

Comprehensive Agreement

This **COMPREHENSIVE AGREEMENT (“Agreement”)**, dated **November 12, 2019** for identification purposes, but effective the last date signed below, by and between the following parties, for services in connection with the Project identified below.

OWNER:

School Board of the City of Harrisonburg, Virginia
One Court Square
Harrisonburg VA 22801

DESIGN-BUILDER:

Nielsen Builders, Inc.
3588 Early Road
Harrisonburg, VA 22801

Class A License No. 2701002224
Commercial Building / Residential Building
License Expiration Date – December 31, 2020
(subject to renewal)

PROJECT:

New Second Harrisonburg High School

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder (also referred to as “Contractor”) agree as set forth herein.

Article 1 **Scope of Work**

1.1 Design-Builder’s Work. Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents that are described below. Owner and Design-Builder acknowledge that they are parties to a Standard Form of Preliminary Agreement Between Owner and Design-Builder (the “Interim Agreement”) pursuant to which 60% Design Documents were prepared by Design-Builder based on Owner’s Project Criteria. In addition, Project Specifications were developed, such specifications being set forth in a Project Manual dated October 2, 2019 (identified as the “60% Submission”) as well as other documents developed from the Interim Agreement. Under this Agreement, Design-Builder will complete the 60% Design Documents, and Design-Builder will provide construction services to complete the Project as contemplated by the Contract Documents. The Work to be performed by Design-Builder under this Agreement includes without limitation the following: (i) site preparation for construction, including site design; and (ii) building construction, including building design. In addition, certain road improvements may be included at Owner’s option as an add-on alternate pursuant to an Addendum to this Agreement described below.

1.2 Site Work. In addition to all other terms and conditions set forth in the Contract Documents, site work performed by Design-Builder is subject to the following conditions, including with respect to road improvements if Owner opts to accept as an add-on alternate:

1.2.1 Geotechnical Services. Pursuant to a contract with Owner, Froehling & Robertson, Inc. performed certain geotechnical services to explore, test and analyze field and subsurface conditions at the Site. Owner has provided to Design-Builder the written reports generated pursuant to the geotechnical services contract. Design-Builder has interpreted and planned site design after consideration of the results of the geotechnical studies in a manner that accommodates site conditions reflected in the reports.

1.2.2 Other Reports. Design-Builder will review any existing reports regarding the Site, including without limitation topographic and boundary surveys, water surveys, wetlands studies, sewage disposal surveys, and drainage determinations. Design-Builder will determine what, if any, additional studies, and reports are required for the Site and will obtain any such additional studies and/or reports as additional services under this Agreement on mutually agreed upon terms. Design-Builder may recommend additional studies based upon the condition of the Site and, only after securing approval from Owner, will obtain any such additional studies or reports. Design-Builder will plan Site design and conduct Site development in accordance with the requirements, recommendations, and conditions reflected in this Agreement.

1.2.3 Reliance on Reports. Design-Builder shall be entitled to rely on all reports provided by Owner concerning site conditions.

1.2.4 Site Design. Design-Builder will manage site design for the Project and will be responsible for the professional quality, technical accuracy, and coordination of all designs, drawings, specifications, and other professional work product provided by Design-Builder for the Project. Site design shall include, but not be limited to, obtaining engineering services; preparing site plans; securing any required permits and approval for any activities on the Site such as clearing and grading; and securing any required permits and approval for storm water management, utilities, curb and gutter, and landscaping. Design-Builder, its Subcontractors and its Sub-subcontractors, may enter the Site and take all actions reasonably necessary to perform the Work contemplated by this Agreement. Design-Builder shall be responsible for ensuring that any Site design and development is planned and completed in accordance with the requirements of this Agreement, and all applicable laws and regulations, whether federal, state or local, and for ensuring that the Site is ready for construction in accordance with this Agreement.

1.2.5 Site Plan Review. Owner shall review and approve in advance the Site plan and any changes thereto. Design-Builder shall obtain all permits, reviews, and approvals for the Project, including, but not limited to, those required for Site work, construction, and occupancy. Owner will provide its authorization or signature as Owner

when required and will cooperate in Design-Builder's efforts to secure such permits, reviews, and approvals.

1.2.6 Site Work and Preparation of the Building Pad. Preparation of the Site, including, but not limited to, grading and filling, shall be performed in conformance with industry standards and as dictated or recommended based upon the Site conditions as reflected in any studies obtained or recommended under this Agreement.

1.3 Design Work and Construction Services. In addition to all other terms and conditions set forth in the Contract Documents, design work and construction services performed by Design-Builder are subject to the following conditions:

1.3.1 Approval of Plans and Changes to Design. Owner shall review and approve in advance the plans and specifications and any changes thereto. No material change of any scope, program, or amenities reflected in design plans and specifications prepared pursuant to this Agreement shall be effective unless such change is specifically brought to Owner's attention in writing and Owner agrees in writing to such change.

