

DISPUTE RESOLUTION PROVISIONS
FOR
LIMITED SCOPE CONSTRUCTION AGREEMENTS

Dated May 25, 2005

Department of Administrative Services
Division of Facilities Construction & Management

ARTICLE I. BASIC DEFINITIONS.

A/E (including all design professionals). "A/E" means the person lawfully licensed to practice architecture or engineering or an entity lawfully practicing architecture or engineering identified as such in the A/E's Agreement and is referred to throughout the Contract Documents as if singular in number. The term "A/E" also means the A/E's representative and its subconsultants. When these General Conditions are part of an Agreement in which the design professional is an interior designer, landscape subconsultant or other design professional, the term "A/E" as used in these General Conditions shall be deemed to refer to such design professional. A license is not required when the type of design professional is one which is not subject to a professional license, but such professional must meet the prevailing standards in the State of Utah for such practice. For projects where there is no A/E hired by DFCM, the references in the General Conditions to A/E shall be deemed to refer to DFCM as may be practicably applied.

AGREEMENT. The Contract Documents form the Agreement for Construction. The term "Agreement" represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the A/E and Contractor, (2) between DFCM and

a Subcontractor or (3) between any persons or entities other than DFCM and Contractor.

CHANGE ORDER. "Change Order" means a written instrument signed by DFCM and Contractor, stating their agreement for changes of the Agreement as specified on the required DFCM's change order form.

CLAIM. "Claim" means a dispute, demand, assertion or other matter submitted by the Contractor, including a Subcontractor at any tier subject to the provisions of these General Conditions. The claimant may seek, as a matter of right, modification, adjustment or interpretation of Agreement terms, payment of money, extension of time or other relief with respect to the terms of the Agreement. A request for Preliminary Resolution Effort (PRE) shall not be considered a "Claim." A requested amendment, requested change order, or a Construction Change Directive (CCD) is not a PRE or Claim unless agreement cannot be reached and the procedures of these General Conditions are followed.

CONSTRUCTION CHANGE DIRECTIVE. A "Construction Change Directive" means a written order signed by DFCM, directing a change in the Work and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. DFCM may by Construction Change Directive, without invalidating the Agreement, order changes in the Work within the general scope of the Agreement

consisting of additions, deletions or other revisions; even if it may impact the Contract Sum and Contract Time.

CONTRACT DOCUMENTS. The term "Contract Documents" means the Contractor's Agreement between DFCM and Contractor (hereinafter referred to as "Contractor's Agreement"), the Conditions of the Agreement (General, Supplementary and other Conditions), the Drawings, Specifications, Addenda, other documents listed in the Contractor's Agreement and Modifications issued after execution of the Contractor's Agreement. The Contract Documents shall also include the bidding/proposal documents, including the Instructions to Bidders/Proposers, Notice to Contractors and the Bid/Proposal Form, to the extent not in conflict with the other above-stated Contract Documents and other documents and oral presentations as part of the Selection which are documented as an attachment to the Agreement.

CONTRACT SUM. The term "Contract Sum" means the Contract Sum as stated in the Contractor's Agreement and, including authorized and signed adjustments to this agreement (modifications), is the total amount payable by the DFCM to the Contractor for performance of the Work under the Contract Documents.

CONTRACT TIME. "Contract Time", unless otherwise provided in the Contract Documents, means the period of time, including authorized and signed adjustments (modifications), stated in the Contract Documents for Substantial Completion of the Work.

CONTRACTOR. The Contractor is the person or entity identified as such in the DFCM Contractor's Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative. When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case, shall mean the

Contractor who executes each separate DFCM Contractor Agreement.

CONTRACTOR'S AGREEMENT.

"Contractor's Agreement" means, unless the context requires otherwise, the Agreement executed by the Contractor and DFCM for the Project.

DAY. The term "day" or "days" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

DEFECTIVE. "Defective" is an adjective which when modifying the word "Work" refers to Work that does not conform to the Contract Documents, or does not meet the requirements of any inspection, referenced standard, code, test or approval referred to in the Contract Documents, or has been damaged.

DFCM REPRESENTATIVE. "DFCM Representative" means the Division of Facilities Construction and Management person directly assigned to work with the Contractor on a regular basis. Unless the context requires otherwise, the "DFCM Representative" is the "Owner's Representative."

