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# Massachusetts School Building Authority

**Timothy P. Cahill**  
*Chairman, State Treasurer*

**Katherine P. Craven**  
*Executive Director*

November 8, 2010

***Sent via US Mail (with enclosures) to:***

Ms. Lauren Rosenzweig, Chair,  
Acton Board of Selectmen  
472 Main Street  
Acton, MA 01720

***Sent via e-mail (with attachments) to:***

JD Head, Director of Facilities (jdhead@mail.ab.mec.edu)

**Re: Project Funding Agreement for Douglas Elementary School Project**

Dear Ms. Rosenzweig:

Enclosed please find one original Execution Copy of the Project Funding Agreement (the "PFA"), including one complete set of PFA Exhibits for the Douglas Elementary School Project in the Town of Acton (the "Town"). The Town must submit three (3) signed originals of the PFA, one of which will be returned to the Town after it has been signed by the Massachusetts School Building Authority's Executive Director. **Please do not date the PFA on pages 1 and 22.** The PFA will be dated by the MSBA when the MSBA's Executive Director signs the Agreement.

Please return the three (3) signed originals of the PFA within thirty (30) calendar days after the date of this letter, so that the MSBA can execute the PFA and begin reimbursing the Town for eligible project costs that it has incurred. The Town should keep the enclosed set of Exhibits A through I for attachment to the fully executed original PFA that will be returned to the Town.

Please review Section 17 of the PFA to make sure that the designated Town officer, address, and facsimile number are accurate with regard to the receipt of notices that may be sent pursuant to the PFA.

The Town must also submit two (2) original copies of the Certification of Legal Counsel, which is being sent via e-mail as a Word document to enable the Town's legal counsel to put the Certification on his or her letterhead. The Legal Counsel Certification requires the Town's legal counsel to certify which local public official or governmental body (the "Local Governing Body") has the full legal authority to execute the PFA on behalf of the Town and to bind the Town to its terms. The Town should keep an additional copy of the certification for its records.

Ms. Rosenweig  
November 1, 2010  
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In addition, the Town will need to provide a certified copy of the vote of the Local Governing Body authorizing the Town to enter into and be bound by the PFA, where required by local charters, ordinances or by-laws. Finally, the Town must submit to the Authority a certified copy of the town meeting vote appropriating and authorizing the total project cost and a certified copy of any related debt exclusion ballot question results.

The required documents, which include: (1) three signed originals of the PFA (please retain the enclosed set of Exhibits for attachment to the fully executed PFA that will be returned to the Town); (2) two signed original of the Certification of Legal Counsel (please keep an additional copy for the Town's records); (3) a certified copy of the vote authorizing the Town to enter into and be bound by the PFA, where required by local charters, ordinances or by-laws; and (4) certified copies of the town meeting vote appropriating and authorizing the total project cost and any related debt exclusion ballot question results, should be mailed to my attention at the following address:

Massachusetts School Building Authority  
40 Broad Street, Suite 500  
Boston, MA 02109

**This documentation must be completed and returned to the MSBA within thirty (30) calendar days.** After this documentation has been properly completed and submitted to the MSBA, and the PFA has been fully executed, the Town can begin submitting requests for reimbursement to the MSBA for project costs beyond the Feasibility Study. **The MSBA will not process reimbursement requests or reimburse for any costs beyond those associated with the Feasibility Study phase of the Project until these requirements have been satisfied and the PFA has been fully executed.**

Please note that the MSBA generally makes reimbursement payments through electronic fund transfers and has banking information on file for most communities that have supplied it for previous school projects. Please notify the MSBA if the Town's banking information has changed or if the Town would like to use a different account at this time.

Please let me know if you have any questions.

Ms. Rosenweig  
October 28, 2010  
Page 3 of 3

Very truly yours,



George F. Driscoll, Jr.  
Deputy General Counsel

Cc: Senator James Eldridge (via US mail without enclosures)  
Representative Cory Atkins (via US mail without enclosures)  
Representative Jennifer Benson (via US mail without enclosures)  
Steven Ledoux, Town Manager, Town of Acton (via US mail without enclosures)  
Xuan Kong, Chair, Acton School Committee (via US mail without enclosures)  
William Ryan, Superintendent, Acton Public Schools (via US mail without enclosures)  
*File Letters 10.2*

**[Letterhead of Legal Counsel]  
Certification of Legal Counsel for the  
[City/Town/Regional School District]**

I, \_\_\_\_\_, duly appointed legal counsel for the [City/Town/RSD], hereby certify that:

1. The following elected or appointed governmental officer(s) or governmental body has the full legal authority under the laws of the Commonwealth of Massachusetts and all applicable local charters, ordinances and by-laws to execute and deliver the Project Funding Agreement (the "Agreement") for the [School] Project (the "Project") between the [City/Town/RSD] and the Massachusetts School Building Authority on behalf of the [City/Town/RSD] and to bind the [City/Town/RSD] to its terms and conditions:

*[Please list Name(s), Title(s), and Contact Information for the authorized governmental officer or governmental body signing the Project Funding Agreement. If a vote is required to authorize the governmental officer or governmental body to sign the Project Funding Agreement, please note such requirements here and submit a copy of said vote to the MSBA.]*

2. The following elected or appointed governmental officer(s) or governmental body has the full legal authority under the laws of the Commonwealth of Massachusetts and all applicable local charters, ordinances and by-laws to make final, binding decisions with respect to the Project described in the Project Funding Agreement, on behalf of the [City/Town/RSD]:

*[Please list Name, Title, and Contact Information for the governmental officer or governmental body who is authorized to make final, binding decisions with respect to the Proposed Project. If a vote is required to authorize the governmental officer or governmental body to make binding decisions with respect to the Proposed Project, please note such requirements here and submit a copy of said vote to the MSBA.]*

I hereby further certify that, to the best of my knowledge and belief, the above-listed certifications are true, complete and accurate.

IN WITNESS WHEREOF, signed this \_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_

\_\_\_\_\_  
Name (Print or Type)

\_\_\_\_\_  
Office/Title (Print or Type)

**PROJECT FUNDING AGREEMENT**  
**GREEN REPAIR PROGRAM**

This PROJECT FUNDING AGREEMENT, (the "Project Funding Agreement"), dated as of \_\_\_\_\_, 2010 (the "Effective Date") is entered into by and between the Massachusetts School Building Authority, an independent public authority of the Commonwealth of Massachusetts (the "Authority"), and the Town of Acton together with its successors and assigns (the "District" or "Owner") (Authority and District or Owner collectively referred to herein as the "Parties").

**RECITALS**

WHEREAS, the provisions of General Laws Chapter 70B, as amended ("Chapter 70B"), Chapters 208 and 210 of the Acts of 2004, and 963 CMR 2.00 *et seq.* authorize the Authority to provide a Total Facilities Grant (as defined in Section 1 below) to Eligible Applicants for approved school building construction, renovation and repair projects; and

WHEREAS, the District has applied for and desires to receive a Total Facilities Grant from the Authority pursuant to the provisions of Chapter 70B, Chapters 208 and 210 of the Acts of 2004, and 963 CMR 2.00 *et seq.* for a Project (as defined in Section 1 below) consisting of a partial roof replacement, at the Douglas Elementary School located at 21 Elm Street, Acton, Massachusetts, as it may be more particularly described in Exhibit B and elsewhere in this Agreement; and

WHEREAS, the Authority has determined that this Project is eligible for participation in the Authority's Green Repair Program; and

WHEREAS, the Authority has determined that the District's Project is eligible for the receipt of a Total Facilities Grant, and the District has agreed to receive a Total Facilities Grant, pursuant to a payment schedule determined by the Authority and subject to all of the terms and conditions of this Project Funding Agreement; and

WHEREAS, the Project is in the best interests of the Commonwealth and the District with respect to its site, type of construction, sufficiency of accommodations, open space preservation, urban development, urban sprawl, and energy efficiency;

WHEREAS, the Project has a value over its useful life commensurate with the lifecycle cost of building, operating, and maintaining the school facility;

WHEREAS, the Project is not at a school that has been the site of an approved school project pursuant to Chapter 70B or Chapter 645 of the Acts of 1948, as amended, within the 10 years prior to the Project Application date, or the Project is unrelated to such previously approved project in the same school;

WHEREAS, the Project is within the capacity of the Authority to finance within revenues projected to be available to the Authority;

WHEREAS, the District has procured a Designer for the Project in accordance with the provisions of M.G.L. c. 7, s. 38A ½ through 38O, 963 CMR 2.10(8), 963 CMR 2.12 and any other applicable laws and regulations.

