

**MODIFIED AGREEMENT
BETWEEN OWNER AND CONTRACTOR
FOR CONSTRUCTION CONTRACT (LUMP SUM)**

THIS AGREEMENT is by and between Transylvania County Schools (“Owner”) and
Superior Mechanical Services, Inc. (“Contractor”).

Effective Date of Agreement: March 22, 2023

Owner and Contractor hereby agree as follows:

ARTICLE 1 – WORK

1.01 Contractor shall complete all Work as specified or indicated in the Contract Documents.
The Work is generally described as follows:

The project generally consists of replacing existing 2 pipe hydronic distribution system with a 4 pipe system. Existing 2 pipe system will remain in service during installation of the 4 pipe system.

ARTICLE 2 – ENGINEER

2.01 The Project has been designed by McGill Associates, P.A. (Engineer), which is to act as Owner’s representative, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

ARTICLE 3 – CONTRACT TIMES

3.01 *Time of the Essence*

A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

3.02 *Dates for Substantial Completion and Final Payment*

A. The Work must be substantially completed (including chilled water system operational) 10 calendar days prior to the first day of school for students in the 2024/ 2025 school year and completed and ready for final payment in accordance with the Modified General Conditions within 30 calendar days from date of substantial completion above.

3.03 *Liquidated Damages*

- A. Contractor and Owner recognize time is of the essence and Owner will suffer financial loss if the Work is not completed within the times specified in Paragraph 3.02 above, plus any extensions allowed in accordance with Article 12 of the Modified General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Owner and Contractor agree that as liquidated damages for delay (but not as a penalty), Contractor shall pay Owner **\$500 (five hundred dollars)** for each calendar day that expires after the time specified in Paragraph 3.02 above for Substantial Completion until the Work is substantially complete. After Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by Owner, Contractor shall pay Owner **\$500 (five hundred dollars)** for each calendar day that expires after the time specified in Paragraph 3.02 above for completion and readiness for final payment until the Work is completed and ready for final payment. Liquidated damages as described in this Paragraph will also apply to delays in completion of each Phase of the Work as described in Paragraph 3.02 above.

ARTICLE 4 – CONTRACT PRICE

- 4.01 Owner will pay Contractor for completion of the Work in accordance with the Contract Documents a lump sum of \$1,625,000 (one million six hundred twenty five thousand dollars). Progress payments shall be an amount equal to the sum of the amounts determined pursuant to Paragraph 4.01.A.
- A. For lump sum work an amount equal to the percentage completed of specific items of work provided by the Contractor as a schedule of values for the Lump Sum work, minus any retainages in accordance with the Contract Documents.

ARTICLE 5 – PAYMENT PROCEDURES

5.01 *Submittal and Processing of Payments*

- A. Contractor must submit Applications for Payment in accordance with Article 14 of the Modified General Conditions. Applications for Payment will be processed by Engineer as provided in the Modified General Conditions.

5.02 *Progress Payments; Retainage*

- A. Owner will make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment on or about the 25th day of each month during performance of the Work as provided in Paragraph 5.02.A.1 below. All payments will be measured by the schedule of values established as provided in Paragraph 2.07.A of the Modified General Conditions (and in the case of Unit Price Work based on the number of units completed).

1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Engineer may determine or Owner may withhold, including but not limited to liquidated damages, in accordance with Paragraph 14.02 of the Modified General Conditions.

95 percent of Work completed (with the balance being retainage). If the Work has been 50 percent completed as determined by Engineer, and if the character and progress of the Work has been satisfactory to Owner and Engineer, then as long as the character and progress of the Work remain satisfactory to Owner and Engineer, there will be no additional retainage.

- B. Upon Substantial Completion, Owner will pay an amount sufficient to increase total payments to Contractor to 97.5 percent of the Work completed, less such amounts as Engineer determines in accordance with Paragraph 14.02.B.5 of the Modified General Conditions and less 250 percent of Engineer's estimate of the value of Work to be completed or corrected as shown on the tentative list of items to be completed or corrected attached to the certificate of Substantial Completion.

5.03 *Final Payment*

- A. Upon final completion and acceptance of the Work in accordance with Paragraph 14.07 of the Modified General Conditions, Owner will pay the remainder of the Contract Price as recommended by Engineer as provided in Paragraph 14.07.

ARTICLE 6 – CONTRACTOR'S REPRESENTATIONS

- 6.01 In order to induce Owner to enter into this Agreement, Contractor makes the following representations:
 - A. Contractor has examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents.
 - B. Contractor has visited the Site and become familiar and satisfied with the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
 - C. Contractor is familiar and satisfied with all federal, state, and local Laws and Regulations which may affect cost, progress, and performance of the Work.
 - D. Contractor has reviewed all General and Supplementary Conditions applicable to the Work.
 - E. Contractor has considered the information known to Contractor; information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, including any specific

means, methods, techniques, sequences, and procedures of construction expressly required by the Contract Documents; and (3) Contractor's safety precautions and programs.

- F. Based on the information and observations referred to in Paragraph 6.01.E above, Contractor does not consider further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract Documents.
- G. Contractor is aware of the general nature of work to be performed by Owner and others at the Site which relates to the Work as indicated in the Contract Documents.
- H. Contractor has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies if any, which Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Contractor.
- I. The Contract Documents are sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.

ARTICLE 7 – MISCELLANEOUS

7.01 *Terms*

- A. Terms used in this Agreement have the meanings stated in the Modified General Conditions and the Supplementary Conditions.

