

Massachusetts School Building Authority

Deborah B. Goldberg
Chairman, State Treasurer

John K. McCarthy
Executive Director

February 11, 2015

Mr. Thomas Guerino, Town Administrator
Town of Bourne
24 Perry Avenue
Buzzards Bay, MA 02532-3441

Re: Town of Bourne, James F. Peebles Elementary School

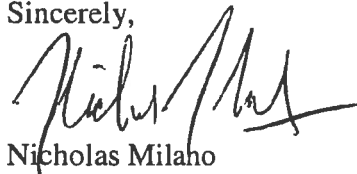
Dear Mr. Guerino:

Enclosed for your records, please find an original, fully-executed Feasibility Study Agreement and Exhibits A-C for the James F. Peebles Elementary School Project in the Town of Bourne (the "District").

Also, attached for your convenience, please find instructions for entering project budgets in the Massachusetts School Building Authority (the "MSBA") ProPay System, and the Feasibility Study Agreement Budget Revision Request Form. Please note the MSBA will not process reimbursement requests until the District has entered the budget and the budget has been accepted by the MSBA.

Please feel free to contact me if you have any questions.

Sincerely,



Nicholas Milano
Project Coordinator

Cc: Legislative Delegation
Peter Meier, Chair, Bourne Board of Selectmen
Christopher Hyldburg, Chair, Bourne School Committee
Steven Lamarche, Superintendent, Bourne Public Schools
Edward Donoghue, Director of Business Services, Bourne Public Schools
File: 10.2 Letters (Region 6)

**MASSACHUSETTS SCHOOL BUILDING AUTHORITY
FEASIBILITY STUDY AGREEMENT**

This Feasibility Study Agreement, dated the 6th day of February, 2015 (the "Agreement") is between the Massachusetts School Building Authority (the "**Authority**"), a public instrumentality of the Commonwealth of Massachusetts established by Chapter 70B of the Massachusetts General Laws and Chapters 208 & 210 of the Acts of 2004 of the Commonwealth, in each case as amended from time to time, and the Town of Bourne (the "**District**").

WHEREAS, the District submitted a Statement of Interest to the Authority for the James F. Peebles Elementary School (hereinafter "**School**"), and the District prioritized this Statement of Interest as its priority to receive any potential funding from the Authority;

WHEREAS, on June 4, 2014, the Board of Directors of the Authority voted to invite the District to the MSBA's Eligibility Period and the District has completed all applicable preliminary requirements to the satisfaction of the MSBA;

WHEREAS, on January 14, 2014, the Board of Directors of the Authority shall have voted to authorize the Parties to enter into this Agreement upon the terms and conditions stated herein.

WHEREAS, the Feasibility Study is one step in the multi-step process of the Authority's grant program for school building construction and renovation projects, and the invitation to collaborate on conducting and/or reviewing a Feasibility Study is not approval of a project or any funding by the Authority, except as expressly provided in this Agreement;

WHEREAS, the Authority's grant program for school building renovation and construction projects is a non-entitlement, discretionary program based on need, as determined by the Authority;

WHEREAS, the District has submitted a signed Initial Compliance Certification, as described in 963 CMR 2.02, 2.03 & 2.10(2), in the form prescribed by the Authority, and it has been accepted by the Authority;

WHEREAS, the District has formed a School Building Committee to monitor the Feasibility Study and advise the District during the study;

WHEREAS, the Authority may reimburse the District for a portion of eligible, approved costs incurred in connection with the Feasibility Study undertaken by the District for the School under certain terms and conditions, hereinafter provided, and subject to the provisions of M.G.L. c. 70B, 963 CMR 2.00 *et seq.* and all applicable policies and guidelines of the Authority.

NOW THEREFORE, in consideration of the promises and the agreements, provisions and covenants contained in this Agreement, and for other good and valuable

consideration, the receipt and sufficiency of which are hereby acknowledged, the Authority and the District (together, the "Parties") agree as follows:

SECTION 1 DEFINITIONS

- 1.1 Capitalized terms not specifically defined in this Definitions section shall have the meanings ascribed to them in either M.G.L. c. 70B or 963 CMR 2.00 *et seq.*

"Budget" shall mean 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, will be incurred in connection with the planning, development, and the completion of the Feasibility Study, which Budget shall be approved by the Authority and attached hereto as **Exhibit A**, as it may be updated from time to time.

"Design Contract" shall mean the standard design contract developed and prescribed by the Authority, as it may be amended by the Authority from time to time that shall be executed by the District and the Designer for design services related to the Proposed 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. 7C, § 44 and has been procured and contracted by the District to conduct a Feasibility Study, in accordance with the provisions of Sections 2.1(a)(i) and 2.1(a)(ii) of this Agreement.

"Excusable Delay" shall mean a delay of the Feasibility Study 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.

"Feasibility Study" shall mean a study as described in 963 CMR 2.10(8) and in any applicable policies and guidelines of the Authority and, in relation to a Major Reconstruction Project or Repair Project, as described in M.G.L. c. 70B, 963 CMR 2.00 *et seq.* and any applicable policies and guidelines of the Authority, shall also include an engineering study, in a format prescribed by or otherwise acceptable to the Authority, to investigate potential options and solutions, including cost estimates, for the deficiencies and issues identified in the Statement of Interest or as otherwise determined by the Authority.

"Owner's Project Manager" shall mean the individual corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity under contract with, designated, 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.

