



Standard Form of Preliminary Agreement Between Owner and Design-Builder (INTERIM AGREEMENT)

*This document has important legal consequences. Consultation with
an attorney is recommended with respect to its completion or modification.*

This **INTERIM AGREEMENT** ("Agreement") dated **May 6, 2019**, for identification purposes, but effective when executed by the parties herein and approved by the City Council of the City of Harrisonburg, Virginia, as set forth herein, by and between the following parties, for services in connection with the Project identified below.

OWNER:

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

DESIGN-BUILDER:

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

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

PROJECT:

New Harrisonburg High School

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree as set forth herein.

Article 1

General

1.1 Duty to Cooperate. Owner and Design-Builder commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith to permit each party to realize the benefits afforded under this Agreement.

1.2 Definitions. Terms, words and phrases used in this Agreement shall have the meanings given them in DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) ("General Conditions of Contract"). In Sections 9.8.2 through 9.8.11, below, references to "contract" are to this Agreement, references to "contractor" are to Design-Builder, and references to "public body" are to Owner. The language used in the aforementioned Sections of this Agreement shall otherwise be interpreted to carry out the intent of the statutes referenced therein.

Article 2

Design-Builder's Services and Responsibilities

2.1 Design Services. Design-Builder shall, consistent with applicable state licensing laws, provide design services, including architectural, engineering and other design professional services, required by this Agreement. Such design services shall be provided through qualified, licensed design professionals who are either (i) employed by Design-Builder, or (ii) procured by Design-Builder from independent sources. Nothing in this Agreement is intended to create any legal or contractual relationship between Owner and any independent design professional.

2.2 Preliminary Services.

2.2.1 Owner shall provide Design-Builder with Owner's Project Criteria describing Owner's program requirements and objectives for the Project. Owner's Project Criteria shall include Owner's use, space, price, time, site, performance and expandability requirements. Owner's Project Criteria may include conceptual documents, design specifications, design performance specifications and other technical materials and requirements prepared by or for Owner. Owner's Project Criteria may be refined and modified by Owner, in its sole discretion, while design services are being provided under this Agreement, to meet Owner's objective to cost-effectively complete the Project while possibly including various alternates set forth in Design-Builder's PPEA Proposal, as amended. Owner's initial Project Criteria are generally described as follows:

Construction of a new, approximate 211,917 gsf, 1,200 student high school, including all site and utility work.

Accommodate 1,200 students with average building utilization rate of 90%

Calculation for Student Core Capacity:

$1,200 \text{ students} \div 0.90 \text{ utilization rate} = 1,333 \text{ student core capacity}$

Student-to-teacher ratio of 20:1

Calculation for Number of Teaching Stations:

$1,333 \text{ student core capacity} \div 20 \text{ students/teacher} = 66 \text{ teaching stations}$

Subject to refinement, Owner's Project Criteria are generally consistent with the Project Design set forth in Design-Builder's PPEA Proposal Volume II and the Project Specifications set forth in Design-

Builder's PPEA Proposal Volume II – Amendment, both of which are incorporated herein by reference. The parties acknowledge and agree that the foregoing Project Design and Project Specifications will be the starting point for the Design Documents to be developed under this Agreement, as set forth below.

Alternates that are under consideration include the following:

Football Stadium, Natural Turf Field, Field House, Concessions, Track
Geothermal HVAC and Water Source Heat Pumps
Auxiliary Gym
Traffic Signal
Second Access Road to Property Line
LEED Certification Program
Design Culinary Arts Laboratory
Plan Integration of Design with Curriculum
Acoustician Consultant

2.2.2 Owner's Project Criteria have been developed prior to the execution of this Agreement, as noted above. Design-Builder will assist Owner in refining Owner's Project Criteria, with such service deemed to be included in this Agreement. Design-Builder shall review and prepare a written evaluation of such criteria, including recommendations to Owner for different and innovative approaches to the design and construction of the Project. The parties shall meet to discuss Design-Builder's written evaluation of Owner's Project Criteria and agree upon what revisions, if any, should be made to such criteria. Factors to be considered in the evaluation include the following:

- Deeming the City to have one high school with two campuses.
- Dividing the schools by geographic areas of the City
- Dividing the curriculum so that one school is more focused on math and science and the other on language and arts (or similar)
- Creating a very strong ESL program at one of the two schools
- Assigning the ROTC students to one of the schools
- Making one school primarily for grades 9-10 and the other grades 11-12
- Developing career-based academies at each school.
- Sharing of athletic facilities

2.3 Design Documents. Design-Builder shall prepare and provide Owner with Design Documents based on Owner's Project Criteria, as may be revised in accordance with Section 2.2.2 hereof at 25%, 40% and 60% completion for review (the percentages being of the combined Design Documents, it being noted that some Design Documents, such as Civil Drawings, will be completed beyond 60%, while others will be below 60%). The Design Documents shall include design criteria, drawings, diagrams and specifications setting forth the requirements of the Project. The intent of the 60% Design Documents is to allow Design-Builder to more accurately estimate the Cost of the Work in order to prepare a Comprehensive Agreement for Owner's consideration that will include a Guaranteed Maximum Price. The parties shall meet to discuss the at 25%, 40% and 60%. Design Documents and agree upon what revisions, if any, should be made. Design-Builder shall perform such agreed-upon revisions. Minutes of the meetings shall be maintained by the Design-Builder and provided to attendees for review. At such meetings, Owner and Design-Builder shall discuss and agree upon what revisions, if any, should be made. Design-Builder shall perform such agreed-upon revisions. Owner's review of the 25%, 40% and 60% Design Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with the Owner's Project Criteria. Neither Owner's review or approval of any interim design submissions shall be deemed to transfer any design liability from Design-Builder to Owner. The Design Documents to be prepared by Design-Builder and provided to Owner under this Agreement include the following (all Design Documents to be partially completed except where noted):

Civil Drawings (100%):

Site Plan

Building Location Drawing
Grading and Paving Plans
Utility Plans

Site Sections

Driveway, Parking Lot, and Sidewalk cross sections

Typical Exterior Design Details

Railings, Stairs, Ramps, etc.

Outdoor Athletic Facilities and Venues

Architectural Drawings

Code Analysis Plan

Architectural Floor Plans

Reflected Ceiling Plans

Building Elevations

Building and Wall Sections

Landscaping Plan

Details (foundation, major walls, windows, etc.)

Interior Elevations

Schedules (interior finish, doors, windows, etc.)

Structural Drawings

Structural Plans

Superstructure Plan

Structural Sections / Details

Structural Steel Sizing

Mechanical Drawings

Floor Plans

Sections

Plumbing Drawings

Floor Plans

Detail Plans

Electrical Drawings

Floor Plans

Floor plans will include the following where appropriate:

- Core Instruction (can also include CTE, STEM, etc. as required)
- Elective Instruction
- Collaborative Areas for Project/Problem-Based-Learning
- Arts Instruction
- Physical Education
- Library and Media
- Administration
- Food Services
- Building Support

The Design Documents to be prepared by Design-Builder and provided to Owner under this Agreement do not include a Traffic Impact Analysis or plans or drawings related to offsite road improvements, traffic signalization or water and sewer improvements.

2.4 Proposal. Based on Owner's Project Criteria, the 60% Design Documents, as each may be revised pursuant to Sections 2.2.2 and 2.3 above, and any other Basis of Design Documents upon which the parties may agree, Design-Builder shall submit a proposal to Owner (the "Proposal"), which shall include the following unless the parties mutually agree otherwise:

2.4.1 a proposed contract price for the design and construction of the Project, which price shall be in the form of a lump sum with a Guaranteed Maximum Price ("GMP");

2.4.2 a schedule and date of Substantial Completion of the Project upon which the Contract Price for the Project is based;

2.4.3 all other information necessary for the parties to enter into a Comprehensive Agreement that meets the requirements of Virginia Code 56-575.9 and 56-575.16(6) and any other contract documents necessary for the completion of the design and construction of the Project; and

2.4.4 the time limit for acceptance of the Proposal, it being acknowledged by the parties that acceptance by Owner is subject to pre-approval by the City Council of the City of Harrisonburg, Virginia, in accordance with applicable law.

