## TAKEOVER AGREEMENT

This Takeover Agreement is made and entered into this \_\_\_\_day of \_\_\_\_\_, 2017, by and between Allied World Specialty Insurance Company (f/k/a Darwin National Assurance Company and hereinafter referred to as "Surety") and Yonkers Public Schools acting through its Board of Education (hereinafter referred to as "Owner") (each a "Party" and collectively, "the Parties").

WHEREAS, Caladri Development Corp. ("Caladri") and Owner entered into a contract ("the Original Contract") for Caladri to perform a construction project known as the Upgrades to HVAC, Electrical, and Select Interior Improvements at Enrico Fermi School ("the Project");

WHEREAS, Surety executed and delivered to Owner, and Owner accepted, Performance Bond No. S0011006 ("the Performance Bond"), in the penal sum of \$562,000.00, as well as Labor and Material Payment Bond No. S0011006 ("the Payment Bond"), in the penal sum of \$562,000.00 both dated December 30, 2015, in connection with the Original Contract;

WHEREAS, on or about November 30, 2016, Owner declared Caladri to be in default of the performance of its obligations under the Original Contract, effective October 19, 2016, and requested that Surety complete the Project pursuant to the Performance Bond;

WHEREAS, Surety is willing to undertake completion of the remainder of the Project in accordance with the terms of the Original Contract, the Performance Bond, and this Agreement, with a full reservation of Surety's and Caladri's rights, claims, and defenses, and provided that in doing so it will receive the entire Remaining Contract Balance (as hereinafter defined) as set forth below;

NOW, THEREFORE, in consideration of the agreements and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy thereof being hereby acknowledged, Owner and Surety agree as follows:

- 1. Surety shall arrange for the completion of the remainder of the Project work
  pursuant to the terms, covenants, and conditions of the Original Contract, to the same extent as
  Caladri would be so obligated, as if Surety was the original contractor under the Original
  Contract, except to the extent the Original Contract is modified by this Agreement.
- 2. Owner acknowledges that Surety, by its execution of this Agreement, is acting in its capacity as performance bond surety for Caladri in arranging for the performance and completion of the Project and not as a completion contractor, and that Surety is not assuming any obligation or liability beyond what the Performance Bond sets forth, except to the extent expressly set forth herein. The Original Contract is not being assigned to or assumed by Surety. Except as provided otherwise in this Agreement, the parties are entitled to all right, title, and interest as provided in the Original Contract in all respects, as if Surety was the original party thereto. After the effective date of this Agreement, the term "Contractor" as used in the Original Contract shall be deemed to refer to Surety rather than to Caladri.
- 3. Owner acknowledges that Surety will subcontract the performance of the remainder of the work under the Original Contract as defined in Exhibit "A" hereto to a completion contractor. With Owner's knowledge and consent, Surety has subcontracted or will subcontract the performance of the remainder of the work to Ernest Bock & Sons, Inc. ("Bock"). Surety has entered or expects to enter into a separate Completion Agreement with Bock. Surety,

Painting of the Boiler Room floors and walls is still required.

however, has the right to terminate and/or replace Bock for any reason, in its own and sole discretion. Surety may satisfy the insurance obligations required by the Original Contract by providing evidence of the required insurance coverage carried by Bock, with Surety and Owner being named as additional insureds under the policy or policies. For purposes of this Agreement, Bock (and any other completion contractor retained by Surety with Owner's knowledge and consent) shall be considered a subcontractor of Surety, and no contractual relationship pursuant to this Agreement shall exist between Owner and Bock (and any other completion contractor).

- 4. Owner and Surety agree that, as of the date of this Agreement:
  - (a) the original amount of the Original Contract was \$562,000.00
  - (b) approved change orders total \$4,500.00;
  - (c) Owner made payments to Caladri totaling \$179,407.50;
  - (d) leaving a remaining contract balance under the Original Contract of \$382,593.00 + \$4,500.00= \$387,093.00 ("the Remaining Contract Balance");
  - (e) potential change orders to be submitted: \$76,308.10 (Allied reserves the right to negotiate this proposed list with the Owner in accordance with the terms of the Original Contract).