1.3.2 Staffing. Within fourteen (14) days of execution of this Agreement, Design-Builder shall submit to Owner a management staff plan for construction of the Project, together with the names, qualifications and years of management service of each such management staff member. Owner may, within fourteen (14) days of receipt of the management staff plan, object to any staff member included on the plan. If Owner objects to any such staff member, Design-Builder shall substitute staff members who are acceptable to Owner. If management staff changes during the course of the Project, Design-Builder shall notify Owner in writing within fourteen (14) days of any such change and Owner shall have the right to object to any substituted staff member within fourteen (14) days of its receipt of the notification of management staff changes. Owner shall not unreasonably object to the management staff members or any proposed change thereto.

Article 2 **Contract Documents**

2.1 The Contract Documents are comprised of the following:

2.1.1 All written modifications, amendments, minor changes and Change Orders to this Agreement issued in accordance with the *General Conditions of Contract Between Owner and Design-Builder* (being a revised version of DBIA Document No. 535, 2010 Edition) ("General Conditions of Contract");

2.1.2 This Agreement, including all exhibits and attachments, executed by Owner and Design-Builder;

2.1.3 The General Conditions of Contract;

2.1.4 Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract.

2.1.5 Those portions of documents developed from the Interim Agreement which contain the plans and specifications for the Project, including the following: (i) 60% Design Documents, a list of which, marked **Exhibit 1**, is attached hereto; (ii) Specifications contained in the Project Manual (60% Submission) dated October 2, 2019; (iii) Food Service Specifications dated September 27, 2019; (iv) Food Service Cut Sheets; (v) GMP Bid Manual dated October 2, 2019; (vi) three Addenda to specifications, dated October 16, 2019, October 22, 2019, and undated; (vii) Design-Builder's Guaranteed Maximum Price Proposal dated November 5, 2019; (viii) List of Qualifications and Exclusions, marked **Exhibit 2**, which is attached hereto; (ix) Allowance Schedule, referenced below; (x) Owner's Permit List, marked **Exhibit 3**, which is attached hereto; and (xi) Projected Billing Schedule, referenced below.

2.2 Conflicts in Contract Document. In the event of conflicts in any terms or conditions set forth in the Contract Documents, the terms and conditions of this Agreement, including mutually agreed changes thereto, supersede those in all other Contract Documents, and the terms and conditions of the General Conditions of Contract supersede those of all Contract Documents except for this Agreement. Unexecuted contracts that are part of any Contract Documents, such as the Project Manual, are not part of the Contract Documents.

Article 3 **Interpretation and Intent**

3.1 Design-Builder and Owner, prior to execution of this Agreement, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of this Agreement.

3.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Times for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof. Conflicts existing within Section 2.1.2 shall be resolved by giving precedence first to the Deviation List, if any, then the Owner's Project Criteria, and then the Design-Builder's Proposal.

3.3 Terms, words, and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

Terms, words, and phrases that are not defined shall be given their customary meaning with the construction industry for the location of the Project.

3.4 If Owner's Project Criteria contain design specifications: (a) Design-Builder shall be entitled to reasonably rely on the accuracy of the information represented in such design specifications and their compatibility with other information set forth in Owner's Project Criteria, including any performance specifications; and (b) Design-Builder shall be entitled to an equitable adjustment in the Contract Price and/or Contract Times to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification.

3.5 The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. With respect to the matters addressed in the Contract Documents, no oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

Article 4 **Ownership of Work Product**

4.1 Work Product. All drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement ("Work Product") are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including, but not limited to, any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in Sections 4.2 through 4.3 below.

4.2 Owner's Limited License Upon Project Completion and Payment in Full to Design-Builder. Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder shall be deemed to have granted Owner and its successors in interest a limited license to use the Work Product in connection with occupancy and use of the Project, conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier.

4.3 Owner's Limited License upon Termination prior to Final Completion. If this Agreement is terminated for any reason prior to Final Completion, Design-Builder shall be deemed to have granted Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier.
In the event of any dispute regarding amounts owed to Design-Builder through the date

of termination, Owner may use the Work Product, subject to the conditions stated herein, pending resolution of the dispute.

Article 5 **Contract Time**

5.1 Date of Commencement. The Work shall commence within five (5) days of full execution of this Agreement or upon Design-Builder's actual receipt of the site permit, whichever is later.

5.2 Substantial Completion and Final Completion.

5.2.1 Substantial Completion of the entire Work shall be achieved no later than **June 15, 2022** ("Scheduled Substantial Completion Date"), subject to adjustments expressly allowed under the Contract Documents. The parties acknowledge that Substantial Completion of the school building may occur prior to completion of the road improvements, whether such road improvement work is performed by Design-Builder under the Road Improvements Addendum (see Section 6.7, below) or by others. If the road improvements are performed by Design-Builder, then the failure to complete the road work by the Substantial Completion Date shall not give rise to any liquidated damages (see Section 5.4, below) provided that Owner has a Certificate of Temporary Occupancy for the school building by June 15, 2022, and provided that a Certificate of Occupancy is issued on or before **August 1, 2022**. In addition, Design-Builder will be entitled to an early completion bonus (see Section 5.5, below) provided that Owner has a Certificate of Temporary Occupancy for the school building by June 15, 2022, and provided that a Certificate of Occupancy is issued on or before **August 1, 2022**. In no event will equitable adjustments to the Substantial Completion Date for the road work entitle Design-Builder to an extension of the Substantial Completion Date for the school building.