DIRECTOR. "Director" means the Director of the Division of Facilities Construction and Management unless the context requires otherwise. Director may include a designee selected by the Director for the particular function referred to in the General Conditions.

DFCM. "DFCM" means the Division of Facilities Construction and Management established pursuant to Utah Code Annotated Section 63A-5-201 et seq. Unless the context requires otherwise, DFCM is the "Owner" as that term is commonly referred to in the construction industry.

EXECUTIVE DIRECTOR. "Executive Director" means the Executive Director of the Department of Administrative Services, including unless otherwise stated, his/her duly authorized designee.

PRELIMINARY RESOLUTION EFFORT. "Preliminary Resolution Effort" or "PRE" means the processing of a request for preliminary resolution or any similar notice about a problem that could potentially lead to a Claim and is prior to reaching the status of a Claim.

PROJECT. The "Project" means the total construction of the Work performed under the Contract Documents.

PROPOSAL REQUEST OR "PR."

A "Proposal Request" or "PR" is a proposal request filed with the Contractor for the purposes of seeking a proposal in order to resolve an issue as part of the Change Order or Agreement Modification process.

PROPOSED CHANGE ORDER.

A "Proposed Change Order" ("PCO"), is an informal request by the Contractor filed with the DFCM Representative, in an effort to commence the Agreement Modification Process. It shall not be considered a "PRE" or a "Claim." The PCO may be related to any potential, or actual delay, disruption, unforeseen condition or materials or any other matter in which the Contractor intends to seek additional monies or time.

REQUEST FOR INFORMATION or RFI.

A "Request for Information" or "RFI" is a request filed by the Contractor with the A/E regarding any request for information, direction or clarification related to the Contract Documents, plans or specifications.

RESOLUTION OF THE CLAIM.

"Resolution of the Claim" means the final resolution of the Claim by the Director, but does not include any administrative appeal, judicial review or judicial appeal thereafter.

RULE. "Rule," unless the context requires otherwise, shall mean a Rule of the Utah Administrative Code.

SUBCONTRACTOR. "Subcontractor" means the person or entity that has a direct contract with the Contractor, including any trade

contractor or specialty contractor, or with another Subcontractor at any tier to provide labor or materials for the work but does not include suppliers who provide only materials, equipment or supplies to a contractor or subcontractor. Notwithstanding the foregoing, the text in which the term is used may provide for the exclusion of Subcontractors of other Subcontractors or the exclusion of suppliers. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or authorized representative of the Subcontractor. The Term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

WORK. The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided, or to be provided, by the Contractor to fulfill the Contractor's obligations.

ARTICLE II. PROCEDURE FOR PRELIMINARY RESOLUTION EFFORTS.

A. REQUEST FOR PRELIMINARY RESOLUTION EFFORT (PRE). A Contractor raising an issue related to a breach of contract or an issue concerning time or money shall file a PRE as a prerequisite for any consideration of the issue by DFCM. The labeling of the notice or request shall not preclude the consideration of the issue by DFCM.

B. TIME FOR FILING. The PRE must be filed in writing with the DFCM Representative within twenty-one (21) days of any of the following:

(1) Issuance of a Construction Change Directive and the Contractor disagrees with such assessment;

(2) Issuance of a denial of a written request by the Contractor for additional monies or time;

(3) In the case of a Subcontractor, after the expiration of the time period for the Contractor/Subcontractor PRE process under Paragraph E below; or

(4) When the Contractor knows or should have known about any other issue where the Contractor seeks additional monies, time or other relief from the State of Utah or DFCM.

C. CONTENT REQUIREMENT. The PRE shall be required to include in writing to the extent information is reasonably available at the time of such filing:

- (1) A description of the issue;
- (2) The potential impact on cost and time or other breach of contract; and
- (3) An indication of the relief sought.

D. SUPPLEMENTATION. Additional detail of the content requirement under Paragraph C above shall be provided later if the detail is not yet available at the initial filing as follows:

- (1) While the issue is continuing or the impact is being determined, the Contractor shall provide a written updated status report every thirty (30) days or as otherwise reasonably requested by the DFCM Representative; and
- (2) After the scope of work or other factors addressing the issue are completed, the complete information, including any impacts on time, cost or other relief requested, must be provided to the DFCM Representative within twenty-one (21) days of such completion.