2.5 Review of Proposal. Design-Builder and Owner shall meet to discuss and review the Proposal. If Owner has any comments regarding the Proposal, or finds any inconsistencies or inaccuracies in the information presented, it shall promptly give written notice to Design-Builder of such comments or findings. If Design-Builder finds the revisions acceptable, Design-Builder shall, upon receipt of Owner's notice, adjust the Proposal.

2.6 Completion of This Agreement. Design-Builder's services under this Agreement shall be deemed completed upon meeting with Owner to discuss the Proposal and making those revisions to the Proposal, if any, Design-Builder finds acceptable.

2.7 Additional Services. Design-Builder shall perform the Additional Services set forth in a separate exhibit to this Agreement. The cost for such services shall be as mutually agreed upon by Owner and Design-Builder, with the Contract Price for this Agreement, as set forth in Section 6.1 hereof, being adjusted accordingly.

Article 3

Owner's Services and Responsibilities

3.1 Timely Performance. Owner shall throughout the performance of this Agreement cooperate with Design-Builder. Owner shall perform its responsibilities, obligations and services, including its reviews and approvals of Design-Builder's submissions, in a timely manner so as not to delay or interfere with Design-Builder's performance of its obligations under this Agreement.

3.2 Owner's Project Criteria. Owner shall provide Design-Builder with Owner's Project Criteria, as noted above.

3.3 Owner Provided Information. Owner shall provide, at its own cost and expense, for Design-Builder's information and use, the following, all of which Design-Builder is entitled to rely upon in performing its obligations hereunder:

- 3.3.1 Surveys describing the property, boundaries, topography and reference points for use during construction, including existing service and utility lines;
- 3.3.2 Geotechnical studies describing subsurface conditions, and other surveys describing other latent or concealed physical conditions at the Site;
- 3.3.3 Temporary and permanent easements, zoning and other requirements and encumbrances affecting land use or necessary to permit the proper design and construction of the Project;
- 3.3.4 A legal description of the Site;
- 3.3.5 To the extent available, as-built and record drawings of any existing structures at the Site; and
- 3.3.6 To the extent available, environmental studies, reports and impact statements describing the environmental conditions, including, but not limited to, Hazardous Conditions, in existence at the Site.

Article 4

Ownership of Work Product

- 4.1 Work Product.** All drawings, specifications and other documents and electronic data 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 below.
- 4.2 Owner's Limited License.** Design-Builder hereby grants unto owner a limited license to use the Work Product to complete the Project either through a Comprehensive Agreement subsequently entered into with Design-Builder or entered into with any other design-builder; provided, however, that if the Project is complete by another design-builder, then the limited license is conditioned on the following:
- 4.2.1** Use of the Work Product is at Owner's sole risk without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier.

Article 5

Contract Time

- 5.1 Commencement Date.** Design-Builder shall commence performance of the services set forth in this Agreement within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing. Design-Builder shall complete such services no later than one hundred twenty (120) calendar days after the Date of Commencement.
- 5.2 Interim Dates.** Interim milestone dates are as follows:
- June 20, 2019 – Design-Builder will submit 25% design documents to Owner for its review and approval.
 - July 25, 2019 – Design-builder will submit 40% design documents to Owner for its review and approval. Within seven (7) days after the foregoing submittal, Design-Builder will submit an estimated Guaranteed Maximum Price ("GMP") that Owner and Designer-Builder acknowledge will be a rough estimate based on the 40% design documents.
 - July 31, 2019 – Design-Builder will complete Civil Design Documents and submit said documents to Owner for its review and approval.

- Aug. 15, 2019 – Design-Builder will submit 60% design documents to Owner for its review and approval
- Aug. 22, 2019 – Design-Builder to begin calculation of a final GMP, subject to approval of 60% design documents by Owner
- Sept. 23, 2019 – Design-Builder to submit Comprehensive Agreement, to include the final GMP, to Owner for its review, consideration, and approval, such approval subject to approval by the City Council of the City of Harrisonburg, Virginia.

Article 6

Contract Price

6.1 Contract Price. The Contract Price for this Agreement is as set forth below:

Three Million Three Hundred Thirty-Five Thousand Two Hundred Six Dollars (**\$3,335,206.00**)

6.2 Scope of Contract Price. The Contract Price shall be the full compensation due Design-Builder for the performance of all services set forth in this Agreement, and shall be deemed to include all the sales, use, consumer and other taxes mandated by applicable Legal Requirements. The Contract Price shall be adjusted to reflect any Additional Services agreed upon by the parties after execution of this Agreement.

Article 7

Procedure for Payment

7.1 Payment. Design-Builder and Owner agree upon the following method for partial and final payment to Design-Builder for the services hereunder, subject to appropriation and availability of fund, as set forth below:

<u>Payment Date</u>	<u>Gross Billing</u>	<u>Retainage</u>	<u>Net Billing</u>	<u>Total Billings</u>
June 14, 2019	\$833,802	\$41,690	\$792,112	\$792,112
July 5, 2019	\$833,802	\$41,690	\$792,112	\$1,584,224
Aug 2, 2019	\$833,802	\$41,690	\$792,112	\$2,376,336
Sept 6, 2019	\$833,800	\$41,690	\$792,110	\$3,168,446
Oct 4, 2019	\$166,760	\$0	\$166,760	\$3,335,206

7.2 Interest. Payments due and unpaid by Owner to Design-Builder shall bear interest commencing five (5) days after payment is due at the legal rate of interest.

Article 8

Electronic Data

8.1 Electronic Data.

8.1.1 The parties recognize that Contract Documents, including drawings, specifications and three-dimensional modeling (such as Building Information Models) and other Work Product may be transmitted among Owner, Design-Builder and others in electronic media as an alternative to paper hard copies (collectively “Electronic Data”).

8.2 Transmission of Electronic Data.

8.2.1 Owner and Design-Builder shall agree upon the software and the format for the transmission of Electronic Data. Each party shall be responsible for securing the legal rights to access the agreed-upon format, including, if necessary, obtaining appropriately licensed copies of the applicable software or electronic program to display, interpret and/or generate the Electronic Data.

8.2.2 Neither party makes any representations or warranties to the other with respect to the functionality of the software or computer program associated with the electronic transmission of Work Product. Unless specifically set forth in the Agreement, ownership of the Electronic Data does not include ownership of the software or computer program with which it is associated, transmitted, generated or interpreted.

8.2.3 By transmitting Work Product in electronic form, the transmitting party does not transfer or assign its rights in the Work Product. The rights in the Electronic Data shall be as set forth in Article 4 of the Agreement. Under no circumstances shall the transfer of ownership of Electronic Data be deemed to be a sale by the transmitting party of tangible goods.

8.3 Electronic Data Protocol.

8.3.1 The parties acknowledge that Electronic Data may be altered or corrupted, intentionally or otherwise, due to occurrences beyond their reasonable control or knowledge, including but not limited to compatibility issues with user software, manipulation by the recipient, errors in transcription or transmission, machine error, environmental factors, and operator error. Consequently, the parties understand that there is some level of increased risk in the use of Electronic Data for the communication of design and construction information and, in consideration of this, agree, and shall require their independent contractors, Subcontractors and Design Consultants to agree, to the following protocols, terms and conditions set forth in this Section 8.3.

8.3.2 Electronic Data will be transmitted in the format agreed upon in Section 8.2.1 above, including file conventions and document properties, unless prior arrangements are made in advance in writing.