5.2.2 Interim milestones and/or Substantial Completion of identified portions of the Work shall be achieved as generally set forth in the Project Schedule to be provided by Design-Builder to Owner within thirty (30) days of the effective date of this Agreement. Design-Builder shall include in the Project Schedule sufficient allowance of time for permitting, reviews, and approvals as is required in the normal course for similar projects. Design-Builder will use its best efforts to secure expedited review and approval by the City, Owner, and any other governmental entity of applications made by Design-Builder for permits, reviews, and approvals. If, despite Design-Builder's diligent and timely efforts, Design-Builder is delayed in the Project Schedule due to a delay in securing required permits, reviews, or approvals and such delay is due to circumstances not reasonably within Design-Builder's control, Design-Builder may request from the Owner an equitable adjustment of the dates and timeframes in the Project Schedule, such adjustment not to be unreasonably withheld by Owner.

5.2.3 Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.7 of the General Conditions of Contract.

5.2.4 All of the dates set forth in this Article 5 (collectively the "Contract Times") shall be subject to adjustment in accordance with the Contract Documents, including those set forth in the General Conditions of Contract.

5.3 Time is of the Essence. Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

5.4 Liquidated Damages. Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, as it may be adjusted under this Agreement, Designer-Builder shall pay Owner Two Thousand Dollars (**\$2,000.00**) per day as liquidated damages for each day that Substantial Completion extends beyond the Scheduled Substantial Completion Date.

5.5 Limitation on Delay Damages. Any liquidated damages assessed pursuant to this Agreement shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature incurred by Owner which are occasioned by any delay in attaining the Scheduled Substantial Completion Date, as it may be adjusted under this Agreement. Further, it is expressly understood and agreed that delay damages are limited by Article 8.2 of the General Conditions of Contract.

5.6 Early Completion Bonus. If Substantial Completion is attained on or before the Schedule Substantial Completion Date, Owner shall pay Design-Builder at the time of Final Payment under Section 7.3 hereof an early completion bonus of Two Thousand Dollars (**\$2,000.00**) per day for each day that Substantial Completion is attained earlier than the Bonus Date, limited to a total amount of \$50,000.00 (such amount being part of Owner's Contingency identified in the soft costs on the Guaranteed Maximum Pricing Summary referenced in the following article).

Article 6 **Contract Price**

6.1 Contract Price. Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of **\$83,905,369.50** ("Contract Price"), subject to adjustments made in accordance with the General Conditions of Contract and this Comprehensive Agreement, including the Design and Construction Contingency and Allowances defined below. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer, and other taxes mandated by applicable Legal Requirements. The Contract Price is the

Guaranteed Maximum Price set forth in Design-Builder's GMP Proposal dated November 5, 2019, which is **\$87,240,574.50**, less the amount already paid by Owner to Design-Builder under the Interim Agreement, such amount being **\$3,335,206.00**. The Guaranteed Maximum Price does not include Owner's "soft costs" or road improvements that are shown on the Guaranteed Maximum Pricing summary, marked **Exhibit 4**, which is attached hereto. Owner, at its option, may add the road improvements as an alternate, as set forth below.

6.2 Design and Construction Contingency.

6.2.1 The Contract Price includes a Design and Construction Contingency ("Contingency") in the amount of **\$900,940.00**. The Contingency is available for Design-Builder's exclusive use for unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) escalation of materials; (d) correction of defective, damaged or nonconforming Work, design errors or omissions, however caused; (e) Subcontractor defaults; (f) errors in estimating or procurement; or (g) those events under Section 8.2.2 of the General Conditions of Contract that result in an extension of the Contract Times, but do not result in an increase in the Contract Price

6.2.2 The Contingency is not available to Owner for any reason, including, but not limited to, changes in scope or any other item which would enable Design-Builder to increase the contract value under the Contract Documents.

6.2.3 Design-Builder shall provide Owner notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status report required by Section 2.1.2 of the General Conditions of Contract an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design-Builder agrees that with respect to any expenditure from the Contingency relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently reimbursed for said costs, then said recovery will be credited back to the Contingency.

6.2.4 Design-Builder's Project Manager will manage Design and Construction Contingency usage with oversight by Owner's representative. At Final Completion, any remaining Design and Construction Contingency will be considered Shared Savings, defined below. Design-Builder assumes the risk that the Design and Construction Contingency will be insufficient to cover the unanticipated Subcontractor construction costs that result from completion of the drawings.