Owner represents and agrees that the Remaining Contract Balance, in its entirety, shall be available for and dedicated to completion of the Project pursuant to this Agreement.

5. Owner shall pay directly to Surety the entire Remaining Contract Balance, and any other amounts that become due to Surety on account of change orders, extra work orders, additional work orders, and the like, unconditionally, in accordance with the payment procedures of the Original Contract. Owner agrees that it will process payment for the benefit of Surety, as

the same shall be progressively payable in accordance with the payment provisions of the Original Contract. Surety reaffirms that the Payment Bond executed on behalf of Caladri as a requirement for the Original Contract shall apply to any claims or liens by Caladri's subcontractors or other persons who supplied Caladri with labor or materials in connection with the Project, as provided by and subject to the Payment Bond's terms and conditions.

- 6. Owner acknowledges that, by this Agreement and/or operation of law, Surety succeeds to all of Caladri's rights to payment under the Original Contract. Owner acknowledges Surety's absolute right and priority to the Remaining Contract Balance in accordance with the terms of the Original Contract, superior to the claims of Caladri, its successors, assigns, or affiliates, any of Caladri's secured or unsecured creditors, or any trustee or debtor-in-possession appointed in a bankruptcy proceeding initiated by or against Caladri, and any appointed receiver.
- 7. Surety represents that Bock will perform all work required under this contract in a workmanlike manner. Owner's issuance of payment to Surety shall constitute Owner's acceptance of the work for which payment is issued. Owner's acceptance of any work shall release Surety from any further obligation in connection therewith under the Performance Bond and the Original Contract, except for liability wider any warranty or guaranty, or for any latent defect that could not have been discovered upon a reasonable inspection by an architect, engineer, or other qualified person. A "reasonable inspection" shall be deemed to be a sight inspection unless such sight inspection reasonably requires further investigation by such architect, engineer, or other qualified person.
- 8. Surety shall spend its own funds as may be necessary to pay for the completion of the remainder of the Project by Bock, up to the penal sum of the Performance Bond and over and

above the Remaining Contract Balance (provided the Remaining Contract Balance is paid to Surety as described above), in the event the Remaining Contract Balance is insufficient, with all such payments being credited against the penal sum of the Performance Bond. All loss incurred by Surety in excess of the Remaining Contract Balance by reason of or in connection with its takeover and completion of the Original Contract shall be credited against the penal sum of the Performance Bond, including but not limited to loss occasioned by any diminution in the Remaining Contract Balance for any reason (including but not limited to assessment or deductions made by Owner for any reason).

- 9. The parties acknowledge that the penal sum of the Performance Bond is \$562,000.00, and that the penal sum is the limit of Surety's obligation under the Performance Bond and under this Takeover Agreement. All payments properly made by Surety in connection with completion of the Project, net of the amount of the Remaining Contract Balance actually paid to Surety, shall be credited against the penal sum of the Performance Bond. Nothing in this Agreement constitutes a waiver of the penal sum by Surety or an increase in the liability of Surety under the Performance Bond. Surety does not assume any obligation herein to spend any amounts in excess of the penal sum to complete the Project. In the event of any dispute between Owner and Surety with respect to the penal sum, upon Owner's request, Surety shall provide a detailed breakdown and other reasonable verification of such sums expended by Surety in connection with these sums that it seeks to credit against the penal sum.
- 10. Surety shall perform within a reasonable time all of the remaining work required by the Original Contract, including warranties and guarantees therein contained, in accordance with the terms and conditions of said Contract except as to the time of completion. Owner waives

any right or claim to damages from Surety as a result of Caladri's delays, default, and/or failure to complete the Project. Owner and Surety reserve all rights and claims they may have against Caladri relative to the Project, including but not limited to Caladri's delay, default, and failure to complete.

