

TRANSFER OF GUARANTEED CONTRIBUTION AND USE AGREEMENT

This Transfer of Guaranteed Contribution and Use Agreement ("Agreement") is made and entered into by and between the **CITY OF ORANGE BEACH, ALABAMA**, an Alabama Municipal Corporation ("City"), and the **BALDWIN COUNTY BOARD OF EDUCATION**, an agency of the State of Alabama ("Board"), as of the ____ day of March, 2019.

W I T N E S S E T H:

WHEREAS, the Board and the City have previously undertaken cooperative efforts to enhance the educational facilities inside the City of Orange Beach; and

WHEREAS, in accordance herewith, the Board and the City desire to enter into the subject Agreement in order to construct a performing arts building (the "Performing Arts Building" or the "Project") on the campus of the New Orange Beach Middle/High School (the "School") which will provide a public benefit for both parties; and

WHEREAS, the City has allocated \$7,231,872.00 as a Guaranteed Contribution from its 2018-2019 General Operations Budget for the construction of the Performing Arts Building; and

WHEREAS, in furtherance of the construction of the Performing Arts Building and in reliance on the City's obligation to pay for a portion of the construction cost associated therewith out of the Guaranteed Contribution, the Board will contract with the lowest qualified bidder Sharpe, Inc. (the "Contractor"), for construction of the Performing Arts Building.

NOW, THEREFORE, for and in consideration of the covenants and conditions contained herein, the parties agree as follows:

1. Contemporaneously herewith, the Board has approved the award of the bid (the "Bid") of Contractor, in an amount not to exceed \$8,648,325.00 (the "Awarded Bid Total"), to construct the Performing Arts Building, contingent upon the full execution of this Agreement. The Contractor will be engaged by the Board to build the Project in accordance with the plans and specifications upon which the Bid was awarded with the value engineering items as set forth on Exhibit A hereto.

2. The parties understand and agree that, but for the City's Guaranteed Contribution, the Board would have insufficient budgeted funds to construct the Performing Arts Building and would be unable to award the Bid.

3. The City covenants and agrees that it is hereby obligated to fund a portion of the Awarded Bid Total in the amount of \$7,231,872.00 (the "Guaranteed Contribution"), and that said funds will be the first funds applied to the Project.

4. Except as provided for in Paragraph 8 below, the Board shall be responsible for the difference between the Awarded Bid Total and the Guaranteed Contribution (the "Board Funding") (i.e., \$1,416,453.00 assuming no change orders).

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5. Upon receipt of Project pay applications, approved by the Project architect, the Board will advance payment thereof to the Contractor in accordance with the construction contract documents ("Construction Contract Documents"). Simultaneously therewith, the Board will provide the City with a copy of all documentation accompanying the pay application.

6. In the event there is any conflict between the Construction Contract Documents and this Agreement, the terms of the Construction Contract Documents shall control. The Board will make a copy of the Construction Contract Documents available to the City.

7. Unless modified in accordance with Paragraph 8 below, the City shall within thirty (30) days of receipt of the applicable payment application and evidence of payment thereof by the Board, reimburse the Board for all sums advanced by the Board for the Project, up to the amount of the Guaranteed Contribution.

8. In the event there are any proposed change orders ("Change Orders"), whether constituting deductions or additions to the contract sum, the parties shall confer prior to a final decision thereon, and no Change Order shall be made unless mutually approved by both parties in the exercise of good faith. The parties understand and agree that it is impossible to predict whether any such Change Orders will be necessary and thus are unable to allocate any associated deductions or additions to the contract sum in advance. In such an event, and prior to the approval of a Change Order, the parties will endeavor to equitably allocate any deduction or addition to the contract sum among the parties. In the event the parties are unable to agree, the Project architect shall render a final decision concerning the equitable allocation of any such decrease or increase to the contract sum among the parties. The parties understand and agree that the operation of the foregoing may result in an increase or decrease in the Guaranteed Contribution and/or the Board Funding, and hereby agree to be bound thereby.

9. As partial consideration for the City's Guaranteed Contribution, the Board grants unto the City the following rights in connection with the use of the Performing Arts Building:

- (a) Daily, until 6:00 p.m. (the "Operational Hours"), the Board shall have primary use and control of the premises. Provided, however, the City may request to schedule use thereof during Operational Hours provided that the proposed use does not interfere with normal educational activities.
- (b) The schedule for the Performing Arts Building shall be maintained by the School Principal. All scheduling by the City shall be through the City's designee, who shall initially be _____. The City's designee for scheduling may be changed upon written notification by the Mayor to the School Principal and Superintendent.
- (c) The City shall provide as much advance notice as reasonably possible, but in no event less than 24-hours' notice of any proposed usage of the premises.

