

A G E N D A

JAMES CITY COUNTY BOARD OF SUPERVISORS

READING FILE

August 11, 2009

FOR YOUR INFORMATION

1. Comprehensive Agreement between James City County, Virginia, and David A. Nice Builders, Inc.
Related to Agenda Item No. F-1: Police Department Building Proposed Comprehensive Agreement and Proposals

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COMPREHENSIVE AGREEMENT

Between

JAMES CITY COUNTY, VIRGINIA

And

DAVID A. NICE BUILDERS, INC.

_____, 2009

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COMPREHENSIVE AGREEMENT

THIS COMPREHENSIVE AGREEMENT (“Agreement”) is entered into as of the _____ day of _____, 2009, between, **James City County, Virginia** (“Owner” or “County”), and **David A. Nice Builders, Inc.** (“Developer”), a corporation authorized to do business in Virginia.

Recitals

R-1 On or about June 16, 2008, the County advertised a Request for Proposal for a Sealed Competitive Negotiable Proposal (Request for Proposal 08-0099) for a Public-Private Partnership for Design and Construction of a Police Department Building at Warhill, James City County, Virginia, a copy of which, along with all related Addenda, is attached hereto as **Exhibit A** (“the RFP”). Proposals were accepted at the James City County Purchasing Office, 101-F Mounts Bay Road, Suite 300, Williamsburg, Virginia 23185 on or before 2:00 PM, local time on August 18, 2008. The RFP was solicited pursuant to Virginia’s Public-Private Education Facilities and Infrastructure Act of 2002 (“PPEA”), Virginia Code Sections 56-575.1 through 56-575.17 (1950, as amended) and other law.

R-2 On August 18, 2008, the Developer submitted its proposal in response to the RFP (as thereafter supplemented, the “Proposal”) and on or about _____, the Developer submitted the Updated Responsibility Schedule both attached hereto as **Exhibit B**.

R-3 Pursuant to the PPEA and its implementing procedures, the County has presented to the James City County Board of Supervisors at its May 12, 2009 meeting their recommendation that the County enter into a Comprehensive Agreement with the Developer for Design and Construction of a Police Department Building at Warhill, James City County, Virginia.

R-4 The parties have negotiated a comprehensive agreement consistent with the PPEA, the County’s implementing procedures, other applicable law, the Proposal and the RFP, the terms and conditions of which are set out in this Agreement.

NOW THEREFORE, for and in consideration of the mutual promises, conditions and covenants herein set forth, the parties agree as follows:

1. **Incorporation of Recitals**. The foregoing recitals are true and correct and are incorporated herein by reference.
2. **Definitions**. The following definitions apply to this Agreement:
 - 2.1 “Building” means the new James City County Police Department Building to be constructed on the Project Site.
 - 2.2 “DBIA 535” means the Design-Build Institute of America (“DBIA”) Document No. 535, Standard Form of General Conditions of Contract between Owner and General

Contractor, and the modifications to it which are included as part of this Agreement as **Exhibit C** hereto.

2.3 “Contract Documents” means this Agreement and the Exhibits hereto listed in Section 26 hereinbelow.

2.4 “Contract Price” means the total compensation paid by the Owner to the Developer for the design and construction of the Project.

2.5 “Design Professionals” means any of those architects, engineers, and consultants providing any design services in connection with the Project who are defined in the DBIA 535, **Article 1.2.3** as a Design Consultant.

2.6 “Developer” means David A. Nice Builders, Inc. which is referred to as the Design-Builder in the DBIA 535.

2.7 “Directed Change” means a document signed by the Owner and Developer after execution of this Agreement constituting a Change Order authorized in accordance with **Article 9** of the DBIA 535.

2.8 “Draw Request” means a document constituting an “Application for Payment” submitted by the Developer to Owner in accordance with the requirements of **Article 6.2.1** of the DBIA 535.

2.9 “Final Completion of the Work”, “Final Completion”, or “final completion” means completion of the Project in conformance with this Agreement and the other Contract Documents, including without limitation, punch list items, record drawings and documentation of the Project but not including any warranty items or final Leadership in Energy and Environmental Design (“LEED”) certification from the United States Green Building Council.

2.10 “Owner” means James City County, a political subdivision of the Commonwealth of Virginia.

2.11 “Owner’s Representative” shall be an authorized representative of the Owner who is designated in writing by the Owner.

2.12 “Plans” mean the drawings, specifications, plans and other design documents for the Project to be prepared and submitted by Developer and approved by the Owner pursuant to the provisions of this Agreement.