WHEREAS, the Board of the Authority has voted to authorize the Executive Director to enter into a Project Funding Agreement with the District for the Project; and

WHEREAS, the District has taken all necessary votes authorizing the Project and has authorized and appropriated the Total Project Budget, in formats acceptable to the Authority; and

NOW, THEREFORE, in consideration of the promises and the mutual covenants contained in this Project Funding Agreement, and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the Authority and the District, intending to be legally bound, hereby agree as follows:

The Authority agrees to provide a Total Facilities Grant to the District, subject to all of the following terms and conditions:

## SECTION 1 DEFINITIONS

Capitalized terms that are not defined in this Section 1 shall have the meanings ascribed to them in Chapter 70B or 963 CMR 2.00 *et seq.* For purposes of this Project Funding Agreement, the following words shall have the following meanings:

“Assisted Facility” means the school facility that is eligible for and will receive either a Total Facilities Grant or partial payment of a Total Facilities Grant pursuant to this Project Funding Agreement.

“Construction Contract Documents” means all agreements, contracts, and other documents, including, but not limited to, the Owner-Contractor or Owner Construction Manager Contracts and attachments thereto, Advertisements, Instructions to Bidders, Bidding Documents, Contract Forms, Conditions of the Contracts, Specifications, Drawings, all addenda issued prior to execution of the Contracts, and other documents listed in the Owner-Contractor or Owner-Construction Manager contracts and any amendments or modifications issued after execution of said contracts, executed by and between the District and the Contractors or any other parties that set forth the terms, conditions, requirements, and specifications for the design and construction of the Project. For purposes of this Project Funding Agreement, the Construction Contract Documents shall also at all times include a current construction schedule, a current Total Project Budget, and a current cash flow projection.

“Construction Manager” or “Construction Manager at Risk” means a sole proprietorship, partnership, corporation, or other legal entity that provides construction management at risk services as defined in G.L. c. 149A, § 2 and is the person or entity procured as such by the District in accordance with G.L. c. 149A, *et seq.*, and who is primarily responsible for the performance and execution of the construction work on the Project.

“Contractor” is the person or entity identified as such throughout the Construction Contract Documents and who is primarily responsible for the performance and execution of the construction work on the Project.

“Designer” shall mean the individual, corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity engaged in the practice of architecture, landscape architecture, or engineering that meets the requirements of M.G.L. c. 7, § 38A 1/2 (b) and has been procured and contracted by the District to perform professional design services.

“Effective Date” means the date stated in the first paragraph of this Project Funding Agreement which shall be the date on which this Project Funding Agreement shall take effect.

“Excusable Delay” means a delay of the Project that either (a) is solely because of a natural event, such as flood, storms, or lightning, that is not preventable by any human agency, or (b) is reasonably determined by the Authority to be excusable.

“Final Request and Certificate for Reimbursement” means the certificate, submitted by the District to the Authority upon final completion of the Project, that is (1) signed by the Owner’s Project Manager stating that, to the best of the Owner’s Project Manager’s knowledge and belief, the Project has been completed and constructed in accordance with all Construction Contract Documents; (2) signed by the Designer stating that, to the best of the Designer’s knowledge and belief, the Project has been completed and constructed in accordance with the Construction Contract Documents and all applicable building and safety codes in effect at the time of construction; and (3) signed by a duly authorized representative of the District stating, to the best of his/her knowledge and belief, that all of the terms and conditions of this Project Funding Agreement, all other agreements between the District and the Authority and all applicable regulations and guidelines of the Authority have been satisfied.

“Green Repair Program” means the Authority’s program to provide Total Facilities Grants to school districts for Projects involving the repair, replacement or upgrade of roofs, boilers, and/or window systems in accordance with the Authority’s “Sustainability Requirements for the Green Repair Program”, which are incorporated by reference herein, and any other eligibility requirements set forth in this Project Funding Agreement or otherwise established by the Authority.

“Monthly” means once each calendar month.

“Notice to Proceed” means the written communication issued by the District to the Contractor or Construction Manager authorizing him to proceed with the Owner-Contractor or Owner-Construction Manager contract and establishing the date for commencement of the contract time.

“Owner’s Project Manager” shall mean the individual, corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity under contract with, designated by, or assigned by the District and approved by the Authority, to fully and completely manage and coordinate administration of the Project to completion. The Owner’s Project Manager must meet the qualifications set forth in M.G.L. c. 149, § 44A ½, 963 CMR 2.00 *et seq.*, and all applicable policies and guidelines of the Authority.

“Project” refers to a partial roof replacement, at the Douglas Elementary School located at 21 Elm Street, Acton, Massachusetts, as it may be more particularly described in Exhibit B and

elsewhere in this Agreement, which is a (1) Capital Construction Project, (2) Major Reconstruction Project, or (3) School Project, each as defined in Chapter 70B, §2.

“Project Cash Flow” means a detailed accounting of the projected amount of funding being received and expended by the District during the course of the Project on a monthly basis, which is attached hereto as Exhibit “D”.

“Project Permits” means all permits, approvals, consents and licenses issued or granted by governmental authorities, necessary or appropriate to the construction, completion and occupancy of the Project.

“Project Schedule” means the schedule for the Project, including a detailed estimated timeline as described in 963 CMR 2.10(10), which is attached hereto as Exhibit “C”.

“Project Scope” means the scope of the Proposed Project that has been mutually agreed to by the Authority and the District and as is attached hereto as Exhibit “B”.

“Project Scope and Budget Agreement” means the agreement described in 963 CMR 2.00, *et seq.* that has been executed by the Parties and is incorporated by reference herein.

“Project Scope and Budget Conference” means the conference described in 963 CMR 2.10(9).

“Schematic Drawings and Plans” means, where applicable to the Project, preliminary floor plans identifying programmatic and other spaces, elevations, site plans, plot plans, topographical plans, plans showing the location of the Project in relationship to other schools in the district, engineering studies, and any other plans deemed necessary by the Authority.

“Subcontractor” means a person or entity that has a direct contract with the Contractor or Construction Manager to perform a portion of the work on the Project.

“Total Facilities Grant” means the Authority’s total financial contribution to an Approved Project, which is calculated by the Authority pursuant to the provisions of Chapter 70B, Chapter 208 of the Acts of 2004, and 963 CMR 2.00 *et seq.*, and paid to the District pursuant to a Progress Payment schedule established by the Authority and subject to the terms and conditions of this Project Funding Agreement.

“Total Project Budget” means a complete and full enumeration of all costs, including both hard costs and soft costs, so-called, that the District reasonably estimates, to the best of its knowledge and belief, has been or will be incurred in connection with the planning, design, construction, development, the mobilization of the operation, and the completion of the Project, approved by the Authority, which may be updated from time to time by mutual agreement of the Parties and which is attached hereto as Exhibit “A”.

“Vendor” means any person, entity, business, or service provider under contract or agreement with the District to provide goods or services to the District in connection with the Project.

**SECTION 2**  
**THE PROJECT AND THE TOTAL FACILITIES GRANT**

2.1 As of the Effective Date and subject to the satisfaction of or compliance with, as reasonably determined by the Authority, (a) all of the terms and conditions of this Project Funding Agreement, (b) the applicable provisions of Chapter 70B, Chapters 208 and 210 of the Acts of 2004, and 963 CMR 2.00 *et seq.*, and (c) any other rule, regulation, policy, guideline, approval or directive of the Authority, the Authority hereby approves the following Total Facilities Grant for the Project: an amount that shall under no circumstances exceed the lesser of (i) **forty-three and eighty-five hundredths percent ( 43.85%)** of the final approved, total eligible Project costs, as determined by the Authority, (“Reimbursement Rate”) or (ii) **two hundred and six thousand, eight hundred and forty dollars (\$206,840.00)**. The Parties hereby acknowledge and agree that this Total Facilities Grant is the maximum amount of funding that the District may receive from the Authority for the Project, and that the final amount of the Total Facilities Grant may equal an amount less than \$206,840.00, as determined by an audit conducted by the Authority. Any costs and expenditures that are determined by the Authority to be either in excess of the above-stated Total Facilities Grant or ineligible for payment by the Authority shall be the sole responsibility of the District. The Parties hereby agree that costs incurred by the District in connection with the Project prior to the Effective Date may be eligible for reimbursement if the Authority determines that such costs otherwise meet the Authority’s eligibility requirements, and such costs shall not be deemed ineligible by the Authority solely because they were incurred prior to the Effective Date. Any costs and expenditures that are determined by the Authority to be either in excess of the above-stated Total Facilities Grant or ineligible for payment by the Authority shall be the sole responsibility of the District.

2.2 In the event that the Authority reasonably determines that the Project is not in accordance or compliance with the Project Scope, the Project Schedule, the Total Project Budget, Furnishings and Equipment Schedule, the Construction Contract Documents, the Schematic Drawings and Plans, all of the covenants in Section 3 of this Project Funding Agreement, all other terms and conditions of this Project Funding Agreement, the provisions of Chapter 70B, Chapters 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.*, and any other applicable rule, regulation, policy, guideline, approval or directive of the Authority, including, but not limited, to the Authority’s “Sustainability Requirements for the Green Repair Program”, or is delayed (other than an Excusable Delay), then the Authority may temporarily and/or permanently withhold payments to the District for the Project, provided that the Authority shall not unreasonably withhold any such payments. In the event that the Authority either temporarily or permanently withholds payment for the Project, the District hereby agrees and acknowledges that the Authority shall have no liability for any such withholding of payment or any loss that may occur as a result of any such withholding of payment.

2.3 INTENTIONALLY LEFT BLANK

2.4 The Reimbursement Rate for the Project is calculated as set forth in the reimbursement rate summary, attached hereto as **Exhibit “I”**, and shall be subject to the provisions of M.G.L. c. 70B, 963 CMR 2.00 *et seq.*, and the policies and guidelines of the Authority. Any incentive reimbursement points that may be included in the calculation of the Reimbursement Rate, as it may be amended from time to time by the written agreement of the Authority, must be earned, as determined by the Authority in its sole discretion, and shall be subject to audit by the Authority. If the Authority determines, in its sole discretion, that the District is ineligible to receive any portion of the incentive reimbursement points that may be included in the

calculation of the Reimbursement Rate, as it may be amended from time to time by the written agreement of the Authority, the Authority may, in its sole discretion, decrease the Reimbursement Rate and the Total Facilities Grant accordingly. Any such decrease in the Reimbursement Rate, and corresponding decrease in the Total Facilities Grant, shall be applied retroactively to all payments made to the District by the Authority under the terms of this Agreement and to all requests for reimbursement of eligible Project costs made by the District to the Authority under the terms of this Agreement. If the Authority determines that, as a result of a decrease in the Reimbursement Rate, or a corresponding decrease in the Total Facilities Grant, it has made overpayments to the District, the Authority may recover the amount of such overpayments from the District by whatever remedies are available to it under this Agreement or under applicable law, including, but not limited to, set off against any future payments owed to the District for reimbursement of eligible Project costs, as determined by the Authority. Upon written demand by the Authority, the District shall promptly return to the Authority the amount of any such overpayments unless otherwise agreed to in writing by the Authority.

### SECTION 3 COVENANTS

The District covenants and agrees that as long as this Project Funding Agreement is in effect, the District shall and shall cause its employees, agents, and representatives to perform and comply with the following covenants:

3.1 The District acknowledges and agrees that the Authority's grant program, established pursuant to Chapter 70B, Chapters 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.*, and any other applicable rule, regulation, policy or guideline of the Authority, is a non-entitlement, discretionary program based on need and the District shall not be entitled to any funds from the Authority except as provided in this Project Funding Agreement.

3.2 The District shall and shall cause its employees to comply with all provisions of this Project Funding Agreement; all other agreements related to the Project that have been referenced herein or otherwise approved in writing by the Authority; and all provisions of law that are applicable to the Project and this Project Funding Agreement and the District shall take all action necessary to fulfill its obligations under this Project Funding Agreement and under all other agreements related to the Project that have been referenced herein or otherwise approved by the Authority.

3.3 The District hereby agrees that it shall submit all Project information, including but not limited to, Total Project Budget information, plans, specifications, Project Schedules, and Project progress reports, and any additional information that may be requested by the Authority, to the Authority in a timely manner in a form satisfactory to the Authority.

3.4 The District hereby agrees that it shall use its best efforts and resources to diligently satisfy and complete each of the terms and conditions of this Project Funding Agreement as promptly as possible.

3.5 The District hereby acknowledges and agrees that all costs related to the Project, including the costs identified in the Total Project Budget and costs of the items appearing in the Project Scope, shall be subject to review and audit by the Authority, and the Authority shall determine, in its sole discretion, whether such costs are eligible for reimbursement pursuant to

the Authority's regulations, policies and guidelines. There may be Project costs, in addition to the items specifically identified as ineligible in the Total Project Budget, the Project Scope and/or the Furnishings and Equipment Schedule that are ineligible for reimbursement according to such regulations, policies and guidelines. The District hereby further acknowledges and agrees that certain costs incurred by the District in connection with the Project shall not be eligible for reimbursement by the Authority, pursuant to 963 CMR 2.10 & 2.16(5) and any other rules, regulations, policies and guidelines of the Authority, including, but not limited to, the following:

- (a.) Financing and Interest Costs. The District hereby acknowledges and agrees that any financing costs incurred by the District, including, but not limited to, interest, principal, costs of issuance and any other cost related to short or long term bonds, notes or other certificates of indebtedness, refunding notes or bonds, temporary loans, or any other form of indebtedness issued by the District in relation to an Approved Project and all costs associated with credit rating services, legal services related to the issuance of any indebtedness and financial consulting services shall not be eligible for reimbursement by the Authority.
- (b.) Legal Fees and Costs. The District hereby acknowledges and agrees that the cost of legal services, including, but not limited to, bond counsel fees, attorney's fees, arbitration or mediation fees, filing fees, and any other legal fees, costs or expenses incurred by the District in connection with the Project shall not be eligible for reimbursement by the Authority.
- (c.) All other costs identified in 963 CMR 2.16(5).

All project costs and Project Scope items are subject to review and audit by the Authority, and whether a project cost is eligible for reimbursement shall be determined by the Authority, in its sole discretion, during the Authority's audit of the Project.

3.6 The District hereby acknowledges and agrees that the Authority's Total Facilities Grant is subject to the District's adherence to and maintenance of the Project Scope, Project Schedule, Total Project Budget, and, where applicable, the Furnishings and Equipment Schedule, and the District shall not make any changes, additions, or reductions to the Project Scope, Project Schedule, Total Project Budget, or the Furnishings and Equipment Schedule without the prior written approval of the Authority. Any increases to the Total Project Budget as set forth in Exhibit A as of the Effective Date, shall not result in any changes to the amount of the Total Facilities Grant set forth in Section 2.1 of this Project Funding Agreement.

3.7 The District hereby acknowledges and agrees that the Authority shall not provide any funding for the Project in excess of the amount of the Total Facilities Grant set forth in Section 2 of this Agreement.

3.8 The District hereby acknowledges and agrees that the Authority shall not be required or obligated to make any payment of the Total Facilities Grant for eligible Project costs while an Event of Default, as defined in Section 22, shall have occurred.