"Scope" shall mean the scope of the Feasibility Study as described in 963 CMR 2.10(8) and any applicable policies and guidelines of the Authority or as otherwise determined in writing by the Authority and as more fully described in **Exhibit B** attached hereto, as it may be updated from time to time as mutually agreed upon by the District and the Authority.

"Schedule" shall mean the schedule for the Feasibility Study, which schedule shall be updated from time to time and approved by the Authority.

"School" shall mean the James F. Peebles Elementary School located in the District.

"Statement of Interest" shall mean the Statement of Interest, as defined in 963 CMR 2.09 and all applicable policies and guidelines of the Authority, submitted to the Authority by the District for the School.

SECTION 2 FEASIBILITY STUDY

Subject to the terms and conditions of this Agreement, and in reliance on the representations, warranties and covenants contained herein, the Parties hereby agree as follows:

2.1 Feasibility Study.

- (a.) The Parties hereby agree that the District shall undertake a Feasibility Study to investigate potential options and solutions, including cost estimates, to the School's deficiencies and issues as identified in the Statement of Interest or as otherwise determined by the Authority and in accordance with the Scope, Budget, and Schedule approved by the Authority. The adequacy, sufficiency and/or acceptability of a Feasibility Study or a Prior Study, as defined in Section 2.1(c) of this Agreement, for the purposes of the Authority's grant program shall be determined by the Authority within its sole discretion. Any determination by the Authority that a Feasibility Study or Prior Study is adequate, sufficient or acceptable for the Authority's purposes shall not be construed as a certification or approval by the Authority of the studies, plans, drawings, designs, cost estimates, specifications or any other information or materials contained therein. The District, its officials, employees and agents are and shall remain responsible for the Feasibility Study and/or Prior Study and the building designs, site plans, drawings, cost estimates, specifications and other materials and information relative thereto that the District submits to the Authority. The Authority's review of the Feasibility Study and/or

Prior Study and any studies, plans, drawings, designs, cost estimates, specifications or any other information or materials contained therein or related thereto is solely for the purpose of determining whether they meet the provisions of this Agreement and the Authority's regulations, standards, policies, guidelines and other requirements and whether the District will be eligible for potential funding from the Authority for the Proposed Project. Approval of a Proposed Project shall only be determined by a vote of the Authority's Board in accordance with 963 CMR 2.00 *et seq.* and the applicable policies and guidelines of the Authority.

- (i.) The District shall procure a Designer to conduct the Feasibility Study pursuant to the provisions of M.G.L. c. 7C, § 44 through 58, 963 CMR 2.10(8), 963 CMR 2.12, and any other applicable laws and regulations; provided, however, that if the estimated construction cost of the Proposed Project is determined to be more than five million dollars (\$5,000,000), then the District shall select the Feasibility Study Designer using the Authority's Designer Selection Panel in accordance with 963 CMR 2.00 *et seq.* and all applicable policies and guidelines of the Authority. The District shall not use a Designer who was procured by the District prior to July 1, 2007, to conduct the Feasibility Study, unless the Designer is acceptable to the Authority. It is further provided that, if said Designer who was procured by the District prior to July 1, 2007, is unacceptable to the Authority, the District shall conduct a new procurement for a Feasibility Study Designer pursuant to the applicable provisions of M.G.L. c. 7C, § 44 through 58, 963 CMR 2.10(8), 963 CMR 2.12, and any rules, regulations, policies and guidelines of the Authority.
- (ii.) The District shall use the Authority's Design Contract to contract with the Designer for the Feasibility Study. The District shall monitor the performance of the Designer and shall require the Designer to fully comply with all provisions of the Design Contract, including, but not limited to, all provisions affecting the interests of the Authority.
- (iii.) If, at any time, the construction cost of the Proposed Project is estimated to be more than one million five

hundred thousand dollars (\$1,500,000), or if the construction cost of the Proposed Project is estimated to be equal to or less than one million five hundred thousand dollars (\$1,500,000) and the Authority so requires, at any time, as a condition to qualify for funding by the Authority, the District shall procure and maintain under contract, or otherwise assign, an Owner's Project Manager, pursuant to M.G.L. c. 149, § 44A ½, 963 CMR 2.00, *et seq.* and any applicable policies and guidelines of the Authority. The selection of an Owner's Project Manager shall be subject to the review and approval of the Authority as required by M.G.L. 70B, 963 CMR 2.00, *et seq.*, and any applicable policies and guidelines of the Authority. Any costs associated with an Owner's Project Manager who is not approved by the Authority shall not be eligible for reimbursement.

(iv.) Where applicable, the District shall use the Authority's model request for services and standard contract to procure and contract with any Owner's Project Manager for the Proposed Project, including the Feasibility Study stage of the Proposed Project. The District shall monitor the performance of the Owner's Project Manager and shall require the Owner's Project Manager to fully comply with all provisions of the contract between the District and the Owner's Project Manager including, but not limited to, all provisions affecting the interests of the Authority.