2.13 “Project” means the design and construction of the Building and related infrastructure pursuant to this Agreement and the other Contract Documents.

2.14 “Project Schedule” means the detailed schedule for the Project prepared and submitted by the Developer in accordance with **Section 4** of this Agreement.

2.15 “Project Site” means the 7.7 acre parcel located at 4600 Opportunity Way in James City County, Virginia, adjacent to Warhill High School and the Historic Triangle campus of Thomas Nelson Community College, parcel ID# 3210100016.

2.16 “Substantial Completion of the Work,” “Substantial Completion,” or “substantial completion,” means, with respect to the entire Project or any milestone in the performance thereof, the date determined by inspection by the Owner, following certification by the Developer that the Work is substantially complete or the milestone has been achieved, as the case may be. For the entire Project to be substantially completed, the Work must be sufficiently complete so that the Owner can occupy or utilize the Building for its intended purpose, including the use of the Building’s mechanical systems as reasonably and customarily needed to operate the Building or as otherwise required by the applicable provisions of this Agreement and the DBIA 535. For a milestone to be substantially completed, the Work must be sufficiently complete to satisfy the agreed-upon requirements for the achievement of such milestone as set forth in the Contract Documents. This Section supersedes and replaces **Article 1.2.11** of the DBIA 535 in its entirety.

2.17 “Work” means all the design, construction and related services required to be furnished by the Developer under the Contract Documents. When the “Work” refers to the entire Project, it means all of the design and construction services required by this Agreement to be provided by the Developer. When the “Work” refers to a specific milestone, stage or task it means all of the design or construction services required by this Agreement to be provided by the Developer as to that specific milestone, stage or task. “Work” may include the entirety of the Work or a portion thereof. This Section replaces **Article 1.2.12** of the DBIA 535 in its entirety.

3. **General Scope.** Under this Agreement, Developer will provide those design and construction services for the Project described in Section III of **Exhibit A** to this Agreement and in **Exhibit D**, to this Agreement.

4. **Project Schedule.**

4.1 Attached hereto as **Exhibit E** is a conceptual or preliminary Project Schedule based on the best information available at the signing of this Agreement. The final Project Schedule will set forth dates for Substantial Completion of certain agreed-upon milestones. Achieving Substantial Completion of these milestones is one of the paramount reasons for the Owner entering into this Agreement.

4.2 Developer will develop the Project Schedule in greater detail, using “MS Project”® software and submit to the Owner as the design develops. The Owner shall review this detailed Project Schedule, may object to portions of the Project Schedule that relate to the Owner’s obligations, and may offer comments on the Project Schedule. However, no action by the Owner relating to this Project Schedule shall constitute a representation by the Owner that it necessarily agrees with the logic or any scheduled activity durations set forth in such Project Schedule, it being the responsibility of the

Developer to prepare a Project Schedule that uses appropriate logic and appropriate durations for activities. The final Project Schedule shall be approved by the Owner, acting reasonably and in good faith. Owner may reasonably withhold approval if Project Schedule is, in Owner's opinion, defective.

4.3 Progress meetings will be held on a mutually agreed upon schedule, not less than once every two weeks during the pre-construction phase and weekly during the construction phase. Either party may call a progress meeting at any time provided that reasonable notice has been given to both Developer and Owner. At these meetings, the Developer shall submit to Owner, in both electronic and paper format, a 3-week look-ahead schedule and an updated Project Schedule to be presented at least monthly, more frequently if required, that shows, among other things, the actual status of activities shown on the schedule as of the date of the update, the date of Project completion, the completion status of milestone items and any change in logic, any change in activities and any change in activity durations. The nature of the Work requires that the Project Schedule be fluid in order to take advantage of the design-build process. The Developer shall clearly summarize all changes from its prior schedule submission in a cover letter to Owner accompanying the update. All schedule updates shall be in a form acceptable to Owner. These scheduling activities will be commenced in compliance with **Article 2.1.3** of the DBIA 535.

4.4 The Developer shall immediately notify Owner in writing if at any time it is anticipated that Substantial Completion of any milestone date as listed in Section 4.7 below will be more than ten (10) days after the date indicated in the approved Project Schedule, and Developer will thereafter promptly provide to Owner a recovery plan reasonably satisfactory to Owner pursuant to which Developer shall achieve Substantial Completion of the milestone in a time period reasonably satisfactory to Owner. Developer shall then implement and adhere to the approved recovery plan.