6.3 Shared Savings. "Shared Savings" means the amount of Design and Construction Contingency remaining after Final Completion. No later than thirty (30) days after Final Completion, Shared Savings shall be divided sixty percent (60%) to

Owner and forty percent (40%) to Design-Builder.

6.4 Guaranteed Maximum Price. The Guarantee Maximum Price (“GMP”) shall not exceed the amount indicated above except to the extent adjusted pursuant to the terms of this Agreement. The amounts paid by Owner to Design-Builder under the Interim Agreement and this Agreement are credited to the GMP.

6.5 Markups for Changes. If the Contract Price requires an adjustment due to changes in the Work, and the cost of such changes is determined under Sections 9.4.1.3 or 9.4.1.4 of the General Conditions of Contract, the parties agree that the markup for reasonable overhead and profit shall be as follows:

a. If a Subcontractor does all or part of the changed Work, the Subcontractor’s markup for overhead and profit of the Work it performs shall be a maximum of fifteen percent (15%).

b. If a Sub-Subcontractor at any tier does all or part of the changed Work, the Sub-subcontractor’s markup of that Work shall be a maximum of fifteen percent (15%). The markup of a sub-subcontractor’s Work by all intervening tiers of Subcontractors shall not exceed a total of ten percent (10%).

c. If work is performed by Design-Builder’s own forces, mark-up of that Work shall be a maximum of fifteen percent (15%).

d. If work is performed by Subcontractor, Design-Builder’s mark-up of that Work shall be a maximum of ten percent (10%).

6.6 Allowance Items and Allowance Values.

6.6.1 Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the Allowance Schedule, marked **Exhibit 5**, which is attached hereto and incorporated herein by reference.

6.6.2 Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

6.6.3 No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner. Owner agrees that if Design-Builder is not provided written authorization to proceed on an Allowance Item by the date set forth in the Project schedule, due to no fault of Design-Builder, Design-Builder may be entitled to an equitable adjustment of the Contract Times and Contract Price.

6.6.4 The Allowance Value for an Allowance Item includes the direct cost of labor, materials, equipment, transportation, taxes, and insurance associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and general conditions costs, overhead and fees, are deemed to be included in the original Contract Price, and are not subject to adjustment, regardless of the actual amount of the Allowance Item.

6.6.5 Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.3.4. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

6.7 Road Improvements Alternate. Design-Builder has priced Road Improvements as an alternate that Owner may elect to include in the Scope of the Work. The additional cost for the Road Improvements is **\$4,932,293.00**, which amount will be added to the Contract Price if the Owner elects to accept the alternate. The Scope of Work associated with the Road Improvement, as well as the plans and specifications, are set forth in the Road Improvements Addendum, marked **Exhibit 6**, which is attached hereto.

6.8 Rock and Unsuitable Materials. The Site is classified, it being understood that rock is present. Owner has included in its soft costs **\$1,300,000.00** to address anticipated additional costs associated with rock excavation and removal of unsuitable materials. Rock and unsuitable materials encountered at the Site within the limits of excavation will be addressed pursuant to change orders based on unit prices contained in the Qualifications. Before proceeding with any rock excavation or removal of unsuitable soils, Design-Builder shall provide an estimated cost to Owner so that Owner may assess whether changes to the plans or Scope of the Work may be made in lieu of incurring the cost. For purposes of this Agreement, "rock excavation" and "unsuitable materials" are defined as follows:

6.8.1 Rock Excavation. "Rock Excavation" means removal of rock that cannot be dislodged by a Caterpillar Model No. D-8N, heavy duty track-type tractor, or with a Caterpillar model 336 excavator with 36" bucket. Rock excavation includes up to 6 inches over-excavation below the required excavation depth. Excavated rock shall be quantified by measuring the volume of removed rock. This definition of rock does not include materials such as hardpan, loose rock, concrete or other materials that can be removed by means other than drilling, blasting and pneumatic hammer.

6.8.2 Trench Rock. Trench rock shall be defined as material encountered in trench excavation that cannot be dislodged by a Caterpillar Model 336 excavator equipped with a 36-inch-wide bucket. Trench rock excavation includes up to 6 inches over-excavation below the required excavation depth. Rock shall be quantified by measuring the extent of rock in the trench, not by measuring the volume of removed rock. This definition of trench rock does not include materials such as hardpan, loose

rock, concrete or other materials that can be removed by means other than drilling, blasting and pneumatic hammer.

6.8.3 Unsuitable Materials. “Unsuitable Materials” shall be defined as material above and below subgrade elevation that exhibit excessive pumping (due to excessive moisture or classification of soil) that does not meet density requirements for fill in structural and non structural areas due to unsatisfactory material as determined by Owner’s Geotechnical Engineer.