(b.) Subject to the satisfaction of or compliance with, as reasonably determined by the Authority, : all of the terms and conditions of this Agreement, the applicable provisions of M.G.L. c. 70B, Chapters 208 and 210 of the Acts of 2004, and 963 CMR 2.00 *et seq.* and any other rule, regulation, policy or guideline of the Authority, and further subject to the Authority's approval of the Scope, Budget and Schedule and the District's approval, authorization and appropriation for the Feasibility Study using forms prescribed by or otherwise acceptable to the Authority, the Authority hereby agrees to pay to the District an amount that shall under no circumstances exceed the lesser of (i) forty-three and eighty-four hundredths percent (43.84%) of the eligible, approved costs of the Feasibility Study, as determined by the Authority, or (ii) three hundred twenty-eight thousand, eight hundred dollars (\$328,800). The Parties hereby acknowledge and agree that \$328,800 is the maximum amount of

funding that the District may receive from the Authority for the Feasibility Study, and that the final amount of eligible Feasibility Study costs approved by the Authority may equal an amount less than \$328,800, as determined by an audit or audits conducted by the Authority. Any costs and expenditures that are determined by the Authority to be either in excess of the \$328,800 or ineligible for payment by the Authority shall be the sole responsibility of the District. The reimbursement rate set forth above, and as more fully described in the Reimbursement Rate Summary, attached hereto as **Exhibit "C"**, is the rate at which the District may be reimbursed for the eligible, approved costs of the Feasibility Study.

In the event that the Authority reasonably determines that the Feasibility Study is not in accordance or compliance with the Scope, Schedule, Budget, all of the terms and conditions of this Agreement, the provisions of M.G.L. c. 70B, Chapters 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.* and any other rule, regulation, policy or guideline of the Authority, or is delayed (other than an Excusable Delay) or is not duly authorized, approved and funded by the District in accordance with applicable law and as required by the Authority, then the Authority may temporarily and/or permanently withhold payments to the District for any eligible, approved costs of the Feasibility Study, provided that the Authority shall not unreasonably withhold any such payments and further provided that the Authority shall give written notice to the District of any such withholding. Notwithstanding the foregoing, failure by the Authority to provide such written notice timely shall not create or result in any entitlement to payment for the District. In the event that the Authority either temporarily or permanently withholds payment for the Feasibility Study, 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.

The District shall not be eligible to receive any funding for the Authority's share of the eligible, approved Feasibility Study costs, or any portion thereof, unless and until the Authority has approved the Scope, Budget, and Schedule. The Authority shall reimburse the District only for costs incurred by the District in connection with the Feasibility Study that are timely submitted to the Authority, eligible for reimbursement pursuant to Authority policies, procedures, and guidelines, and audited and approved by the Authority.

- (c) Notwithstanding the provisions of Section 2.1(a) above, in the event that the District commenced a feasibility study unilaterally or without the prior written acknowledgement and concurrence of the Authority in connection with the deficiencies and issues identified in the Statement of Interest or as otherwise determined by the Authority (hereinafter "Prior Study"), and, after review, the Authority has determined in writing that the Prior Study

is adequate and meets the needs of the Authority, in whole or in part, the District may submit to the Authority requests for reimbursement of costs related to the Prior Study subject to the provisions of Section 2.1 (b), Section 4 and any other applicable provisions of this Agreement. The District acknowledges and agrees that any costs incurred by the District in relation to the Prior Study may not be eligible for reimbursement. In the event that any such costs are determined to be eligible, approved costs by the Authority, they shall be subject to the provisional reimbursement rate set forth in Section 2.1(b) of this Agreement and shall be subject to audit by the Authority. The District further acknowledges and agrees that, notwithstanding a determination by the Authority that the Prior Study is adequate and meets the Authority's needs, in whole or in part, the Authority may require the District to conduct a new or supplemental Feasibility Study, in accordance with, and as described in, the Budget, Scope and Schedule. The District further acknowledges and agrees that costs incurred in connection with a Prior Study that (i) does not meet the needs of the Authority, in whole or in part, as determined by the Authority, or (ii) was conducted after September 22, 2006, shall not be eligible for reimbursement.

2.2 Term of Agreement.

This Agreement shall terminate upon (1) approval of a Project Scope and Budget Agreement for the Proposed Project by the Authority's Board and (2) execution of said Project Scope and Budget Agreement by the Authority and the District or it shall terminate on July 17, 2017 or whichever occurs sooner.

SECTION 3 COVENANTS

The District covenants and agrees that as long as this Agreement is in effect, the District shall and shall cause its employees, officers, agents, and representatives to perform and comply with all covenants of this Agreement.

3.1 The District hereby agrees that it shall make available for inspection by, and submit to, the Authority any and all information and documentation related to the Feasibility Study, including, but not limited to budget information, progress reports, and draft copies that may be requested by the Authority, promptly and in no event later than the deadline stated in any such request.

3.2 The District hereby agrees that it shall work with the Authority in developing the Scope, Budget and Schedule for the Feasibility Study and it acknowledges and agrees that the Authority's funding for the Feasibility Study is subject to the Authority's approval of the Scope, Budget and Schedule.

3.3 The District hereby acknowledges and agrees that the Authority shall not provide any amounts in excess of the amount determined under Section 2.1(b) of this Agreement.

3.4 The District hereby acknowledges and agrees that the Authority may, in its sole discretion, determine that certain costs incurred by the District in connection with the Feasibility Study are not eligible for reimbursement by the Authority, pursuant to any applicable provisions of M.G.L. c. 70B, 963 CMR 2.00 *et seq.*, including, but not limited to, sections 2.10 & 2.16(5), and any other policies and guidelines of the Authority.

3.5 The District shall comply with all provisions of this Agreement; the provisions of all other agreements between the Authority and the District that relate to the Feasibility Study; the provisions of M.G.L. c. 70B, 963 CMR 2.00 *et seq.*, and all policies and guidelines of the Authority; and all provisions of law applicable to the Feasibility Study, this Agreement, and any other agreements and documents related to the Feasibility Study, and shall take all action necessary to fulfill its obligations under this Agreement.