4.5 Except as otherwise provided herein, Owner's receipt and review of Project Schedule updates will not be deemed to constitute any approval of any time extension or delay claims, since time extensions may only be granted pursuant to provisions of this Agreement.

4.6 The Owner and Developer shall use their best efforts to maintain the Project Schedule, which can be modified by mutual written agreement of the parties as circumstances warrant, keeping in mind the importance of achieving the Substantial Completion of the milestones identified in the Project Schedule in a timely manner. The Developer shall include in the Project Schedule sufficient time to allow for permit reviews and approvals as required in the normal course of business in the County.

4.7 Preliminary Milestone Dates

4.7.1	11/11/09	Architectural design complete
4.7.2	12/1/09	Site plan approval
4.7.3	12/14/10	Building complete
4.7.4	1/5/11	Substantially Complete

- 4.7.5 5/6/11 Submission of LEED Certification applications as described in Section 5.23
- 4.7.6 5/9/11 Project complete

5. The Developer’s Responsibilities.

5.1 Project Management – Provide one project manager to be accountable and responsible for coordinating and accomplishing the improvements necessary for the Project.

5.2 Construction Management and Engineering – Provide a comprehensive quality assurance and quality control program encompassing both design and construction activities. Developer agrees that the quality assurance and quality control program shall include input from and agreement and approval from the Owner regarding the selection of primary subcontractors subject to Article 2.7.3 of DBIA 535.

With the exception of special (third party) inspections that are required to be provided by the Owner, the Developer shall provide at its expense all the testing, inspection services required for the Project including any inspections, tests or approvals required for the Owner’s acceptance of materials or equipment to be incorporated in the Work, or of materials, mix designs, or equipment submitted for approval prior to the Developer’s purchase thereof for incorporation in the Work. The Developer shall furnish the Owner with copies of the inspections and the required certificates of inspection and approval.

5.3 General Submittals – Submit fabrication or installation documents as well as shop drawings designating products and materials to be used in construction to the Owner for review and approval. Owner shall have at least five (5) working days unless otherwise agreed to by the parties to review submittals and return comments to the Developer.

5.4 Schedule – Institute and comply with the Project Schedule for the design and construction, with interim milestone completion dates.

5.5 Topographic Survey and Mapping – Furnish a topographical survey of the land areas to be impacted by the Project, describing any required roadway improvements on Opportunity Way and any required offsite water, sewer, stormwater or other utility improvements. This Section will supersede Article 3.2.1.1 of the DBIA 535.

5.6 Sewer and Water Line Planning – Review water line modeling data and demand requirements for the various facilities, and prepare preliminary plan for waterline sizing and routes for interconnections. Review preliminary study data for sewer facilities. Provide preliminary plans for sewer design. Submit plans to the Virginia Department of Environmental Quality as required for approval and issuance of a certificate to permit construction of water and sewer utilities. James City Service Authority utilities must be designed and constructed in accordance with JCSA’s Standards and Specifications for Water Distribution and Sanitary Sewer Systems, dated April, 2002. These standards include by reference the Hampton Roads Planning District Commission Regional Standards.

5.7 A Traffic Impact Study – Prepare a traffic impact study for the Project.

5.8 Roadway, Entrance Way and Parking Lot Plans - Furnish Plans describing impacts for environmental permit preparation and right-of-way acquisition requirements. Roadway geometry depicted in such Plans will be determined based on the Traffic Impact Studies and will need to meet all of VDOT design requirements and/or procedures for acceptance by VDOT.

5.9 Information Meetings - Hold at least two meetings to inform citizens, and/or public bodies such as the County Board of Supervisors and/or School Board about the status of the Project. Other public meetings may be held upon mutual agreement of the parties.

5.10 Geotechnical Investigation - Perform a geotechnical investigation of the Project Site. The Developer will take all the risk relating to Differing Site Conditions. This Section replaces **Article 4.2** of the DBIA 535.

5.11 Permit Approvals - Coordinate the design and prepare and submit all necessary permit applications to the County to obtain all necessary site plan and building approvals.

5.12 Wetlands and other Environmental Permitting - Prepare and submit the required information to secure such authorization to construct the Project. If wetland or other resource mitigation is required, Developer will determine the mitigation site and develop the mitigation plan accordingly.

5.13 Stormwater Pollution Permit for Construction - Obtain a Stormwater Pollution Permit for construction of the Project.