- Surety shall provide any warranties or guaranties required by the Original
   Contract, or arrange to have such warranties or guaranties provided by the completion contractor.
- 12. Insofar as Owner has any right, title, or interest therein, Surety and Bock (or any other completion contractor) shall have the right to use, without charge, any of the equipment, materials, and appurtenances furnished or supplied by Caladri which may be stored on or about the premises of the Project site or materials that may have been fabricated for use in connection with the Project, whether currently upon the Project site or not.
- 13. Owner shall provide Surety and Bock (and any other completion contractor) with access to the Project site to the fullest extent possible as may be requested by Surety and/or Bock.
- 14. Surety designates J.S. Held, LLC ("J.S. Held"), as its
  representative and agent in connection with the completion of the Project. Donald M. Bieda,
  James Harrigan, Jed Henning and such other employees of J.S. Held as Surety may designate in
  writing are authorized to represent Surety in dealing with Owner on day-to-day construction
  issues. This authorization includes, but is not limited to, preparing and processing payment
  applications and negotiating and signing change orders. Any agreement with respect to corrective
  work as a result of latent defects in the work of Caladri, however, shall require the written
  approval of an employee of Surety. Nothing herein shall be construed to diminish the rights and
  responsibilities of Owner's architect.

- 15. Owner acknowledges that it does not have privity of contract with Bock and does not have the obligation or the right to direct the day-to-day activities of Bock (or any other completion contractor or subcontractor). All communications with Bock (and any other completion contractor or subcontractor) relating to its work on the Project shall be issued by and through J.S. Held.
- 16. Payments by Owner shall be made payable to Surety and transmitted to Surety at the following address, unless and until Owner is notified in writing of a different address:

James A. Keating, Esq.
Allied World Insurance Company
30 South 17th Street, 16th Floor
Philadelphia, PA 19103.

- 17. This Agreement is solely for the benefit of Owner and Surety. Owner and Surety do not intend by any provision of this Agreement to create any rights in or increase the rights of any third-party beneficiaries, nor do they intend to confer any benefit or enforceable rights under this Agreement or otherwise upon anyone other than Owner and Surety. Owner and Surety acknowledge that nothing in this Agreement shall extend or increase the rights of any third-party claimants or the liabilities or obligations of Surety under the Bonds.
- 18. The parties acknowledge that two actions have been commenced by a subcontractor of Caladri in the matter of Unitech Services Group, Inc., v. Caladri Development
  Corp., Yonkers Pubic Schools et al., Supreme Court, State of New York, Westchester County,
  Index No. 67759/2016 and Roebell Painters Co, Inc. v. Caladri Development Corp., et al;,
  Supreme Court, State of New York, Westchester County, Index No.: 53659/2017. Surety hereby
  represents that it will indemnify and hold harmless the Owner for any liability resulting from any
  judgment obtained against the Owner in connection with the Complaint and/or any counterclaim

or cross-claim therein, up to but not exceeding the remaining contract balance. Within 10 days of the date of this agreement, Owner agrees to take all steps necessary to have any cross-claims advanced against the Surety in the above-referenced cases dismissed without prejudice.

- 19. This Agreement, with the Original Contract and Performance Bond, constitute the whole of the understanding, discussions, and agreements by and between Owner and Surety. The terms and provisions of this Agreement are contractual and not mere recitals. Owner and Surety acknowledge that there have been no oral, written, or other agreements of any kind as a condition precedent to or to induce the execution and delivery of this Agreement. Any written or oral discussions conducted prior to the effective date of this Agreement shall not, in any way, vary or alter the terms of this Agreement. Other than as stated herein, the Performance Bond remains in full force and effect. Similarly, the Payment Bond shall remain in full force and effect according to. its terms and applicable law, and Surety's total liability under the Payment Bond shall not exceed its penal sum.
- 20. Neither Surety's willingness to enter into this Takeover Agreement nor its undertaking completion of the Project constitutes or is to be construed as an admission of liability, and neither is to be deemed as a waiver of any right, claim, or defense that Surety may have relative to the Project. All claims and defenses possessed by either Party not expressly waived or released herein are reserved. The Parties acknowledge that this Agreement is being executed with a full reservation of all rights, claims, and/or defenses Surety and/or Caladri may have against Owner and that Owner may have against Surety and/or Caladri regarding the default and termination of Caladri on the Project.
  - This Agreement shall not and cannot be amended or altered in any way except in

a writing signed by both Surety and Owner.