3.6 The District hereby acknowledges and agrees that the Authority shall not be required or obligated to make any payment for any eligible Feasibility Study costs while an Event of Default, as defined in section 8 of this Agreement, shall have occurred.

3.7 The District shall, and shall cause any Owner's Project Manager and Designer and their employees, subconsultants and agents to, keep adequate records of the Feasibility Study and make all Feasibility Study records and the Feasibility Study site(s) available to the Authority or representatives of the Authority for review during the course of the Feasibility Study.

3.8 The District hereby acknowledges and agrees that the duties of any Owner's Project Manager hired by and/or assigned to the Proposed Project by the District shall include, but not be limited to, fully and completely managing and coordinating on behalf of the District the administration of the Feasibility Study to completion. Any Owner's Project Manager hired by and/or assigned to the Proposed Project by the District shall be responsible for overseeing, tracking, and managing the Budget and Schedule. In the event that an Owner's Project Manager is not required for the Proposed Project, the District shall have the aforesaid duties and responsibilities in addition to any others imposed by M.G.L. c. 70B, 963 CMR, *et seq.*, the policies and guidelines of the Authority, and any other applicable provisions of law.

3.9 The District hereby agrees that the Authority shall have free access to, and open communication with, any Owner's Project Manager hired by and/or assigned to the Proposed Project by the District and that the Authority shall have full and complete access to all information and documentation relating to the Proposed Project to the same extent that the District has such access. The District agrees that it shall require any such Owner's Project Manager to fully cooperate with the Authority in all matters related to the Proposed Project; to promptly communicate, transmit, and/or make available for inspection and copying any and all information and documentation requested by the Authority; to fully, accurately and promptly complete all forms and writings requested by

the Authority; and to give complete, accurate, and prompt responses to any and all questions, inquiries and requests for information posed by the Authority. The District agrees that it shall not in any way, directly or indirectly, limit, obstruct, censor, hinder or otherwise interfere with the free flow of communication and information between the Owner's Project Manager and the Authority in all matters related to the Proposed Project and as provided herein; that it shall not suffer the same to occur by the act or omission of any other person or entity; and that it shall not retaliate against the Owner's Project Manager for communicating information to the Authority as provided herein. The District agrees to execute, deliver and/or communicate to the Owner's Project Manager any and all authorizations, approvals, waivers, agreements, directives, and actions that are necessary to fulfill its obligations under this paragraph. The District further agrees that the Authority shall bear no liability whatsoever arising out of the Authority's knowledge or receipt of information communicated to the Authority by the Owner's Project Manager and that the District shall remain responsible for the management and completion of the Proposed Project.

3.10 The District hereby acknowledges and agrees that the duties of the Designer shall include, but not be limited to, those described in this Agreement, including, but not limited to, the Scope attached hereto as Exhibit B; 963 CMR 2.10(8); any applicable rules, regulations, policies and guidelines of the Authority; and any standard scope of services and the Design Contract prescribed by the Authority.

3.11 The District hereby acknowledges and agrees that neither the District nor any of its employees, officials, agents, consultants or contractors shall submit any false or intentionally misleading information or documentation to the Authority in connection with this Feasibility Study Agreement or the Feasibility Study, and further acknowledges and agrees that the submission of any such information or documentation may cause the Authority to suspend, revoke or terminate any and all payments otherwise due to the District and/or recover any previous payments made to the District, and the District may be ineligible for any 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.

3.12 The District hereby acknowledges and agrees that the Authority shall bear no responsibility or liability of any sort for the results of any Feasibility Study, environmental assessment, geotechnical site testing, any necessary site remediation, clean-up, or other site remediation services.

3.13 The District hereby acknowledges and agrees that it shall provide a final Feasibility Study report to the Authority, which shall be in a format that is prescribed by or otherwise acceptable to the Authority.

3.14 The District hereby acknowledges and agrees that the Authority's grant program is a non-entitlement, discretionary program based on need, and the Feasibility Study may

not result in a school construction, renovation or repair project that is eligible for funding by the Authority.

3.15 The District shall not combine, consolidate, or conjoin in any way the procurement, pre-qualification or selection of an Owner's Project Manager or Designer for the Proposed Project with the procurement, pre-qualification or selection of an Owner's Project Manager or Designer for any other construction, repair or renovation project without the express prior 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 prior written approval of a duly authorized representative of the Authority shall not be eligible for reimbursement.

SECTION 4 PAYMENTS AND AUDIT

4.1 Subject to the terms and conditions of the Agreement, the Authority shall reimburse the District for eligible, approved costs incurred in connection with the Feasibility Study in accordance with the following:

(a) Using the Authority's Pro-Pay system, the District shall submit requests for reimbursement on a monthly basis to the Authority in a format 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 acceptable to the Authority, shall include reasonable detail, including, but not limited to (1) the amount of funding requested, (2) the nature of the materials or property or services received, (3) the total value of the work performed and materials furnished by the Owner's Project Manager, if any, the Designer, and each consultant, subconsultant or vendor to date, and (4) the value of the work completed during the Feasibility Study. The District agrees that each request for reimbursement shall be accompanied by the invoices for each of the amounts requisitioned and 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.

(b) 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 Feasibility Study costs, (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, (3) the reimbursement requested is due for work actually and properly performed or materials or property actually supplied prior to the date of the requisition, (4) the reimbursement requested is for costs that already have been duly paid by the District, and (5) such reimbursement requested is within the Budget approved by the Authority.