- (d) After Operational Hours, the Board and the City shall have the ability to schedule use of the premises on a first-come basis. An event shall not be deemed scheduled until entered upon the schedule to be maintained in accordance with subparagraph (b) above. The allocation of usage of the premises shall be equitable.
- (e) Regardless of timing, the City's use of the premises shall be solely and exclusively for the promotion and advancement of education, music, the arts, recreational purposes and any other uses serving a public purpose. The foregoing shall not operate as a prohibition of fundraising efforts of a charitable nature or of charging an admission fee or offering concessions for sale.
- (f) At all times in use by the City, the premises shall be under the direction, supervision and control of agents and employees of City. During those times when the premises are used by City in accordance herewith, the Board shall not be responsible for supervision of any activities related to the City's use thereof.
- (g) The City's use of the premises, shall be at no additional cost or expense to the City. Provided, however, following any period of use by the City, the City shall restore the premises to the condition that existed immediately prior to the use thereof, reasonable wear and tear excepted.
- (h) The City's use of the premises shall be in accordance with all applicable policies and procedures of the Board, including, without limitation the Board's prohibition against alcohol, tobacco and firearms on any of its facilities.
- (i) The City shall be provided keys to the premises and any other information needed (security codes as applicable) to gain access and use.

10. At all times that the City utilizes the Performing Arts Building, it shall maintain, at its sole cost, comprehensive broad-form general liability insurance against claims and liability for personal injury, death and property damage arising from the City's use and occupancy of the Performing Arts Building. The insurance shall be carried by insurance companies authorized to transact business in the State of Alabama, selected by City. In addition, the following conditions shall be met: the insurance provided pursuant to this Paragraph 10 shall be in the amount of no less than \$1,000,000 for property damage, and in the amount no less than \$1,000,000 for one person and \$1,000,000 for one accident for personal injury.

11. The Board shall obtain and keep in force replacement cost value coverage (the "Coverage") through the Alabama Department of Risk Management State Insurance Fund (the "Fund") on the Performing Arts Building and all appurtenances thereto. The Board shall furnish the City evidence that such policy is in full force and effect, upon request from time to time by the City. Such policy shall contain a customary provision affording the City notice in writing in advance of any cancellation or lapse of coverage. To the extent permitted by the Fund, the Board

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waives any and all rights to recover against the City (or any of its officers, employees, agents, invitees or contractors), for any loss or damage arising from any cause covered by any insurance carried by the Board.

12. The Board will be solely responsible for the compliance of the Performing Arts Building (including all parking lots, sidewalks and walkways), with all applicable building codes, laws, ordinances, orders, rules and regulations whether local, state, federal, or promulgated by other agencies or bodies having jurisdiction over the Performing Arts Building, including the Americans with Disabilities Act.

13. The Board will, at its sole cost and expense, maintain the Performing Arts Building and make repairs, restorations and replacements to the Performing Arts Building, including the heating systems, ventilating, systems air conditioning systems, mechanical systems, electrical systems, plumbing systems, speaker systems, signs, fire sprinklers (including heads and pipes), structural systems, roof, walls, ceilings, windows, doors, plate glass, lateral supports, foundations, restrooms, parking areas, sidewalks, gutters, downspouts, drains, sewer and storm water pipes, utility lines and pipes, entrance areas, dumpster areas, indoor and outdoor lighting, lawns, shrubbery and other landscaping, and all fixtures and appurtenances to the Performing Arts Building as and when needed to preserve them in the same general condition as they were in as of the date of substantial completion thereof, normal wear and tear, casualty and condemnation excepted, and regardless of whether the repairs, restorations, and replacements are ordinary or extraordinary, foreseeable or unforeseeable, capital or noncapital. All repairs, restorations, and replacements will be in quality and class equal to or better than the original work or installations. In furtherance thereof, the Board shall (i) maintain the Performing Arts Building in a clean and attractive condition, (ii) replace promptly any cracked or broken glass of the Performing Arts Building with glass of like grade and quality; (iii) maintain a pest extermination program for the Performing Arts Building, (iv) maintain a termite and wood infestation prevention program for the Performing Arts Building, and (v) maintain an HVAC maintenance program. The Board agrees to keep the parking areas and sidewalks clean and in good repair.

14. The Board will provide routine janitorial service for the Performing Arts Building.

15. The Board shall ensure that water, sewer, electricity, gas and telecommunications utility services are available to the Performing Arts Building, and shall be responsible for the payment of the utility charges therefor, including the reasonable usage of the Performing Arts Building by the City.

16. If the Performing Arts Building is damaged or destroyed by fire, wind, hurricane or other casualty, the Board shall restore the Performing Arts Building to substantially the same condition as before the damage occurred as soon as practicable.