5.14 Coordinate Right-of-Way and Utility requirements to Optimize Design - Explore opportunities available during various stages of preliminary design to minimize right-of-way and utility relocation costs. The right-of-way review will consider possible design alternatives that will avoid or minimize damage payments to landowners and cost cure items. Coordinate any access or construction within utility right-of-ways that impact the Project Site. This may include coordination with Newport News Waterworks, Dominion Virginia Power, Virginia Natural Gas or any other utility with facilities or assets contained in the utility corridor. Prepare surveys and/or plats necessary for the transfer of easements from James City County to James City Service Authority for on-site and off-site water and sewer infrastructure. Developer will assume the risk related to any Utility Relocations that are required by their designed improvements, including the cost to relocate. This Section amends **Article 3.2.1.3** of the DBIA 535.

5.15 Site Clearing and Grading - Establish any requirements for use or disposal of excess material. Prepare appropriate cost estimates and schedules.

5.16 Design – Furnish Plans for the Building and the Project Site stormwater management system; roadways, entry ways, parking lots, sidewalks, utility corridors and

easements and connections to include, but not limited to, water, sewer, gas, electric, and communications, and all related infrastructure on the Project Site. Developer's design services will be in compliance with **Articles 2.2 and 2.3** of the DBIA 535.

5.17 Verify Total Project Cost – Prepare budget estimates at 30%, 60%, 90% and 100% stages of architectural design development based upon negotiated Total Project Cost as listed in **Exhibit D**. Resources may be reallocated and designs may be changed during this process to the extent that the proposed changes do not increase the previously agreed upon Contract Price.

5.18 Construction – Construct the Project as shown in the Plans in compliance with the Contract Documents, including **Articles 2.7 and 2.8** of the DBIA 535.

5.19 Construction of roadways, signals, parking lots, storm sewer and their related infrastructure items shown in the Plans will be performed according to the applicable or current Virginia Department of Transportation Road and Bridge Specifications.

5.20 The Owner, the Owner's Representative, testing agencies and governmental agencies with jurisdictional interests shall have access to the Project at all times for their work, observations, inspecting and testing. The Developer shall provide proper and safe conditions for such access.

5.21 Design Professionals - Developer represents and warrants that the Design Professionals for the Project shall, without limitation, comply with the following:

5.21.1 Design Professionals responsible for design of any of the Project shall carry errors and omissions insurance, on a "claims made" basis, in an amount not less than \$1,000,000, and as reasonably acceptable to Developer and to Owner for the duration of the Project up to, and including, the Owner's acceptance. James City County shall be named as an Additional Insured per ISO 2010 on a primary basis. All Design Professionals shall provide the Owner with updated Certificates of Insurance as policies expire or renew. All such Design Professionals shall be required to indemnify Owner against any errors or omissions, including without limitation, patent and copyright infringement, and Developer also agrees to indemnify Owner for any errors or omissions by any of the Design Professionals.

5.21.2 Developer shall deliver to Owner copies, including reproducible copies, of the Plans and other related documents for information and reference in connection with Owner's use. Further, the Plans and other related documents may be used by Owner, in whole or in part, or in modified form, for completion of, or payment of any additional compensation to any of the Design Professionals. In the event of the termination of this Agreement for any reason, Developer shall immediately deliver to Owner a full set of copies of the Plans and other related documents then in the possession or control of Developer or the Design Professionals retained by Developer.

5.21.3 Developer shall ensure that the requirements of **Section 5.21** of this Agreement are incorporated into its contracts with its Design Professionals and that they incorporate these same requirements into their subcontracts with other Design Professionals so that Owner is able to enjoy the full benefits of this paragraph.

5.22 Representations and Warranties of Developer. Developer represents and warrants that it has legal authority to enter into this Agreement and perform all of its obligations herein (including all necessary state construction and design licenses), and that the execution of this Agreement has been duly and properly authorized.

5.23 The Developer shall:

(i) design the Project to meet the Silver certification level of the Leadership in Energy and Environmental Design ("LEED") program of the United States Green Building Council ("USGBC");

(ii) submit the plans and specifications to the USGBC as appropriate for the LEED certification process for purposes of evaluation and approval by the USGBC;

(iii) prepare and submit a LEED certification application for the Project to the USGBC which shall result in the Developer's receipt of fifty (50%) percent of the retainage on the Project to the extent all other requirements for Final Completion have been complied with by the Developer within seven (7) days of the submission of the LEED certification application;

(iv) receive fifty (50%) percent of the remaining retainage after the Developer receives initial comments from the USGBC after its review of the LEED certification application and submits an appropriate response to the USGBC;

(v) receive the remaining retainage within seven (7) days after the Silver LEED Certification is received.

If the Silver LEED certification is not granted by the USGBC within a reasonable time after the initial LEED certification application is submitted to the USGBC and the Owner and Developer mutually determine that further resubmission is futile, then the Owner shall release all remaining retainage to the Developer.

6. Owner's Responsibilities. Article 3 of the DBIA 535 is hereby modified to add the following representations of the Owner:

6.1 Assist and cooperate with Developer so that Developer may perform the design and construction services in a timely manner.

6.2 Revise and comment upon all proposed Plans and related documents submitted by the Developer within a reasonable time (not to exceed fourteen (14) calendar days) so as to ensure approval of the Plans in a timely manner and not delay the Developer in the

performance of the Work. Provide approval of the final Plans in accordance with the Project Schedule.

6.3 Provide to the Developer all available information pertinent to the Project including previous reports and other relevant data.

6.4 Appoint an Owner's Representative to represent the Owner. The Owner's Representative will serve as the primary point of contact for the Developer and shall be responsible for official communication and information dissemination.

6.5 Owner shall not be due compensation from the Developer for any oversight or reviews related to the design or construction of the Project.

6.6 Representations and Warranties of Owner. Owner represents and warrants that it has the legal authority and power to enter into this Agreement and perform all of its obligations herein; that the County has to the best of its knowledge complied with the PPEA and the County's implementing procedures in its acceptance, reviews and approval of the Proposal and this Agreement; and that the execution of this Agreement has been duly and properly authorized by all necessary action on behalf of the James City County Board of Supervisors.

7. **Insurance and Bonds.** This Section replaces **Article 5** of the DBIA 535 in its entirety.

7.1 Developer shall procure and maintain from an insurance company or companies authorized to do business in the Commonwealth of Virginia with the minimum of an A{-} rating, the insurance coverage as specified in **Exhibit A** to this Agreement for certain claims which may arise from or out of the performance of the Work and obligations under the Contract Documents:

7.1.1 Developer shall be responsible for the filing and settling of claims and liaison with insurance adjusters.

7.1.2 Developer shall send a certification of all policies to Owner, which shall be deemed to have approved of such policies unless, within thirty (30) days after receipt thereof, Owner shall by notice in writing advise Developer to the contrary.

7.2 **Additional Insured.** The Commercial General Liability insurance policy shall name James City County, Virginia, as an Additional Insured per ISO 2010 on a primary basis.

7.3 **Right to Revise or Reject.** Owner reserves the right, but not the obligation, to review and revise any insurance requirement, not limited to limits, sub-limits deductibles, self-insured retentions, coverage(s) and endorsements based upon insurance market conditions affecting the availability or affordability of coverage, or changes in the scope of work/specifications affecting the applicability of coverage. Additionally, the Owner reserves the right, but not the obligation, to review and reject any insurance policies failing to meet

the criteria stated herein and to reject any insurer providing coverage due to its poor financial condition or failure to operate legally

7.4 **Certificates of Insurance.** Developer agrees to provide Owner Certificates of Insurance evidencing that all coverage(s), limits and endorsements required herein are maintained and are in full force and effect. The Certificates of Insurance shall clearly indicate the Project name and project number. Said Certificates of Insurance shall include a minimum thirty (30) day endeavor to notify due to cancellation or non-renewal of coverage. The Certificate Holder address shall read:

James City County
Attn: Stephanie Luton, Purchasing Director
101F Mounts Bay Road, Suite 300
Williamsburg, VA 23185
Fax: (757) 253-6753

7.5 **Payment Bonds, Performance Bonds and Other Security.**

7.5.1 To secure its performance of the construction, Developer shall furnish separate performance and payment bonds to Owner in the amount of one hundred percent (100%) of the cost of construction. The bonds shall be executed by a corporate surety or corporate sureties that are reasonably acceptable to Owner, and duly authorized to do business in the Commonwealth of Virginia, and executed in a form acceptable to Owner. If a surety becomes insolvent, or otherwise not authorized to do business in the Commonwealth of Virginia, Developer shall promptly replace the bond or furnish equivalent security acceptable to Owner. Developer shall cooperate with Owner to fulfill any reasonable requirements in connection with the financing for the Project with respect to the form of performance and payment bonds provided hereunder.

7.5.2 Developer shall also furnish any cash escrow, funds, cashiers checks, certified checks, or letters of credit required for the issuance of any earth-disturbing or other permit and any bonds or security required by VDOT or any other governmental authority.

8. **Payments to Developer.** Payments to Developer, except as provided herein, will be in compliance with **Article 6** of the DBIA 535. Payments made to Developer of the Contract Price shall be made as follows:

8.1 **Payments of Contract Price.** Subject to appropriation of funds by the Board of Supervisors of James City County as reflected in a Board Resolution, the Owner shall make progress payments of the Contract Price due under the Draw Requests as provided in **Section 8.2.**

8.2 **Delivery of Draw Request.** On or about the 1st day of each month, Developer shall submit to the Owner's Representative three (3) copies of a Draw Request ("Application for Payment") in the form attached as **Exhibit F.** Each Draw Request shall be signed by Developer's project manager. No Draw Request shall be considered complete unless:

- i. It describes the status or percent complete as it relates to the Project Schedule
- ii. Sets forth the related payments(s) which is/are then due in accordance with the Project Schedule as of the end of the 10th day of the month
- iii. Includes the required attachments and supporting documentation thereto in a form approved by the Owner. Within ten (10) days after the Owner's Representative receives the request the Owner will review the request and all attachments thereto for conformity with all requirements of the Contract Documents, and shall notify Developer of the amount approved for payment and the reason for disapproval of any remaining invoiced amount or other information set forth in the request. Developer may include such disapproved amount in the next month's request after correction of the deficiencies noted by the Owner (all such disapproved amounts shall be deemed in dispute unless otherwise agreed).

All payments will be made by the Owner within thirty (30) days after the Owner's receipt of a complete Draw Request. The Owner will not unnecessarily withhold payment on approved Work while resolving any disputed payment items. Notwithstanding paragraph 37 of Attachment H to Exhibit A, Developer shall pay subcontractors within thirty (30) days of receipt of payment from the Owner.

9. Indemnification. This section replaces **Article 7** of the DBIA 535.

9.1 Developer shall indemnify and hold Owner harmless, to the fullest extent permitted by law, from any and all third-party claims or causes of action for loss, liability, damage or expense, including reasonable attorney's fees and disbursements, arising out of (i) bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) in connection with the performance of the Work by Developer under this Agreement; (ii) any mechanics' or construction liens arising as a result of the Work; (iii) any claim of patent infringement or copyright infringement arising as a result of the Work; or (iv) any failure of the Project to comply with any applicable governmental laws, ordinances, rules and regulations; provided, however, that such obligation by Developer to indemnify and hold Owner harmless shall not apply to any loss, liability, damage or expense, including attorneys' fees, to the extent proximately caused, in whole or in part, by the sole negligence of Owner.

9.2 Developer's obligations to indemnify Owner and hold it harmless under this Paragraph 21 do not supersede any obligations by Developer or anyone else under the DBIA 535, or elsewhere in this Agreement to indemnify Owner and hold it harmless, these indemnification obligations being intended to be cumulative.

10. Time. Except as otherwise provided herein, performance of the Project will be in compliance with **Article 8** of the DBIA 535. The time within which Developer agrees to complete construction of the Project milestones is of the essence to this Agreement. The Developer shall proceed expeditiously with adequate forces and make diligent efforts to keep the Project on schedule, and the Developer shall achieve for each of the milestones

Substantial Completion of the Work and Final Completion of the Work within any completion times specified in the Project Schedule.

10.1 **No Damages for Delay.** Except as provided in the Contract Documents, Developer will not be entitled to any damages for delay from Owner even if such delays are outside Developer's reasonable control except as provided below in this paragraph. This restriction on damages for delay applies to this Agreement and to the applicable provisions of the DBIA 535. Developer will, however, be entitled to an extension of the Project Schedule and reimbursement of Developer's actual job site costs incurred as a result of Owner delays that could not be reasonably anticipated by Developer despite the exercise of due diligence or avoided or mitigated by reasonable efforts by Developer, provided that Developer gives written notice of such Owner delay within ten (10) days of the first occurrence of such Owner delay per paragraph 19 of this Agreement.

10.2 **Liquidated Damages.** If the date established in the Project Schedule for Substantial Completion is not met, Developer shall pay to Owner, as liquidated damages for such delay, \$1,000 per day for each day in excess of the Substantial Completion date. Developer agrees that these liquidated damages are reasonable and not a penalty. Developer agrees that the per diem measure of liquidated damages is a reasonable measure of the damages likely to be suffered by the Owner in case of delay, and that Developer will not challenge the per diem amount of liquidated damages or damages imposed pursuant to this paragraph except as to whether Developer is responsible for the delays that have resulted in the Owner's assessment of liquidated damages. The Developer hereby waives any defense as to the validity of any liquidated damages stated herein on the grounds that such liquidated damages are void as penalties or are not reasonably related to actual damages.

11. **Changes to the Contract Price and Time.** Except as provided herein, Change Orders will be in compliance with **Article 9** of the DBIA 535.
12. **Contract Adjustments and Disputes.** See **Exhibit A.**
13. **Termination of Agreement.** Except as provided herein, termination of this Agreement will be in compliance with **Article 11** of the DBIA 535.

13.1 **Owner's Right to Stop Work**

13.1.1 Owner may terminate this Agreement for material breach without any need for providing Developer notice and an opportunity to cure for the following reasons

- (i) For any collusive bidding,
- (ii) For commission by Developer or its joint ventures/members of actual fraud or a crime that is a felony, provided that such fraud or crime is related to the Project, or

(iii) If Developer or any member of Developer declares bankruptcy or is involuntarily placed into bankruptcy.

13.1.2 If Developer defaults or fails or neglects to carry out the Work in accordance with this Agreement, Owner shall give written notice that Owner intends to terminate this Agreement, which notice shall contain a reasonably detailed explanation of the reasons for the proposed termination. Developer shall correct the default, failure or neglect within forty-five (45) days after being given such notice; provided, however, if (i) the nature of such default, failure or neglect is such that they are not reasonably capable of being corrected within such 45-day period and (ii) Developer notifies Owner of a reasonable alternative period reasonably acceptable to Owner within fifteen (15) days of receipt of such notice, Developer shall be allowed such reasonable alternative period to correct the default, failure or neglect so long as Developer promptly commences and diligently pursues such corrections to completion. If Developer fails to make such corrections within the 45-day period or fails to commence and diligently pursue to completion such corrections within the alternative period, then Owner may, at its sole discretion and without prejudice to any other remedy, terminate the employment of Developer and take possession of the Project Site and of all materials and, if Owner so chooses, finish construction of the Project by whatever method Owner may deem expedient. Upon termination hereunder,

i. Those contracts for the design and/or construction designated by Owner shall be assigned to Owner for Owner to use at Owner's option to complete the Work, and,

ii. Developer will promptly provide Owner all Plans that have been prepared to date, regardless of whether they are complete. The Developer shall cause to be included in its contracts and in the subcontracts of those with whom it and its subcontractors contract provisions that ensure smooth continuity of services and the ability to assign contracts to carry out this paragraph's requirements in the event of such termination and shall use its best efforts to ensure that the design and construction continues smoothly without interruption if a termination occurs before Final Completion of the Work.

13.2 **Termination for Convenience of Owner.** Termination for convenience of the Owner shall be governed by the provisions of **Exhibit A**, Attachment H, paragraph 51.

13.3 **Developer's Right to Stop Work.** Should the Work be stopped for a period of ninety (90) days or more through no fault of the Developer, or should the Owner fail to pay the Developer any payment within a reasonable length of time after said payment shall become due, the Developer may, upon seven (7) days written notice to the Owner, either suspend the Work or terminate this Agreement and recover from the Owner payment for all Work

executed to date. Interest shall accrue on the overdue payment at the rate of twelve percent (12%) per annum from the date due until paid.

14. **Records Copies and Plans.** Developer shall maintain in good order one record copy of the Plans, Change Orders and any other related documents, marked currently to record changes made during construction. During construction, the Owner shall have the right to review all Plans, Change Orders and other related documents during regular business hours. Upon Final Completion of the Project, Developer shall deliver to the Owner, in a format(s) reasonably acceptable to the Owner, a complete set of as-built Plans for the Project, including mechanical systems, utilities, site work and utilities going to or from the Building and all written Specifications as amended.

14.1 **Owner's Right To Inspect Certain Records.**

14.1.1 The Developer shall retain all books, records and other documents relative to the Project for five (5) years after final payment or until audited by the County, whichever is sooner. County auditors and its authorized agents shall have full access to and the right to examine any of said materials during said period.

14.1.2 Developer's information including, but not limited to, proprietary and other corporate records, will be subject to the protection of the Freedom of Information Act.

15. **Successors and Assigns.** Except as expressly otherwise provided, all of the terms, covenants and conditions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. This Agreement may not be assigned without the prior written consent of the parties to this Agreement.
16. **Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Virginia. The provisions of this Agreement shall not be construed in favor of or against either party but shall be construed according to their fair meaning as if both parties jointly prepared this Agreement.
17. **Severability.** If any term or provision of this Agreement shall be determined to be invalid or unenforceable in any respect, it shall be replaced with a substantially similar provision to the greatest extent possible and the Agreement shall remain in full force and effect.
18. **No Waiver.** The failure of Owner to insist upon the strict performance of any provisions of this Agreement, the failure of Owner to exercise any right, option or remedy hereby reserved, or the existence of any course of performance hereunder shall not be construed as a waiver of any provision hereof or of any such right, option or remedy or as a waiver for the future of any such provision, right, option or remedy or as a waiver of a subsequent breach thereof. The consent or approval by Owner of any act by Developer requiring Owner's consent or approval shall not be construed to waive or render unnecessary the requirement for Owner's consent or approval of any subsequent similar act by Developer. No provision of this Agreement shall be deemed to have been waived unless such waiver shall be in writing signed by the party to be charged.

19. **Notices.** All notices and demands by any party to any other shall be given in writing and sent by a nationally recognized overnight courier or by United States certified mail, postage prepaid, return receipt requested, and addressed as follows:

To the County: _____

_____, Virginia
Facsimile No.: _____
Telephone No.: _____

With copies to: _____
County Attorney
County

Facsimile No.: _____
Telephone No.: _____

To Developer: David A. Nice Builders, Inc.
Bitty Miscavige
Project Manager
4571 Ware Creek Road
Williamsburg, VA 23188
Facsimile No.: (757) 566-4686
Telephone No.: (757) 566-3032

With copies to: Terence Murphy
Kaufman & Canoles, P.C.
P. O. Box 3037
Norfolk, VA 23514-3037
Facsimile No.: (757) 624-3169
Telephone No.: (757) 624-3139

Any party may, upon prior notice to the others, specify a different address for the giving of notice. Notices shall be effective one (1) day after sending if sent by overnight courier or three days after sending if sent by certified mail, return receipt requested.

20. **Independent Contractor.** It is expressly understood and agreed by the parties hereto that Developer, in performing its obligations under this Agreement, shall be deemed an independent contractor and not an agent, employee or partner of Owner.
21. **Cooperation.** The parties agree to cooperate to achieve the objectives of this Agreement and to use reasonable and good faith efforts to resolve all disputes and disagreements that

may arise hereunder. Each party agrees to designate representatives with the authority to make decisions binding upon such party (subject in the case of Owner to those matters requiring an appropriate vote) so as to not unduly delay the Project Schedule.

22. **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but both of such counterparts together shall be deemed to be one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for the other counterpart.
23. **Entire Agreement.** This Agreement and the other Contract Documents set forth all the covenants, promises, agreements, conditions and understandings between Developer and Owner concerning the Project, and there are no covenants, promises, agreements, conditions or understandings; either oral or written, between them other than are herein set forth. No alteration, amendment, change or addition to this Agreement shall be binding upon Developer or Owner unless reduced to writing and signed by each party.
24. **Force Majeure.** The Developer shall not be responsible for loss, damage, or delays of any kind arising directly out of any acts of God.
25. **Amendments.** This agreement may be modified, changed or amended when reduced to a writing signed by the Owner and Developer.
26. **Exhibits.** This Agreement and the following exhibits are the Contract Documents, which Exhibits are hereby incorporated by this reference into this Agreement:
 - Exhibit A - James City County's PPEA Request For Proposals 08-0099 and related Addenda
 - Exhibit B -Developer Proposal
 - Exhibit C - Design-Build Institute of America Document No. 535 and List of Modifications
 - Exhibit D - Scoping and Cost Summary
 - Exhibit E - Conceptual Schedule
 - Exhibit F - Draw Request (Request for Payment)
27. **Ownership of Work Product.** Ownership of all materials and documentation including the original drawings and the Plans and Specifications and copies of any calculations and analyses prepared pursuant to this Agreement shall belong exclusively to the Owner. Such materials and documentation, whether completed or not, shall be the property of the Owner whether the work for which they are made is executed or not. The Developer and any of the Developer's subcontractors shall not use these materials on any other work or release any information about these materials without the express written consent of the Owner.
28. **Precedence.** In the event of a conflict or inconsistency between or among any of the Contract Documents, the order of precedence to be used in resolving the conflict or inconsistency shall be, first, the text of this Agreement to be followed in priority by the provisions of the Exhibits in the order listed in **Section 26** above.

IN WITNESS WHEREOF, the parties have executed this Comprehensive Agreement as of the day and year first above written.

“OWNER”

JAMES CITY COUNTY, VIRGINIA

By: _____
Its Designee _____

“DEVELOPER”

DAVID A. NICE BUILDERS, INC

By: _____
Its Designee: _____