(c) The Authority shall review all requests for reimbursement properly submitted pursuant to this Agreement as soon as reasonably possible. The Authority shall not consider requests for reimbursement that are not, as reasonably determined by the Authority, (1) timely and properly submitted, (2) in accordance with the most recent Budget approved by the Authority, and (3) for eligible Feasibility Study costs incurred by the District. The District understands and agrees that no reimbursement shall be made by the Authority unless the District has complied with all of the terms and conditions of this Agreement, the applicable provisions of M.G.L. c. 70B, chapters 208 and 210 of the Acts of 2004, 963 CMR 2.00 *et seq.*, and all policies and guidelines of the Authority.

(d) After receipt from the District of a timely and properly submitted request for reimbursement pursuant to this Agreement, the Authority shall make payment to the District of the Authority's share of approved, eligible Feasibility Study costs, subject to the terms and conditions of this Agreement. The District hereby agrees and acknowledges that the amount of approved, eligible Feasibility Study costs reimbursed by the Authority may be subject to change, pending audit, including but not limited to an audit pursuant to Section 4.2 of this Agreement and the final close-out audit pursuant to Section 4.3 of this Agreement.

4.2 The Authority may review and perform a preliminary audit on each request for reimbursement submitted pursuant to this Agreement to ensure that only eligible costs of the Feasibility Study are approved and paid by the Authority. Any such preliminary audits shall be conducted in accordance with 963 CMR 2.16 and other policies and guidelines of the Authority. In the event that the Authority determines that an item contained in a request for reimbursement submitted by the District pursuant to this Agreement is not eligible for reimbursement by the Authority, the Authority shall adjust 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 4.2 is preliminary, and the Authority may further adjust and alter the results of a preliminary audit after it conducts subsequent audits or a final close-out audit of the Feasibility Study.

4.3 The District hereby acknowledges and agrees that a final, close-out audit of the Feasibility Study by the Authority shall include an audit of all requests for reimbursement submitted and all reimbursements made by the Authority. The final, close-out audit shall be conducted in accordance with 963 CMR 2.16 and any other applicable regulations, policies and guidelines of the Authority. The District shall make all documents and

materials requested by the Authority or its representatives available in a timely manner. The District further acknowledges and agrees that the final, close-out audit of the Feasibility Study may not occur until such time as the Authority conducts its final, close-out audit of the project that may result from the Feasibility Study, should the District be approved for any such project. Any adjustments applicable as a result of the final, close-out audit may be made in the final amount of the Total Facilities Grant, as determined by the Authority.

SECTION 5 REPRESENTATIONS AND WARRANTIES

The District hereby warrants and represents that each of the following statements is true, correct and complete:

5.1 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 Agreement and all other documents related to the Feasibility Study.

5.2 The District is duly authorized to execute and deliver this Agreement and has taken all necessary steps to authorize the execution and delivery of this Agreement, to undertake the Feasibility Study and to perform and consummate all transactions contemplated by this Agreement.

5.3 The undersigned has the full legal authority to execute this Agreement on behalf of the District and to bind the District to its provisions.

5.4 This Agreement does not and will not, to any material extent, conflict with, or result in violation of any applicable provisions of law, including, but not limited to, any statute, charter, by-law, ordinance, rule or regulation, or any judgment, order, rule or regulation of any court or other agency of government.

5.5 The District has all requisite legal power and authority to own and operate the School that is the subject of the Feasibility Study and to undertake and oversee the Feasibility Study or, in the case of a school facility that is leased by the District, the District has all of the requisite legal power and authority to control and operate the School that is the subject of the Feasibility Study and to undertake and oversee the Feasibility Study pursuant to a lease which assures that the District has exclusive jurisdiction and control of the School and the land upon which it is situated for the anticipated useful life of the Proposed Project.

5.6 No information furnished by or on behalf of the District to the Authority in this Agreement, the Budget, the Initial Compliance Certification, or any other document, certificate or written statement furnished to the Authority in connection with the Feasibility Study contains any untrue statement of a material fact or omitted, omits or will omit to state a material fact necessary in order to make the statements contained in

this Agreement or therein not misleading in light of the circumstances in which the same were made.

5.7 The District has duly obtained all necessary votes, resolutions, authorizations, appropriations and local approvals, 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 Agreement and to fund and perform its obligations hereunder, in accordance with the Authority's guidelines, regulations, policies and standards. This 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.

5.8 No litigation before or by any court, public board or body is pending or threatened against the District or the Authority seeking to restrain or enjoin the execution and delivery of this Agreement or the Feasibility Study, or contesting or affecting the validity of this Agreement or the power of the District to pay its share of the Feasibility Study.

5.9 The District has implemented policies and procedures to prevent and eliminate fraud, waste and abuse of public funds in connection with the Feasibility Study and any future construction or renovation projects that may be forthcoming as a result of the Feasibility Study.

5.10 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.

5.11 All meetings of all public bodies in the District that relate in any way to the Proposed Project, including, but not limited to, the meetings of the District's school building committee, have been conducted, and shall be conducted, in compliance with the provisions of G.L. c. 30A, §§ 18 – 25, 940 CMR 29.00 *et seq.*, the so-called Open Meeting Law, and all other applicable law.

SECTION 6 INSURANCE

6.1 The District shall obtain and maintain all insurance required by law and insurance of such types and limits and upon such terms and conditions as may be required by, or as may be acceptable to, the Authority.

6.2 The District shall require by contractual obligation, and shall also ensure by the exercise of due diligence, that any Designer hired by the District in connection with the Feasibility Study obtain and maintain, at a minimum, insurance of such types and limits and upon such terms and conditions as may be required by law and as may be prescribed by the Authority in the Design Contract between the Designer and the District.