8.3.3 The Electronic Data represents the information at a particular point in time and is subject to change. Therefore, the parties shall agree upon protocols for notification by the author to the recipient of any changes which may thereafter be made to the Electronic Data, which protocol shall also address the duty, if any, to update such information if such information changes prior to Final Completion.

8.3.4 The transmitting party specifically disclaims all warranties, expressed or implied, including, but not limited to, implied warranties of merchantability and fitness for a particular purpose, with respect to the media transmitting the Electronic Data. However, transmission of the Electronic Data via electronic means shall not invalidate or negate any duties pursuant to the applicable standard of care with respect to the creation of the Electronic Data, unless such data is materially changed or altered after it is transmitted to the receiving party, and the transmitting party did not participate in such change or alteration.

Article 9

Other Provisions

9.1 Insurance. Prior to or contemporaneous with execution of this Agreement, Design-Bidder shall provide to Owner a Certificate of Insurance validating insurance in force meeting the following minimums involving only satisfactorily rated companies, as determined in the sole discretion of Owner, licensed to do business in Virginia with provision to ensure at least ten (10) days prior written notification to HCPS before any cancellation of insurance:

- a. Workers' Compensation: Coverage and limit required by applicable law.

b. Automotive Liability: Bodily injury and property damage insurance shall have limits of \$1,000,000 combined single limits

c. Comprehensive General Liability: Bodily injury liability insurance shall have limits of \$2,000,000 per occurrence. Property damage liability insurance shall have limits of \$2,000,000 per occurrence.

d. Professional Liability: \$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. The minimum coverage limits shall be \$1,000,000 per occurrence and \$2,000,000 aggregate. No design-build exclusions will be allowed.

9.2 Owner's Right to Terminate for Convenience. Owner may terminate this Agreement for its convenience and without cause by providing written notice to Design-Builder. The date of termination will be the date of delivery of the notice or such later date that may be included in the notice. In the event of a termination for cause hereunder, Design-Builder shall be compensated for the reasonable value of all services completed through the date of termination, including profit on such services, but excluding anticipated profit on services not completed.

9.3 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.

9.4 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.

9.5 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.

9.6 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.

9.7 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.

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

9.8.1 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.

9.8.2. 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.

9.8.3. 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 § 9.8.1

9.8.4. 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.

9.8.5. 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.

9.9 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.

9.10 Appropriation Disclosure. Owner may terminate this Agreement 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 a school board 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 Project site, but not including any overhead or profit on the work not executed.

9.11 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.

9.12 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.

In executing this Agreement, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

9.13 Dispute Resolution. The parties agree that any claim, cause of action, dispute or controversy arising out of or relating to this Agreement or the breach thereof that cannot be resolved through discussions by the parties shall be submitted to non-binding mediation administered by Juridical Solutions, PLC. Any claim, cause of action, dispute, or controversy arising out of or relating to this Agreement or the breach thereof which has not been resolved by mediation 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.

9.14 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.

9.15 Assignment. Neither Design-Builder nor Owner shall without the written consent of the other party assign, transfer, or sublet any portion or part of its obligations under this Agreement.

9.16 Governing Law. This Agreement shall be governed by the laws of the place of the Project, without giving effect to its conflict of law principles.

9.17 Severability. If any provision or any part of a provision of this Agreement 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 this Agreement, which shall remain in full force and effect as if the unenforceable provision or part was deleted.

9.18 Amendments. This Agreement may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of both parties.

9.19 Entire Agreement. This Agreement forms the entire agreement between Owner and Design-Builder. No oral representations or other agreements have been made by the parties except as specifically stated in this Agreement.

WITNESS the following signatures:

OWNER:
School Board of City of Harrisonburg, Virginia

DESIGN-BUILDER:
Nielsen Builders, Inc.

By: _____
 Deb Fitzgerald
Its: Chair

By: _____
 Tony E. Biller
Its: President

Date: _____

Date: _____

APPROVED:

CITY COUNCIL OF THE CITY OF HARRISONBURG, VIRGINIA

By: _____

Eric D. Campbell

Its: City Manager

Date: _____