

**AGREEMENT FOR PRELIMINARY SERVICES
BETWEEN
MT. DIABLO UNIFIED SCHOOL DISTRICT AND
XL CONSTRUCTION, INCORPORATED
FOR
MT. DIABLO HIGH SCHOOL
S-Wing Modernization**

This Agreement for Preliminary Services ("Agreement") dated as of June 4, 2013 ("Effective Date"), is made and entered into by and between the Mt. Diablo Unified School District, a school district duly organized and validly existing under the laws of the State of California ("District"), and XL CONSTRUCTION, INC, a California company duly organized and existing under the laws of the State of California, as lessee ("Developer") (together, the "Parties"), for the purposes of providing preliminary services relating to the construction of the S-Wing Modernization - Mt. Diablo High School located at 2450 Grant Street, Concord, , CA 9 ("Project").

WHEREAS, the Project will be located at 2450 Grant Street, Concord, CA 94520 as more particularly described in **Attachment "B,"** attached hereto and incorporated herein by this reference ("Site"); and

WHEREAS, District and Developer intend to enter into a lease-leaseback arrangement for the development of the Project pursuant to Education Code section 17406 ("Lease Agreements") after Developer's performance of its duties as set forth in the Agreement and pending both the approval of the Plans and Specifications by the California Division of State Architect ("DSA") and approval by the District and Developer of the Lease Agreements.

WHEREAS, Developer desires to provide consulting services to the District with respect to other related services in preparation for the Project's development; and

WHEREAS, the District is authorized by Section 53060 of the California Government Code to contract with and employ any persons for the furnishing of special services and advice in financial, economic, accounting, engineering, legal or administrative matters, if those persons are specially trained and experienced and competent to perform the special services required; and

WHEREAS, Developer represents that it is specially trained and has the expertise and experience to perform the services set forth in this Agreement; and

NOW, THEREFORE, the Parties hereto agree as follows:

ARTICLE 1. SCOPE OF SERVICES

Scope of Developer's Services. Developer, as the District's development consultant and authorized representative as contemplated by Business and Professions Code Section 7040, agrees to perform the services indicated in **Attachment "A,"** attached hereto and incorporated herein by this reference ("Services"). In providing the Services pursuant to this Agreement, Developer does not assume any responsibility for design, design errors, omissions or inconsistencies. The duties, responsibilities and limitations of authority of Developer shall not be restricted, modified or extended without written agreement between the District and Developer

ARTICLE 2. CONSTRUCTION

The Parties expect to enter into the Lease Agreements on or about June 17, 2013. The Parties expect that the Project shall be completed on or before February 10, 2014.

ARTICLE 3. DISTRICT'S RESPONSIBILITIES

The District shall provide to Developer information regarding requirements for the Project, including information regarding the District's objectives, schedule, constraints and criteria.

ARTICLE 4. TERM & TERMINATION

4.1. Term. The term of this Agreement ("Term") shall be 1 month(s) from the date indicated above as the date of this Agreement. The Term may be shortened or lengthened by mutual agreement of the Parties or terminated as indicated herein.

4.2. Termination by Developer. This Agreement may be terminated by Developer upon fourteen (14) days written notice to District in the event of an uncured substantial failure of performance by District.

4.3. Termination by District. This Agreement may be terminated without cause by District upon fourteen (14) days written notice to Developer. In the event of a termination by District, the District shall pay Developer for all Services performed and all expenses incurred under this Agreement up until the date of notice of termination plus any sums due Developer for Board approved extra services. In ascertaining the Services actually rendered hereunder up to the date of termination of this Agreement, consideration shall be given to both completed work and work in process of completion and to complete and incomplete documents whether delivered to the District or in the possession of Developer.

ARTICLE 5. COMPENSATION TO DEVELOPER

District agrees to pay Developer the amount of NO CHARGE Dollars (\$0.00), for the performance of the Services contemplated by this Agreement, as indicated in **Attachment "C" ("Services: Costs & Schedule")**. Developer shall be responsible for all costs and expenses including the costs of hiring sub-consultants and other professionals to perform the Services, travel expenses to the Project site as well as for meetings with District and its representatives, long distance telephone charges, copying expenses, salaries of Developer's staff and employees working on the Project, overhead, and any other reasonable expenses incurred by Developer in performance of the Services contemplated by this Agreement. Developer shall submit the names of all proposed sub-consultants to District in writing for the District's prior approval.

ARTICLE 6. MISCELLANEOUS

6.1. Developer's Insurance. Developer has in force, and during the term of this Agreement shall maintain in force with the minimum indicated limits, the following insurance: **Commercial General Liability insurance:** \$1,000,000 for each occurrence and general aggregate with Products and Completed Operations Coverage; **Automobile Liability – Any Auto:** combined single limit of \$1,000,000; **Excess Liability insurance:** \$4,000,000; **Workers Compensation:** Statutory limits; **Employers' Liability:** \$1,000,000; and **Professional Liability (Errors and Omissions):** \$1,000,000. Developer shall provide to the District certificate(s) of insurance and endorsements satisfactory to the District. The policy(ies) shall not be amended or modified and the coverage amounts shall not be reduced without thirty (30) days written notice to the District prior to cancellation. Except for the worker's compensation and professional liability insurance policies, the District shall be named as an additional insured on all policies. Developer's policy(ies) shall be primary; any insurance carried by the District shall only be secondary and supplemental. All policies, except for professional liability, shall be written on an occurrence form. Developer shall not allow any subconsultant, subcontractor, employee, or agent to commence work on this Agreement or any subcontract until the insurance required of Developer, subcontractor, or agent has been obtained.