Article 7 **Procedure for Payment**

7.1 Progress Payments.

7.1.1 Design-Builder shall submit to Owner on the first day of each month, beginning with the first month after the Date of Commencement, Design-Builder’s Application for Payment in accordance with Article 6 of the General Conditions of Contract. Amounts due shall be based on a Draw Schedule to be prepared by Design-Builder based on the Projected Billing Statement, marked **Exhibit 7**, which is attached hereto, and the Schedule of Values to be provided by Design-Builder pursuant to Article 6 of the General Conditions of Contract. The Draw Schedule will be a guide, but the Project will be billed based on Work actually completed that is identified in each Application for Payment, less retainage and other amounts allowed to be withheld under this Agreement.

7.1.2 Subject to appropriation and availability of funds, as set forth in this Agreement, Owner shall make payment within thirty (30) days after Owner’s receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.

7.2 Retainage on Progress Payments.

7.2.1 Owner will retain five percent (5.0%) of each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional retention amounts from Design-Builder’s subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.

7.2.2 Within fifteen (15) days after Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to Section 6.6 of the General Conditions of Contract, Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to (a) the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion, and (b) all other amounts Owner is entitled to withhold pursuant to Section 6.3 of the General Conditions of Contract.

7.3 Final Payment. Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment within thirty (30) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.2 of the General Conditions of Contract.

7.4 Interest. Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing five (5) days after payment is due at the legal rate of interest, which is currently an annual rate of six percent (6.0%).

7.5 Record Keeping and Finance Controls. With respect to changes in the Work performed on a cost basis by Design-Builder pursuant to the Contract Documents, Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access to, and the right to audit from time-to-time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to changes in the Work performed on a cost basis in accordance with the Contract Documents, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by the Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, with the composition of such multiplier or markup not being subject to audit.

Article 8

Termination for Convenience

8.1 Upon ten (10) days' written notice to Design-Builder, Owner may, for its convenience and without cause, elect to terminate this Agreement. In such event, Owner shall pay Design-Builder for the following:

8.1.1 All Work executed and for proven loss, cost, and expense in connection with the Work;

8.1.2 The reasonable costs and expenses attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with Subcontractors and Design Consultants.

8.1.3 The fair and reasonable sums for overhead and profit on the sum of items 8.1.1 and 8.1.2, but only to the extent not already included in such sum.

Article 9
Representatives of the Parties

9.1 Owner's Representatives.

9.1.1 Owner designates the individual listed below as its Senior Representative ("Owner's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract:

Dr. Michael G. Richards, Superintendent
Harrisonburg City Public Schools
One Court Square
Harrisonburg, Virginia 22801
mrichards@harrisonburg.k12.va.us
(540) 434-9916

9.1.2 Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract:

Craig D. Mackail, Chief Operating Officer
Harrisonburg City Public Schools
One Court Square
Harrisonburg, Virginia 22801
cmackail@harrisonburg.k12.va.us
(540) 437-3322

9.2 Design-Builder's Representatives.

9.2.1 Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract:

Tony Biller
Nielsen Builders, Inc.
3588 Early Road
Harrisonburg, VA 22801
tbiller@nielsen-inc.com
540-434-7376

9.2.2 Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract:

Jacob Hull

Nielsen Builders, Inc.
3588 Early Road
Harrisonburg, VA 22801
jhull@nielsen-inc.com
540-434-7376

Article 10 **Bonds and Insurance**

10.1 Design-Builder's Insurance. Design-Builder shall maintain the following insurance at all times when performing services under the Contract Documents:

- a. Workers' Compensation: Coverage and limit required by applicable law.
- b. Automobile Liability: Bodily injury and property damage insurance shall have limits of at least \$1,000,000 combined single limits.
- c. Comprehensive General Liability: Bodily injury liability insurance shall have limits of at least \$2,000,000 per occurrence. Property damage liability insurance shall have limits of at least \$2,000,000 per occurrence.
- d. Umbrella or Excess liability coverage with a minimum single limit of \$10,000,000.00 supplementing the Comprehensive General Liability and Automobile Liability coverage.
- e. Professional Liability: Minimum of \$1,000,000 errors and omissions per occurrence and \$2,000,000 aggregate. In addition, and any other design professional providing design services on behalf of, under contract with, or in connection with Design-Builder, shall be required to maintain professional liability insurance for claims arising from their negligent acts, errors and/or omissions in the performance of design services pursuant to the Agreement and add Design-Builder as an additional insured. The minimum coverage limits shall be \$1,000,000 per occurrence and \$2,000,000 aggregate.
- f. Property insurance, commonly referred to as "Builder's Risk Insurance," upon the entire Project to the full insurable value of the Project, including professional fees, overtime premiums and all other expenses incurred to replace or repair the insured property. The property insurance obtained by Design-Builder shall be the broadest coverage commercially available, and shall include as additional insureds the interests of Owner, Design-Builder, Design Consultants, and Subcontractors of any tier. Such insurance shall include, but not be limited to, the perils of fire and extended coverage, theft, vandalism, malicious mischief, collapse, flood, earthquake, debris removal and other perils or causes of loss as called for in the Contract Documents. The property insurance shall include physical loss or damage to the Work, including materials and equipment in transit, at the Site or at another location as may be indicated in Design-Builder's Application for Payment and approved by Owner. Design-Builder is responsible for the payment of any deductibles under the property insurance described herein.