- 6.3 Except where the Owner's Project Manager is an existing employee of the District, the District shall require by contractual obligation, and shall also ensure by the exercise of due diligence, that any Owner's Project Manager hired by the District obtain and maintain, at a minimum, insurance of such types and limits and upon such terms and conditions as may be required by law and as may be prescribed by the Authority in its standard contract for Owner's Project Manager services which is incorporated by reference herein.

SECTION 7
COMPLIANCE WITH CONTRACT DOCUMENTS, PROJECT PERMITS AND
OTHER APPLICABLE LAW

- 7.1 The District shall take all reasonable actions designed to ensure that the Feasibility Study complies with all applicable contract documents, building codes, laws, rules and regulations and to ensure that all necessary project permits have been obtained. Notwithstanding any right of approval or review held or exercised by the Authority in connection with this Agreement or the Feasibility Study, the District shall be responsible for the successful performance and completion of the Feasibility Study in accordance with this Agreement, the Design Contract, design documents and project permits, if any, and for the economical and efficient operation and administration of the Feasibility Study.

SECTION 8
DEFAULTS AND REMEDIES

- 8.1 The occurrence of any of the following events shall constitute, and is herein defined to be, an Event of Default under this Agreement:
- (a) If the District shall fail to perform and observe any covenant, agreement or condition on its part provided in this 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 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. Any forbearance or failure of the Authority in giving such written notice shall not amount to any waiver of the Authority's rights under this Agreement as to the same or subsequent breaches and shall not preclude the Authority from pursuing any of its rights or remedies provided under this Agreement or as otherwise provided by law.
 - (b) If any representation or warranty made by the District in this Agreement or in any other agreement entered into by the District with the Authority shall prove to have been incorrect or to be misleading in any material respect.

- 8.2 If any Event of Default hereunder shall occur and be continuing, the Authority may proceed to protect its rights under this Agreement, and may: (a) terminate this Agreement, (b) permanently withhold or temporarily suspend payment of any eligible, approved costs to the District, (c) recover any payments of eligible, approved costs previously made to the District, and/or (d) exercise any other right or remedy upon such default as may be granted to the Authority under this Agreement or under any other applicable provision of law.
- 8.3 No remedy conferred upon or reserved to the Authority is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity. 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 the Authority may deem expedient.

SECTION 9 OTHER TERMS

- 9.1 Governing Law. This Agreement shall be governed by, construed, and enforced in accordance with, the laws of the Commonwealth of Massachusetts.
- 9.2 Venue. 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 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 such civil action that may arise out of the provisions of this Agreement.
- 9.3 Indemnification of the Authority by the District. To the fullest extent permitted by law, the District shall indemnify and hold harmless the Authority and its officers, agents and employees from and against any and all claims, actions, damages, liabilities, injuries, costs, fees, expenses, or losses, including, without limitation, reasonable attorney's fees and costs of investigation and litigation, whatsoever which may be incurred by, or for which liability may be asserted against, the Authority or any of its officers, agents or employees arising out of any activities undertaken by, for, or on behalf of the District in the execution or implementation of this Agreement or with respect to the Feasibility Study, including, but not limited to, the performance of any contract or obligation directly or indirectly related to the Feasibility Study. Such obligation shall not be construed to negate or abridge

any other obligation of indemnification running to the Authority which would otherwise exist.

- 9.4 Members, Employees Not Liable. No member or employee of the Authority shall be charged or held personally or contractually liable by or to the District under any term or provision of this Agreement or because of any breach thereof or because of its execution or attempted execution.
- 9.5 Assignability. The District shall not assign any interest, in whole or in part, in this Agreement and shall not transfer any interest in the same, whether by assignment or novation, without the prior written approval of the Authority.
- 9.6 Payment Not A Waiver.

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

The rights and remedies of the Authority provided for under this Agreement are 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 Agreement.

- 9.7 Notices. 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) 720-8460

If to the District:

Town of Bourne
36 Sandwich Road
Bourne, MA 02532
Attention: Superintendent
(provide title only)

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.

9.8 Severability. If any provisions of this Agreement shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such provision shall not affect any of the remaining provisions of this Agreement, and this Agreement shall be construed and enforced as if such invalid or unenforceable provision had not been contained herein.

9.9 Counterparts. This Agreement may be executed in one or more counterparts, any of which shall be regarded for all purposes as an original and all of which constitute but one and the same instrument. Each party agrees that it will execute any and all documents or other instruments, and take such other actions as may be necessary to give effect to the terms of this Agreement.

9.10 No Waiver. No waiver by either party of any term or conditions of this Agreement shall be deemed or construed as a waiver of any other terms or conditions, nor shall a waiver of any breach be deemed to constitute a waiver of any subsequent breach, whether of the same or of a different section, subsection, paragraph, clause, phrase, or other provision of this Agreement.

9.11 Integration. This Agreement merges and supersedes all prior negotiations, representations, and agreements between the Parties hereto relating to the Feasibility Study and constitutes the entire agreement between the Parties hereto with respect to the Feasibility Study and the Authority's funding of a portion of the eligible, approved costs of the Feasibility Study.

9.12 Amendments. This Feasibility Study Agreement may be amended only through a written amendment signed by duly authorized representatives of the District and the Authority.

IN WITNESS WHEREOF, the Parties have executed this Agreement on this 6th day of February, 2015.