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3.13 The District hereby acknowledges and agrees that it shall keep all records related to the Project including, but not limited to, those records described in 963 CMR 2.16(4), for as long as the Assisted Facility is in service as a public school or remains under the ownership or control of the District. The District shall and shall cause its employees, agents, representatives, and its Owner's Project Manager, Designer, Contractor or Construction Manager and Vendors to keep adequate records of the Project and shall make all Project records and the Project site available to the Authority, representatives of the Authority, and the Authority's Commissioning Consultant.

3.14 INTENTIONALLY LEFT BLANK

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3.17 With respect to all actions taken in relation to the Project, the District and all of its officers, agents and employees shall observe and obey all federal, state and local laws, regulations, ordinances, codes, statutes, orders and directives and any other applicable provisions of law.

3.18 INTENTIONALLY LEFT BLANK

3.19 The District shall furnish to the Authority such further affidavits, certificates, opinions of counsel, surveys and other documents and instruments as may be required by the Authority to ensure that the terms of this Project Funding Agreement are being observed and performed in all respects, and that the Project has progressed satisfactorily as planned in strict compliance with all applicable federal, state and local laws, regulations, ordinances, codes, statutes, orders and directives and any other applicable provisions of law.

3.20 The District shall submit to the Authority a list of all actual changes, amendments, addenda to the Construction Contract Documents, and to the Owner-Designer contract. The District shall submit all executed change orders, extra work orders, or modifications to the Project to the Authority for the Authority to consider whether the costs associated with such change orders, extra work orders, or modifications are eligible for reimbursement by the Authority pursuant to this Project Funding Agreement.

3.21 The District shall ensure that the Contractor or Construction Manager and Subcontractors obtained all Project Permits and shall certify to the Authority in writing that the Contractor or Construction Manager and Subcontractors obtained such Project Permits. With respect to any of the Project Permits that are required by law to be recorded or filed with any government office, the same shall be duly recorded and filed in accordance with all applicable requirements. The Authority shall have the right to request copies of Project Permits at any time, and the District shall make available any Project Permits requested by the Authority.

3.22 Prior to receiving final payment from the Authority, the District shall have obtained all required inspections and approvals of the Project that are required by law or otherwise required by the Authority.

3.23 INTENTIONALLY LEFT BLANK

3.24 Within ninety (90) days after the District approves final payment to the Contractor or Construction Manager for the Project, or provides such other appropriate documentation, as reasonably determined by the Authority, indicating that the construction of the Project is one hundred percent (100%) complete, the District shall submit to the Authority a Final Request and Certificate for Reimbursement and an accounting of the total final Project costs in a form prescribed by or otherwise acceptable to the Authority.

3.25 The District hereby agrees that, upon completion of the Project, the Assisted Facility shall have an anticipated useful life of at least 50 years as a public school or that the Project will materially extend the useful life of the School and preserve an asset that otherwise is capable of supporting the required Educational Program.

3.26 The District hereby acknowledges and agrees that neither the District nor any of its employees, officials or agents shall submit any false or intentionally misleading information or documentation to the Authority in connection with this Project Funding Agreement, and further acknowledges and agrees that the submission of any such information or documentation shall be a material breach of this Project Funding Agreement and shall be cause for the Authority to revoke any and all payments otherwise due to the District; to recover any previous payments made to the District, and/or make the District ineligible for any further funding from the Authority. The District hereby further agrees that it shall have a continuing obligation to update and notify the Authority in writing when it knows or has any reason to know that any information or documentation submitted to the Authority contains false, misleading or incorrect information.

3.27 The District hereby acknowledges and agrees that the Authority shall bear no responsibility, cost or liability for the results of any study, environmental assessment, geotechnical site testing, including but not limited to, site remediation, clean-up, or other site remediation services.

3.28 The District hereby acknowledges and agrees that the requirements set forth in the Agreement are intended solely for the benefit and protection of the Authority as the grantor of Project funding. Nothing herein shall be construed as advice to, nor create a duty to provide advice to, the District regarding legal or contractual requirements or best practices for the Project. It is solely the obligation of the District to determine and comply with all legal requirements applicable to the Project and to determine and enforce any necessary contractual requirements and obligations of its Designer, Owner's Project Manager, and Contractor or Construction Manager.

3.29 INTENTIONALLY LEFT BLANK

3.30 The District shall use its best efforts to enforce the provisions of the District's contracts with the Designer, Contractor or Construction Manager, and Vendors for the Project.

3.31 The District shall not have combined, consolidated, or conjoined in any way the procurement, pre-qualification or selection of an Owner's Project Manager, Designer, Contractor, Construction Manager at Risk, Subcontractor, consultant or vendor for the Project

with the procurement, pre-qualification or selection of an Owner's Project Manager, Designer, Contractor, Construction Manager at Risk, Subcontractor, consultant or vendor for any other construction, repair or renovation project except with the express written approval of a duly authorized representative of the Authority. Any costs incurred by the District that relate to, or arise out of, the use of a combined, consolidated or conjoined procurement, pre-qualification or selection process as proscribed above, including, but not limited to, the preparation of bid documents, requests for services, and requests for qualifications, without the express written approval of a duly authorized representative of the Authority shall not be eligible for reimbursement.

#### **SECTION 4 REPRESENTATIONS AND WARRANTIES**

The District and the undersigned, for themselves and for the District, hereby warrant and represent that each of the following statements is true, correct and complete:

4.1 The District is validly organized and existing under and by virtue of the laws of the Commonwealth, has full power and authority to own its properties and carry on its business as now conducted, and has full power and authority to execute, deliver and perform its obligations under this Project Funding Agreement.

4.2 The District is duly authorized and has taken all necessary steps to authorize the execution and delivery of this Project Funding Agreement and to perform and consummate all transactions contemplated by this Project Funding Agreement. The undersigned have been duly authorized in accordance with law to execute and deliver this Project Funding Agreement on behalf of the District. This Project Funding Agreement and its execution by the undersigned does not and will not, to any material extent, conflict with or result in the violation of any charter, by-law, ordinance, order, rule, regulation, statute or any other applicable provision of law or any order, rule, regulation or judgment of any court or other agency of government.

4.3 The District has all requisite legal power and authority to own, or to control in accordance with the provisions of 963 CMR 2.05(1), and to operate the Assisted Facility and Project Site for the useful life of the Assisted Facility.

4.4 The District holds fee simple title, or, in the alternative, a lease in accordance with the provisions of 963 CMR 2.05(1), to the Assisted Facility and the Project Site and any easements and rights-of-way necessary to ensure the undisturbed use and possession of the Assisted Facility and Project Site.

4.5 No information furnished by or on behalf of the District to the Authority in this Project Funding Agreement, including all Exhibits attached hereto, the Project Scope and Budget Agreement, the Feasibility Study Agreement, the Initial Compliance Certification, or any other document, certificate or written statement furnished to the Authority in connection with the Statement of Interest or Project contains any untrue statement of a material fact or omits any material fact necessary to make the statements contained in this Agreement or in the aforementioned documents not misleading in light of the circumstances in which the same were made.

4.6 The District has duly obtained all necessary votes, resolutions, appropriations, and local approvals for the Project, in accordance with formats prescribed by or otherwise acceptable to the Authority, and has taken all actions necessary or required by law to enable it to enter into this Project Funding Agreement and to fund and perform its obligations hereunder in accordance with the Authority's policies and standards. This Project Funding Agreement constitutes a valid and binding obligation of the District, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, moratorium, reorganization or other laws heretofore or hereafter enacted and general equity principles.

4.7 The District has read and fully understands, and shall remain in compliance with Chapter 70B; Chapter 208 and 210 of the Acts of 2004; 963 CMR 2.00 *et seq.*, and all other applicable rules, regulations, policies, guidelines approvals, directives, and procedures of the Authority.

4.9 The District has read and fully understands the provisions of 963 CMR 2.04 and warrants and represents that the Project has been designed and constructed in accordance with the requirements and standards set forth in 963 CMR 2.04.

4.10 The District has read and fully understands the provisions of 963 CMR 2.16 and understands that certain costs and expenses incurred by the District in connection with the Project shall not be eligible for reimbursement by the Authority, including, but not limited to, those items listed in 963 CMR 2.16.