All of the foregoing insurance shall be maintained in accordance with Article 5 of the General Conditions of Contract.

10.2 Owner's Insurance. Owner shall maintain the following insurance through Final Completion of the Project:

- a. Comprehensive general liability insurance, or substantially equivalent, with such limits as Owner has determined to be reasonable to protect its interests.
- b. Automotive liability insurance with such limits as Owner has determined to be reasonable to protect its interests.
- c. Workers compensation insurance with coverage and limits required by law.

10.3 Bonds and Other Performance Security. Design-Builder shall provide performance and payment bonds in the forms and amounts satisfactory to Owner and in compliance with Virginia Code § 2.2-4337 for all components of the Project that involve construction. In addition, and except for permits and approvals that are the responsibility of Owner under this Agreement, Design-Builder shall furnish or cause to be furnished any bonds, cash escrow, funds, cashiers' checks, certified checks, letters of credit or other security required for issuance of any permit or for any review or approval required by any governmental entity with jurisdiction to require any such permit, review or approval with respect to the Site, Work, or Project.

Article 11 **Statutorily Required Provisions**

11.1 Limitation on Modification of Contract Price. Pursuant to Virginia Code § 2.2-4309, the Contract Price, as it may be adjusted by the Road Improvements Addendum, Owner contingency for rock and unsuitable materials, exceedance of Allowances, and other costs contemplated by this Agreement, may not be increased by more than twenty-five percent of the foregoing amount or \$50,000, whichever is greater, without the advance written approval of the City Council of the City of Harrisonburg, Virginia. In no event may the Contract Price, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer. The provisions of this section shall not limit the amount a party to a public contract may claim or recover against a public body pursuant to Virginia Code § 2.2-4363 or any other applicable statute or regulation. Modifications made by a political subdivision that fail to comply with this section are voidable at the discretion of the governing body, and the unauthorized approval of a modification cannot be the basis of a contractual claim as set forth in § 2.2-4363.

11.2 Anti-Discrimination. Pursuant to Virginia Code § 2.2-4311, the following provision is included in this Agreement:

1. During the performance of this contract, the

contractor agrees as follows:

a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.

c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$ 10,000, so that the provisions will be binding upon each subcontractor or vendor.

11.3 Unauthorized Aliens. Pursuant to Virginia Code § 2.2-4311.1, the following provision is included in this Agreement:

The Contractor does not, and shall not during the performance of this Agreement, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986.

11.4 Authority to Transact Business. Pursuant to Virginia Code § 2.2-4311.2, the following provision is included in this Agreement:

The Contractor, if it is organized as a stock or nonstock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership, represents and warrants that it is authorized to transact business in the Commonwealth of Virginia as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law. If the Contractor is required by law to be authorized to

transact business in the Commonwealth of Virginia, then it shall not allow its existence to lapse or its certificate of authority or registration to be revoked or cancelled at any time during the term of the Agreement. The Owner may void this Agreement if the Contractor fails to remain in compliance with this Section or any term of condition of Virginia Code § 2.2-4311.2.

11.5 Drug-Free Workplace. Pursuant to Virginia Code § 2.2-4312, the following provision is included in this Agreement:

During the performance of this contract, the contractor agrees to (i) provide a drug-free workplace for the contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, "drug-free workplace" means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.

11.6 Escrow Accounts for Retainage. Pursuant to Virginia Code § 2.2-4334, the following provisions are included in this Agreement:

In the event the Contractor elected to use an escrow account procedure for utilization of the Owner's retainage funds by so indicating on the escrow agreement form included with the Bid Proposal documents (including the unsigned version of this Agreement), if applicable, then in such event the Contractor shall submit the form to the Owner within fifteen (15) calendar days after notification of

acceptance of the Contractor's bid. If the escrow agreement form is not submitted to the Owner within the fifteen-day period, then the Contractor shall forfeit its rights to the use of the escrow account procedure.

11.7 Payment to Subcontractors. Pursuant to Virginia Code § 2.2-4354, the following provisions are included in this Agreement:

11.7.1 Within seven (7) days of after receipt of amounts paid by the Owner to the Contractor for work that was performed by a subcontractor, the Contractor shall take one of the following two (2) actions:

a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or

b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

11.7.2. The Contractor, if an individual, shall provide his or her social security number. The Contractor, if a proprietorship, partnership, limited liability company, limited liability partnership, or any other type of business entity, shall provide its federal employer identification number.

11.7.3. The Contractor shall be obligated to pay interest of any of its subcontractors on all amounts owed by the Contractor that remain unpaid after seven (7) days following receipt by the Contractor of payment from the Owner for work performed by the subcontractor under this Agreement, except for amounts withheld as allowed under § 11.7.1.

11.7.4. Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month. In the preceding sentence, the term "contract" refers to this Agreement.