MASSACHUSETTS SCHOOL BUILDING AUTHORITY

By,



John K. McCarthy
Executive Director

MSBA Project No.: 201400360010
District: Bourne

TOWN OF BOURNE

By,



Thomas Guerinio
NAME (type or print)

Town Administrator
TITLE (type or print)

EXHIBIT A

FEASIBILITY STUDY BUDGET

**Town of Bourne
James F. Peebles Elementary School**

The total Budget for the Feasibility Study conducted pursuant to this Agreement, which is attached hereto and incorporated by reference herein, shall be no more than \$750,000 based upon the following estimates:

| | |
|--------------------------|------------|
| Owner's Project Manager: | \$ 140,000 |
| Designer: | \$ 500,000 |
| Environmental/Testing: | \$ 90,000 |
| Other: | \$ 20,000 |

EXHIBIT B

SCOPE OF THE FEASIBILITY STUDY

Town of Bourne James F. Peebles Elementary School

The Scope of the Feasibility Study conducted under this Agreement, which is attached hereto and incorporated by reference herein, shall consist of the development of a feasibility study/schematic design for evaluation of a renovation of the existing school, a renovation of and addition to the existing school, and/or new construction for the James F. Peebles Elementary School in the Town of Bourne (the "District"). Pursuant to the Massachusetts School Building Authority's (the "MSBA") regulations, 963 CMR 2.06, the space allowance for the potential project shall meet all applicable MSBA regulations and guidelines.

The Feasibility Study shall contain all information required by 963 CMR 2.10(8) and any other applicable rules, regulations, policies, guidelines and directives of the MSBA including, but not limited to, a final design program, space summary, budget statement for preferred educational objectives, and a proposed total project budget. The Feasibility Study for this proposed project will examine the following three options: to consolidate the District's grades K-5 population at a District-wide elementary school, which for purposes of the design shall be based on no more than a total of 885 students; to consolidate the District's grades K-4 population at a District-wide elementary school, which for purposes of the design shall be based on no more than 725 students; and to maintain the current James F. Peebles Elementary School grade configuration of grades K-4, which for the purposes of the design shall be based on no more than 250 students. The District will prepare and submit to the MSBA the educational space template for both options for review and acceptance. Upon acceptance of the educational space summary, the District will commence with the evaluation of alternatives. The Schematic Designs that are developed pursuant to this Agreement shall be based upon the final design program which shall be subject to the written approval of the MSBA. The Schematic Design shall include, but not be limited to, the information required by the MSBA's Feasibility Study Guidelines, including, but not limited to, a site development plan, environmental assessment, geotechnical assessment, geotechnical analysis, code analysis, utility analysis, schematic building floor plans, schematic exterior building elevations, narrative building systems descriptions, MA-CHPS scorecard or LEED for Schools checklist, outline specifications, cost estimates, project schedule and proposed total project budget.

In conducting the Feasibility Study and developing the Schematic Design, the District shall, in a sufficient and timely manner as determined by the MSBA, initiate such notification procedures, undertake such review processes, and obtain such determinations and approvals as may be required by 963 CMR 2.03(2)(h) & (i), including, but not limited to, such procedures, reviews, determinations, and approvals as may be required by the Massachusetts Historical Commission ("MHC") and/or the Massachusetts Environmental Policy Act ("MEPA"). At its earliest opportunity, the District shall seek a written determination from MHC as to whether MHC intends to undertake a review of the Proposed Project.

The District shall be responsible for conducting such geotechnical evaluations, site investigations, soils explorations and environmental assessments as are reasonable and necessary

to determine whether any significant environmental, geotechnical or other physical conditions exist that may have an impact upon eventual construction on the proposed site. The MSBA may require the District to fully fund certain environmental or geotechnical site testing beyond initial investigatory costs. The MSBA shall bear no responsibility or liability of any sort for the results of any geotechnical evaluations or site testing, soils explorations, environmental assessments, nor for any site remediation, clean-up, or other site remediation services.

The development of the Schematic Design shall be subject to continuing review by the MSBA in accordance with the provisions of this Agreement, the Schedule of Deliverables contained herein, the MSBA's Feasibility Study guidelines and any other applicable rule, regulation, policy, guideline or directive of the MSBA. The District shall be responsible for submitting to the MSBA all documentation that is required to complete the Feasibility Study and Schematic Design and to support the preparation of a Project Scope and Budget Agreement.

Exhibit C

Calendar Year 2015

Bourne

| <u>MSBA Reimbursement Rate Calculation</u> | |
|--|-------|
| Base Points | 31.00 |
| Income Factor | 6.95 |
| Property Wealth Factor | 5.89 |
| Poverty Factor | - |
| Racial Desegregation Plan Approved prior to 6/30/2000 | - |
| <i>Subtotal: Reimbursement Rate Before Incentives</i> | 43.84 |
| <u>Incentive Points</u> | |
| Maintenance (0-2) | - |
| CM @ Risk (0-1) | - |
| Newly Formed Regional District (0-6) | - |
| Major Reconstruction or Reno/Reuse (0-5) | - |
| Overlay Zoning 40R & 40S (0-1) | - |
| Overlay Zoning 100 units or 50% of units for 1, 2 or 3 family structures (0-0.5) | - |
| Energy Efficiency - "Green Schools" (0 or 2) | - |
| Model Schools (5) | - |
| Total Incentive Points | - |
| MSBA Reimbursement Rate | 43.84 |

Instructions for Entering Feasibility Study Budgets in the MSBA ProPay System

The User Guide for the ProPay System, “**ProPay User Guide V3 7/10**” is available on the MSBA website www.massschoolbuildings.org. To access the user guide place your cursor over “Policies & Guidelines”, click on “System User Guides & Access Request Forms”, then “ProPay User Guide”.