4.11 The District has read and fully understands the provisions of 963 CMR 2.16(4) and has a record keeping system in place to file, track, and retain all records related to the Project for as long as the Assisted Facility is in service as a public school or remains under the ownership of the District.

4.12 The Project has successfully undergone review by any departments or agencies of the Commonwealth required by law to review such projects, including, but not limited to, the Massachusetts Historical Commission, the Massachusetts Commission Against Discrimination, the Secretary of Environmental Affairs, and the Architectural Access Board in accordance with all applicable laws and regulations and the District has provided written documentation evidencing such reviews to the Authority.

4.13 No litigation before or by any court, public board or body is pending against either the District or the Authority seeking to restrain or enjoin the execution and delivery of this Project Funding Agreement or the construction or operation of the Project, or contesting or affecting the validity of this Project Funding Agreement or the power of the District to pay its share of the Project.

4.14 The District has read and fully understands the provisions of the Massachusetts Conflict of Interest law, M.G.L. c. 268A, and has implemented policies and procedures to ensure that all District employees, agents, consultants and representatives and the Owner's Project Manager, Designer, Contractor and Vendors working on or for the Project are in compliance with M.G.L. c. 268A to the extent that it is applicable.

4.15 The District meets all of the applicable requirements of M.G.L. c. 7, § 38A ½; c. 30 (sections 39F, 39J, 39K, 39N, 39O, 39P and 39R); c. 70B; c. 149; chapter 193 of the Acts of 2004; 963 CMR 2.00 *et seq.* ; and all other applicable provisions of federal, state and local law, and has

implemented policies and procedures to ensure that all District employees, agents, consultants and representatives and the Owner's Project Manager, Designer, Contractor and Vendors working on or for the Project are in compliance with the applicable requirements of M.G.L. c. 7, § 38A ½; c. 30 (sections 39F, 39J, 39K, 39N, 39O, 39P and 39R); c. 70B; c. 149; chapter 193 of the Acts of 2004; 963 CMR 2.00 *et seq.*; and all other applicable provisions of federal, state and local law.

4.16 The District has implemented policies and procedures to prevent and eliminate fraud, waste and abuse of public funds in connection with the Project.

4.17 The District has submitted all audit materials requested by the Authority in connection with any project for which the District has received or anticipates receiving funding from the Authority.

4.18 The District has submitted to the Authority a completed electronic payments form, as prescribed by the Authority, in accordance with the instructions stated on the form.

4.19 In each fiscal year since fiscal year 1999, the District has spent at least 50% of the sum of the District's calculated foundation budget amounts for the purposes of foundation utility and ordinary maintenance expenses and extraordinary maintenance allotment as defined in M.G.L. c. 70 for those purposes.

## SECTION 5 DISBURSEMENT OF TOTAL FACILITIES GRANT

Subject to the terms and conditions of this Project Funding Agreement, the Authority shall disburse Total Facilities Grant funds to the District in accordance with and subject to the following:

5.1 (a.) Using the Authority's Pro-Pay system, the District shall submit requests for reimbursement to the Authority on a Monthly basis in a format and manner prescribed by the Authority. Each Monthly request for reimbursement shall be approved locally by a duly authorized representative of the District, shall be in a form prescribed by or otherwise acceptable to the Authority, and shall include, in reasonable detail: (1) the amount of reimbursement requested, (2) the nature of the materials, property, or services received, (3) the total value of the work performed and materials furnished by each of the Designer, Contractor, Owner's Project Manager, and each Vendor to date, (4) the value of the work completed during the reimbursement period, and (5) the percentage of completion to date for each line item of work.

(b.) Each request for reimbursement submitted by the District shall be accompanied by (1) the invoices for each of the amounts requisitioned, (2) proof of payment by the District, and (3) any other supporting documentation and information substantiating the District's request for reimbursement, as the Authority may request, in a form satisfactory to the Authority.

(c.) Each request for reimbursement shall include a written certification signed by a duly authorized representative of the District stating that: (1) such request for reimbursement is solely for costs incurred by the District in connection with the Project, (2) the obligations itemized in the request for reimbursement have not been the basis for a prior request for reimbursement submitted by the District that has been paid or rejected by the Authority, unless otherwise directed by the Authority, (3) the request for reimbursement is for work actually and properly performed or for materials or property properly identified in the request for reimbursement as not incorporated in the work but delivered and suitably stored at the Project Site, (4) the request for reimbursement

properly identifies materials or property approved for payment by the District as stored off the Project Site, with all costs of storage, insurance, perpetual inventory, monthly inspection and any maintenance requirement borne by the Contractor, and that the District has received the necessary proof of insurance and titles to the materials or property prior to payment to the Contractor, (5) the District has not received and is not expecting to receive any rebates, monetary settlements, grants, monetary donations, surety bond payments, insurance proceeds, or any other funding from a third party, other than the Authority, in connection with the Project that is the subject of the request for reimbursement, (6) the request for reimbursement is for costs that already have been duly paid by the District, and (7) the request for reimbursement is within the Total Project Budget approved by the Authority.

(d.) After receipt from the District of a timely and properly submitted request for reimbursement, the Authority shall make a reasonable effort to reimburse the District for the Authority's share of eligible Project costs, subject to the terms and conditions of this Project Funding Agreement within 15 days of receiving such request for reimbursement. The District hereby acknowledges and agrees that the amount of eligible Project costs reimbursed by the Authority may be subject to change depending on the results of an audit conducted by the Authority pursuant to Sections 5 and 6 of this Project Funding Agreement.

5.2 The Authority may review and perform a preliminary audit on each request for reimbursement submitted pursuant to this Section 5 to ensure that only eligible, approved costs of the Project are reimbursed by the Authority. In the event that the Authority determines that an item contained in a request for reimbursement submitted by the District is not eligible for reimbursement by the Authority, the Authority shall adjust a pending or a subsequent reimbursement to the District to account for the ineligible costs. The District hereby acknowledges and agrees that each audit conducted pursuant to this Section 5 is preliminary, and the Authority may further adjust and alter the results of a preliminary audit after conducting subsequent audits or the final project cost audit of the Project pursuant to Section 6 of this Project Funding Agreement.

5.3 Notwithstanding any other provisions of this Project Funding Agreement to the contrary, in no event shall disbursements of the Total Facilities Grant by the Authority exceed, in the aggregate, ninety-five percent (95%) of the Total Facilities Grant described in Section 2 of this Project Funding Agreement, unless the District has filed a Final Request and Certificate for Reimbursement and the Authority has completed a final project cost audit of the Project pursuant to Section 6 of this Project Funding Agreement.

## **SECTION 6 FINAL PROJECT COST AUDIT**

6.1 Upon the filing of a Final Request and Certificate for Reimbursement with the Authority or at a time determined by the Authority, the Authority shall conduct a final, close-out project cost audit of the Project, including a review of all requests for reimbursement and other documentation previously submitted to the Authority, any other documents or materials that the Authority may request, and an inspection of the Project, to determine the final Total Facilities Grant. The District hereby agrees and acknowledges that the Contractor's, Owner's Project Manager's and Designer's records shall be subject to audit by the Authority and such records shall include, but not be limited to, to the extent applicable, accounting records, written policies and procedures, Subcontractor files (including proposals of successful and unsuccessful bidders, bid tabulations, etc.), original estimates, estimating work sheets, correspondence, change order files (including documentation

covering negotiated settlements), backcharge logs and supporting documentation, general ledger entries detailing cash and trade discounts earned, insurance rebates and dividends, and any other Contractor records which may have a bearing on matters of interest to the Authority in connection with the Contractor's work for the District. All of the foregoing shall be open to inspection and subject to audit and/or reproduction by the Authority and/or its agent and/or its authorized representative to the extent necessary to adequately permit evaluation and verification of (a) Contractor compliance with all requirements of the Construction Contract Documents, and (b) compliance with provisions for pricing change orders, invoices or claims submitted by the Contractor or any of his payees.

