim and in the aggregate.

Section 5.1.6 The Architect shall provide to the Owner certificates of insurance evidencing compliance with the requirements in this Section 2.3. The certificates will show the Owner as an additional insured on the Comprehensive General Liability, Automobile Liability, umbrella or excess policies.

ARTICLE 6 **OWNERSHIP OF DOCUMENTS**

Section 6.1 Ownership of Documents. Regardless of whether the Project is completed, any Design Documents prepared by the Architect and the architectural and engineering consultants engaged by the Architect, any copies thereof furnished to the Contractor, and all other documents created in association with the Project shall become the sole property of the Owner upon full

payment of Architect's fees then due under this Agreement, and shall not to be used by the Architect, its subconsultants on other projects, or for additions to this Project outside the scope of the work, without the specific written consent of the Owner. However, the Owner expressly acknowledges and agrees that the documents to be provided by the Architect under this Agreement will contain innumerable design details, features and concepts including some from the Architect's library, which collectively form part of the design for the project, but which separately are and shall remain the sole and exclusive property of the Architect. These details are repetitive in nature, not Project specific, function rather than form-oriented, and were not developed for or identifiable with the Project. Nothing herein shall be construed as a limitation on the Architect's absolute right to re-use such component design details, features and concepts on other projects, in other contexts or for other clients.

The Owner shall be under no obligation to account to the Architect for any profits obtained by the Owner as a result of the Project, or the use of such drawings, specifications and other documents in connection with the Project. In the event that the Agreement is terminated prior to completion of the Project or the Architect is unable to complete this Project for any reason, the Owner shall have the right to use without the Architect's consent, and the Architect shall deliver to the Owner and/or its designee within two (2) calendar days after such termination or inability, all such drawings, specifications and other documents as well as design concepts and details in connection with the Project or necessary for the Owner's completion of this Project (including subsequent phases thereof), so long as the Owner has paid the Architect all fees then owed to the Architect under this Agreement. The Owner's rights hereunder shall extend to its successors and assigns and the Architect's obligation to deliver such drawings, specifications, and documents. Any other use shall be at the Owner's sole risk and without liability to the Architect or the Architect's consultants. Unless Owner fails hereunder to pay Architect therefor, Owner shall be deemed the owner of such drawings, specifications, and other documents and shall have and retain all rights therein. In the event Owner is adjudged to have failed hereunder to pay Architect for such drawings, specifications or other documents, ownership thereof, and all rights therein, shall revert to the Architect. This provision shall survive termination of this Agreement.

ARTICLE 7 **CLAIMS AND DISPUTES**

Section 7.1 Claims and Disputes.

Section 7.1.1 The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of this Article 7 within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section.

Section 7.1.2 To the extent damages are covered by property insurance, the Owner and Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, except such rights as they may have to the proceeds of such insurance as set forth in AIA Document A201–2007, General Conditions of the Contract for Construction. The Owner or the Architect, as appropriate, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

Section 7.1.3 The Architect shall indemnify and hold the Owner and the Owner's officers, agents and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement.

Section 7.1.4 The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

Section 7.2 **Mediation.**

Section 7.2.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation.

Section 7.2.2 The Owner and Architect shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint but, in such event, mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

Section 7.2.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Section 7.2.4 If the parties do not resolve a dispute through mediation pursuant to this Section 7.2, the method of binding dispute resolution shall be Arbitration.

Section 7.3 Arbitration.

Section 7.3.1 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration.

- .1** A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim, dispute or other matter in question would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim, dispute or other matter in question.

Section 7.3.2 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

Section 7.3.3 The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 8
TERMINATION OR SUSPENSION

Section 8.1 If the Owner fails to make payments to the Architect in accordance with this Agreement, and such failure continues for more than sixty (60) days, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, prior to suspending services, the Architect shall give seven days' written notice to the Owner during which the Owner shall have the opportunity to cure. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

Section 8.2 If the Owner suspends the Project for more than 30 consecutive days, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

Section 8.3 If the Owner suspends the Project for more than one (1) year for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days' written notice.

Section 8.4 The Owner may terminate this Agreement upon not less than seven days' written notice to the Architect for the Owner's convenience and without cause.

Section 8.5 In the event of termination not the fault of the Architect, the Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Section 8.6.

Section 8.6 Termination Expenses are in addition to compensation for the Architect's services and include expenses directly attributable to termination for which the Architect is not otherwise compensated.

Section 8.7 In the event Architect fails to perform any of its obligations hereunder, including the services, in the manner required hereby, subject to seven (7) calendar days notice and a right for Architect to cure, Owner shall be entitled to terminate this Agreement and upon such termination, Owner shall be entitled to recover from Architect or setoff against any sums due Architect, Owner's reasonable damages and costs of delay in replacing Architect with a different architect. Owner shall be entitled to withhold payment from Architect until such damages may be calculated. If it is ultimately determined by the parties or a court that Owner withheld payments unreasonably, Owner shall pay the amount owed to Architect with interest at the annual rate of Wall Street Journal prime plus one percent.