17. In the event all or any portion of the Performing Arts Building is taken in condemnation proceedings, the condemnation proceeds shall be used to proportionately reimburse the City and the Board based upon the Guaranteed Contribution and the Board Funding (including any increase or decrease thereof under Paragraph 8). Upon repayment in full of the Guaranteed Contribution and the Board Funding, any remaining condemnation proceeds shall be the property {BH381277.1}

of the Board.

18. The Board will not make any alterations or improvements to the Performing Arts Building without the City's prior written consent, which consent will not be unreasonably withheld; provided, however, the City's prior written consent will not be necessary for any alterations or improvements which are anticipated to cost less than \$50,000 and would not affect the load-bearing structural components of the Performing Arts Building.

19. The signage for the Performing Arts Building shall be subject to mutual approval by both parties.

20. In the event that the Board desires to sell, transfer, convey, exchange or grant (a "Transfer") the Performing Arts Building to a third party (a "Proposed Transferee"), the Board shall provide the City with a copy of any bona fide, written offer (the "Offer") from such Proposed Transferee, setting forth the material terms and conditions of the Transfer. The City shall have the right for a period of twenty (20) days following receipt of the Offer, to elect to acquire the interest proposed to be transferred from the Board to the Proposed Transferee (the "Right of First Refusal") on the terms and conditions set forth in the Offer, except as otherwise provided herein. The City shall exercise its Right of First Refusal by giving written notice to the Board, specifying a date not more than sixty (60) days after the date of exercise of the Right of First Refusal, on which the City and Board will complete the closing on the Transfer. The City shall receive a credit against the purchase price in the amount of the Guaranteed Contribution (including any increase or decrease thereof under Paragraph 8). Additionally, the conveyance to the City shall include either fee simple to the parking areas which generally serve the Performing Arts Center (or appropriate easements therefor), as well as any reasonably necessary easements for utilities, egress and ingress. In the event that the City does not timely elect to exercise its Right of First Refusal, the Board shall be free to complete the Transfer to the Proposed Transferee in substantial accordance with the Offer. Upon any Transfer (to a party other than the City), this Agreement shall remain in force and effect. If the City proceeds to closing pursuant to the Right of First Refusal, the Board shall deliver to the City a statutory warranty deed against delivery of the purchase price for the property (taking into account the credit described above), subject to the following exceptions to title: (i) any matters which are in existence on the date that the Board acquired title to the subject property, (ii) any matters shown on the subdivision plat for the subject property, if applicable, (iii) liens for ad valorem taxes and general and special assessments not yet due and payable, (iv) utility, access, drainage and other easements and rights of way, mineral rights, restrictions and exceptions none of the foregoing of which, individually or in the aggregate, materially interfere with or impair the use of the subject property, and (v) such other minor defects, irregularities, encumbrances, easements, rights of way and clouds on title (including zoning and other similar restrictions and regulations) as customarily exist with respect to properties similar in character to the subject property and would not in the aggregate materially impair the title or interest of the City in acquiring the subject property.

21. This Agreement shall continue in full force and effect for a period of ninety-nine (99) years from the date first written above, except that the City shall have the unilateral right to terminate it upon providing written notice of termination to the Board at any time after the City has paid the Guaranteed Amount.

22. The City shall have the right to record this Agreement or a memorandum hereof (in such form as it reasonably determines) against the Performing Arts Building in the real estate records of the Office of the Judge of Probate of Baldwin County, Alabama.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the Board and the City have executed and signed this Agreement or have caused this Agreement to be executed and signed by their duly authorized representatives on this the ____ day of March, 2019.

BALDWIN COUNTY BOARD OF EDUCATION,
an agency of the State of Alabama

By: _____
CARL E. TYLER, Superintendent

CITY OF ORANGE BEACH, ALABAMA,
an Alabama municipal corporation

By: _____
TONY KENNON, Mayor

ATTEST:

CITY CLERK

STATE OF ALABAMA
COUNTY OF BALDWIN

I, _____, a Notary Public, in and for said County in said State, hereby certify that **Carl E. Tyler**, whose name as Superintendent and Ex-Officio Secretary of the Baldwin County Board of Education, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of this instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said Board.

Given under my hand and seal this ____ day of March, 2019.

Notary Public, Baldwin County, Alabama
My Commission Expires: _____

STATE OF ALABAMA
COUNTY OF BALDWIN

I, _____, a Notary Public, in and for said
County in said State, hereby certify that **Tony Kennon**, whose name as Mayor, and
_____, whose name as City Clerk of the City of Orange
Beach, Alabama, are signed to the foregoing instrument and who are known to me,
acknowledged before me on this day that, being informed of the contents of this instrument, they,
as such officers and with full authority, executed the same voluntarily for and as the act of said
municipal corporation.

Given under my hand and seal this ____ day of March, 2019.

Notary Public, Baldwin County, Alabama

My Commission Expires: _____