E. SUBCONTRACTORS.

- (1) Under no circumstances shall any provision of these Contract Documents be intended or construed to create any contractual relationship between DFCM and any Subcontractor.
- (2) The Contractor must include the provisions of this Paragraph E in its contract with the first tier Subcontractor, and each Subcontractor must do likewise. At the

Contractor's discretion, the Contractor may allow a Subcontractor at the 2nd tier and beyond to submit the PRE directly with the Contractor.

(3) In order for a Subcontractor at any tier to be involved with the PRE of DFCM, the following conditions and process shall apply:

(a) The Subcontractor must have attempted to resolve the issue with the Contractor including the submission of a PRE with the Contractor.

(b) The Subcontractor must file a copy of the PRE with the DFCM Representative;

(c) The PRE to the Contractor must meet the time, content and supplementation requirements of Paragraphs B, C and D above. The triggering event for a Subcontractor to file a PRE shall be the time at which the issue cannot be resolved through the normal business practices associated with the Agreement, excluding arbitration and litigation;

(d) The PRE submitted to the Contractor shall only be eligible for consideration in the DFCM's PRE process to the extent the issue is reasonably related to the performance of the DFCM or an entity for which the DFCM is liable;

(e) The Contractor shall resolve the PRE to the satisfaction of the Subcontractor within sixty (60) days of its submittal to the Contractor or such other time period as subsequently agreed to by the Subcontractor in writing. If the Contractor fails to resolve the PRE with the Subcontractor within such required time period, the Subcontractor may submit in writing the PRE with the Contractor and the DFCM. In order to be eligible for DFCM consideration of the PRE, the Subcontractor must submit the PRE within twenty-one (21) days of the expiration of the time period for the Contractor/Subcontractor PRE process. DFCM shall consider the PRE as being submitted by the Contractor on behalf of the Subcontractor;

(f) Upon such PRE being submitted, the Contractor shall cooperate with the DFCM Representative in reviewing the issue;

(g) The DFCM shall not be obligated to consider any submission which is not in accordance with any provision of this Article II;

(h) The Subcontractor may accompany the Contractor in participating with DFCM regarding the PRE raised by the Subcontractor. The DFCM is not precluded from meeting with the Contractor separately and it shall be the responsibility of the Contractor to keep the Subcontractor informed of any such meetings; and

(i) Notwithstanding any provision of this Paragraph E, a Subcontractor shall be entitled to pursue a payment bond claim.

F. PRE RESOLUTION PROCEDURE. The DFCM Representative may request additional information and may meet with the parties involved with the issue.

G. CONTRACTOR REQUIRED TO CONTINUE PERFORMANCE. Pending the final resolution of the issue, unless otherwise agreed upon in writing by the DFCM Representative, the Contractor shall proceed diligently with performance of the Agreement and DFCM shall continue to make payments in accordance with the Contract Documents.

H. DECISION. DFCM shall issue to the Contractor, and any other party brought into the process by the DFCM Representative as being liable to DFCM, a written decision providing the basis for the decision on the issues presented by all of the parties within thirty (30) days of receipt of all the information required under Paragraphs C and D above.

I. DECISION FINAL UNLESS CLAIM SUBMITTED. The decision by DFCM shall be final, and not subject to any further administrative or judicial review (not including judicial enforcement) unless a Claim is submitted in accordance with these General Conditions.

J. EXTENSION REQUIRES MUTUAL AGREEMENT. Any time period specified in this Article II may be extended by mutual agreement of the Contractor and DFCM.

K. IF DECISION NOT ISSUED. If the decision is not issued within the thirty (30) day period, including any agreed to extensions, the issue may be pursued as a Claim.

L. PAYMENT FOR PERFORMANCE.

(1) Except as otherwise provided in the Contract Documents, any final decision where DFCM is to pay additional monies to the Contractor, shall not be delayed by any PRE, Claim or appeal by another party.

(2) Payment to the Contractor of any final decision shall be made by DFCM in accordance with the Agreement for the completed work.

(3) Notwithstanding any other provision of the Contract Documents, payment to the Contractor shall be subject to any set-off, claims or counterclaims of DFCM.

(4) Payment to the Contractor for a Subcontractor issue submitted by the Contractor shall be paid by the Contractor to the Subcontractor in accordance with the contract between the Contractor and the Subcontractor.