11.7.5. The Contractor shall require that its subcontractors include in each of their respective subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements set forth herein with respect to each lower-tier subcontractor.

11.8 Contractual Claims. Pursuant to Virginia Code § 2.2-4363.B, the Owner's procedure for consideration of contractual claims shall be the procedure set forth in Virginia Code § 2.2-4363.C, which states as follows [the reference to the "public body" being the Owner under this Agreement]:

1. Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after receipt of final payment; however, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or at the beginning of the work upon which the claim is based.

2. No written decision denying a claim or addressing issues related to the claim shall be considered a denial of the claim unless the written decision is signed by the public body's chief administrative officer or his designee. The contractor may not institute legal action prior to receipt of the final written decision on the claim unless the public body fails to render a decision within 90 days of submission of the claim. Failure of the public body to render a decision within 90 days shall not result in the contractor being awarded the relief claimed or in any other relief or penalty. The sole remedy for the public body's failure to render a decision within 90 days shall be the contractor's right to institute immediate legal action.

The provisions of Virginia Code § 2.2-4363.D and § 2.2-4363.E are also incorporated into this Agreement by reference, such provisions stating as follows:

D. A contractor may not invoke administrative procedures meeting the standards of § 2.2-4365, if available, or institute legal action as provided in § 2.2-4364, prior to receipt of the public body's decision on the claim, unless the public body fails to render such decision within the time specified in the contract or, if no time is specified, then within the time provided by subsection C. A failure of the public body to render a final decision within the time provided in subsection C shall be deemed a final decision denying the claim by the public body.

E. The decision of the public body shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the public body by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364.

11.9 Appropriation Disclosure. Owner may terminate this Agreement, as well as all other Contract Document, if for any reason the City Council of the City of Harrisonburg, Virginia, fails to appropriate the funds to Owner to pay for all or any portion of the Project at issue, it being understood by the parties that Owner is subject to Virginia Code § 22.1-91 that prohibits Owner from expending or contracting to expend, in any

fiscal year, any sum of money in excess of funds available for school purposes for that fiscal year without the consent of the governing body. In the event of such Owner termination, therefore, but necessarily limited to funds that may have been appropriated for the Project or to the extent of consent given by the Harrisonburg City Council, Design-Builder shall be entitled to receive payment for work executed, plus costs incurred to cease operations at the Site, but not including any overhead or profit on the work not executed.

11.10 Availability of Funds. Design-Builder acknowledges and agrees that it shall perform no work which would result in exceeding the amount appropriated for this Agreement unless Harrisonburg City Council has given its express consent under Virginia Code § 22.1-91.

11.11 Child Abuse Prevention. Pursuant to Virginia Code § 22.1-296.1, Design-Builder, as a Contractor, by its signature to this Agreement, certifies that its employees that may have direct contact with students on school property during regular school hours or during school-sponsored activities have not been convicted of a felony or any offense involving the sexual molestation or physical or sexual abuse or rape of a child. Contractor acknowledges that pursuant to Virginia Code § 22.1-296.1, any person making a materially false statement regarding any such offense shall be guilty of a Class 1 misdemeanor and, upon conviction, the fact of such conviction shall be grounds for the revocation of the contract to provide such services and, when relevant, the revocation of any license required to provide such services. Contractor shall require that its subcontractors include in each of their respective subcontracts the certification set forth herein.

11.12 Inspection and Monitoring. Pursuant to Virginia Code § 56-575.9, Owner shall have the right to inspect Design-Builder's activities to confirm that they are acceptable to Owner and in accordance with the provisions of this Agreement. In addition, Owner may monitor the practices of Design-Builder to ensure that the Project is properly maintained throughout the construction process. During construction of the Project, Owner and its agents, authorized representatives, and consultants shall be afforded reasonable access to the Site and to Design-Builder's facilities during regular business hours, or at other times as agreed upon by both parties, for the purpose of making the inspections and conducting the monitoring set forth herein, and to otherwise confirm that the Design-Builder's Work is being performed in accordance with this Agreement.

11.13 Financial Statements. Pursuant to Virginia Code § 56-575.9, Design-Builder will provide to Owner copies of complete and current financial statements for Design-Builder, such statements to be provided on or before April 15 of each year through the date of Final Completion. The statements do not need to be audited prior to being provided, however, if the statements so provided are subsequently audited, Design-Builder shall supplement the statements with copies of audited statements within thirty (30) days after the audited statements become available. Design-Builder's financial statements shall be confidential proprietary information that is exempt from release under the Virginia Freedom of Information Act.

11.14 Local Governing Body Approval. Design-Builder acknowledges that Owner is a “school board,” as that term is defined under Virginia Code § 56-575.16, and, accordingly, it may not enter into this Agreement unless it has the approval of the local governing body, which in this case is the City of Harrisonburg, Virginia. Accordingly, this Agreement is neither effective or enforceable until such as time as it has been executed by both Owner and the City of Harrisonburg, Virginia.