- 22. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same Agreement. Facsimile, electronic, and/or images of signatures shall have the same force and effect as an original signature.
- 23. This Agreement shall be governed and controlled by the laws of the State of New York. Any disputes between Owner and Surety relative to this Agreement or the Original Contract shall be resolved or determined pursuant to the laws of the State of New York in a court of competent jurisdiction.
- 24. Any notices that are required to be given by the terms of this Agreement, the Original Contract, or the Performance Bond shall be provided via both e-mail and overnight courier to:

As to the Owner: Yonkers Corporation Counsel One Larkin Center, 4th Floor Yonkers, New York 10701 Bradford.Gorson@yonkersny.gov

As to the Surety:
Paul T. DeVlieger, Esquire
DeVlieger Hilser P.C.
1518 Walnut Street, 16th Floor
Philadelphia, PA 19102
pdevlieger@dvhlaw.com

Should a sender request confirmation of the recipient's receipt by e-mail of any notice, and should the recipient expressly confirm such receipt, then the additional delivery by overnight courier shall not be necessary.

25. This Agreement is effective as of the date first written above.

26. This Agreement shall be binding upon the Parties and their respective successors and assigns.

27. In the event any provision contained in this Agreement shall be held to be invalid, illegal, or unenforceable in any respect by a court of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired thereby, such invalidity shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such unenforceable provision had never been contained herein, unless the unenforceable provision is material or necessary to this Agreement.

28. In the event a provision of this Agreement is inconsistent with or contradicts the Original Contract or the Performance Bond, the terms of this Agreement shall govern and control. Any capitalized term not defined in this Agreement shall be ascribed the meaning set forth in the Original Contract.

29. This Agreement is the product of the Parties' joint drafting effort. As such, it shall be construed without regard to any presumption or other rule requiring construction against the drafter.

IN WITNESS HEREOF, the Parties have executed this Agreement on the date indicated above, and each of the undersigned personally represent and warrant that they have the full right, power and authority to execute this Agreement on behalf of the respective parties.

Yonkers Public School

lame: Dr. Edwin M. Odezada

Page 10 of 12

Title: Superintendent, Yonkers Public Schools

Date:

6/20/17

Allied World Specialty Insurance Company, f/k/a Darwin National Assurance Company

By:

Name: James Keating
Title: Assistant Vice President

# ACKNOWLEDGMENTS

STATE OF New York )
COUNTY OF Westchester )ss.:
On the Oudday of
STATE OF PENUSYLVANIA )
COUNTY OF Philadelphia
On the 5th day of 70% 2017, personally came before me  70.05 K(24, N) of Allied World Specialty Insurance  Company, f/k/a Darwin National Assurance Company, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she had the authority to execute the same on behalf of the corporation/company.
Notary Public U. 3 Lord

NOTARIAL SEAL
MICHAEL W. ZAHODSKI, Notary Public
City of Philadelphia, Phila. County
My Commission Expires November 18, 2018

Exhibit "A"

Scope of Work



# Eisenbach & Ruhnke

ENGINEERING, P.C.

Yonkers Public Schools Enrico Fermi School Remaining Construction

### SUMMARY OF WORK

### A. EXTERIOR STEEL STAIRS

Work is for the restoration of the school's exterior steel stairs and includes but is not limited to the following:

- 1. Scaffolding
- 2. Remove all rust and lead-based paint from the stairs
- 3. Repainting stairs
- 4. Include the amount of \$25,863.25 to pay American Scaffold for rental and removal of scaffolding. See attached email for contact information.

### B. GYM ACOUSTICAL PANELS

Work includes but is not limited to the following:

1. Installation of acoustical panels furnished by owner to be hung on walls and ceilings in the gymnasium

# C. AUDITORIUM STAIRS

Work includes but is not limited to the following:

- Replacement of interior steel stairs exiting the auditorium
- 2. Related plaster repairs, wall construction and painting
- Installation of suspended ceiling
- Installation of access doors to the attic in select classrooms

### D. BOILER ROOM

Work includes but is not limited to the following:

- 1. Painting
- 2. Replacement of exterior doors

### E. BATHROOMS

Work includes but is not limited to the following:

- 1. Provide new wall-mounted accessories
- 2. Provide new registers and diffusers

### SUMMARY OF WORK

### PART I GENERAL

### 1.01 PROJECT

- A. Project Name: Building Renovations at the Enrico Fermi School for the Performing Arts.
- B. Yonkers Public School District.
- C. Engineer's Name: Eisenbach & Ruhnke Engineering, P.C.

### 1.03 DESCRIPTION OF ALTERATIONS WORK

A. Scope of work is indicated on the Drawings and described in the specifications.

### 1.04 OWNER OCCUPANCY

- A. Yonkers Public School District intends to occupy the Project upon Substantial Completion.
- B. Cooperate with Yonkers Public School District to minimize conflict and to facilitate Yonkers Public School
  District's operations.
- C. Schedule the Work to accommodate Yonkers Public School District occupancy.

### 1.05 CONTRACTOR USE OF SITE AND PREMISES

- A. Construction Operations: Limited to areas noted on Drawings.
- B. Arrange use of site and premises to allow:
  - 1. Yonkers Public School District occupancy.
  - 2. Work by Others.
  - 3. Work by Yonkers Public School District.
  - 4. Use of site and premises by the public.
- C. Provide access to and from site as required by law and by Yonkers Public School District:
  - Emergency Building Exits During Construction: Keep all exits required by code open during construction period; provide temporary exit signs if exit routes are temporarily altered.
  - Do not obstruct roadways, sidewalks, or other public ways without permit.
- D. Utility Outages and Shutdown:
  - 1. Limit disruption of utility services to hours the building is unoccupied.
  - Do not disrupt or shut down life safety systems, including but not limited to fire alarm system, without 7
    days notice to Yonkers Public School District and authorities having jurisdiction.
  - Prevent accidental disruption of utility services to other facilities.

### 1.06 WORK SEQUENCE

A. Coordinate construction schedule and operations with Eisenbach & Ruhnke Engineers, P.C. and Yonkers Public School District.

# 1.07 SPECIFICATION SECTIONS APPLICABLE TO ALL CONTRACTS

- Unless otherwise noted, all provisions of the sections listed below apply to all contracts. Specific items of work listed under individual contract descriptions constitute exceptions.
- B. Section 01 30 00 Administrative Requirements.
- C. Section 01 32 16 Construction Progress Schedule.
- D. Section 01 40 00 Quality Requirements.
- E. Section 01 50 00 Temporary Facilities and Controls.
- F. Section 01 60 00 Product Requirements.
- G. Section 01 70 00 Execution and Closeout Requirements.
- H. Section 01 78 00 Closeout Submittals.

### 1.08 SUMMARY OF WORK

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Work includes but is not limited to the following:

- 1. Provide new wall-mounted accessories
- 2. Provide new registers and diffusers

PART 2 PRODUCTS - NOT USED PART 3 EXECUTION - NOT USED

**END OF SECTION** 

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LIST OF DRAWINGS

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YONKERS PUBLIC SCHOOLS

One Larkin Center, Yonkers, New York 10701

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EMUCO FEMA SCHOOL Nº Nº PCH CHLINO ANTS 27 PCPLAR STREET TOMESS, Nº 1870

YONKERS PUBLIC SCHOOLS

**BOARD OF EDUCATION** 

Judith Ramos Meier, Vice President Rev. Steve Lopez, President

James Cavanaugh

Dr. Nader J. Sayegh

Curtis Kendrick

John Jacono

Pasquale Mondesando Andrea Brown Edgar Santana

Dr. Edwin Quezada

Kevin Cacace

Superintendent of Schools

School Facililies Management **Executive Director** John P. Carr, P.E.