Section 8.8 In the event of termination or suspension, the Architect shall discontinue Work immediately upon written notice from the Owner. The Architect shall furnish to the Owner reproducible copies of all drawings, sketches, etc. and all specifications, reports, studies, analyses, and other electronic documents in approved format prepared by the Architect and his consultants, to the date of termination, whether or not termination is due to the fault of Architect, but only after Architect has received payment for all services performed in accordance with this Agreement.

ARTICLE 9 **MISCELLANEOUS PROVISIONS**

Section 9.1 This Agreement shall be governed by the laws of the District of Columbia.

Section 9.2 Terms in this Agreement shall have the same meaning as those in AIA Document A201–1997, General Conditions of the Contract for Construction to the extent such terms do not conflict with this modified AIA B103 Agreement between Owner and Architect.

Section 9.3 The Owner and Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns of such other party with respect to all covenants of this Agreement. The Architect shall assign this Agreement without the written consent of the Owner

Section 9.4 If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. The Architect shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.

Section 9.5 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

Section 9.6 Unless otherwise required in this Agreement, the Architect shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.

Section 9.7 The Architect shall have the right to include photographic or artistic representations of the design of the Project among the Architect’s promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations. However, the Architect’s materials shall not include the Owner’s confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner shall provide professional credit for the Architect in the Owner’s promotional materials for the Project.

Section 9.8 If the Architect or Owner receives information specifically designated by the other party as “confidential” or “business proprietary,” the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except to (1) its employees, (2) those who need to know the content of such information in order to perform services or construction solely and exclusively for the Project, or (3) its consultants and contractors whose contracts include similar restrictions on the use of confidential information.

Section 9.9 The Architect agrees to indemnify and hold the Owner and the Owner’s Representative harmless from and against any and all claims, liabilities, demands, losses, damages, costs, or expenses arising from its negligent performance of the Work.

Section 9.10 The Architect agrees to indemnify and hold the Owner and the Owner's Representative harmless from and against any and all claims, liabilities, demands, losses, damages, costs, or expenses arising from the failure to perform to agreements with third parties made pursuant to this Agreement.

Section 9.11 The Architect shall pay for and defend all such suits or claims arising out of the Work for infringement of any patent rights or copyrights and hold the Owner and Owner's Representative harmless from loss on account thereof.

Section 9.12 Confidentiality. The Architect shall maintain the confidentiality of information specifically designated as confidential by the Owner, unless withholding such information would violate the law, create the risk of significant harm to the public or prevent the Architect from establishing a claim or defense in an adjudicatory proceeding. The Architect shall require of the Architect's consultants similar agreements to maintain the confidentiality of information specifically designated as confidential by the Owner.

Section 9.13 Extent of Agreement. This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect.

ARTICLE 10 **GOVERNMENTAL PROVISIONS**

Section 10.1 Buy American Act Provision. The Architect shall not design or specify a proprietary product that does not comply with the provisions of the Buy American Act (41 U.S.C. § 10a). The Trade Agreements Act and the North American Free Trade Agreement (NAFTA) provide that designated country (as defined in FAR 25.401) and NAFTA country construction materials are exempted from application of the Buy American Act and are therefore acceptable hereunder. It is the Contractor's responsibility to insure compliance with the Buy American Act.

Section 10.2 False Claims Act. The Architect shall be governed by all laws and regulations prohibiting false or fraudulent statements and claims made to the government, including the prescriptions set forth in D.C. Code § 2-308.14.

Section 10.3 Retention of Records: Inspections and Audits.

Section 10.3.1 The Architect shall maintain books, records, documents and other evidence directly pertinent to performance under the Agreement in accordance with generally accepted professional practice and appropriate accounting procedures and practices consistently applied in effect on the date of execution of the Agreement.

Section 10.3.2 The Architect shall also maintain the financial information and data used in the preparation and support of the costing and cost summary submitted to the Owner and the required cost submissions in effect on the date of execution of the Owner.

Section 10.3.3 Owner, the District of Columbia government, the Comptroller General of the United States, the U.S. Department of Labor and any of their authorized representatives shall have access to the books, records, documents and other evidence held, owned or maintained by the Architect for the purpose of inspection, audit and copying during normal business hours and upon advance written notice to the Architect. The Architect shall provide proper facilities for such access and inspection.

Section 10.3.4 The Architect agrees to include the wording of this Section 10.3 in all its subcontracts in excess of five thousand dollars (\$5,000.00) that directly relate to Project performance.

Section 10.3.5 Audits conducted pursuant to this Section will be in accordance with generally accepted auditing standards with the results prepared in accordance with generally accepted accounting principles and established procedures and guidelines of the applicable reviewing or audit agency.

Section 10.3.6 The Architect agrees to the disclosure of all information and reports, resulting from access to records, to any authorized representative of the Owner. Where the audit concerns the Architect, the auditing agency will afford the Architect an opportunity for an audit exit conference and an opportunity to comment on the pertinent portions of the draft audit report. The final audit report will include the written comments, if any, of the audited parties.