(5) Any payment or performance determined owing by the Contractor to DFCM shall be made in accordance with the Contract Documents.

ARTICLE III. RESOLUTION OF CLAIM.

A. CLAIM. If the decision on the PRE is not issued within the required timeframe or if the Contractor is not satisfied with the decision, the Contractor or other party brought into the process by DFCM, may submit a Claim in accordance with this Article III as a prerequisite for any further consideration by DFCM or the right to any judicial review of the issue giving rise to the claim.

B. SUBCONTRACTORS. In order for a Subcontractor to have its issue considered in the Claim process by DFCM, the Subcontractor that had its issue considered under Article II.E above may submit the issue as a Claim by filing it with the Contractor and DFCM within the same timeframe and with the same content requirements as required of a Claim submitted by the Contractor under this rule. DFCM shall consider the Claim as being submitted by the Contractor on behalf of the Subcontractor. Under no circumstances shall any provision of these General Conditions or the Contract Documents be intended or construed so as to create any contractual relationship between the DFCM and any Subcontractor.

(1) Upon such Claim being submitted, the Contractor shall fully cooperate with the Director, the person(s) evaluating the claim and any subsequent reviewing authority.

(2) The Director shall not be obligated to consider any submission which is not in accordance with this Article IIIB.

(3) The Subcontractor may accompany the Contractor in participating with the Director, the person(s) evaluating the Claim and any subsequent reviewing authority regarding the Claim. The Director, the person(s) evaluating the Claim and any subsequent reviewing authority is not precluded from meeting with the Contractor separately, and it shall be the responsibility of the Contractor to keep the Subcontractor informed of any such meetings and matters discussed.

(4) Notwithstanding any provision of this Article III, a Subcontractor shall be entitled to pursue a payment bond claim.

C. TIME FOR FILING. The Claim must be filed in writing promptly with the Director, but in no case more than twenty-one (21) days after the decision is issued on the PRE under Article IIIH above or no more than twenty-one (21) days after the thirty (30) day period under Article IIK above has expired with a decision not issued, whichever is later.

D. CONTENT REQUIREMENT. The written Claim shall include:

(1) A description of the issues in dispute;

(2) The basis for the Claim, including documentation and analysis required by the Agreement and applicable law and rules that allow for the proper determination of the Claim;

(3) A detailed cost estimate for any amount sought, including copies of any related invoices; and

(4) A specific identification of the relief sought.

E. EXTENSION OF TIME TO SUBMIT DOCUMENTATION. The time period for submitting documentation and any analysis to support a Claim may be extended by the Director upon written request of the claimant showing just cause for such extension, which request must be included in the initial Claim submittal.

F. CONTRACTOR REQUIRED TO CONTINUE PERFORMANCE. Pending the final determination of the Claim, including any judicial review or appeal process, and unless otherwise agreed upon in writing by the Director, the Contractor shall proceed diligently with performance of the Contractor's Agreement and DFCM shall continue to make payments in accordance with the Contract Documents.

G. AGREEMENT OF CLAIMANT ON METHOD AND PERSON(S) EVALUATING THE CLAIM. The Director shall first attempt to reach agreement with the claimant on the method and person(s) to evaluate the Claim. If such agreement cannot be made within fourteen (14) days of filing of the Claim, the Director shall select the method and person(s), considering the purposes described in Rule R23-26-1. Unless agreed to by the Director and the claimant, any selected person shall not have a conflict of interest or appearance of impropriety. Any party and the person(s) evaluating the Claim has a duty to promptly raise any circumstances regarding a conflict of interest or

appearance of impropriety. If such a reasonable objection is raised, and unless otherwise agreed to by the Director and the claimant, the Director shall take appropriate action to eliminate the conflict of interest or appearance of impropriety. The dispute resolution methods and person(s) may include any of the following:

(1) A single expert and/or hearing officer qualified in the field that is the subject of the Claim;

(2) An expert panel, consisting of members that are qualified in a field that is the subject of the Claim;

(3) An arbitration process which may be binding if agreed to by the parties to the Claim;

(4) A mediator; or

(5) Any other method that best accomplishes the purposes set forth in Rule R23-26-1.

H. THE EVALUATION PROCESS, TIMEFRAMES OF EVALUATOR(S), DIRECTOR'S DETERMINATION, ADMINISTRATIVE APPEAL TO THE EXECUTIVE DIRECTOR AND JUDICIAL REVIEW. The Claim shall be evaluated, the timeframe for specific events related to the person(s) evaluating the Claim, the Director's determination, any appeal to the Executive Director and any judicial review shall be subject to the provisions of Rule R23-26-5(8), R23-26-5(9), R23-26-6 and R23-26-8. A copy of these Administrative Rules are available at DFCM.

I. APPEAL PROCESS PREREQUISITE FOR FURTHER CONSIDERATION OR JUDICIAL REVIEW. The administrative appeal to the Executive Director is a prerequisite for any further consideration by the State of Utah, or to judicial review of the issue giving rise to the Claim. It shall be considered that the Contractor, or another party brought into the process by DFCM, has not exhausted its administrative remedies if such an administrative appeal is not undertaken.

ARTICLE IV. PAYMENT OF CLAIM.

A. When a stand alone component of a Claim has received a final determination, and is no longer subject to review or appeal, that amount shall be paid in accordance with the payment provisions of the Contract Documents or judicial order.

B. When the entire Claim has received a final determination, and is no longer subject to review or appeal, the full amount shall be paid within fourteen (14) days of the date of the final determination unless the work or services has not been completed, in which case the amount shall be paid in accordance with the payment provisions of the Contract Documents to the point that the work or services is completed.

C. The final determination date is the earlier of the date upon which the claimant accepted the settlement in writing with an executed customary release document and waived its rights of appeal, or the expiration of the appeal period, with no appeal filed, or the determination made resulting from the final appeal.

D. Any final determination where the Division is to pay additional monies to the Contractor shall not be delayed by any appeal or request for judicial review by another party brought into the process by the Division as being liable to DFCM.

E. Notwithstanding any other provision of the Contract Documents, payment of all or part of a Claim is subject to any set-off, claims or counterclaims of DFCM.

F. Payment to the Contractor for a Subcontractor issue (Claim) deemed filed by the Contractor, shall be paid by the Contractor to the Subcontractor in accordance with the contract between the Contractor and the Subcontractor.

G. The execution of a customary release document related to any payment may be required as a condition of making the payment.

ARTICLE V. ALLOCATION OF COSTS OF CLAIM RESOLUTION PROCESS.

A. In order to file a Claim, a claimant must pay a \$1500 filing fee to DFCM. When the Claim is a pass-through from a Subcontractor in accordance with Article IIE above, the payment of the fee shall be made by the Subcontractor.

B. Unless otherwise agreed to by the parties to the Claim, the costs of resolving the Claim shall be allocated among the parties on the same proportionate basis as the determination of financial responsibility for the Claim.

C. The costs of resolving the Claim that are subject to allocation include the claimant's filing fee, the costs of any person(s) evaluating the Claim, the costs of making any required record of the process, and any additional testing or inspection procured to investigate and/or evaluate the Claim.

D. Each party is responsible for its own attorney fees.

ARTICLE VI. ALTERNATIVE PROCEDURES.

To the extent otherwise permitted by law, if all parties to a Claim agree in writing, a protocol for resolving a Claim may be used that differs from the process described in these Articles I through IX.

ARTICLE VII. IMPACT ON FUTURE SELECTIONS.

A. The presentation of a good faith and non-frivolous issue or Claim shall not be considered by DFCM's selection process for a future award of Agreement; and

B. The submission of a bad faith and frivolous issue or Claim, or the failure by a Contractor to facilitate resolution of a Claim, may be considered in DFCM's evaluation of performance.

ARTICLE VIII. REPORT TO BUILDING BOARD. DFCM may report on the claim to the Utah State Building Board.

ARTICLE IX. DFCM'S RIGHT TO HAVE ISSUES, DISPUTES OR CLAIMS CONSIDERED. As stated in Rule R23-26-1(6), Articles I through VIII above do not limit the right of DFCM to have any of its issues, disputes or claims considered. DFCM reserves all rights to pursue its issues, disputes or claims in law or equity including, but not limited to, any or all of the following: damages, delay damages and impacts, losses, liability, patent or latent defects, or failure to perform under the Contract Documents. If the Director appoints an expert or a panel to consider any such issue(s), dispute(s) or claim(s) of DFCM, the Contractor shall cooperate with such expert or panel process.