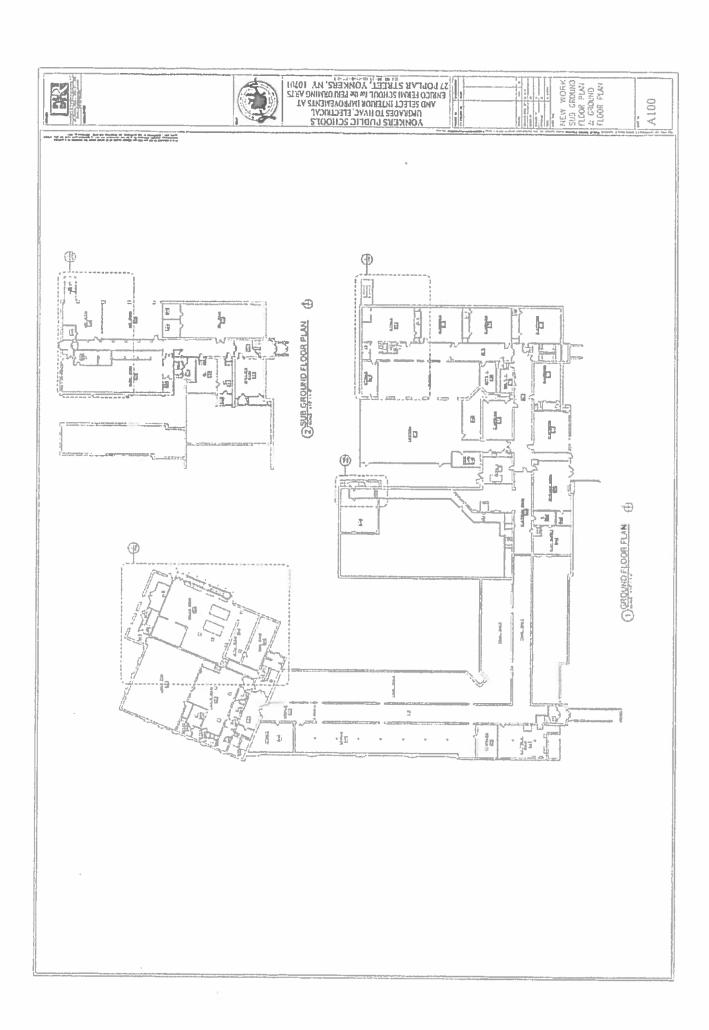
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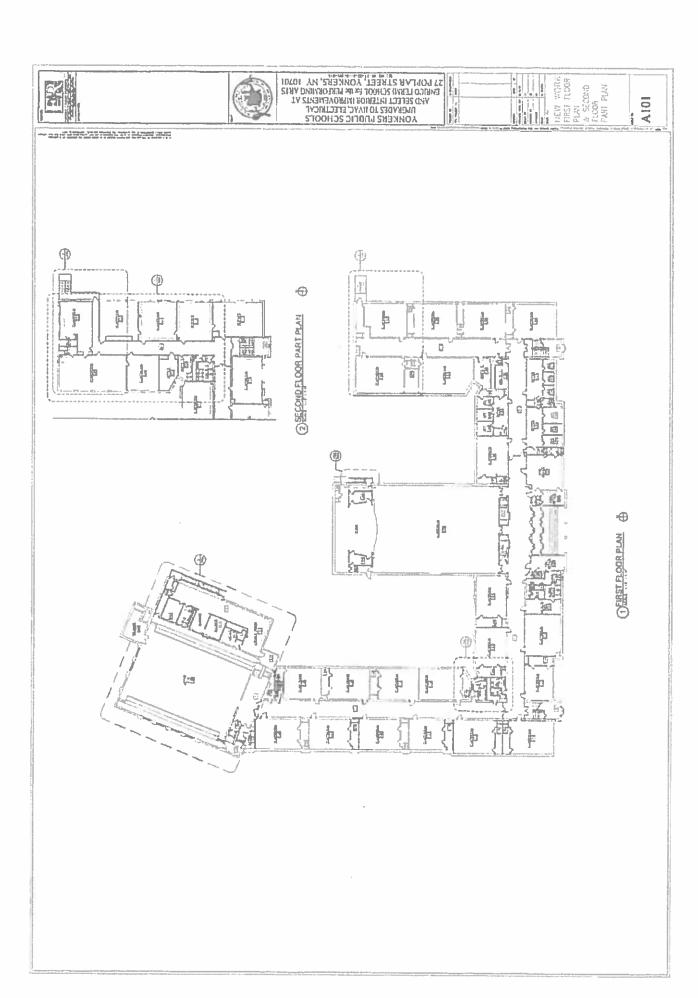
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REMAINING CONSTRCUTION SET