Section 10.3.7 The Architect shall preserve all records described herein from the effective date of the Agreement completion and for a period of seven (7) years after a final settlement. In addition, those records which relate to any dispute, appeal or litigation, or the settlement of claims arising out of such performance, or costs or items to which an audit exception has been taken, shall be maintained and made available until seven (7) years after the date of resolution of such dispute, appeal, litigation, claim or exception.

Section 10.4 Gratuities and Owners Not to Benefit Provisions.

Section 10.4.1 If it is found, after notice and hearing, by the Owner that gratuities (in the form of entertainment, gifts, payment, offers of employment or otherwise) were offered or given by the Architect, or any agent or representative of the Architect, to any official, employee or agent of the Owner or the District with a view toward securing the Agreement or any other contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of the Contract, the Owner may, by written notice to the Architect,

terminate the right of the Architect to proceed under the Agreement and may pursue such other rights and remedies provided by law and under the Contract.

Section 10.4.2 In the event the Agreement is terminated as provided in Section 10.4.1, the Owner shall be entitled:

- .1 to pursue the same remedies against the Architect as it could pursue in the event of a breach of the Agreement by the Architect; and
- .2 as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Owner) which shall be not less than ten times the costs incurred by the Architect in providing any such gratuities to any such Owner or employee.

Section 10.4.3 No member of, nor delegate to Congress, Mayor or City Council Member, nor Owner nor employee of the District, nor Owner nor employee of the Owner shall be admitted to any share or part of the Agreement or to any benefit that may arise therefrom, and all agreements entered into by the Contracting Owner of the Owner in which he or any Owner or employee of the Owner shall be personally interested as well as all agreements made by the Owner in which the Mayor or City Council Member or Owner or employee of the District shall be personally interested shall be void and no payments shall be made on any such contracts by the Owner or by any Owner thereof; but this provision shall not be construed or extend to the agreement if the share of or benefit to the member of, or delegate to Congress, Mayor or City Council Member, or Owner or employee of the District is de minimis.

Section 10.5 Ethical Standards For Owner's Employees And Former Employees. The Owner expects the Architect to observe the highest ethical standards and to comply with all applicable law, rules, and regulations governing ethical conduct or conflicts of interest. Neither the Architect, nor any person associated with the Architect, shall provide (or seek reimbursement for) any gift, gratuity, favor, entertainment, loan or other thing of value to any employee of the District or the Owner not in conformity with applicable law, rules or regulations. The Architect shall not engage the services of any person or persons in the employment of the Owner or the District for any Work required, contemplated or performed under the Contract. The Architect may not assign to any former Owner or District employee or agent who has joined the Architect's firm any matter on which the former employee, while in the employ of the Owner, had material or substantial involvement in the matter. The Architect may request a waiver to permit the assignment of such matters to former Owner personnel on a case-by-case basis. The Architect shall include in every subcontract a provision substantially similar to this section so that such provisions shall be binding upon each Architect or vendor.

Section 10.6 Anti-Deficiency Act. The Owner's obligations and responsibilities under the terms of the Agreement are and shall remain subject to the provisions of (i) the federal Anti-

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

ARTICLE 11 **ECONOMIC PROVISIONS**

Section 11.1 LSDBE Utilization.

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

Section 11.1.2 The Architect has developed an LSDBE Utilization Plan that is attached hereto as **Exhibit D**. The Architect shall comply with the terms of the LSDBE Utilization Plan in making purchases and administering its Subconsultants and Supply Agreements.

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

Section 11.2 Equal Employment Opportunity and Hiring of District Residents.

Section 11.2.1 The Architect shall comply with applicable laws, regulations regarding equal employment opportunity and affirmative action programs.

Section 11.2.2 The Architect shall ensure that at least fifty-one percent (51%) of the Architect's Team and every subconsultant's and subcontractor's employees hired after the

effective date of the Contract, or after such subconsultant or subcontractor enters into a contract with the Architect, to work on the Project shall be residents of the District of Columbia. This percentage shall be applied in the aggregate, and not trade by trade.

Section 11.2.3 Fifty percent (50%) of all apprentices for the Project must be District residents.

Section 11.3 First Source Agreement.

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

Section 11.3.1 The Architect and its constituent entities shall comply with subchapter III of Chapter 11 Title 1, and subchapter II of Chapter 11 of Title 1 of the D.C. Code, and all successor acts thereto and the rules and regulations promulgated thereunder. The Contractor and all member firms and Subcontractors shall execute a First Source Agreement with the District of Columbia Department of Employment Services (“DOES”) prior to beginning Work at the Project site.

Section 11.3.2 The Architect shall maintain detailed records relating to the general hiring of District of Columbia and community residents.

Section 11.3.3 The Architect shall be responsible for: (i) including the provisions of this Section 2.10.9 in all subcontracts; (ii) collecting the information required in this Section 2.10.9 from its Subcontractors; and (iii) providing the information collected from its Subcontractors in the reports required to be submitted by the Architect pursuant to Section 2.10.3.

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

**OFFICE OF PUBLIC EDUCATION FACILITIES
MODERNIZATION**, an agency within the executive
branch of the Government of the
District of Columbia

By: _____
Name: Allen Y. Lew
Title: Chief Contracting Officer

[INSERT COMPANY NAME]

By: _____
Name:
Its:

DRAFT