6.2 Other specific records subject to audit by the Authority shall include all information, materials and data of every kind and character such as documents, subscriptions, recordings, computerized information, agreements, purchase orders, leases, contracts, commitments, arrangements, correspondence, electronic mail, invoices, notes, daily diaries, photographs, videos, meeting minutes, field reports, superintendent reports, drawings, receipts, vouchers and memoranda, and any and all other agreements, sources of information that may in the Authority's judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any District documents, Designer documents, Owner's Project Manager documents, Vendor documents or Construction Contract Documents. Such records subject to audit shall also include those records necessary to evaluate and verify direct and indirect costs, (including overhead allocations) as they may apply to costs associated with the Project. In those situations where said records have been generated from computerized data (whether mainframe, mini-computer, PC based or other computer systems), the District agrees to provide the Authority with extracts of data files in computer readable format on data disks or suitable alternative computer data exchange formats.

6.3 Upon satisfactory completion of the final project cost audit, as reasonably determined by the Authority, the Authority shall send an audit report and acceptance form and release to the District and, subject to the execution of the acceptance form and release by the District, make a final payment of the Total Facilities Grant to the District, less all adjustments for ineligible Project costs and any other adjustments that the Authority reasonably determines as necessary.

6.4 Notwithstanding any provisions in this Project Funding Agreement to the contrary, the ninetieth (90<sup>th</sup>) day after the District approves final payment to the Contractor for the Project or the ninetieth (90<sup>th</sup>) day after the District provides sufficient documentation, as reasonably determined by the Authority, indicating that the construction of the Project is approximately one-hundred percent (100%) complete or such other time, as the Authority may determine in its sole discretion, shall be the final cut-off date for incurring Project costs that may be eligible for reimbursement by the Authority.

## **SECTION 7**

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## **SECTION 8**

### **DUTY TO BUILD, MAINTAIN AND OPERATE**

8.1 The District hereby acknowledges and agrees that, in the event that the District fails to operate and maintain the Assisted Facility as a public school in substantial compliance with the

Educational Program filed with the Authority as part of its Application and in accordance with the provisions of this Project Funding Agreement, Chapter 70B, Chapter 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.* and any rules, regulations, policies and guidelines of the Authority, the District shall reimburse the Authority the full amount of any and all funds received from the Authority in connection with the Project.

8.2 The District shall maintain the Assisted Facility as a public school in substantial compliance with the Educational Program and in accordance with the provisions of this Project Funding Agreement, Chapter 70B, and 963 CMR 2.00 *et seq.*, Chapter 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.* and any rules, regulations, policies and guidelines of the Authority, unless otherwise agreed to in writing by the Authority. In the event that the District knows or has reason to know that the Assisted Facility is no longer operated and maintained as a public school in substantial compliance with the Educational Program and in accordance with the provisions of this Project Funding Agreement, Chapter 70B, and 963 CMR 2.00 *et seq.*, Chapter 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.* and any rules, regulations, policies and guidelines of the Authority,, the District shall give written notice thereof to the Authority.

8.3 The District shall maintain the Assisted Facility in a good, safe and habitable condition in all respects and in full compliance with all applicable laws, by-laws, ordinances, codes, covenants and rules and regulations set forth by any government authority with jurisdiction over matters concerning the condition and the use of the Assisted Facility.

## SECTION 9 INSURANCE

9.1 The District shall obtain and maintain all insurance required by law and such other insurance in such types and in such amounts as the Authority may require from time to time.

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9.1.2 Following completion of the Project, the District shall, at its sole expense, purchase and maintain coverage against loss or damage to the Assisted Facility in an amount equivalent to the estimated full replacement cost of the Assisted Facility. Such coverage shall be written on an "all risks" basis or equivalent form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and theft, vandalism, malicious mischief, terrorism, collapse, earthquake, flood (if the Project is not in an "A" or "V" flood zone), windstorm, falsework, mechanical and electrical breakdown, and boiler and machinery accidents, and debris removal including demolition occasioned by enforcement of any applicable legal requirements. The limits for earthquake and flood shall be the lesser of the estimated full replacement cost of the Assisted Facility or \$10,000,000. The policy shall include the Authority as a loss payee as its interests may appear. The District is responsible for the payment of any and all deductibles, self-insured retentions or any portion thereof under the policy.

9.1.3 The District shall include the Authority as an additional insured in any commercial general liability policy held by the District for liability arising out of the Project.

9.1.4 The Authority shall not be responsible for the payment of deductibles, self-insured retentions, or any portion thereof.

9.1.5 Upon request by the Authority, the District shall obtain and provide to the Authority originals of certificates of insurance evidencing the insurance coverage required by this section of the Project Funding Agreement.

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9.3 INTENTIONALLY LEFT BLANK

9.4 INTENTIONALLY LEFT BLANK .

9.5 The failure of the District to provide the insurance certificates required by this Project Funding Agreement shall constitute a material breach of this Project Funding Agreement and shall be just cause for termination of this Project Funding Agreement.

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9.9 All insurance policies required by this Project Funding Agreement shall be issued by companies lawfully authorized to write that type of insurance under the laws of the Commonwealth of Massachusetts with a financial strength rating of "A-" or better as assigned by A.M. Best Company, or an equivalent rating assigned by a similar rating agency acceptable to the District and the Authority.

9.10 INTENTIONALLY LEFT BLANK

9.11 The District shall, upon request by the Authority, produce copies of all policies of insurance maintained by the District, its Contractor or Construction Manager, Owner's Project Manager, Designer and Vendors related to the Project, to the Authority.

## SECTION 10

### COMPLIANCE WITH CONSTRUCTION CONTRACT DOCUMENTS, PROJECT PERMITS and OTHER APPLICABLE LAW

10.1 The District shall be solely responsible to the Authority for the implementation and completion of the Project in accordance with the Construction Contract Documents and Project Permits, and for the economical and efficient operation and administration of the Project. In addition, notwithstanding any right of approval, review, or inspection held by the Authority in connection with this Project Funding Agreement, the District shall be fully and solely responsible for taking all reasonable actions designed to ensure that the Project complies with all applicable building codes, laws, rules and regulations.

10.2 The District shall be responsible for enforcing the provisions of the Construction Contract Documents and shall use its best efforts to ensure that the Contractor or Construction Manager performs all of its contractual obligations thereunder in a satisfactory manner.

**SECTION 11  
DEFECTS**

11.1 The District shall use its best efforts to require the Contractor or the Construction Manager, at the Contractor's or Construction Manager's own cost and expense, to repair any defect in materials or workmanship in the Project or any portion of the Project that may develop during the applicable warranty period and the District shall, to the extent permitted by law, indemnify, defend and hold the Authority harmless from and against any loss, cost, liability or expense paid or incurred by the Authority (including all attorney's fees and other costs incurred by the Authority in the defense of any such action) with respect to any claim asserted against the Authority by any party with respect to any such defect, actual or alleged.

**SECTION 12  
ACCESS**

12.1 The District shall permit the Authority to have unrestricted access to the Project Site and the Assisted Facility at all reasonable times and shall allow the Authority to examine, inspect and copy all agreements, Construction Contract Documents, books, records, communications, and all other documents, materials and information related to the Project, for the purposes of, without limitation, determining compliance with this Project Funding Agreement, compliance with all other agreements related to the Project, and for assessing the progress of the Project.

12.2 The District shall promptly make available to the Authority any other documents or materials related to the Project, as the Authority may request from time to time.

**SECTION 13  
PRESENCE ON THE PREMISES OF THE ASSISTED FACILITY**

13.1 The District shall require each of the Owner's Project Manager, Designer, Contractor or Construction Manager and Vendors, as the case may be, to agree that that all persons whose duties bring them upon the Project Site shall comply with the reasonable directions of the authorized officers and/or representatives of the District and the Owner's Project Manager.

13.2 In the event of a material accident of any kind related to the Project, the District shall immediately notify the Authority in writing. For purposes of this section, material accident shall mean an accident resulting in death, serious injury or a serious breach in the physical plant.

**SECTION 14  
RESTRICTION ON SALE, LEASE, or REMOVAL FROM SERVICE**

14.1 As a condition of the Authority providing a Total Facilities Grant to the District, the District agrees to maintain and operate the Assisted Facility as a public school facility consistent with its Educational Program and in accordance with the provisions of this Project Funding Agreement, Chapter 70B, Chapter 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.*, and any rules, regulations, policies and guidelines of the Authority. In the event that the District wishes to sell, rent, lease, license, mortgage, donate, transfer control of, declare as surplus or otherwise dispose of an Assisted Facility, or any portion of an Assisted Facility, or convey or terminate any interest therein, other than renting, licensing, leasing or otherwise allowing for a temporary or periodic community use of the Assisted Facility that does not interfere with or result in changes to the

Educational Program, the District shall provide the Authority with a written notice of its intent to sell, rent, lease, license, mortgage, donate, transfer control of, declare as surplus, or otherwise dispose of the Assisted Facility, or any portion of an Assisted Facility, or convey or terminate any interest therein, at least sixty (60) days prior to the effective date of any such proposed action, in accordance with the notice provisions of Section 17 of this Project Funding Agreement. The notice of intent to take any of the aforementioned actions shall include the current appraised value of the Assisted Facility and the maximum resale price on the basis of highest and best use of the facility. If the Authority disagrees with the current appraised value of the Assisted Facility, the Authority may obtain a second appraisal at its own expense, and the current appraised value shall be equal to the greater of the two appraisal amounts on the basis of highest and best use of the facility.

14.2 The provisions of Chapter 70B, § 15(a)-(c) shall apply to any sale, rental, lease or removal from service of the Assisted Facility, except for a rental or lease that is for a temporary or periodic community use. In the event that the District sells, rents, or leases the Assisted Facility, other than renting or leasing the Facility for a temporary or periodic community use, the Authority shall receive no less than its share, in proportion to its investment in the total Project cost, of the fair market value of the Assisted Facility, as determined by an appraisal conducted pursuant to Section 14.1 above.

#### **SECTION 15 NOTICE OF CLAIMS**

15.1 The District shall notify the Authority promptly in writing at the address and in the manner required by Section 17 of this Project Funding Agreement of any material claim or action brought against the District, Designer, Owner's Project Manager, Contractor or Construction Manager, Vendors and/or any and all Sub-Contractors arising out of this Project Funding Agreement or the Project.

15.2 Neither the District nor any person or entity claiming by through or under it, shall file a civil action arising out of the provisions of this Project Funding Agreement against the Authority without first serving the Authority with a written notice stating the factual basis of its claims, the applicable provisions of the Project Funding Agreement that the claim is based upon, and the remedy that the District is seeking. No civil action arising out of the provisions of this Project Funding Agreement shall be filed by the District against the Authority until the expiration of sixty (60) days after the Authority has received the notice of claim required by this section.

#### **SECTION 16 INDEMNIFICATION**

16.1 To the fullest extent permitted by law, the District shall indemnify, defend, and hold harmless the Authority and its officers, agents and employees from and against any and all claims, actions, damages, awards, judgments, liabilities, injuries, costs, fees, expenses, or losses, including, without limitation, reasonable attorneys fees and costs of investigation and litigation whatsoever which may be incurred by or for which liability may be asserted against the Authority, its officers, agents or employees arising out of any activities undertaken by, for, or on behalf of the District in the implementation of this Project Funding Agreement or any activities, acts or omissions in relation to the Project, including, but not limited to, the performance of any contract or obligation directly or indirectly related to the Project. This Section shall not be construed to negate or abridge any other obligation of indemnification running to the Authority which would otherwise exist.

16.2 INTENTIONALLY LEFT BLANK

**SECTION 17  
NOTICE**

17.1 Any notices required or permitted to be given by either of the Parties hereunder shall be given in writing and shall be delivered to the addressee (a) in-hand (b) by certified mail, postage prepaid, return receipt requested; (c) by facsimile; or (d) by a commercial overnight courier that guarantees next day delivery and provides a receipt, and such notices shall be addressed as follows:

If to the Authority:

Massachusetts School Building Authority  
40 Broad Street, Suite 500  
Boston, MA 02109  
Attention: Director of Capital Planning  
Facsimile: 617-720-5260

If to the District:

Town of Acton  
472 Main Street  
Acton, MA 01720  
Attention: Town Treasurer

Facsimile: (978) 264-9630

or to such other address or addressee as the District and the Authority may from time to time specify in writing. Any notice shall be effective only upon receipt, which for any notice given by facsimile shall mean notice that has been received by the party to whom it is sent as evidenced by a confirmation slip that bears the time and date of receipt.

**SECTION 18  
AMENDMENTS**

18.1 This Project Funding Agreement may be amended only through a written amendment signed by duly authorized representatives of the District and the Authority.

**SECTION 19  
ADDITIONAL PROVISIONS**

19.1 All certifications, filings, and submissions to the Authority required by this Project Funding Agreement shall contain a statement, signed by a duly authorized representative of the District, that such certification, filing, or submission is true, complete and accurate, to the best of the District's knowledge.

19.2 No member or employee of the Authority shall be held personally or contractually liable by or to the District under any provision of this Project Funding Agreement, because of any breach of this Project Funding Agreement, or because of its execution or attempted execution.

19.3 The District shall neither assign any interest, in whole or in part, in this Project Funding Agreement, nor transfer any interest in same, whether by assignment or novation, without the prior written approval of the Authority.

19.4 Nothing in this Project Funding Agreement shall be construed as creating a duty or obligation on the part of the Authority to oversee or monitor the performance of the Designer, Contractor or Construction Manager, Owner's Project Manager or other Project participants. The Authority shall not be responsible for, among other things, the design of the Project, architectural plans, construction means, methods, techniques, sequences or procedures, quality control or construction safety, or compliance with the Construction Contract Documents, Project Permits or any applicable provisions of law, which shall be and remain the sole responsibility of the District and its Designer, Contractor or Construction Manager, Owner's Project Manager and Vendors, as the case may be.

## **SECTION 20 GOVERNING LAW, VENUE, AMENDMENT and SEVERABILITY**

20.1 This Project Funding Agreement shall be governed by and interpreted in accordance with the laws of the Commonwealth of Massachusetts. In case any provision(s) hereof shall be determined invalid or unenforceable under the applicable law, such provision(s) shall, insofar as possible, be construed or applied in such manner as will permit the enforcement of this Project Funding Agreement; otherwise, this Project Funding Agreement shall be construed as though such provision(s) had never been made a part hereof.

20.2 Any civil action brought against the Authority by the District, or any person or entity claiming by through or under it, that arises out of the provisions of this Project Funding Agreement, shall only be brought in the Superior Court for Suffolk County, Massachusetts. The District, for itself and for any person or entity claiming by through or under it, hereby waives any defenses that it may have as to the venue to which it has agreed herein, including, but not limited to, any claim that this venue is improper or that the forum is inconvenient. The District for itself and for any person or entity claiming by through or under it, hereby waives all rights, if any, to a jury trial in any civil action against the Authority that may arise out of the provisions of this Project Funding Agreement.

20.3 This Project Funding Agreement and any amendments hereto shall be deemed null and void and of no further force or effect unless it is executed by a duly authorized representative of the District and a duly authorized representative of the Authority. The undersigned, who are signing on behalf of the District, hereby warrant and represent that they possess the full legal authority to execute this Project Funding Agreement on behalf of the District and to bind the District to its terms and conditions. In the event that the Authority determines that the undersigned are not duly authorized to execute this Project Funding Agreement and to bind the District, the Authority may, in its sole discretion, take whatever action it deems necessary to terminate this Project Funding Agreement, to suspend or terminate payments to the District and to recover any funds disbursed to the District. Any rights and remedies available to the Authority under the provisions of this Project Funding Agreement shall be in addition to any other rights and remedies provided by law.