In order to initiate the reimbursement process for eligible incurred costs, Districts are required to enter project budgets associated with the Feasibility Study Agreement (“FSA”) into the ProPay System. The individual line item budgets as reflected in “Exhibit A” of the FSA are what must be submitted through ProPay System. If an individual budget line item needs to be adjusted during the course of the project, the District is able to submit a “Feasibility Study Agreement Budget Revision Request Form” for MSBA approval, see below.

Please note the following:

- ProPay Training is required to submit for reimbursement of eligible incurred costs through the MSBA ProPay System. The MSBA typically offers ProPay Training every Friday from 10:00 AM to noon in our Boston Office. If you have yet to attend training please contact your MSBA assigned Project Coordinator to sign up.
- The MSBA will be unable to process any requests for reimbursement of eligible costs until project budgets are entered into the MSBA ProPay system in accordance with Exhibit A of the FSA.
- MSBA will not reimburse for eligible incurred costs that exceed the budget for each line item within Exhibit A of the executed Feasibility Study Agreement (“FSA”).
- If an individual budget line item needs to be adjusted during the course of the project, the District must complete and submit a “Feasibility Study Agreement Budget Revision Request Form”, which is also available on the MSBA website www.massschoolbuildings.org. Place cursor over “Building With Us”, click on “Project Advisories”, then “Project Advisories, 5-8, June 2010”, then scroll down to “Advisory 8” to access a word version of the form. Once the budget revision is processed by the MSBA and returned to the District, the District enters the Budget Revision Request online through the MSBA ProPay system. The MSBA will review the submitted budget requests, if in accordance with the Approved Feasibility Study Agreement Budget Revision Request Form the budgets will be updated. If the online Budget Revision Request is not in accordance with the approved Feasibility Study Agreement Budget Revision Request Form sent to the District the request will be rejected.

- Monitoring of project costs and timely requests for budget revisions are critical to ensure that the MSBA review of the budget revision request does not delay the processing of reimbursement requests submitted to the MSBA.
- The MSBA will review the District's documentation explaining the need for transfers from one budget line item to another. All budget revisions will need to be reviewed and accepted by the MSBA in order to authorize a revision to the District's ProPay budget, which would be required to process a payment request containing applicable incurred eligible costs.

TO: Director of Capital Planning

FROM: Superintendent Name

District Name

School Name

MSBA Project ID Number:

DATE: Month XX, 20XX

RE: Feasibility Study Agreement (FSA) Budget Revision Request

Pursuant to the Feasibility Study Agreement between the [CITY/TOWN/RSD] of XXXXXXXX (the "District") and the MASSACHUSETTS SCHOOL BUILDING AUTHORITY (the "Authority"), the District hereby requests a revision to the Feasibility Study Budget, Exhibit A, dated _____, for the _____ Project. As required, the District has provided the information outlined in the table below to indicate the Feasibility Study Budget categories (line items) affected, the amounts needed and the reasons for the proposed revision.

The District acknowledges and agrees that it will not seek reimbursement from the Authority for any costs that exceed the already approved line item limits set forth in Exhibit A until after the Authority has accepted this Feasibility Study Budget Revision Request, and the Authority's ProPay system has been adjusted accordingly.

The District further acknowledges and agrees that in accordance with Section 3.3 of the Feasibility Study Agreement, any revisions to the Feasibility Study Budget will not result in an increase to the grant amount set forth in Section 2.1 of the Feasibility Study Agreement.

The District further acknowledges and agrees that the need for these revisions to the Feasibility Study Budget [have not/have] been identified in the OPM monthly report as required pursuant to the Contract for Owner's Project Management Services between the District and the OPM.

The District further acknowledges and agrees that all of the information contained in this Feasibility Study Agreement Budget Revision Request has been reviewed and approved by the [CITY/TOWN/RSD] of XXXX's School Building Committee, and it further certifies and acknowledges that the funds to pay for the costs associated with these proposed revisions are available as indicated by the signatures noted below.

The Total Budget in the Current Feasibility Study Budget, Exhibit A of the FSA dated xxxxx is \$XXXXXX.

| From Class' Code | From Classification Name | To Class' Code | To Classification Name | Budget Revision Amount | Reason for transfer (Attach all supporting documentation, e.g., executed contracts, amendments and or supporting invoices for reimbursable expenses) | Amount Remaining in Other | Ineligible/Cost/Scope Items excluded from the Total Facilities Grant |
|------------------|--------------------------|----------------|------------------------|------------------------|--|---------------------------|--|
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

By signing this Total Project Budget Revision Request, I hereby certify that I have read and understand the terms of this Request and further certify that the information supplied by the District in the tables is true, accurate and complete.

By signing this Total Project Budget Revision Request, I hereby certify that I have read and understand the terms of this Request and further certify that the information supplied by the District in the tables is true, accurate and complete.

By signing this Total Project Budget Revision Request, I hereby certify that I have read and understand the terms of this Request and further certify that the information supplied by the District in the tables is true, accurate and complete.

By:

By:

By:

Title: Chief Executive Officer

Title: Superintendent of Schools

Title: Chair of the School Committee

Date:

Date:

Date:

MASSACHUSETTS SCHOOL BUILDING AUTHORITY

By:

Title: Director of Capital Planning

Date:

