

## **Board of Trustees Agenda Item**

**Board Meeting Date:** November 5, 2012

### **Title of Item:**

Authorize Award of a Site Lease and a Facilities Lease to Sundt Construction Inc. for the Advanced Technology Center (ATC) renovation project at De Anza College (Measure C Project #245)

### **Background and Analysis:**

On February 6, 2012, the Board authorized the use of the Lease-Leaseback contractor selection process for the ATC renovation project at De Anza College in accordance with Education Code 81335.

On August 6, 2012, the Board authorized award of a Preconstruction Services Agreement to Sundt Construction Inc. (Sundt) based upon the recommendation of the ATC contractor selection committee.

The Preconstruction Services Agreement required Sundt to prequalify subcontractors, obtain competitive bids from subcontractors, develop an actual Guaranteed Maximum Price (GMP) and develop a Preliminary Construction Schedule. The GMP was established based upon the DSA-approved set of drawings and specifications.

Sundt's GMP for this project is \$8,206,523. The scope of work includes interior and exterior renovation of the ATC Building. Pursuant to Education Code section 81456 the governing board may, when letting contracts for reconstructing existing school buildings, require each bidder to agree in its bid to purchase and to remove from the school grounds all old materials required by the specifications to be removed that is not required for school purposes. The ATC building contains furnishings and fixtures that are of no use to the District that remain after educational programs were relocated to the Media & Learning Center building. Therefore, the District required Sundt to include in its GMP a price for the removal and disposal of such old materials. Furthermore, although it is not required by Education Code 81456, the District has written language into the Facilities Lease agreement Construction Provisions that Sundt make a good faith effort to remove and dispose of the property through a process that is in the best interest of the District, and in the most charitable and environmentally sound way practical. This procedure was also reviewed by legal counsel, Mr. Phillip Jaret of Jaret & Jaret law offices. The GMP is subject to adjustments for extra work and changes as directed and agreed to by the District. The GMP is within the Architect's estimate of \$8,494,939 for the complete cost of the work. The ATC Renovation project is funded by Measure C.

District Staff recommends that the Board of Trustees award the Site Lease and Facilities Lease agreements to Sundt to construct the project based upon DSA-approved construction documents for an amount not-to-exceed the GMP. Under the two agreements, the District will lease District-owned land to Sundt, and Sundt will agree to construct the Project pursuant to the District's Construction Provisions and Sundt's responses to RFQ/RFP 1475-245. The District will receive incremental title to the constructed property in accordance with payments made. The District will pay for and take title to all improvements no later than completion of construction of the Project, at which time the leases will be terminated.

Upon execution of the Site Lease and the Facilities Lease, Sundt will be given access to and control of the site to commence work. Substantial Completion of the work will be achieved within 219 calendar days of the start of the work; anticipated completion is June 2013.

**Recommendation:**

Accept the GMP and authorize Gina Bailey, Interim Director of Purchasing Services, to award the Site Lease and the Facilities Lease to Sundt Construction Inc. for Project 245.

Submitted by:	Gina Bailey, x6166
Additional contact names:	Charles Allen, x6150; Tom Armstrong, x8289; Annette Perez, x6163
Is backup provided?	Yes

RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, CA 94022  
Attention: Carmen Redmond

This document is recorded for the  
benefit of the Foothill-De Anza  
Community College District, and  
recording is fee exempt under Section  
6103 of the Government Code.

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**SITE LEASE AGREEMENT**

ADVANCED TECHNOLOGY CENTER  
DE ANZA COLLEGE  
CUPERTINO, CALIFORNIA

by and between

FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT  
as Lessor

and

SUNDT CONSTRUCTION, INC.  
as Lessee

Dated as of NOVEMBER 5, 2012

## **SITE LEASE**

THIS SITE LEASE (this "Lease") dated as of **NOVEMBER 5, 2012** ("Effective Date"), is made and entered into by and between the **FOOTHILL - DE ANZA COMMUNITY COLLEGE DISTRICT**, a California community college district duly organized and validly existing under the Constitution and laws of said State of California, (the "District"), as lessor, and **SUNDT CONSTRUCTION, INC.** ("Contractor"), a corporation duly organized and existing under the laws of the State of California, as lessee.

### **I. RECITALS**

WHEREAS, the District currently owns a parcel of land located at De Anza College, Cupertino, California, as more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Site"), which Site is adequate to accommodate the renovation of the Advanced Technology Center (ATC) building and associated site improvements;

WHEREAS, the District desires to provide the renovation of the **ATC** building as more particularly described in Exhibit "A" to the Facilities Lease (defined below) and incorporated herein by this reference (the "Project");

WHEREAS, the Governing Board of the District (the "Board") has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Site to the Contractor and by immediately entering into the Facilities Lease (defined below) under which the District will sublease the Site and lease the Project from the Contractor;

WHEREAS, the District is authorized under Section 81335 of the Education Code of the State of California to lease the Site to the Contractor and to have the Contractor construct the Project on the Site and to lease to the District the Site and the Project, and has duly authorized the execution and delivery of this Lease;

WHEREAS, the Contractor is authorized to lease the Site as lessee and to construct the Project on the Site, and has duly authorized the execution and delivery of this Site Lease; and

WHEREAS, the District has performed all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into this Site Lease do exist, have happened and have been performed in regular and due time, form and manner as required by law, and the parties hereto are now duly authorized to execute and enter into this Site Lease;

**NOW, THEREFORE**, in consideration of the promises and of the mutual agreements and covenants contained herein, the sum of One Dollar (\$1.00) and other

valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto do hereby agree as follows:

## **ARTICLE I**

### **II. DEFINITIONS**

Section 1.1. Unless the context clearly otherwise requires, all words and phrases defined in Section 1.1 of the Facilities Lease dated as of NOVEMBER 5, 2012 by and between the District and the Contractor (the "Facilities Lease") shall have the same meaning in this Site Lease.

## **ARTICLE II**

### **DEMISING CLAUSES**

Section 2.1. Lease of the Site. The District hereby leases to the Contractor, and the Contractor hereby leases from the District the Site, subject only to Permitted Encumbrances, in accordance with the provisions of this Site Lease, to have and to hold for the term of this Site Lease. This Site Lease shall only take effect if the Facilities Lease is executed by the District and Contractor within three (3) days of execution of this Site Lease.

Section 2.2. Rental. In consideration for the lease of the Site by the District to the Contractor and for other good and valuable consideration, the Contractor shall pay One Dollar (\$1.00) to the District per year.

Section 2.3. No Merger. The leasing of the Site by the Contractor to the District pursuant to the Facilities Lease shall not effect or result in a merger of the estates of the District in the Site, and the Contractor shall continue to have a leasehold estate in the Site pursuant to this Site Lease throughout the term hereof.

## **ARTICLE III**

### **QUIET ENJOYMENT**

Section 3.1. The parties intend that the Site will be sub-leased back to the District pursuant to the Facilities Lease for the term thereof. It is further intended that, to the extent provided herein and in the Facilities Lease, if an Event of Default occurs under the Facilities Lease, the Contractor, or its assignee, will have the right, for the then remaining term of this Site Lease, to: (a) take possession of the Site; (b) if it deems it appropriate, cause appraisal of the Site and a study of the then reasonable use thereof to be undertaken; and (c) relet the Site. Subject to any rights the District may have under the Facilities Lease (in the absence of an Event of Default) to possession and enjoyment of the Site, the District hereby covenants and agrees that it will not take any action to prevent the Contractor from having quiet and peaceable possession and

enjoyment of the Site during the term hereof and will, at the request of the Contractor, to the extent that it may lawfully do so, join in any legal action in which the Contractor asserts its right to such possession and enjoyment.

## **ARTICLE IV**

### **SPECIAL COVENANTS AND PROVISIONS**

Section 4.1. Waste. The Contractor agrees that at all times that it is in possession of the Site, it will not commit, suffer or permit any waste on the Site, and that it will not willfully or knowingly use or permit the use of the Site for any illegal purpose or act.

Section 4.2. Further Assurances and Corrective Instruments. The District and the Contractor agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Site hereby leased or intended so to be or for carrying out the expressed intention of this Site Lease and the Facilities Lease.

Section 4.3. Right of Entry. The District reserves the right for any of its duly authorized representatives to enter upon the Site at any reasonable time to inspect the same.

Section 4.4. Representations of the District. The District represents and warrants to the Contractor as follows:

(a) Due Organization and Existence. The District is a community college district, duly organized and existing under the Constitution and laws of the State of California.

(b) Authorization. The District has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Site Lease.

(c) No Violations. Neither the execution and delivery of this Site Lease nor the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Site, except Permitted Encumbrances.

Section 4.5. Representations of the Contractor. The Contractor represents, covenants and warrants to the District as follows:

(a) Due Organization and Existence. The Contractor is a corporation duly organized and existing under the General Corporation Law of the State of California, has power to enter into this Site Lease and the Facilities Lease; is possessed of full power to own and hold real and personal property, and to lease and sell the same; and has duly authorized the execution and delivery of all of the aforesaid agreements.

(b) Authorization. The Contractor has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Site Lease.

(c) No Violations. Neither the execution and delivery of this Site Lease or the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Contractor is now a party or by which the Contractor is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the Contractor, or upon the Site, except Permitted Encumbrances.

## **ARTICLE V**

### **ASSIGNMENT, SUBLEASING, MORTGAGING AND SELLING**

Section 5.1. Assignment and Subleasing. This Site Lease may be assigned and the Site subleased, as a whole or in part, by the Contractor only upon the prior written consent of the District to such sublease.

Section 5.2. Restrictions on District. The District agrees that it will not mortgage, sell, encumber, assign, transfer or convey the Site or any portion thereof during the term of this Site Lease.

Section 5.3. Liens. The Contractor agrees to keep the Site and every part thereof free and clear of any and all liens, including without limitation, pledges, charges, encumbrances, claims, materialmen liens, mechanic liens and other liens for or arising out of or in connection with work or labor done, services performed, or materials or appliances used or furnished for or in connection with the Site or the Project. Contractor further agrees to pay promptly and fully and discharge any and all claims on which any such lien may or could be based, and to save and hold the District free and harmless from any and all such liens, mortgages, including without limitation, claims of liens and suits or other proceeding's pertaining thereto.

## **ARTICLE VI**

### **IMPROVEMENTS**

Section 6.1. Title to all improvements made on the Site during the term hereof shall vest subject to the terms of the Facilities Lease.

## **ARTICLE VII**

### **TERM AND TERMINATION**

Section 7.1. Term. The term of this Site Lease shall commence as of NOVEMBER 5, 2012 and shall terminate on the last day of the Term of the Facilities Lease, provided the District has paid to the Contractor, or its assignee, all Lease Payments and other payments which may be due under the Facilities Lease, and provided this Site Lease has not terminated pursuant to Sections 4.3(a) or 4.3(c) of the Facilities Lease.

## **ARTICLE VIII**

### **MISCELLANEOUS**

Section 8.1. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received forty-eight (48) hours after deposit in the United States mail in registered or certified form with postage fully prepaid:

If to the Contractor: Sundt Construction Inc.  
2860 Gateway Oaks Drive, Suite 300  
Sacramento, CA 95833  
Attn: Tom Camden

If to the District: Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, California 94022  
Attn: Gina Bailey, Purchasing Services  
WITH A COPY TO:

Foothill-De Anza Community College District  
1234 El Monte Road  
Los Altos Hills, California 94022  
Attn: Tom Armstrong, Facilities Department

The Contractor and the District, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent.



Section 8.2. Binding Effect. This Site Lease shall inure to the benefit of and shall be binding upon the Contractor and the District and their respective successors and assigns.

Section 8.3. Severability. In the event any provision of the Site Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 8.4. Amendments, Changes and Modifications. This Site Lease may not be effectively amended, changed, modified, altered or terminated without the written agreement of both parties hereto.

Section 8.5. Obligations Absolute. The Contractor agrees that the obligations of the Contractor are absolute and unconditional and not subject to any charges or setoffs against the District whatsoever.

Section 8.6. Execution in Counterparts. This Site Lease may be executed in several counterparts, each of which shall be original and all of which shall constitute but one and the same instrument.

Section 8.7. Applicable Law. This Site Lease shall be governed by and construed in accordance with the laws of the State of California.

Section 8.8. Contractor and District Representatives. Whenever under the provisions of this Site Lease the approval of the Contractor or the District is required, or the Contractor or the District is required to take some action at the request of the other, such approval or such request shall be given for the Contractor by the Contractor Representative and for the District by the District Representative, and any party hereto shall be authorized to rely upon any such approval or request.

Section 8.9. Captions. The captions or headings in this Site Lease are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Site Lease.

Section 8.10 Prior Agreements. This Site Lease and the corresponding Facilities Lease collectively contain all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Site Lease and no prior agreements or understanding pertaining to any such matter shall be effective for any purpose. No provision of this Site Lease may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors-in-interest.

Section 8.11 Attorney's Fees. If either party brings an action or proceeding involving the Property or to enforce the terms of this Site Lease or to declare rights hereunder, each party shall bear the cost of its own attorney's fees.

Section 8.12. Construction of Lease. It is the intent of the parties that this Site Lease and the Facilities Lease, and all Exhibits incorporated therein, be construed and interpreted together to accomplish the goals of the parties.

**IN WITNESS WHEREOF**, the parties hereto have caused this Site Lease to be executed by their respective officers thereunto duly authorized, as of the Effective Date.

**“DISTRICT”**  
**FOOTHILL-DE ANZA COMMUNITY**  
**COLLEGE DISTRICT**

By: \_\_\_\_\_  
Gina Bailey  
Interim Director, Purchasing Services  
Date: \_\_\_\_\_

**“CONTRACTOR”**  
**SUNDT CONSTRUCTION, INC.**

By: \_\_\_\_\_  
\_\_\_\_\_  
Date: \_\_\_\_\_

RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

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Attention: Carmen Redmond

This document is recorded for the  
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**FACILITIES LEASE AGREEMENT**

ADVANCED TECHNOLOGIES CENTER  
DE ANZA COLLEGE  
CUPERTINO, CALIFORNIA

by and between

*SUNDT CONSTRUCTION, INC.*  
as Sublessor

and

FOOTHILL-DEANZA COMMUNITY COLLEGE DISTRICT  
as Sublessee

Dated as of November 5, 2012

## **FACILITIES LEASE**

**THIS FACILITIES LEASE** (“Facilities Lease”), dated as of **November 5, 2012**, (“Effective Date”), is made and entered into by and between **SUNDT CONSTRUCTION, INC.**, a corporation duly organized and existing under the General Corporation Law of the State of California, as sublessor (the “Contractor”), and **FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT**, a California community college district duly organized and validly existing under the Constitution and laws of said State of California, as sublessee (the “District”).

### **RECITALS**

WHEREAS, the District desires to provide for the renovation of the **Advanced Technology Center (ATC)** as more particularly described in Exhibit “A” attached hereto and incorporated herein by this reference (the “Project”);

WHEREAS, on the date hereof, the District has leased to the Contractor the real property for the construction of the Project described on Exhibit “B” attached hereto (the “Site”) pursuant to the terms of a Site Lease dated as of the date hereof by and between the District and the Contractor;

WHEREAS, the District is authorized under Section 81335 of the Education Code of the State of California to lease the Site to the Contractor and to have the Contractor construct the Project on the Site and to lease to the District the Site and the Project, and to accomplish that purpose has duly authorized the execution and delivery of this Facilities Lease;

WHEREAS, the Contractor is authorized to sublease the Site as lessee and is obligated to construct the Project on the Site, and has duly authorized the execution and delivery of this Facilities Lease;

WHEREAS, the Governing Board of the District (the “Board”) has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Site to the Contractor and by immediately entering into this Facilities Lease under which the District will sublease the Site and lease the Project from the Contractor and make Lease Payments on the dates and in the amounts set forth in the payment schedule attached hereto as Exhibit “C” (the “Lease Payment Schedule”).

WHEREAS, the District has performed all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into this Facilities Lease do exist, have happened and have been performed in regular and due time, form and manner as required

by law, and the parties hereto are now duly authorized to execute and enter into this Facilities Lease;

**NOW, THEREFORE**, in consideration of the above premises and of the mutual covenants hereinafter contained and for other valuable consideration, the parties hereto do hereby agree as follows:

## **ARTICLE I**

### **DEFINITIONS AND EXHIBITS**

Section 1.1. Definitions. Unless the context otherwise requires, the terms defined in this Section shall, for all purposes of this Facilities Lease, have the meanings herein specified.

“Construction Provisions” means the terms and conditions for construction of the Project as set forth in Exhibit “D”.

“Contractor” means SUNDT CONSTRUCTION, INC., a corporation organized and existing under the General Corporation Law of the State of California, and its successors and assigns.

“Contractor Representative” means the Chief Executive Officer of the Contractor, or any person authorized to act on behalf of the Contractor under or with respect to this Facilities Lease as evidenced by a resolution conferring such authorization adopted by the Board of Directors of the Contractor or as so designated by the President of the Contractor.

“District” means the FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT, a California community college district duly organized and validly existing under the Constitution and laws of said State of California.

“District Representative” means the spokesperson or agent of the District, or any other person authorized by the Governing Board of the District to act on behalf of the District under or with respect to this Facilities Lease.

“Event of Default” means one or more events of default as defined in Section 9.1 of this Facilities Lease.

“Facilities Lease” means this Facilities Lease together with any duly authorized and executed amendment hereto.

“Lease Payment” means any payment required to be made by the District pursuant to Section 4.5 of this Facilities Lease and as set forth in Exhibit “C” attached to this Facilities Lease.

“Lease Payment Schedule” shall mean the payment schedule attached hereto as Exhibit “C”.

“Permitted Encumbrances” means, as of any particular time: (i) liens for general ad valorem taxes and assessments, if any, not then delinquent, or which the District may, pursuant to provisions of Section 5.1 hereof, permit to remain unpaid; (ii) the Site Lease; (iii) this Facilities Lease; (iv) easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions which exist of record as of the date of this Facilities Lease and which will not materially impair the use of the Site; and (v) easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions established following the date of recordation of this Facilities Lease and to which the Contractor and the District consent in writing which will not impair or impede the operation of the Site.

“Project” means the improvements and equipment to be constructed and installed by the Contractor as more particularly described in Exhibit “A” attached hereto, and includes, unless the context requires otherwise, the Site.

“Site” means that certain parcel of real property and improvements thereon (if any) more particularly described in Exhibit “B” attached hereto.

“Site Lease” means the Site Lease dated as of NOVEMBER 5, 2012, by and between the District and the Contractor together with any duly authorized and executed amendment thereto under which the District leases the Site to the Contractor.

“Term of this Facilities Lease” or “Term” means the time during which this Facilities Lease is in effect, as provided for in Section 4.2 of this Facilities Lease.

Section 1.2. Exhibits. The following Exhibits are attached to and by reference incorporated and made a part of this Facilities Lease:

Exhibit A - DESCRIPTION OF PROJECT: The description of the Project.

Exhibit B - DESCRIPTION OF SITE: The descriptions of the real property constituting the Site.

Exhibit C - SCHEDULE OF LEASE PAYMENTS: The schedule of Lease Payments to be paid by the District hereunder.

Exhibit D - CONSTRUCTION PROVISIONS: The terms and conditions for the construction of the Project, including Supplementary Provisions.

## ARTICLE II

### REPRESENTATIONS, COVENANTS AND WARRANTIES

Section 2.1. Representations, Covenants and Warranties of the District. The District represents, covenants and warrants to the Contractor as follows:

(a) Due Organization and Existence. The District is a community college district, duly organized and existing under the Constitution and laws of the State of California.

(b) Authorization. The District has the full power and authority to enter into, to execute and to deliver this Facilities Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Facilities Lease.

(c) No Violations. Neither the execution and delivery of this Facilities Lease nor the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Site, except Permitted Encumbrances.

Section 2.2. Representations, Covenants and Warranties of the Contractor. The Contractor represents, covenants and warrants to the District as follows:

(a) Due Organization and Existence. The Contractor is a corporation duly organized and existing under the General Corporation Law of the State of California, has power to enter into this Facilities Lease and the Site Lease; is possessed of full power to own and hold real and personal property, and to lease and sell the same; and has duly authorized the execution and delivery of all of the aforesaid agreements.

(b) No Encumbrances. The Contractor will not pledge the Lease Payments or other amounts derived from the Site and from its other rights under this Facilities Lease, and will not mortgage or encumber the Site, except as provided under the terms of this Facilities Lease.

(c) No Violations. Neither the execution and delivery of this Facilities Lease or the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Contractor is now a party or by which the Contractor is bound, or constitutes a default under any of the

foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the Contractor, or upon the Site, except Permitted Encumbrances.

(d) No Assignments. Except upon written consent of the District, the Contractor will not assign this Facilities Lease, its right to receive Lease Payments and prepayments from the District, or its duties and obligations hereunder to any other person, firm or Contractor so as to impair or violate the representations, covenants and warranties contained in this Section 2.2.

(e) Authorization. The Contractor has the full power and authority to enter into, to execute and to deliver this Facilities Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Facilities Lease.

### **ARTICLE III**

#### **CONSTRUCTION OF PROJECT**

Section 3.1. The Contractor agrees to cause the Project to be constructed and installed in accordance with the Construction Provisions which are attached hereto as Exhibit "D". The Contractor agrees that it will cause the construction and installation of the Project to be diligently performed. The District and the Contractor may approve changes in the plans and specifications for the Project as provided in the Construction Provisions. The Contractor will cooperate at all times with the District in bringing about the timely completion of the Project. The definition and description of the Project contained herein may be amended by the District from time to time.

### **ARTICLE IV**

#### **AGREEMENT TO LEASE; TERMINATION OF LEASE; LEASE PAYMENTS; TITLE TO THE SITE**

Section 4.1. Lease of Property; No Merger. The Contractor hereby leases the Project and the Site to the District, and the District hereby leases said Project and Site from the Contractor upon the terms and conditions set forth in this Facilities Lease. The leasing by the Contractor to the District of the Site shall not effect or result in a merger of the District's leasehold estate pursuant to this Facilities Lease and its fee estate as lessor under the Site Lease, and the Contractor shall continue to have and hold a leasehold estate in said Site pursuant to the Site Lease throughout the term thereof and the term of this Facilities Lease. As to the Site, this Facilities Lease shall be deemed and constitute a sublease. Leasing the Project to the District shall not relieve the Contractor of its obligations under Article III.

Section 4.2. Term of Facilities Lease. The Term of this Facilities Lease shall commence as of **NOVEMBER 5, 2012** and shall terminate on the completion of the



Project and payment of the last Lease Payment, as provided in the Lease Payment Schedule.

Section 4.3. Termination of Term. The Term of this Facilities Lease shall terminate upon the earliest of any of the following events:

(a) An Event of Default and the Contractor's election to terminate this Facilities Lease pursuant to Section 9.2 hereof; or

(b) The arrival of the last day of the Term of this Facilities Lease and payment of all Lease Payments hereunder.

Section 4.4. Possession. The District may take possession of the Project hereunder as it is completed.

Section 4.5. Lease Payments.

(a) Obligation to Pay. Subject to the provisions of Articles III, VI and X hereof, the District agrees to pay to the Contractor, its successors and assigns, as rental for the use and occupancy of the Project and the Site, the Lease Payments in the amounts specified in the Lease Payment Schedule. Pursuant to the Lease Payment Schedule, Lease Payments shall be made for the Site and portions of the Project as construction of the Project is completed. All Lease Payments will be subject to the Final Guaranteed Maximum Price set forth in the Construction Provisions.

(b) Lease Payments to Constitute Current Expense of the District. The District and the Contractor understand and intend that the obligation of the District to pay Lease Payments and other payments hereunder constitutes a current expense of the District and shall not in any way be construed to be a debt of the District in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by the District, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or moneys of the District. Lease Payments due hereunder shall be payable only from current funds which are budgeted and appropriated, or otherwise legally available, for the purpose of paying Lease Payments or other payments due hereunder as consideration for use of the Site during the fiscal year of the District for which such funds were budgeted and appropriated or otherwise made legally available for such purpose. This Facilities Lease shall not create an immediate indebtedness for any aggregate payments which may become due hereunder. The District has not pledged the full faith and credit of the District, the State of California or any agency or department thereof to the payment of the Lease Payments or any other payments due hereunder. It is the intent of the parties that Lease Payments by the District shall not be considered tax exempt or tax free interest payments.

(c) Appropriation. The District has appropriated the Guaranteed Maximum Price from the District's current fiscal year and/or State funds to be received

during the District's current fiscal year, and has segregated such funds in a separate account to be utilized solely for Lease Payments.

Section 4.6. Quiet Enjoyment. Excepting any interference resulting from the Contractor's performance pursuant to the Construction Provisions, during the term of this Facilities Lease, the Contractor shall provide the District with quiet use and enjoyment of the Site, and the District shall during such Term peaceably and quietly have and hold and enjoy the Site, without suit, trouble or hindrance from the Contractor, except as expressly set forth in this Facilities Lease. The Contractor will, at the request of the District join in any legal action in which the District asserts its right to such possession and enjoyment to the extent the Contractor may lawfully do so. Notwithstanding the foregoing, the Contractor shall have the right to inspect the Site as provided in Section 7.2 hereof.

Section 4.7. Title. During the Term of this Facilities Lease, the District shall hold title to the Site and obtain title to the Project from the Contractor, and any and all additions which comprise futures, repairs, replacements or modifications thereof, as construction progresses and lease payments are made to the Contractor. During the term of this Facilities Lease, the Contractor shall have a leasehold interest in the Site pursuant to the Site Lease.

If the District prepays the Lease Payments in full pursuant to Article X hereof or makes an advance deposit pursuant to Section 10.1 hereof, or pays all Lease Payments, all remaining right, title and interest of the Contractor, if any, in and to the Project and the Site, shall be fully transferred to and vested in the District. Title shall be transferred to and vested in the District hereunder without the necessity for any further instrument of transfer. However, upon such prepayment if then deemed necessary by the District, the Contractor shall be required to execute an instrument conveying to the District any interest created by the Site Lease.

Section 4.8. Abatement of Rental in the Event of Substantial Interference With Use and Occupancy of the Project and the Site. The amount of Lease Payments for the Project and the Site shall be abated during any period in which by reason of delay in the completing of the Project beyond the final completion date specified in the Construction Provisions, there is substantial interference with the use and occupancy of the Project and the Site by the District. The amount of such abatement shall be agreed upon by the District and the Contractor such that the resulting Lease Payments represent fair consideration for the use and occupancy of the portion of the

Project and the Site, if any, with respect to which there is no such substantial interference. Such abatement shall continue for the period commencing with such substantial interference and ending with the termination of such interference.

Section 4.9. Fair Rental Value. The Lease Payments and any prepayment thereof coming due and payable constitute the total rental for the Project and shall be paid by the District as set forth in Exhibit "D" hereto for and in consideration of

the right to use and occupy, and the continued quiet use and enjoyment of, the Project during each month. The District and the Contractor have agreed and determined that the total Lease Payments and any prepayment thereof do not exceed the fair rental value of the Project. In making such determination, consideration has been given to the obligations of the parties under the Facilities Lease and Site Lease, the uses and purposes which may be served by the Project, and the benefits therefrom which will accrue to the District and the general public.

## **ARTICLE V**

### **MAINTENANCE; TAXES; AND OTHER MATTERS**

Section 5.1. Maintenance, Utilities, Taxes and Assessments. Except as provided for in the Construction Provisions, the repair and maintenance of the Project and the Site shall be the responsibility of the District.

If applicable, the District shall also pay or cause to be paid all taxes and assessments of any type or nature charged to the Contractor or District which affect the Project and the Site.

## **ARTICLE VI**

### **EMINENT DOMAIN**

Section 6.1. Eminent Domain.

(a) Eminent Domain Takings. If all of the Project and the Site shall be taken permanently under the power of eminent domain, the term of this Facilities Lease shall cease as of the day possession shall be so taken. If less than all of the Project and the Site shall be taken permanently, or if all of the Project and the Site or any part thereof shall be taken temporarily, under the power of eminent domain:

(1) this Facilities Lease shall continue in full force and effect and shall not be terminated by virtue of such taking and the parties waive the benefit of any law to the contrary, and

(2) there shall be a partial abatement of Lease Payments as a result of the application of the net proceeds of any eminent domain award to the prepayment of the Lease Payments hereunder.

(b) From Eminent Domain Award. The net proceeds of any eminent domain or condemnation shall be payable to the District.

## **ARTICLE VII**

### **ACCESS**

Section 7.1. The Contractor shall have the right at all reasonable times to enter upon the Site to construct the Project pursuant to the Construction Provisions. The District shall have the right at all reasonable times to enter upon the Site for whatever purpose the District chooses.

## **ARTICLE VIII**

### **ASSIGNMENT, SUBLEASING; AMENDMENT**

Section 8.1. Assignment and Subleasing. This Facilities Lease may be assigned by the District subject to the terms hereof, but may not be assigned by the Contractor without the written consent of the District. Any sublease by the District shall be subject to all of the following conditions:

- (a) This Facilities Lease and the obligation of the District to make Lease Payments hereunder shall remain obligations of the District; and
- (b) The District shall, within thirty (30) days after the delivery thereof, furnish or cause to be furnished to the Contractor a true and complete copy of such sublease; and
- (c) No such sublease by the District shall cause the Project or the Site to be used for a purpose other than a governmental or proprietary function authorized under the provisions of the Constitution and laws of the State of California.

Section 8.2. Amendment of this Facilities Lease. Without the written consent of the Contractor, the District will not alter, modify or cancel, or agree or consent to alter, modify or cancel this Facilities Lease.

## **ARTICLE IX**

### **EVENTS OF DEFAULT AND REMEDIES**

Section 9.1. Events of Default Defined. The following shall be “Events of Default” under this Facilities Lease and the terms “Event of Default” and “Default” shall mean, whenever they are used in this Facilities Lease, any one or more of the following events:

- (a) Failure by the District to pay any Lease Payment or other payment required to be paid hereunder at the time specified herein.

(b) Failure by the District to observe and perform any covenant, condition or agreement in this Facilities Lease on its part to be observed or performed, other than as referred to in clause (a) of this Section, for a period of thirty (30) days after written notice specifying such failure and requesting that it be remedied has been given to the District by the Contractor; provided, however, if the failure stated in the notice cannot be corrected within the applicable period, the Contractor shall not unreasonably withhold their consent to an extension of such time if corrective action is instituted by the District within the applicable period and diligently pursued until the default is corrected.

(c) The filing by the District of a voluntary petition in bankruptcy, or failure by the District promptly to lift any execution, garnishment or attachment, or adjudication of the District as bankrupt, or assignment by the District for the benefit of creditors, or the entry by the District into an agreement of composition with creditors, or the approval by a court of competent jurisdiction of a petition applicable to the District in any proceedings instituted under the provisions of the Federal Bankruptcy Statute, as amended, or under any similar acts which may hereafter be enacted.

Section 9.2. Remedies on Default. Whenever any Event of Default referred to in Section 9.1 hereof shall have happened and be continuing, it shall be lawful for the Contractor to exercise any and all remedies available pursuant to law or granted pursuant to this Facilities Lease; provided, however, there shall be no right under any circumstances to accelerate the Lease Payments or otherwise declare any Lease Payments not then in default to be immediately due and payable. Each and every covenant hereof to be kept and performed by the District is expressly made a condition hereof and upon the breach thereof, the Contractor may exercise any and all rights of entry and re-entry upon the Project and the Site, and also, at its option, with or without such entry, may terminate this Facilities Lease; provided, however, that no such termination shall be effected either by operation of law or acts of the parties hereto, except only in the manner herein expressly provided. In the event of such default and notwithstanding any re-entry by the Contractor, the District shall, as herein expressly provided, continue to remain liable for the payment of the Lease Payments and/or damages for breach of this Facilities Lease and the performance of all conditions herein contained and in any event such rent and/or damages shall be payable to the Contractor at the time and in the manner as herein provided, to wit:

(a) In the event the Contractor does not elect to terminate this Facilities Lease in the manner herein provided for in subparagraph (b) hereof, the District agrees to and shall remain liable for the payment of all Lease Payments and the performance of all conditions herein contained and shall reimburse the Contractor for any deficiency arising out of the re-letting of the Project and the Site, or, in the event the Contractor is unable to re-let the Project and the Site, then for the full amount of all Lease Payments to the end of the Term of this Facilities Lease, but said Lease Payments and/or deficiency shall be payable only at the same time and in the same manner as hereinbefore provided for the payment of Lease Payments hereunder, notwithstanding such entry or reentry by the Contractor or any suit in unlawful detainer, or otherwise, brought by the

Contractor for the purpose of effecting such re-entry or obtaining possession of the Project and the Site or the exercise of any other remedy by the Contractor. The District hereby waives any and all claims for damages caused or which may be caused by the Contractor in re-entering and taking possession of the Project and the Site as herein provided, all claims for damages that may result from the destruction of or injury to the Project and the Site, and all claims for damages to or loss of any property belonging to the District that may be in or upon the Project and the Site. The District agrees that the terms of this Facilities Lease constitute full and sufficient notice of the right of the Contractor to re-rent the Project and the Site in the event of such re-entry without effecting a surrender of this Facilities Lease, and further agrees that no acts of the Contractor in effecting such re-renting or re-leasing shall constitute a surrender or termination of this Facilities Lease irrespective of the term for which such re-leasing or re-renting is made or the terms and conditions of such re-leasing or re-renting or otherwise, but that, on the contrary, in the event of such default by the District the right to terminate this Facilities Lease shall vest in the Contractor to be effected in the sole and exclusive manner hereinafter provided for in subparagraph (b) hereof.

(b) In an event of default by the District hereunder, the Contractor at its option may terminate this Facilities Lease and re-rent or re-lease all or any portion of the Project and the Site. In the event of the termination of this Facilities Lease by the Contractor at its option and in the manner hereinafter provided on account of default by the District (and notwithstanding any re-entry upon the Project and the Site by the Contractor in any manner whatsoever or the re-renting or re-leasing of the Project and the Site), the District nevertheless agrees to pay to the Contractor all costs, losses or damages howsoever arising or occurring, payable at the same time and in the same manner as is herein provided in the case of payment of Lease Payments. The Net Proceeds relating to the re-renting of the Site and the Project shall be used in the manner set forth in Section 9.6 hereof. Neither notice to pay rent or to deliver up possession of the premises given pursuant to law nor any proceeding in unlawful detainer taken by the Contractor shall of itself operate to terminate this Facilities Lease, and no termination of this Facilities Lease on account of default by the District shall be or become effective by operation of law, or otherwise, unless and until the Contractor shall have given written notice to the District of the election on the part of the Contractor to terminate this Facilities Lease. The District covenants and agrees that no surrender of the Site for the remainder of the Term hereof or any termination of this Facilities Lease shall be valid in any manner or for any purpose whatsoever unless stated or accepted by the Contractor by such written notice.

(c) Notwithstanding any other provision herein, to the extent this Lease provides any right or remedy to Contractor which contradicts or is inconsistent with the Construction Provisions, the latter shall control over the former.

Section 9.3. No Remedy Exclusive. No remedy herein conferred upon or reserved to the Contractor is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Facilities Lease or now or hereafter existing at law or in equity. No delay or omission to exercise

any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the Contractor to exercise any remedy reserved to it in this Article IX it shall not be necessary to give any notice, other than such notice as may be required in this Article or by law.

Section 9.4. Attorneys' Fees and Expenses. In the event either party to this Facilities Lease should default under any of the provisions hereof, each party shall bear the cost of its own attorney's fees and expenses.

Section 9.5. No Additional Waiver Implied by One Waiver. In the event any agreement contained in this Facilities Lease should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

Section 9.6. Application of Proceeds. All net proceeds received from the re-rent, re-lease or other disposition of the Project and the Site under this Article IX, and all other amounts derived by the Contractor as a result of an Event of Default hereunder, shall be applied to the Lease Payments in order of payment date and, in the case of the Net Proceeds received from the re-renting or re-leasing of the Project and the Site pursuant to Section 9.2(b), shall be applied to the prepayment of the Lease Payments in accordance with Section 10.2 hereof.

## **ARTICLE X**

### **PREPAYMENT OF LEASE PAYMENTS**

Section 10.1. Security Deposit. Notwithstanding any other provision of this Facilities Lease, the District may, so long as the District is not in default hereunder, on any date secure the payment of Lease Payments by a deposit with the Contractor of cash in an amount which is sufficient to pay all unpaid Lease Payments, including the principal and interest components thereof, in accordance with the Lease Payment Schedule set forth in Exhibit "C" hereto. In the event of a deposit pursuant to this Section, all obligations of the District under this Facilities Lease and all security provided by this Facilities Lease for said obligations shall cease and terminate, excepting only the obligation of the District to make, or cause to be made, Lease Payments from the deposit made by the District pursuant to this Section.

Section 10.2. Optional Prepayment. The District may prepay the Lease Payments, in whole or in part, at any time. The District shall give the Contractor written notice of its intention to exercise its option and the date and amount of such prepayment no less than fifteen (15) days in advance of the date of exercise.

## ARTICLE XI

### MISCELLANEOUS

Section 11.1. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received forty-eight (48) hours after deposit in the United States mail in registered or certified form with postage fully prepaid:

If to the Contractor: Sundt Construction, Inc.  
2860 Gateway Oaks Drive, Suite 300  
Sacramento, CA 95833  
Attn: Tom Camden

If to District: Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, California 94022  
Attn: Gina Bailey, District Purchasing Services

#### WITH A COPY TO:

Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, California 94022  
Attn: Tom Armstrong, District Facilities Department

The Contractor and the District, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent.

Section 11.2. Binding Effect. This Facilities Lease shall inure to the benefit of and shall be binding upon the Contractor and the District and their respective successors and assigns.

Section 11.3. Severability. In the event any provision of this Facilities Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 11.4. Net-Net-Net Lease. This Facilities Lease shall be deemed and construed to be a “net-net-net lease” and the District hereby agrees that the Lease Payments shall be an absolute net return to the Contractor, free and clear of any expenses, charges or setoffs whatsoever.



Section 11.5. Further Assurances and Corrective Instruments. The Contractor and the District agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Site hereby leased or intended so to be or for carrying out the expressed intention of this Facilities Lease.

Section 11.6. Execution in Counterparts. This Facilities Lease may be executed in several counterparts, each of which shall be original and all of which shall constitute but one and the same instrument.

Section 11.7. Applicable Law. This Facilities Lease shall be governed by and construed in accordance with the laws of the State of California.

Section 11.8. Contractor and District Representatives. Whenever under the provisions of this Facilities Lease the approval of the Contractor or the District is required, or the Contractor or the District is required to take some action at the request of the other, such approval or such request shall be given for the Contractor by the Contractor Representative and for the District by the District Representative, and any party hereto shall be authorized to rely upon any such approval or request.

Section 11.9. Captions. The captions or headings in this Facilities Lease are for convenience only and in no way define, limit or describe the scope or intent of any provisions or section of this Facilities Lease, nor the construction or interpretation of any part thereof.

Section 11.10 Prior Agreements. This Facilities Lease and the corresponding Site Lease and the exhibits incorporated into them collectively contain all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Facilities Lease and no prior agreements or understanding pertaining to any such matter shall be effective for any purpose. No provision of this Facilities Lease may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors-in-interest.

Section 11.11 Attorney's Fees. If either party brings an action or proceeding involving the Property or to enforce the terms of this Facilities Lease or to declare rights hereunder, each party shall bear the cost of its own attorney's fees.

IN WITNESS WHEREOF, the parties hereto have caused this Facilities Lease to be executed by their respective officers thereunto duly authorized, as of the Effective Date.

**“DISTRICT”**

**FOOTHILL-DE ANZA COMMUNITY  
COLLEGE DISTRICT**

By: \_\_\_\_\_

Gina Bailey

Interim Director, Purchasing Services

Date: \_\_\_\_\_

**“CONTRACTOR”**

**SUNDT CONSTRUCTION, INC.  
COMPANY**

By: \_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

## **EXHIBIT “A”**

### **DESCRIPTION OF PROJECT**

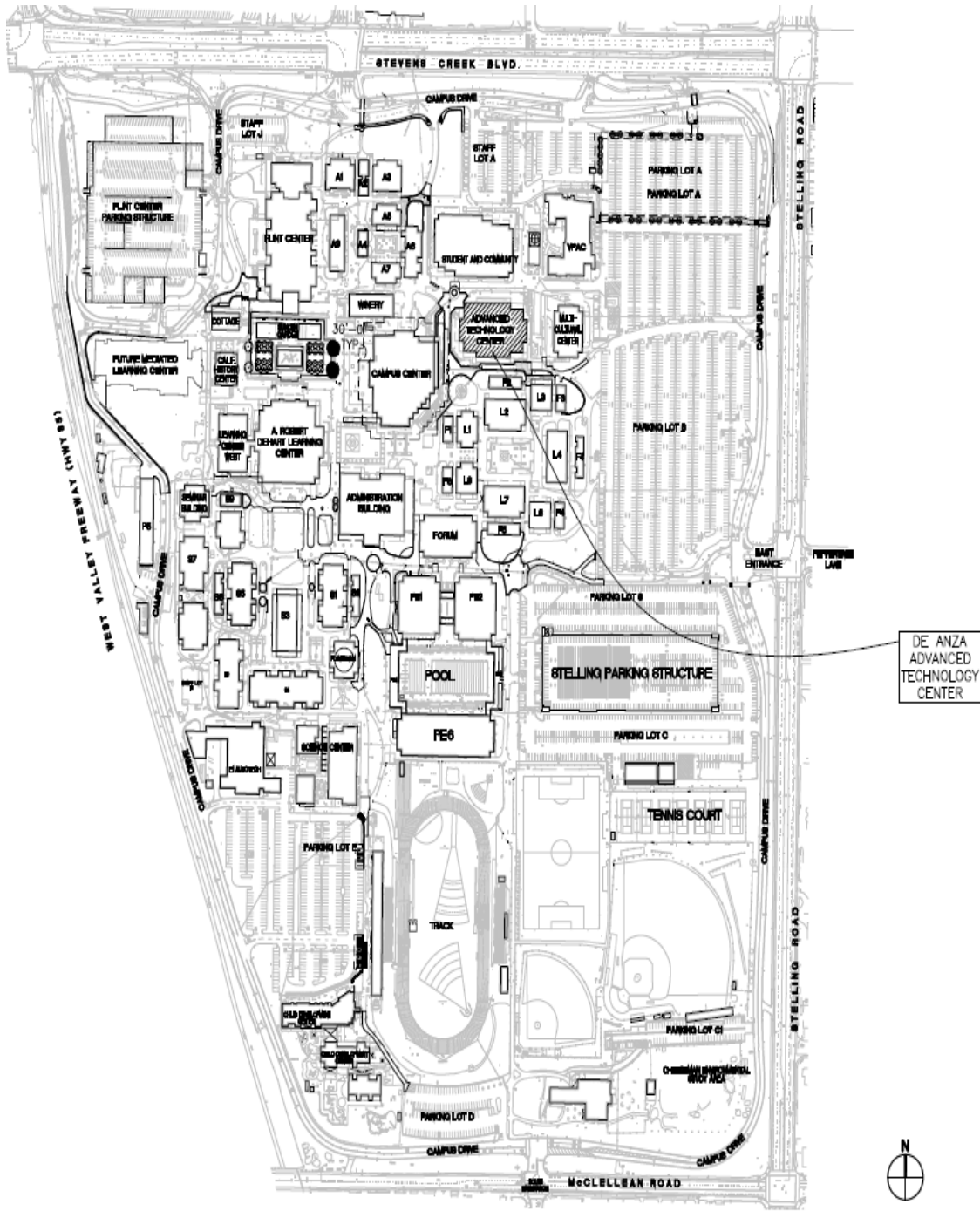
The De Anza College Advanced Technology Center (ATC) consists of renovation of the existing 76,345 square foot, 3 story building on an existing community college campus.

The ATC modernization will address HVAC deficiencies, Telecom decentralization and a refresh of building spaces. A new mechanical system will be installed including removal and replacement of all air-handling units with duct cleaning and limited duct replacement. A new roof will be installed due to the extent of work on the roof. Two new IDF rooms will be created on each floor to facilitate new distribution pathways, more effective cable management, maintain cooling, and for future flexibility. The Business CS Division Office will be relocated to the building and rooms 208 & 209 will be reconfigured to accommodate this change. The elevator will be upgraded to meet current codes. The bathrooms will be renovated to meet current codes and receive new finishes. There is an exterior waterproofing deficiency at the second floor terrace that will be addressed. The fire riser valves will be relocated from the first to the second floor to provide dedicated access and allow draining if required. The only architectural layout revisions included in the current scope are to accommodate the new IDF rooms, the new Business CS Division Office and the fire riser reconfiguration. The project will not attempt a LEED certification but will utilize the LEED certification guidelines and apply for a CCCIOU grant.

## EXHIBIT "B"

### DESCRIPTION OF SITE

[To Be Inserted Prior To Execution Of Lease]



## **EXHIBIT “C”**

### **SCHEDULE OF LEASE PAYMENTS**

District shall make Lease Payments for the Facilities Lease in conformance with and subject to the terms and conditions for Progress Payments for the Project as set forth in the Construction Provisions. The last Lease Payment shall be Final Payment as set forth in the Construction Provisions.

The total amount of Lease Payments shall not exceed the sum of the Guaranteed Maximum Price and the cost of Extra Work and Changes made in accordance with the Construction Provisions.

The Guaranteed Maximum Price shall not exceed \$8,206,523.