11.15 Other. Owner and Design-Builder acknowledge that there may be other statutes that apply to construction of the Project contemplated under this Agreement. All such statutes are deemed a part of this Agreement whether or not they are expressly stated herein.

Article 12 **Records and Documents**

12.1 Record Copy. Design-Builder shall maintain in good order one record copy of all construction and design documents, change orders, and other documents related to the Project, all of which shall be updated to reflect any changes made during the term of this Agreement.

12.2 Review and Inspection by Owner. Beginning on the Effective Date and continuing through three (3) years after the date of final payment to Design-Builder or termination of this Agreement, whichever is later, Owner and its agents, authorized representatives, and consultants shall have the right to review and reproduce, during regular business hours, all construction and design documents, change orders, and other documents related to the Agreement or the Project which shall include, but are not limited to, accounting records, written policies and procedures, subcontract files (including proposals of successful and unsuccessful bidders), payroll records, original estimates, estimating worksheets, correspondence, and any other evidence necessary to substantiate charges relating to Shared Savings under this Agreement; to evaluate and verify invoices, payments, or claims submitted by Design-Builder or any Subcontractors or Sub-subcontractors; or to evaluate and verify direct and indirect costs, including overhead allocations associated with this Agreement and/or Project.

12.3 Review Space. Owner and its agents, authorized representatives, and consultants shall be provided with adequate and appropriate workspace in which to conduct the review, audits, and reproduction of documents and records allowed under this Agreement. Owner shall give Design-Builder reasonable advance notice of any such intended review, audit, or reproduction of Design-Builder's documents and records.

12.4 Delivery of Documents at Final Completion. Upon Final Completion, Design-Builder shall deliver to Owner one (1) set of the following: (i) a complete set of as-built drawings for the Project; (ii) all written specifications and amendments thereto made during the course of the Project; (iii) complete copies of all operations and maintenance manuals for all equipment installed at the Project; and (iv) all warranties required pursuant to this Agreement.

Article 13
Miscellaneous Provisions

13.1 Dispute Resolution. Any claim, cause of action, dispute, or controversy arising out of or relating to this Agreement or any other Contract Document or the breach thereof shall be submitted to an appropriate state or federal court located in the City of Harrisonburg, Virginia, such courts to have exclusive jurisdiction and venue.

13.2 Confidentiality. Subject to the limitations set forth herein, Confidential Information is defined as information which is determined by the transmitting party to be of a confidential or proprietary nature and: (i) the transmitting party identifies it as either confidential or proprietary; (ii) the transmitting party takes steps to maintain the confidential or proprietary nature of the information; (iii) the information is not otherwise available in or considered to be in the public domain; and (iv) the information is deemed and otherwise designated as confidential under applicable law. The receiving party agrees to maintain the confidentiality of the Confidential Information and agrees to use the Confidential Information solely in connection with the services set forth in this Agreement; provided, however, that the receiving party may disclose Confidential Information to its attorneys, accountants, and similar persons who may reasonably require the information and agree to maintain the information as confidential as set forth in this Agreement. The receiving party may also disclose Confidential Information to the extent required by applicable law, including without limitation any court order.

13.3 Governing Law. This Agreement and the balance of the Contract Documents shall be governed by the laws of the place of the Project, without giving effect to its conflict of law principles.

13.4 Severability. If any provision or any part of a provision of this Agreement or any other Contract Document shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to applicable laws by any authority having jurisdiction, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provisions or parts of the provision of the Contract Document, which shall remain in full force and effect as if the unenforceable provision or part was deleted.

13.5 Amendments. This Agreement and the balance of the Contract Document may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of both parties.

13.6 No Waiver. The failure of either Design-Builder or Owner to exercise a right or insist, in any one or more instances, on the performance of any of the obligations required by the other under the Contract Documents shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance.

13.7 Successorship. Design-Builder and Owner intend that the provisions of this Agreement and the balance of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors, and assigns.

13.8 Entire Agreement. This Agreement and the balance of the Contract Documents form the entire agreement between Owner and Design-Builder. With respect to the matters addressed in the Contract Documents, no oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

WITNESS the following signatures:

OWNER:

**School Board of City of Harrisonburg,
Virginia**

By: _____

Deb Fitzgerald

Its: Chair

Date: _____

DESIGN-BUILDER:

Nielsen Builders, Inc.

By: _____

Tony E. Biller

Its: President

Date: _____

[Approval of City Council of City of Harrisonburg, Virginia on following page]

APPROVED:

City Council of the City of Harrisonburg, Virginia

By: _____

Deanna R. Reed

Its: Mayor

Date: _____

Attachments:

- Exhibit 1 – List of 60% Design Documents
- Exhibit 2 – List of Qualifications and Exclusions
- Exhibit 3 – Owner's Permit List
- Exhibit 4 – Guaranteed Maximum Pricing Summary
- Exhibit 5 – Allowance Schedule
- Exhibit 6 – Road Improvement Addendum
- Exhibit 7 – Projected Billing Statement