## **SECTION 21 WAIVERS**

21.1 The terms, conditions, covenants, duties and obligations contained in this Project Funding Agreement may be waived only by written agreement executed by duly authorized representatives of the District and the Authority. No waiver by either party of any term, condition, covenant, duty or obligation shall be construed as a waiver of any other term, condition, covenant, duty or obligation nor shall a waiver of any breach be deemed to constitute a waiver of any subsequent breach, whether of the same or a different section, subsection, paragraph, clause, phrase, or other provision of this Project Funding Agreement. Forbearance or indulgence in any form or manner by either Party to this Project Funding Agreement shall not be construed as a waiver, nor in any way limit the remedies available to that party.

21.2 The Authority's payment(s) to the District under this Project Funding Agreement or its review, approval or acceptance of any actions by the District under this Project Funding Agreement shall not operate as a waiver of any rights or remedies available to the Authority under this Project Funding Agreement or as otherwise provided by law and the District shall remain liable to the Authority for all damages incurred by the Authority arising out of the District's failure to perform in accordance with the terms and conditions of this Project Funding Agreement.

## **SECTION 22 DEFAULTS AND REMEDIES**

22.1 The occurrence of any of the following events shall constitute, and is herein defined to be, an Event of Default under this Project Funding Agreement:

(a.) If the District shall fail to perform or observe any covenant, agreement, term or condition on its part provided in this Project Funding Agreement and such failure shall continue for a period of thirty (30) days after written notice thereof shall be given to the District by the Authority; provided that, if such failure cannot be remedied within such thirty (30) day period, it shall not constitute an Event of Default hereunder if corrective action satisfactory to the Authority, as determined by the Authority, in writing, is instituted by the District within such period and diligently pursued until the failure is remedied;

(b.) If any representation or warranty made by the District in this Project Funding Agreement shall prove to have been incorrect, false, or to be misleading in any material respect;

22.2 If any Event of Default hereunder shall occur and be continuing, the Authority may proceed to protect its rights under this Project Funding Agreement, and may: (a) terminate this Project Funding Agreement, (b) permanently withhold or temporarily suspend payment of the Total Facilities Grant to the District, (c) recover any payments of the Total Facilities Grant previously made to the District, and/or (d) may exercise any other right or remedy upon such default as may be granted to the Authority under this Project Funding Agreement or under any other applicable provision of law.

22.3 No delay or omission to exercise any right, remedy or power accruing upon any Event of Default shall impair any such right, remedy or power or shall be construed to be a waiver thereof, but any such right, remedy or power may be exercised from time to time and as often as may be deemed expedient.

22.4 The rights and remedies conferred upon or reserved to the Authority under this Project Funding Agreement are not intended to be exclusive and every such right or remedy shall be cumulative and shall be in addition to any other rights or remedies provided by law. The Authority may assert a right to recover damages by any appropriate means, including, but not limited to, set-off, suit, withholding, recoupment, or counterclaim either during or after performance of this Project Funding Agreement.

**SECTION 23  
TERMINATION**

23.1 This Project Funding Agreement may be terminated by the Authority if an Event of Default shall have occurred as provided in Section 22. Notice of such termination shall be in writing and shall be effective immediately upon service of the notice in the manner provided in Section 17. Upon five (5) days written notice, this Project Funding Agreement may be terminated by the Authority in the event of any action constituting fraud, malfeasance, or illegal activity committed in connection with the Project by the District or any of the District's employees, or, where the District knew or should have known, by the Architect, Owner's Project Manager, Construction Manager, Contractors or Vendors.

23.2 This Agreement may be terminated by mutual written agreement of the Parties.

**SECTION 24  
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IN WITNESS WHEREOF, the Authority and the District have caused this Project Funding Agreement to be executed by their duly authorized representatives this \_\_\_\_ day of \_\_\_\_\_ in the year 2010.

**THE MASSACHUSETTS SCHOOL BUILDING AUTHORITY  
BY:**

\_\_\_\_\_  
Katherine P. Craven  
Executive Director

**THE DISTRICT  
BY:**

\_\_\_\_\_  
Name (Type/Print)

\_\_\_\_\_  
Title/Office (Type/Print)

## Christine Joyce

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**From:** Steve Ledoux  
**Sent:** Thursday, December 09, 2010 12:34 PM  
**To:** Christine Joyce  
**Subject:** FW: MSBA PFA - Douglas Elementary

We need to add to agenda

Steven L Ledoux  
Town Manager  
472 Main Street  
Acton, MA 01720  
Telephone (978) 929-6611

When writing or corresponding, please be aware that the Secretary of State has determined that most email is a public record and, therefore, may not be kept confidential.

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**From:** JD Head [mailto:jdhead@mail.ab.mec.edu]  
**Sent:** Thursday, December 09, 2010 12:31 PM  
**To:** Steve Ledoux  
**Subject:** Re: MSBA PFA - Douglas Elementary

Does Lauren have to sign or can I. Seems I have signed these in the past

Looks to me it depends on how Town Legal counsel fills out the attached PFA Legal Certification will determine who signs. Section 1 asks counsel to identify the elected official (Lauren) or appointed governmental officer (you) who can execute the PFA. Section 2 asks counsel to identify the elected official or appointed governmental officer who can make final binding decisions with regards to the project. Counsel could name me there if you would like, fact of the matter is that all decisions have already been made and approved by MSBA as the project is completed so this section is nonconsequential.

Additionally, these documents say that we must submit a certified copy of the Town meeting vote authorizing the town to appropriate the funds. This has been submitted already. But it also says the Town governing body (BOS) needs to vote to execute the PFA and a certified copy of that vote must be submitted. If you recall we did this last year or a year and a half ago for the Conant Heating System PFA. This was done in a special meeting that was called to order one evening in the small room downstairs at Town Hall, not sure if that rings a bell. I would be happy to give a presentation to the BOS or answer any questions in any format at their convenience with regards to this document or the project in general.

12/9/2010

I hope this is helpful. Just let me know how you want to handle it or what you need me to do.

Best,  
JD

**Christine Joyce**

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**From:** Lauren Rosenzweig [lsr57@comcast.net]  
**Sent:** Wednesday, December 08, 2010 3:36 PM  
**To:** JD Head  
**Cc:** Manager Department  
**Subject:** Fwd: PFA Douglas Roof

Hi JD,

Steve L has not seen the agreement, and I never received it.

Do you know how it was sent?

Also, is there a deadline?

Does it need BOS approval or can Town Manager sign?

We meet this coming Monday at 5:00 PM, so if you can send any documents and tell us what we need to vote, we can take care of it then. We need to post the meeting by tomorrow at 4:00PM. I'll ask the Town Manager to put it on the agenda just in case.

STEVE L--Can you add this to Monday 5 PM agenda? It would be titled "Project Funding Agreement from the MSBA (Massachusetts School Building Authority) for the Douglas School Roof."

Sorry for the mix-up. We'll do whatever we need to get it done.

--Lauren

Begin forwarded message:

**From:** Lauren Rosenzweig <lsr57@comcast.net>  
**Date:** December 8, 2010 3:15:40 PM EST  
**To:** Steve Ledoux <sledoux@acton-ma.gov>  
**Cc:** JDHead@mail.ab.mec.edu  
**Subject:** Fwd: PFA Douglas Roof

Hi Steve,

I must have missed this e-mail.

I checked my records and I did not receive a copy of the Agreement, unless it was delivered to me hard copy? on DocuShare?

Can you look into this and get back to JD Head as soon as possible? He sent me another

12/8/2010

reminder today (see attached).

Thank You.

Lauren

JD:

Attached please find the Project Funding Agreement for the Douglas Elementary School. A hardcopy for execution has been sent in the mail to Ms. Rosenzweig (Chair, BOS). The instructions for execution can be found on the cover letter. Also attached is the legal certification as a Word document so that it can be placed on district letterhead as outlined in the cover letter.

The PFA Exhibits will be emailed separately due to size.

Please feel free to call or email me with any questions.

Noah Luskin

Massachusetts School Building Authority  
40 Broad Street  
Boston, MA 02109

Direct: 617-960-3037  
Main: 617-720-4466  
Fax: 617-720-5260

[noah.luskin@MassSchoolBuildings.org](mailto:noah.luskin@MassSchoolBuildings.org)