6.2. Indemnity. To the furthest extent permitted by California law, Developer shall defend, indemnify, and hold free and harmless the District, its agents, representatives, officers, consultants, employees, trustees, and volunteers ("the indemnified parties") from any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury of any kind, in law or equity ("Claim"), to property or persons, including personal injury

and/or death, to the extent that any of the above arise out of, pertain to, or relate to the negligence, recklessness, errors or omissions, or willful misconduct of Developer, its officials, officers, employees, subcontractors, consultants, or agents directly or indirectly arising out of, connected with, or resulting from the performance of the Services, the Project, or this Agreement

6.3. Independent Contractor. Developer, in the performance of this Agreement, shall be and act as an independent contractor. Developer understands and agrees that Developer and all of Developer's employees shall not be considered officers, employees or agents of the District.

6.4. Audit. Developer shall establish and maintain books, records, and systems of account, in accordance with generally accepted accounting principles, reflecting all business operations of Developer transacted under this Agreement. Developer shall retain these books, records, and systems of account during the Term of this Agreement and for five (5) years thereafter. Developer shall permit the District, its agent, other representatives, or an independent auditor to audit, examine, and make excerpts, copies, and transcripts from all books and records, and to make audit(s) of all billing statements, invoices, records, and other data related to the Services covered by this Agreement. Audit(s) may be performed at any time, provided that the District shall give reasonable prior notice to Developer and shall conduct audit(s) during Developer's normal business hours, unless Developer otherwise consents.

6.5. Confidentiality. Developer and all Developer's agents, personnel, employee(s), and/or subcontractor(s) shall maintain the confidentiality of all information received in the course of performing the Services. This requirement to maintain confidentiality shall extend beyond the termination of this Agreement.

6.6. Standard of Care. Developer shall remain liable to the District in accordance with this Agreement for all damages to the District caused by Developer's failure to perform any of the Services furnished under this Agreement to the standard of care of Developer for its Services, which shall be, at a minimum, the standard of care of a construction managers performing similar work for California school districts at or around the same time and in or around the same geographic area of the District.

6.7. No Third Party Rights. Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of any third party against either the District or Developer.

6.8. Binding on Successors. The District and Developer, respectively, bind themselves, their partners, officers, successors, assigns and legal representatives to the other party to this Agreement with respect to the terms of this Agreement. Developer shall not assign this Agreement.

6.9. Governing Law. This Agreement shall be governed by the laws of the State of California. The Parties further agree that any action or proceeding brought to enforce the terms and conditions of this Agreement shall be maintained and venued in the county where the District's administrative offices are located.

6.10. Modifications. This Agreement represents the entire Agreement between the District and Developer and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended or modified only by an agreement in writing signed by both the District and Developer.

6.11. Lease Agreements. In no event shall either party be obligated to enter into the Lease Agreements. District reserves the right to enter into the Lease Agreements with parties other than Developer. District shall not be responsible to Developer for any claims or damages resulting from District's failure to enter into the Lease Agreements with Developer.

ACCEPTED AND AGREED on the date indicated below:

Dated: _____, 20 _____

Mt. Diablo Unified School District

By: _____

Print Name: _____

Print Title: _____

Dated: May 23, 20 13

XL CONSTRUCTION, INC.

By: 

Print Name: Steve Winslow

Print Title: Vice President

Attachment "A"

Scope of Services

Developer shall perform management and coordination services, plan and specification constructability reviews, provide value-engineering reviews and recommendations and other reviews as necessary to verify that the drawings and specifications are clear and reasonably accurate to minimize the need for changes during the construction phase of the project, including but not limited to the following:

A. General Services.

- 1 Developer shall attend regular meetings during project development between the Architect, the District, District site personnel, and any other applicable consultants of the District as required to discuss the Project, including budget, scope and schedule.
- 2 Developer shall assist Architect with the making of a written record of all meetings, conferences, discussions and decisions made between or among the District, Architect and Developer.
- 3 Developer shall assist the Architect with making formal presentations to the governing board of District.
- 4 Developer shall prepare and update the preliminary Project schedule.
- 5 Developer shall prepare and update the components of the Guaranteed Project Cost and shall be primarily in control of ensuring that the Project can and is constructed for no more than that amount.
- 6 Assist District with City land use issues;
- 7 Assist District with DSA review, input, and timeframe for same;
- 8 Provide review and comment upon survey of the Project site;
- 9 Provide review and comment upon any EIR or other required CEQA documents with District's CEQA consultant.

B. Review of Design Documents.

- 1 Review Project design and budget with the District and the Architect during the Schematic Design Phase, the Design Development Phase, at 50% Construction Documents Phase, and at 100% Construction Documents Phase to:
 - a. Provide recommendations on site use and improvements, selection of materials, building systems and equipment and methods of Project delivery;
 - b. Provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction of the Project and subparts thereof if requested, and factors relating to cost including, but not limited to, construction costs of alternate designs of materials, preliminary budgets and possible economics that could be achieved through alternate methods or substitutions;
 - c. Provide interim design phase estimates to establish and maintain the Project budget and scheduled costs; and
 - d. Provide plan review.

- e. Value-engineering. Prepare a value-engineering report for District review and approval that:
- (1) Details areas of cost saving (e.g. construction processes/procedures, specified materials and equipment, and equipment or other aspects of the design documents that can be modified to reduce costs and/or the time for achieving final completion of the Project and/or to extend life-cycle and/or to reduce maintenance/operations costs, without diminution in the quality of materials/equipment/workmanship, scope or intended purposes of the Project);
 - (2) Provides detailed estimate for proposed value-engineering items;
 - (3) Defines methodology or approaches that maximize value; and
 - (4) Identifies design choices that can be more economically delivered.

- f. Constructability Review. Prepare detailed interdisciplinary constructability review within thirty (30) days of receipt of the plans from the District that:

- (1) Ensures construction documents are well coordinated and reviewed for errors;
- (2) Identifies to the extent known, construction deficiencies and areas of concern;
- (3) Back-checks design drawings for inclusion of modifications;
- (4) Provides the District with written confirmation that:
 - (a) Requirements noted in the design documents prepared for the Project are consistent with and conform to the District's Project requirements and design standards.
 - (b) Various components have been coordinated and are consistent with each other so as to minimize conflicts within or between components of the design documents.

- 2 Confirm Modifications to Design Drawings. If the District accepts Developer's comments, including the value-engineering and/or constructability review comments, review the design documents to confirm that those comments are properly incorporated into the final design documents.

C. Budget of Project Costs.

- 1 At each stage of plan review indicated above, Developer will update and refine the budget of the Guaranteed Project Cost based on the most recent set of design documents. Developer shall also advise the District and the Architect if it appears that the total construction costs may exceed the Guaranteed Project Cost established by the District and shall make recommendations for corrective action. Developer will further provide input to the District and Architect relative to value of construction, means and methods for construction, duration of construction of various building methods and constructability.
- 2 In each budget of the Guaranteed Project Cost, Developer shall include values of scopes of work subdivided into component parts in sufficient detail to serve as the basis for progress payments during construction. This budget of the Guaranteed Project Cost shall include, at a minimum, the following information divided into at least the following categories:
 - a. Overhead and profit;
 - b. Supervision;
 - c. General conditions;
 - d. Layout & Mobilization (not more than 1%)
 - e. Submittals, samples, shop drawings (not more than 3%);
 - f. Bonds and insurance (not more than 2%);
 - g. Close-out documentation (not less than 3%);
 - h. Demolition;
 - i. Installation;
 - j. Rough-in;

- k. Finishes;
- l. Testing;
- m. Punchlist and acceptance.

- 3 Developer shall indicate its willingness and ability to enter into the Lease Agreements to construct the Project for at or below that Guaranteed Project Cost, excluding unforeseen conditions or District-requested changes. This commitment will be a component of the Lease Agreements.

D. Construction Schedule and Phasing Plan.

Developer shall prepare a preconstruction schedule to guide the design team through to bid dates. That schedule shall show the multiphases and interrelations of design, constructability review, and estimating. Developer shall also prepare a full construction schedule for the Project detailing the phasing and construction activities. Developer shall further investigate, recommend and prepare a schedule for the District's purchase of materials and equipment requiring long lead time procurement, and coordinate the schedule with the early preparation of portions of the Contract Documents by the Architect.

E. Construction Planning and Bidding.

- 1 Prepare and distribute specifications and drawings provided by District to facilitate bidding to Developer's subcontractors.
- 2 Review the drawings and specifications to eliminate areas of conflict and overlapping in the work to be performed by various subcontractors, and with a view to eliminating change order requests by the Architect or subcontractors.
- 3 Conduct pre-bid conferences. Coordinate with District and the Architect in responding to subcontractor questions or providing clarification to all subcontractors.
- 4 At or around DSA approval (estimated to be June 6, 2013), receive subcontractor bids and develop the final GPC in accordance with the lease-leaseback agreement forms, including the requirement that the Developer receive at least three (3) to seven (7) bona fide bids from subcontractors for all scopes of work on the Project that constitute more than three percent (3%) of the total GPC (Article 7 of Attachment D to the Facilities Lease).

Attachment "C"
Services: Costs & Schedule

Services See Attachment A	
General Services Items 1 thru 9 inclusive	No Cost
Review of Design Documents Items 1 thru 2 inclusive	No Cost
Budget of Project Costs Items 1 thru 3 inclusive	No Cost
Construction Schedule and Phasing Plan inclusive	No Cost
Construction Planning and Bidding Items 1 thru 4 inclusive	No Cost
And no others	