JUNE 19, 2017





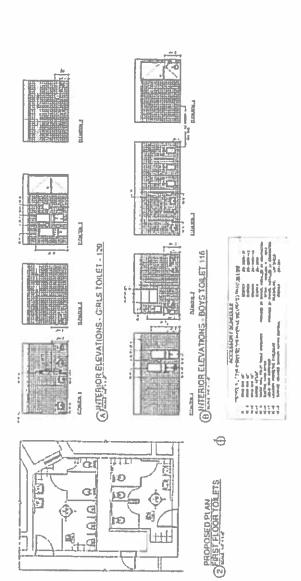


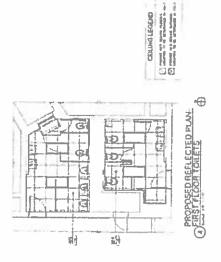


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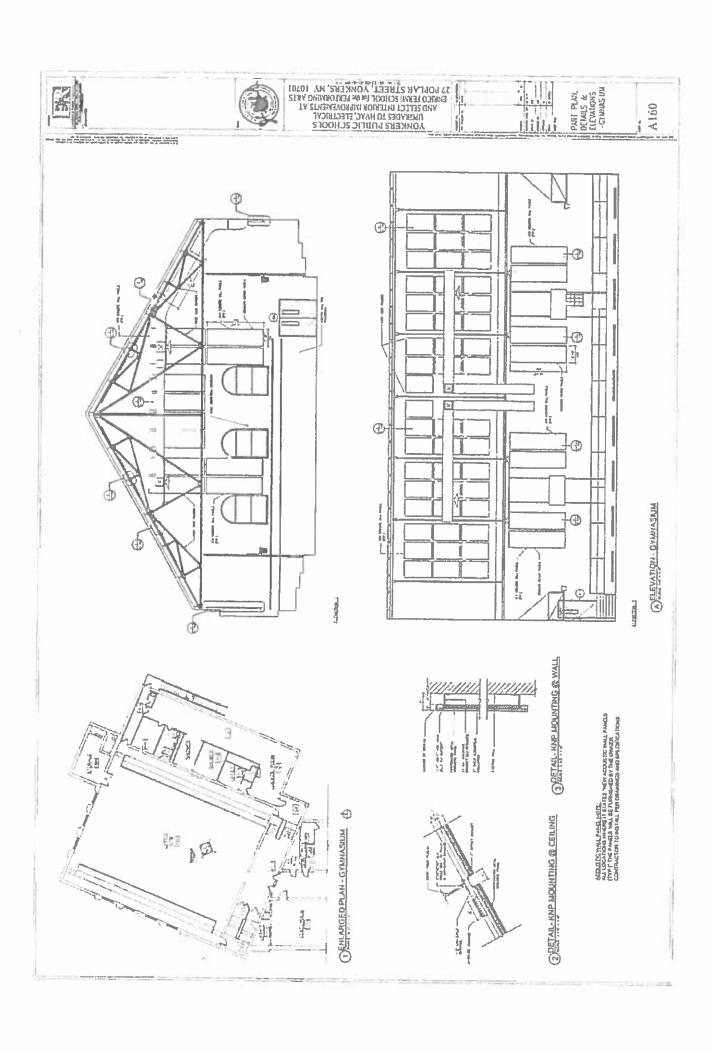
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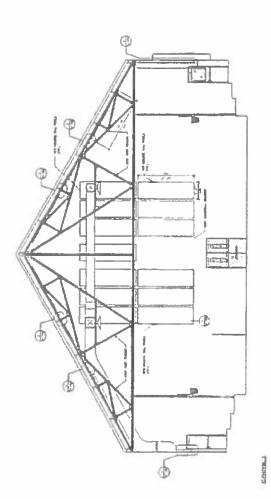
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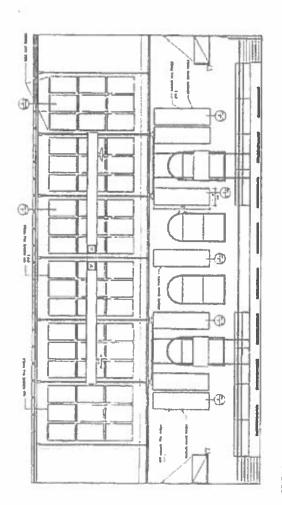
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ELEVATIONS

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