7.02 *Assignment of Contract*

- A. No assignment by a party of any rights under or interests in the Contract will be binding on another party without the written consent of the party sought to be bound; and, specifically but without limitation, moneys may become due and moneys that are due may not be assigned without such consent (except to the extent the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

7.03 *Successors and Assigns*

- A. Owner and Contractor each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

7.04 *Severability*

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Contractor, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

7.05 *Contractor's Certifications*

- A. Contractor certifies it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 7.05:
 - 1. "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value likely to influence the action of a public official in the bidding process or in the Contract execution.
 - 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition.
 - 3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels.
 - 4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

ARTICLE 8 – CONTRACT DOCUMENTS

8.01 Contents

- A. The Contract Documents consist of the following:
1. This Agreement
 2. Performance bond
 3. Payment bond
 4. Other bonds
 5. Notice of Award
 6. Modified General Conditions
 7. Specifications as identified in the table of contents of the bound Project Manual.
 8. Drawings consisting of each sheet bearing the following general title: HVAC Piping Improvements, Pisgah Forest Elementary School
 9. Addenda (numbers 1 through 2, inclusive).
 10. Exhibits to this Agreement (enumerated as follows):
 - a. Contractor's Bid (pages 1 through 12, inclusive).
 11. The following may be delivered or issued on or after the Effective Date of the Agreement but are not attached hereto:
 - a. Notice to Proceed (pages through , inclusive).
 - b. Work Change Directives.
 - c. Change Orders.
- B. The documents listed in Paragraph 8.01.A are attached, and incorporated here by reference, to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 8.
- D. The Contract Documents may only be amended, modified, or supplemented as provided in Paragraph 3.04 of the Modified General Conditions.

ARTICLE 9. SAFETY

The Contractor is solely and exclusively responsible for initiating, maintaining, monitoring and supervising all safety programs, safety precautions and procedures, safety equipment and

required safety reporting procedures in connection with the work and in accordance with County requirements and State and Federal statutes. The Contractor must take all necessary or required measures to prevent damage, injury and loss to all employees present at the site, the employees of subcontractors and all other parties having access to the project site including visitors and the general public. Before beginning work, the Contractor must provide a written copy of its Safety Program to the Owner for informational purposes and for verification a safety program is available.

The project is considered a " Hard Hat", " Protective Eyewear" and` Appropriate Clothing" construction project. All workmen, delivery truck drivers and visitors to the project are required to procure and wear approved safety headgear and eye protection regardless of whether` overhead hazard" or` flying debris" work is being performed and regardless of whether the workman is operating a piece of equipment from an enclosed station. All workmen and visitors are required to wear appropriate clothing including trousers, long/ short sleeved shirts and leather footwear. No sleeveless shirts or canvas or" athletic- style" shoes will be permitted. The Contractor must furnish, install, maintain and remove signs at the project entrance stating that appropriate clothing, hard hats and protective eyewear must be worn at all times.

Notwithstanding anything contained within these General Conditions to the contrary and to the fullest extent permitted by law, the Contractor shall indemnify, protect and hold harmless the Owner, and Engineer from and against all losses, claims, liens, causes of action at law or at equity and expenses, including without limit, attorney' s fees arising or allegedly arising from such operations, activities, mistakes, negligence or omission of the Contractor, its employees, agents, representatives, subcontractors, materialmen, or suppliers incidental to, or related to the Contract Agreement. Contractor understands and agrees the Owner and Engineer will not, in any way, be responsible for any losses or damages incurred, or allegedly incurred, by the Contractor, its employees, agents, representatives, subcontractors, materialmen or suppliers.

ARTICLE 11. CONTRACT GOVERNED BY NORTH CAROLINA LAWS

This Agreement and the rights and obligations to the parties hereunder shall be construed and governed by the laws of the State of North Carolina and venue for any proceedings shall be in the Superior Court of Transylvania County.

ARTICLE 12. USE OF ILLEGAL IMMIGRANTS/ HOLD HARMLESS

Transylvania County Schools assumes no responsibility for, and Contractor shall hold Transylvania County Schools harmless from, all fines or fees arising from Contractor' s failure to satisfy Department of Labor or Immigration and Naturalization Service employment regulations.

As a condition of payment for services rendered under this Agreement, Contractor must comply with the requirements of Article 2 of Chapter 64 of the General Statutes. Further, if Contractor provides services to the County utilizing a subcontractor, Contractor must require the subcontractor to comply with the requirements of Article 2 of Chapter 64 if the General Statutes.

IN WITNESS WHEREOF, Owner and Contractor have signed this Agreement. Counterparts have been delivered to Owner and Contractor. All portions of the Contract Documents have been signed or have been identified by Owner and Contractor or on their behalf.

OWNER:

Transylvania County Schools

By: _____

Title: BOARD OF EDUCATION, CHAIR

Attest: _____

Title: _____

Address for giving notices:

225 ROSENWALD LANE

BREVARD, NC 28712

Pre-Audit Statement: This instrument has been preaudited in the manner required by the Local Budget and Fiscal Control Act as amended.

By: _____

Title: _____

Date: _____

Approved as to Form:

By: _____

Title: _____

Date: _____

CONTRACTOR

Superior Mechanical Services, Inc.¹

By: [Signature]

Title: President

(If Contractor is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)

Attest: [Signature]

Title: Corp. Secretary

Address for giving notices:

607 Industrial Ave

Greensboro, NC 27406

License No.: 18629

Agent for service of process:
