

## **DESIGN AGREEMENT BETWEEN DFCM AND ARCHITECT / ENGINEER**

This AGREEMENT is made [Click here to enter a date](#) between the Division of Facilities Construction and Management, hereinafter referred to as "DFCM", and [Consultant Name](#), the "Architect / Engineer", a corporation of the State of [State](#), whose address is [Consultant Address](#), hereinafter called the "A/E", agree to all the provisions of this Agreement for the Project identified as:

Project Name  
Agency  
Location

### **ARTICLE I. DOCUMENTS INCORPORATED BY REFERENCE**

#### **A. DFCM GENERAL CONDITIONS.**

1. The [DFCM General Conditions](#) ("General Conditions") and Supplemental General Conditions ("also referred to as General Conditions") on file at the office of DFCM and available on the [DFCM website](#), are incorporated by reference as if fully set forth in this Agreement.

2. The A/E and DFCM shall be bound by the definitions and terms described in the [General Conditions](#).

3. Unless the context provides otherwise, all definitions and interpretations of provisions of this Agreement shall be as stated in the [General Conditions](#). In case of conflict between the provisions of this Agreement and the [General Conditions](#), the provisions of this Agreement shall control.

#### **B. SOLICITATION / PROCUREMENT DOCUMENTS AND REQUIREMENTS.**

The A/E shall comply with the following:

1. State Procurement requirements.

2. The DFCM solicitation documents and A/E submitted documents for this project are hereby incorporated by reference as part of this Agreement as Attachment "A", hereto indicates changes to the A/E's response, if applicable.

3. The procurement documents and Contract Documents.

#### **C. DFCM DESIGN MANUAL.**

1. The current DFCM Design Manual ("Design Manual") on file with the DFCM is incorporated by reference as if fully set forth in this Agreement.

2. The A/E and DFCM shall be bound by the definitions and terms described in the Design Manual.

#### **D. ATTACHMENTS TO THIS AGREEMENT**

All attachments to this Agreement are incorporated by reference as if fully set forth in this Agreement. Unless the context requires otherwise, any reference in this Agreement to an “Attachment” means such an incorporated by reference attachment to this Agreement.

#### **E. HIERARCHY OF DOCUMENTS.**

In case of conflict, the following documents supersede each other in accordance with the following respective hierarchy:

1. Codes and applicable law;
2. The attachments hereto;
3. The solicitation documents issued by DFCM for the selection of the A/E;
4. Any response by A/E to the procurement documents attached to this Agreement;
5. The body of this Agreement;
6. The [General Conditions](#); and
7. The Design Manual.

### **ARTICLE II. GENERAL REQUIREMENTS**

**A. GENERAL OBJECTIVES.** The objectives of the Work under this Agreement include, but are not limited to the following:

1. Comply with the requirements of the Predesign Program;
2. Provide designs that comply with applicable laws, codes, rules, regulations and quality requirements;
3. Comply with this Agreement including the [General Conditions](#) and Design Manual;
4. Meet the established Construction Budget in Attachment “A”;
5. Maintain the Project Schedule in Attachment “A”; and
6. To work with DFCM and the Contractor to accomplish all these objectives.

**B. SCHEDULE.** Time is of the essence. The A/E shall commence and prosecute the work diligently so as to be in compliance with the Project Schedule in Attachment “A.” However, the A/E shall not be responsible for failure to comply with the Project Schedule or any portion thereof to the extent such noncompliance is not due to the fault of the A/E or anyone for whom the A/E is liable.

**C. STANDARD OF CARE; RESPONSIBILITY.** The services of A/E and its Subconsultants, if any, shall be performed in accordance with and judged solely by the standard of care exercised by licensed members of their respective professions having substantial experience providing similar services on projects similar in type, magnitude and complexity to the Project that is the subject of this Agreement. The A/E shall be liable to the DFCM or the State of Utah for claims, liabilities, additional burdens, penalties, damages or third party claims (i.e. a Contractor claim against DFCM or the State of Utah), to the extent caused by errors or omissions that do not meet this standard of care.

**D. PUBLIC INFORMATION RELEASE.** A/E shall not make any public information release in connection with the Project without advance written permission of DFCM. A/E shall require of it’s Subconsultants the same agreement to maintain the confidentiality of information. Notwithstanding this provision, the A/E does not need DFCM’s consent to respond to any information release which is needed to defend the A/E’s interest, or to the extent such public information release is protected by constitutional free speech rights.

**E. CONFLICT OF INTEREST.** A/E and the A/E’s Subconsultants shall not have any member that has a conflict of interest that may reasonably affect the A/E or Subconsultants professional judgment in regard to the Project, unless such conflict is disclosed to the DFCM and approved by the DFCM in writing. It is the A/E’s duty to enforce this provision with the Subconsultants.

1. **Use of “Sales Agents.”** The A/E warrants that no person or selling agency has been employed or retained except as indicated in writing to DFCM.

**F. LAWS, CODES AND REGULATIONS.** A/E and its Subconsultants shall use their best efforts consistent with the Standard of Care stated herein to comply with laws, codes, rules, regulations, ordinances and quality requirements applicable to the Project as established by State statute, codes adopted by State law, administrative rule and/or deemed applicable to the Project pursuant the express terms of this Agreement including those documents incorporated by reference. A/E or DFCM may request, and will be granted, a meeting with the other to discuss any additional codes or requirements that are applicable to the Project. In the case of change(s) or conflicts in the applicable code requirements, laws, rules or regulations, during the work of the Scope of A/E’s Services, when and if the A/E becomes aware of such change(s) or conflicts, the A/E shall promptly notify the DFCM in writing. If the DFCM determines that work that has already been properly performed must now be changed, such change will be considered additional work under this Agreement and the A/E shall then prepare all documents to comply with the needed change(s).

**G. ESTABLISH CONSTRUCTION BUDGET.** The A/E shall prepare a construction budget (including cost estimate) for each phase of work under this Agreement in accordance with the Design Manual.

**H. IF BIDS/PROPOSALS EXCEED CONSTRUCTION BUDGET.** If no acceptable bid or proposal is received within the Construction Budget, the DFCM in its sole discretion may elect any one or more of the following options:

1. Give written approval of an increase in the Construction Budget; and/or
2. Rebid or renegotiate the construction contract within a reasonable time; and/or
3. Revise the Project scope and/or quality as necessary to meet the Construction Budget; and/or
4. Abandon the Project and terminate this Agreement.

If the DFCM elects an option or options which does not abandon the Project, the A/E shall perform the A/E's services to implement the selected option or options at no additional cost to the DFCM.

**I. STAFFING.** The A/E shall maintain the human, physical and other resources reasonably necessary to timely meet its obligations under this Agreement.

**J. DFCM REVIEWS, LIMITATIONS.** The right of the DFCM or any entity/user to perform plan checks, plan reviews, other reviews and/or comment upon the work of the A/E, as well as any approval by the DFCM, shall not be construed as relieving the A/E from its professional and legal responsibility for services required under this Agreement. No review by the DFCM or any entity/user, approval or acceptance, or payment for any of the services required under this Agreement shall be construed to operate as a waiver by the DFCM of any right under this Agreement or of any cause of action arising out of the performance or nonperformance of this Agreement, and the A/E shall be and remain liable to the DFCM in accordance with applicable law for all damages to the DFCM caused by the A/E's acts, errors and/or omissions.

**K. USE OF PROTOTYPICAL DESIGNS OR DESIGNS PROVIDED BY DFCM.** A/E shall use prototypical designs or other design drawings, specifications or calculations provided by DFCM in the request for proposal. A/E shall recheck such designs and any other design data, drawings, specifications and calculations provided by DFCM. A/E shall correct any error or omission as deemed necessary thereafter, and shall be responsible therefore to the same extent as if such materials had been provided by A/E under this Agreement. A/E shall be provided with all change orders, proposed change orders, and clarifications, from previous projects that are applicable to this Project. A/E shall incorporate all pertinent material into the new plans and specifications. If A/E has provided design services to DFCM on previous projects and has designed buildings similar to the components of this Project, which are in A/E's charge, at the direction of DFCM, A/E shall modify and reuse existing design as much as possible. Where existing designs are being reused, drawings are required to conform to DFCM graphic/CAD standards unless prior written approval is given by DFCM.

**L. SUBCONSULTANTS.** The A/E shall be responsible and liable to the DFCM for the services of any Subconsultant of A/E. Any reference in this Agreement to Subconsultant shall refer to any subcontractor, consultant or subconsultant of the A/E at any tier. A/E shall, without additional expense to DFCM, be responsible for obtaining any business and professional licenses

and for complying with any applicable Federal, State, and local laws, codes, and regulations, as necessary for the performance of the A/E's services.

**M. HAZARDOUS MATERIALS.** The A/E shall comply with the [General Conditions](#) and Design Manual provisions regarding hazardous materials.

**N. DISCRIMINATION AND SEXUAL HARASSMENT PROHIBITED.** Pursuant to the laws of the State of Utah, the A/E, or any person acting on behalf thereof, will not discriminate against any employee or applicant for employment because of race, creed, color, sex, religion, ancestry or national origin. To the extent applicable, said persons will comply with all provisions of Executive Order No. 11246 dated September 24, 1965 and rules, regulations, orders, instructions, designations and other directives promulgated pursuant thereto. The A/E, or anyone for whose act the A/E may be liable, shall not act in any manner as would violate the laws, regulations and policies of the United States or the State of Utah prohibiting sexual harassment.

### **ARTICLE III. PROJECT TEAM.**

**A. DFCM REPRESENTATIVE.** The DFCM Representative is the person assigned by the Director of DFCM to manage the Project and is the sole person authorized to act on behalf of DFCM or the State of Utah.

**B. A/E AND SUBCONSULTANTS.**

1. **Need DFCM Permission to Change Organizational Chart.** The A/E and Subconsultants have been selected to perform the services of this Agreement because of the skills and expertise of designated key personnel. Attachment "A" to this Agreement provides the organization chart of the A/E and Subconsultants. The identified persons and entities in the organizational chart cannot be changed without advance written approval by DFCM.

2. **A/E's Representative.** The A/E's Designated Representative identified in the organization chart is and shall be authorized to act on the A/E's behalf and bind the A/E in regard to the Project.

### **ARTICLE IV. DFCM RESPONSIBILITIES AND RIGHT TO EVALUATE A/E**

**A. DFCM RESPONSIBILITIES.** Unless otherwise expressly agreed herein, DFCM shall at its sole cost and expense shall:

1. Place advertisements for bids or proposals;
2. Conduct bid or proposal openings and interviews;
3. Timely provide and update A/E with available "public" information in DFCM's possession regarding the Project, including but not limited to, legal descriptions, topographic surveys, ALTA or other boundary surveys, utility surveys, record drawings, reports, project objectives, budgets, and other material requirements and limitations.

4. Notify A/E of any known fault, known defect, or known deficiency in the Project, including but not limited to acts, errors, omissions, or inconsistencies in A/E's services and Deliverable Instruments of Service. Notwithstanding this provision, any failure to notify the A/E, shall not relieve the A/E of any responsibility or liability for such fault, defect or deficiency.

5. The DFCM Representative shall timely render decisions so as to avoid unreasonable delays in the orderly progress of the Project.

**B. PERFORMANCE EVALUATION OF A/E.** The DFCM may conduct a performance evaluation of the A/E's services, including specific personnel of A/E or any Subconsultant at any time. Results of any evaluation will be made available to the A/E upon request.

#### **ARTICLE V. SCOPE OF A/E'S BASIC SERVICES.**

**A. IN GENERAL.** The A/E's Basic Services consist of those described in this Agreement, the [General Conditions](#), and Design Manual, and include normal structural, mechanical, electrical, and architectural as well as other consulting services reasonably necessary to fulfill the A/E's duties under this Agreement. Any additional scope of service requirements are provided in Attachment "A" and the Design Manual.

1. **Incidental Services/Reimbursements.** Not included in the Basic Services are amounts to cover Direct and Reimbursable costs such as travel and printing. These costs are reimbursed at 1.05 % of cost and travel will be determined as per State Travel Guidelines.

a. **Travel/Lodging/Meals:** only for the members whose distance of travel from their office to the site is greater than 100 miles from the servicing office location:

i. Travel: flights shall be coach on commercial airlines; personnel vehicle use will be reimbursed at the current Federally allowed reimbursement rate per mile; and incidental travel (taxi, bus, airport long term parking only, and other ground transportation) submit an original receipt for each item (tips for taxi, baggage, etc. are not reimbursable);

ii. Lodging may be booked through the state and will be reimbursed at either the actual cost or the state rate (whichever is less). Tips for baggage, maid service, doormen, etc. are not reimbursable. The state rates are located on the [State Travel website](#).

iii. For in-state travel, meal per diems are allowed at the state rate as identified on the [State Travel website](#) (tips and tax on meals are included in the per diem amount).

iv. For consultants traveling from out-of-state, meal per diems are allowed at the state rate as identified on the [State Travel website](#) (tips and tax on meals are included in the per diem amount).

b. **Miscellaneous:** e.g. express mail, photos, long distance calls. An original invoice must be submitted for each item.

Exceptions to the above shall be approved by the DFCM Director in writing.

2. **Direction from DFCM Representative Only.** A/E has neither the responsibility nor the authority to accept directives or determinations from any person other than the DFCM Representative. The A/E shall not take any direction from the end User's of the Project, Contractor or any other third party's representative.

3. **Review Requests for Information.** The A/E shall review properly prepared and timely Requests for Information by the Contractor.

4. **Issue ASI's and Supplemental Drawings and Specifications.** If approved by the DFCM Representative, the A/E shall issue an ASI, and prepare, reproduce, and distribute supplemental and/or corrected drawings and/or specifications in response to Requests for Information by the Contractor.

## **B. SCHEMATIC DESIGN PHASE.**

1. **Review Program and Statement of Scope.** The A/E shall review the program or other "statement of scope" furnished by DFCM to ascertain the requirements of the Project and shall arrive at a mutual understanding of such requirements with the DFCM Representative. The term "program" as referred to in this Agreement shall be deemed to include any "statement of scope" provided by DFCM.

2. **Preliminary Evaluation.** The A/E shall provide a preliminary evaluation of DFCM's program, schedule and construction budget requirements.

### **3. Documents and Drawings.**

a. Based on the mutually agreed upon program, or scope of work, schedule and construction budget requirements, the A/E shall prepare, for written approval by DFCM, Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of Project components.

b. The Schematic Design Documents shall comply with this Agreement and the Design Manual.

c. The Schematic Design narrative shall include the A/E's proposed design and construction budget which shall be within the DFCM budget provided to the A/E.

4. **Alternative Approaches.** The A/E shall review with DFCM, alternative approaches to design and construction of the Project. Several options shall be submitted for DFCM's evaluation.

5. **Land Use Approval Assistance.** The A/E shall cooperate with DFCM in obtaining applicable permits, and land use approvals, so as to allow for construction of the Project. However, appearances as an expert as well as the preparation of necessary drawings, visual aids and any other design work solely prepared for an appearance with zoning boards or planning commissions or other governmental meetings or hearings, shall be considered as Additional Services, if not included in Attachment "A".

### **C. DESIGN DEVELOPMENT PHASE.**

1. **General Description of Design Development Submittal.** A/E shall prepare, for written approval by the DFCM Representative, Design Development Documents consisting of drawings and other documents to fix and describe the size and character of the Project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate. The narrative shall include the A/E's proposed design and construction budget which shall be within the DFCM budget provided to the A/E. The Design Development submittals shall comply with the following:

- a. The DFCM approved Schematic Design Documents and any adjustments authorized by DFCM in the program, scope of work, schedule or construction budget; and
- b. The provisions of this Agreement and the Design Manual.

2. **Authorization to Proceed Required in Writing from DFCM.** The A/E may proceed on and be paid for Design Development work only after a written authorization to proceed to the Design Development Phase is provided by the DFCM Representative.

3. Should DFCM initiate or require a material change from the approved Design Development Documents and there is no fault or responsibility of the A/E related to DFCM's initiation or requirement of the change, A/E's effort implementing said change(s) shall be compensated as an Additional Service and the schedule for delivery of A/E's services shall be equitably adjusted if/as appropriate.

### **D. CONSTRUCTION (CONTRACT) DOCUMENTS PHASE.**

1. **General Description of Construction Documents Submittal.** A/E shall prepare, for written approval by the DFCM Representative, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project. The narrative shall include the A/E's proposed design and construction budget which shall be within the DFCM budget provided to the A/E. The A/E shall advise the DFCM of any adjustments to previous preliminary estimates of Construction cost indicated by changes in requirements or general market conditions. The Construction Documents shall comply with the following:

- a. The DFCM approved Design Development Documents and any further adjustments in the scope or quality of the Project or in the construction budget authorized by DFCM;
- b. The Construction Documents shall comply with and identify all applicable codes, tests and inspections; and
- c. The provision of this Agreement and the Design Manual.

2. **Authorization to Proceed Required in Writing from DFCM.** The A/E may proceed on and be paid for Construction Documents work only after a written authorization to proceed to the Construction Documents Phase is provided by the DFCM Representative.



3. **Assistance with Procurement Documents.** The A/E shall assist DFCM in the preparation of the necessary procurement documents to obtain a Contractor and other entities needed to complete the Project.

4. **Assist with Filing for Governmental Approval.** When requested by DFCM, A/E shall assist DFCM in preparation and filing of documents required for the approval of governmental authorities having jurisdiction over the Project.

#### **E. PROCUREMENT OR NEGOTIATION PHASE.**

1. **In General.** The A/E, after written authorization is provided by the DFCM Representative, shall assist DFCM in obtaining bids or negotiated proposals and assist in awarding contracts for construction.

2. **Pre-Bid (including pre-proposal) Conference.** The A/E shall attend any pre-bid conference as requested by the DFCM. DFCM shall control all advertising, bid openings, publishing of bid results, awarding of the Contract.

3. **Available for Interpretations.** The A/E shall at all reasonable times be available personally, or have available, a responsible member of his or her staff to make such interpretations of the Construction Documents as are necessary to facilitate completion of the construction contract.

#### **F. CONSTRUCTION PHASE - ADMINISTRATION OF THE CONSTRUCTION CONTRACT.**

1. **Commencement and Termination.** The A/E's responsibility to provide Basic Services for the Construction Phase commences with DFCM's written authorization to proceed on to this Phase and terminates upon the completion of the guaranty period of the Contractor's work, unless extended by written agreement of the A/E and DFCM. Any final payment made prior to the end of the guaranty period does not terminate A/E's obligation to provide full performance of the A/E's services throughout the guaranty period for the fee already paid for basic services.

2. **A/E's General Assistance During Construction and One-Year Guaranty Period.** A/E shall advise and assist DFCM (1) during the Construction Phase, and (2) during period of the Contractor's guaranty obligations under the Contract Documents. During the One-Year Guaranty Period, the A/E shall make a qualified representative available to answer questions and to perform a 1-year guaranty walk through. A/E shall have authority to act on behalf of DFCM only to the extent provided in this Agreement unless otherwise modified in writing by DFCM and A/E. The A/E shall be liable for any representations made by the A/E or anyone for whose acts the A/E may be liable, not consistent with the provisions of the Contract Documents, unless DFCM has given written approval in advance.

3. **Site Visits.**

a. **In General.** Site visits shall be conducted in accordance with Attachment "A" and the Contract Documents.

b. **Compliance with Contract Documents, Reporting Defects and Deficiencies.** Site visits shall require the A/E to examine the Work of the Contractor in progress to assist the DFCM in identifying any lack of compliance with the Construction Documents, defects or deficiencies in the Work and to determine whether the Work is proceeding in a manner such that, when completed, will likely be in accordance with the Construction Documents. Except as may otherwise be provided in Attachment "A", the A/E's on-site construction-phase services are (i) not full-time, continuous, or exhaustive; (ii) do not include a duty to discover latent defects in the Work; and (iii) do not constitute a guarantee of the A/E's Work or relieve the Contractor of its responsibilities. A/E is not responsible for the Contractor's selected means, methods, or sequences of work. The A/E shall cooperate and assist the DFCM in enforcement of the Construction Documents. The A/E shall promptly report known or obvious defects to the DFCM. This provision does not relieve the Contractor of its responsibility to comply with the Construction documents.

c. **Written Report.** A/E shall promptly submit to DFCM a written report subsequent to each site visit.

d. **Limitations.** A/E shall not be required to make exhaustive or continuous on-site inspections or observations to check the quality or quantity of the Work unless specified elsewhere in this Agreement including the Attachment(s).

4. **Submittals.** Contractor submittals shall be addressed in accordance with the Contract Documents.

5. **Modifications.** A/E shall prepare Change Orders, or Construction Change Directives, with supporting documentation and data for DFCM's approval and execution in accordance with the Contract Documents, and may issue ASI's not involving an adjustment in the Contract Sum or an extension of the Contract Time which are not inconsistent with the intent of the Contract Documents. ASI's must be approved by the DFCM Representative prior to being issued. When approved by DFCM, the A/E shall prepare Statements of Justification, detailed cost and time estimates of the proposed change in the work, Requests for Proposals, Construction Change Directives, and Change Orders. A/E shall prepare, reproduce, and distribute Drawings and Specifications to completely describe Work to be added, deleted, and/or modified. The preparation of all such documentation shall not be considered additional services unless the change in the Work is determined by DFCM to be a scope change and/or an unknown condition.

6. **Record Drawings (As-Builts).** The A/E shall monitor the Contractor's efforts to regularly update the redline drawings during construction. Upon completion of the Construction Phase, A/E shall prepare Record Drawings based upon redline construction drawings and/or other information provided by Contractor. A/E has no duty to verify the accuracy or completeness of said information and, unless A/E knows that said information is on its face inaccurate and/or incomplete, A/E is entitled to rely upon said information in preparing Record Drawings. If and to the extent A/E knows that said information is on its face inaccurate and/or incomplete, A/E shall promptly advise DFCM in reasonable detail of the inaccurate and/or incomplete information. Subject to said obligation to advise and its obligation to transcribe the Contractor's redline construction drawings and/or other information provided by Contractor in a manner consistent with the Standard of Care, A/E makes no representation regarding the accuracy or completeness of its Record Drawings.

7. **Review Process.** A/E shall comply with any review process required by DFCM. A/E shall make submissions to the reviewing entity in a timely manner so as not to delay the reviewing entity.

8. **Specific Delay Liability of A/E.** The A/E shall be liable to DFCM for damages incurred to DFCM or the State of Utah as a result of impact on the Contractor's critical path schedule to the extent due to A/E's error, act or omission.

9. **Notification of Impacts on Critical Path.** The A/E shall promptly notify DFCM in writing of facts, events or circumstances of which the A/E is or should be aware and which have or likely will adversely impact the critical path schedule.

## **ARTICLE VI. DELIVERABLE INSTRUMENTS OF SERVICE**

**A. DEFINED.** "Deliverable Instruments of Service" as used in this Agreement shall mean the drawings, specifications, addendum, attachments, calculations, manuals, reports, official project meeting minutes, project observation reports and/or other information, regardless of medium, identified in and required to be delivered or submitted to the DFCM under this Agreement.

**B. OWNERSHIP.** It is acknowledged and agreed that all documents developed pursuant to this Agreement are Instruments of Service. Deliverable Instruments of Service are the sole property of DFCM. DFCM shall have unlimited rights, for the benefit of DFCM, in all said deliverable instruments of service, including, but not limited to use, re-use, modification, and transferability for reference only related to the site.

**C. PROMOTIONAL ISSUES.** The A/E shall have the right to include photographic or artistic representations of the design of the Project among the A/E's promotional and professional materials, provided that the A/E appropriately gives recognition to the State of Utah regarding the Project. The A/E shall be given reasonable access to the completed Project to make such representations. However, the A/E's materials shall not include the DFCM confidential or proprietary information. The DFCM shall provide professional credit for the A/E in the DFCM's promotional materials that relate to the A/E's work for the Project. Except to the extent related to the A/E's defense of any statements made by others in regard to the A/E's performance, and notwithstanding any other provision of this Agreement, the A/E shall not make any public information release in connection with services performed under this Agreement without the advance written approval of the Director of the Division of Facilities Construction and Management.

**D. LICENSE.** A/E hereby grants DFCM a nonexclusive license for governmental purposes to any copyrighted portion of Deliverable Instruments of Service. Such license shall include, but not be limited to, the right to use and reuse such copyrighted materials to construct the buildings, facilities, or other matters covered by such copyrighted materials for additional use and to license such copyrighted materials for reuse. DFCM's rights and licenses in and to said Deliverable Instruments of Service are conditioned upon A/E receiving all sums related to DFCM approved deliverables due under this Agreement.

**E. INDEMNIFICATION RELATED TO CERTAIN DFCM'S ACTION WITH DELIVERABLES.** DFCM's use on other projects, DFCM's re-use, or DFCM's modification of the Deliverable Instruments of Service shall be at DFCM's sole risk and without recourse against A/E, its Subconsultants at any tier, and their principals, agents and employees. DFCM shall hold harmless, indemnify and defend A/E, its Subconsultants at any tier and their respective principals, agents and employees from and against any and all actions, claims, loss, or damages of any nature whatsoever to the extent related to and resulting from any said use, re-use, or modification of all or any portion of the Deliverable Instruments of Service by or on behalf of DFCM, or under any license issued by, through, or on behalf of DFCM, irrespective of any actual or alleged fault on the part of the indemnitee(s). Under no circumstances shall A/E be indemnified for the use of the Deliverable Instruments of Service for the Project that is the subject of this Agreement. For purposes of this paragraph, DFCM includes the State of Utah or any department, division or agency of the State of Utah.

**F. ACCESS TO DELIVERABLES.** A/E, for a period of three (3) years after completion of the Project, agrees to furnish and to provide access to all the aforesaid Deliverable Instruments of Service upon the request of DFCM. DFCM shall pay all costs for labor, reproduction and/or shipping of requested documents. DFCM agrees to make no demand on A/E for responsibility for DFCM use of such material for any other DFCM work which is not the subject of an Agreement between DFCM and the A/E for such use.

**G. STAMP.** If the A/E is not the same A/E commissioned for the project within the Deliverable Instruments of Services, DFCM shall reasonably remove all indications of authorship, including the title blocks, names, initials, signatures, and professional stamps of A/E, its Subconsultants at any tier, and their agents and employees.

## **ARTICLE VII. COMPENSATION, PAYMENTS TO THE A/E, AND DAMAGES**

**A. FEES IN ATTACHMENT "A".** Payment shall be in accordance with the schedule of lump sum payments for each phase listed under this Agreement as shown in the Schedule of A/E's and Subconsultant Fees in Attachment "A". Progress payments with respect to such lump sum amounts shall be based upon percentage of such services completed.

**B. PAYMENT IN FULL.** The fee for any particular phase or activity described in Attachment "A" shall be the full payment owing by DFCM for such phase or activity.

**C. WITHHOLDING OF PAYMENT; LIABILITY OF EXCESS OWING.** Should the A/E fail to perform any of its obligations hereunder, be in default of this Agreement, or otherwise fail to complete the services of this Agreement within the time established by the Project Schedule in Attachment "A", the A/E shall be liable to the DFCM for the actual damages incurred and such amount, may be deducted from any amount due or that may become due the A/E. To the extent that the damages exceed any amount that would otherwise be due the A/E, the A/E shall be liable for such excess to the DFCM. The DFCM may seek enforcement of such obligation by legal action, and if such is necessary, shall recover the related costs and attorney fees. Notwithstanding the above, the DFCM agrees that the A/E is not responsible for damages arising directly or indirectly from any delays for causes beyond the A/E's control.

**D. OTHER PREREQUISITES TO RECEIVE PAYMENT:** In addition to any other requirements under this Agreement, the following is required before any payment shall be made and/or deemed owed by the DFCM:

1. **Invoices.** The A/E shall submit invoices for progress payments not more than once a month. Invoices shall include the DFCM project and contract number, and be signed by the A/E. Each invoice shall include a detailed description by line item showing the contract prices, percentage of the services completed for the period, payments received to date, payment requested for the period, the overall percentage of completion, any lien waivers or releases previously requested by DFCM.

2. **Adjustments of Progress Payments.** The DFCM may, at its discretion, adjust any progress payments so that it corresponds to the percentage of completion as estimated by the DFCM. Notice shall be given to the A/E prior to making any such adjustments.

**E. ACCEPTANCE OF FINAL PAYMENT.** The acceptance by the A/E of final payment without a written protest filed with DFCM within three (3) days of receipt of final payment, shall release the DFCM from all claims and all liability to the A/E for fees and costs of the performance of the services pursuant to this Agreement.

**F. INTEREST ON LATE PAYMENTS.** Except as otherwise provided by law, if any payment is late based upon the provisions of this Agreement, the A/E shall be paid interest in an amount equal to the published Wall Street Journal prime rate plus 2%. The published Wall Street Journal Prime Rate shall be determined using such rate that is published closest to the 1<sup>st</sup> of the month for each month of the late period. The amount of payment of interest shall be apportioned using such rate(s) for the late period.

## **ARTICLE VIII. REQUIREMENTS FOR ADDITIONAL SERVICES.**

### **A. ADDITIONAL SERVICES; IN GENERAL.**

1. **Not Allowed when Correcting an Error, Omission or is Already Part of this Agreement.** Notwithstanding any provision of this Agreement, the A/E shall not be entitled to any additional compensation or the considering of any work as an additional service when such work is being performed in order to resolve an error or omission of the A/E or is otherwise required to meet the terms of this Agreement.

2. **Written Modification in Advance of Work Required.** The A/E shall perform additional services when authorized by a written modification to this Agreement in advance of the performance of the subject work. Failure of the A/E to obtain a written approval from the DFCM of the cost and authorization to proceed shall result in the A/E's forfeiture of the right to seek additional compensation for the contended additional service. A/E shall have no obligation, and shall not, begin or provide any additional services unless and until such written modification has been provided by the DFCM.

**ARTICLE IX.  
INSURANCE AND INDEMNIFICATION**

**A. INSURANCE.** To protect against liability, loss and/or expense arising in connection with the performance of services described under this Agreement, the A/E shall obtain and maintain in force during the entire period of this Agreement without interruption, at its own expense, the stated insurance from the [General Conditions](#). The A/E shall require all Subconsultants to have and maintain these required policies. All of the following listed insurance coverages shall be submitted to DFCM according to the [General Conditions](#) by the A/E.

1. **A/E's Professional Liability Insurance.** The A/E shall maintain a Professional Liability Insurance policy in accordance with the [General Conditions](#).

2. **Commercial General Liability Insurance.** A/E shall provide, at its own expense, Commercial General Liability Insurance in accordance with the [General Conditions](#), including independent Subconsultants.

3. **Workers' Compensation Insurance and Employers' Liability Insurance.** Worker's Compensation Insurance shall cover full liability under the Worker's Compensation Laws of the jurisdiction in which the Project is located at the statutory limits required by said jurisdiction's laws, also stated in the [General Conditions](#).

4. **Automobile.** Automobile liability insurance shall be held in accordance with the [General Conditions](#). Insurance shall cover all owned, non-owned, and hired automobiles used in connection with the work.

5. **Valuable Papers and Records Coverage and Electronic Data Processing (Data and Media) Coverage.** The A/E and all Subconsultants of the A/E shall provide coverage for the physical loss of or destruction to their work product including drawings, specifications and electronic data and media, in accordance with the [General Conditions](#).

6. **Waivers of Subrogation.** All policies required as stated in the [General Conditions](#), shall be endorsed to include waivers of subrogation in favor of the State of Utah and DFCM.

7. **Excess Coverage.** Any type of insurance or any increase of limits of liability not described in this Agreement and by the [General Conditions](#) which the A/E requires for its own protection or on account of any statute, rule or regulation, shall be its own responsibility and at its own expense.

8. **Certificates.** Before this Agreement is executed, the A/E shall submit to DFCM certificates showing proof of coverage for the policies listed in items 1-6 above.

9. **Maintain Throughout Agreement Term.** The A/E agrees to maintain all insurance required under this Agreement and in the [General Conditions](#) during the required term. If the A/E fails to furnish and maintain said required insurance, the DFCM may purchase such insurance on behalf of the A/E, and the A/E shall pay the cost thereof to the DFCM upon demand and shall furnish to the DFCM any information needed to obtain such insurance.

10. **Not Relieve A/E of Liability.** The carrying of any insurance required by this Agreement shall in no way be interpreted as relieving the A/E of any other responsibility or liability under this Agreement or any applicable law, statute, rule, regulation or order.

11. **A/E Compliance with Policies.** A/E shall not violate or knowingly permit to be violated any of the provisions of the policies on insurance required under this Agreement.

## **B. INDEMNIFICATION**

1. **“Indemnitees”** as that term is used in this Article IX-B means the State of Utah, its institutions, agencies, departments, divisions, authorities, and instrumentalities, boards, commissions, elected or appointed officers, employees, agents, and authorized volunteers.

2. **“A/E”** as that term is used in this Article IX-B, means the A/E, its Subconsultants at any tier, or any of their agents, employees including those employed directly or indirectly, or other persons or entities for whose acts the A/E or its Subconsultants at any tier may be liable.

### **3. Indemnification Requirements.**

a. **A/E’s Indemnification of Indemnities.** To the fullest extent permitted by law, A/E shall indemnify and hold harmless the Indemnities from and against every kind and character of claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, to the extent caused by any negligent or wrongful act, error or omission of the A/E.

b. **Defense by A/E.** A/E shall defend all actions brought upon such matters to be indemnified hereunder and pay all costs and expenses incidental thereto, but the State of Utah shall have the right, at its option and its own expense, to participate in the defense of any such action without relieving the A/E of any obligation hereunder. A/E shall be reimbursed by DFCM their reasonable costs and expenses incurred under this provision to the extent such costs and expenses relate to the fault of DFCM and not the A/E.

c. **Not Affect Other Indemnification Rights or Obligations.** Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person under this Agreement.

d. **Not Affected by Workmen’s Compensation or Certain Benefit Acts.** In claims against any person or entity indemnified under this paragraph by the A/E, the indemnification obligation under this paragraph shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the A/E under workers' or workmen's compensation acts, disability benefits acts or other employee benefit acts.

e. **Affect of Written Directives by DFCM.** Notwithstanding any of the above, to the extent A/E is complying with a written directive from DFCM, that is not based on the A/E’s recommendation, the A/E shall not be held liable under the indemnification provisions of this Agreement if the A/E has promptly disagreed with the written directive by delivering such objection to DFCM in writing.

f. **Specific Waiver for Damages Covered by Builder's Risk.** DFCM and A/E waive all rights against each other for damages, but only to the extent covered by the State of Utah's Builder's Risk Policy concerning damage to the Work during construction, except such rights as they may have to the proceeds of such insurance as set forth in the [General Conditions](#). DFCM and A/E each shall require similar waivers from their Subconsultants and agents at any tier.

## ARTICLE X. LIMITATIONS OF ACTIONS

**A. STATUTE OF LIMITATION AND STATUTE OF REPOSE.** An action by or against the A/E, the A/E's Subconsultant, agent, independent Subconsultant, or anyone for whom the A/E may be liable, shall comply with and be bound by the applicable and lawful statute of limitation and statute of repose provisions. Notwithstanding this, any action by or against the A/E, the A/E's Subconsultant, agent, independent Subconsultant, or anyone for whom the A/E may be liable, that is based in contract or warranty shall be commenced within six (6) years of the date of substantial completion of the improvement or abandonment of construction except that such period of limitation shall be modified as follows:

1. **Fraudulent Concealment.** In the event that the A/E, the A/E's Subconsultant, agent, independent Subconsultant, or anyone for whom the A/E may be liable has fraudulently concealed the act, error, omission or breach of duty, or the injury, damage or other loss caused by the act, error, omission or breach of duty, the six year period shall not begin to run until such time as the DFCM discovers or, through the exercise of reasonable diligence, should have discovered its claim.

2. **Willful and Intentional.** In the event that the A/E, the A/E's Subconsultant, agent, independent Subconsultant, or anyone for whom the A/E may be liable commits a willful or intentional act, error, omission, or breach of duty, the six year period shall not begin to run until such time as the DFCM discovers or, through the exercise of reasonable diligence, should have discovered its claim.

3. **Unintentional and Nonfraudulent Latent Acts, Errors, Omissions or Breaches of Duty.** In the event of an unintentional and nonfraudulent latent act, error, omission or breach of duty, the DFCM shall have the time period allowed by Utah law and the Utah Code, unless a longer period is provided for in an attachment to this Agreement.

4. **"Different Period of Limitation" from Utah Code.** These provisions are understood and agreed to by the Consultant as establishing a "different period of limitations" as that term is used in UCA 78B-2-225(3)(a) or any other similar statute of the Utah Code. These provisions are not intended to shorten any time period allowed by Utah law and code for non-contract actions, including but not limited to, those based in tort.

## ARTICLE XI. PRELIMINARY RESOLUTION EFFORTS, CLAIMS AND DISPUTES

**A. GENERAL CONDITIONS REQUIREMENTS APPLY.** The provisions of the Articles listed in this Agreement of the [General Conditions](#) shall allow to Preliminary Resolution Efforts, Claims and Disputes under this Agreement. References in all Articles in the Agreement to the term



“Contractor” and “Subcontractor” shall refer to A/E and Subconsultant under this Agreement, respectively. Unless inconsistent with the provisions of this Agreement, definitions in the [General Conditions](#) shall apply to this Agreement.

**B. TIME FOR FILING.** Notwithstanding paragraph A above, 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 denial by DFCM of an A/E request for additional monies or other relief under this Agreement;
2. In the case of a Subconsultant, after the expiration of the time period for the A/E / Subconsultant PRE process under the [General Conditions](#); or
3. When the A/E knows or should have known about any other issue where the A/E seeks additional monies, time or other relief from the State of Utah or DFCM.

**C. NOT LIMIT DFCM RIGHTS.** As stated in Rule R23-26-1(6), this does 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 this Agreement. If the Director appoints an expert or a panel to consider any such issue(s), dispute(s) or claims(s) of DFCM, the A/E shall cooperate with such expert or panel process.

## **ARTICLE XII. TERMINATION OR SUSPENSION**

**A. TERMINATION FOR CAUSE.** The DFCM or A/E may terminate this Agreement for cause should the other party fail to substantially perform the material covenants herein contained at the time and in the manner herein provided, including the failure to design the project within the Construction Budget. In such event, the party seeking termination shall give the other party fourteen (14) calendar days written notice of intent to terminate for cause. If the other party cures said default, or is diligently pursuing a cure, within said fourteen (14) day period, there shall be no termination for cause.

1. **DFCM May Proceed; Liabilities.** In the event of such termination for cause by the DFCM, the DFCM may proceed with the work in any manner deemed proper by the DFCM. The cost to the DFCM or damage to the DFCM as a result of the failure to perform shall be deducted from any sum due the A/E under this Agreement, and the balance, if any, shall be paid to the A/E upon demand. If the cost or damage to the DFCM exceeds the sums due the A/E, such costs or damages shall be paid to the DFCM by the A/E.

2. **Paid Sums Owing Through Date of Termination.** In the event of such termination for cause by the A/E, the A/E shall be paid all sums owing A/E through the date of termination. Under no circumstances, shall A/E be paid for any other sums related to the termination for cause, including but not limited to, lost profits or consequential damages.

**B. TERMINATION FOR CONVENIENCE.** The DFCM reserves the right to terminate this Agreement for convenience or any reason upon fourteen (14) calendar days written notice to A/E. The DFCM may also suspend the services of the A/E for a period not to exceed 180 days and pay the A/E all sums owing through the date of suspension. For any period beyond 180 days, the A/E may consider it a termination for convenience. Should said termination occur during or upon completion of the Schematic Design Phase, A/E shall be entitled to receive and shall be paid all fees stated herein through the Schematic Design Phase, together with reimbursable expenses incurred to date, less the amount of said fees and expenses paid by DFCM and received by A/E through said date. Should said termination occur during the Design Development Phase or any subsequent phase, A/E shall be entitled to receive and shall be paid the greater of: (i) all fees earned and reimbursable expenses incurred through the effective date of said termination, less said fees and expenses paid by DFCM and received by A/E through said date; (ii) the actual, reasonable cost to A/E and its Subconsultants (regardless of tier) of the authorized services provided, plus a profit thereon of 10%, plus reasonable reimbursable expenses incurred under this Agreement through the effective date of said termination, less said fees and expenses paid by DFCM and received by A/E through said date; or such other amount as agreed to by A/E and DFCM.

**C. DEATH OR INCAPACITY.** If the A/E transacts business as a sole proprietorship, the A/E's death or incapacity shall automatically terminate this Agreement as of the date of such event. Under these circumstances, neither the A/E nor the A/E's estate shall have any further right to perform hereunder and the DFCM shall pay the A/E or the estate shall be paid through the date of termination.

**D. DELIVERABLES PROVIDED TO DFCM.** Promptly after termination and payment of any sums owing the A/E, the A/E shall deliver all of the Deliverable Instruments of Services, including those in progress, to the DFCM as hereinbefore described.

**E. RIGHT TO COMPLETE.** Subject to the above termination provisions of this Agreement, DFCM shall have the right to complete the work or any portion thereof by itself or others, and to modify and/or use the A/E's work in part or in its entirety as hereinabove described.

### **ARTICLE XIII. GENERAL LEGAL REQUIREMENTS**

**A. SEVERABLE AGREEMENT.** This Agreement is severable. Authorization to perform one of the design phases or activities under this Agreement shall not be considered as creating any obligation of DFCM to authorize any further phase(s) or activity(ies).

**B. INDEPENDENT CONTRACTOR.** A/E is an independent contractor and not an employee of DFCM or the State of Utah. A/E shall have no authorization, express or implied, to bind the State of Utah or DFCM to any agreement, settlement, liability or understanding whatsoever, nor to perform any acts as agent for the State of Utah or DFCM, except as specifically set forth in this Agreement.

**C. THIRD PARTIES.** Nothing contained in this Agreement shall create a contractual relationship or a cause of action in favor of a third party against the State of Utah and DFCM and/or A/E or its-Subconsultants at any tier.

**D. AGREEMENT BINDING AND ASSIGNMENT LIMITATIONS.** This Agreement shall be binding upon DFCM, A/E, and their respective partners, employees, agents, joint ventures, successors and assigns. Neither the performance of this Agreement, a right or claim, nor any part thereof including any monies to be paid, may be assigned by the A/E or DFCM without the prior written consent and approval of the other party. The DFCM may assign this Agreement to an institutional lender providing financing for the Project. In such event, the lender shall assume the DFCM's rights and obligations under this Agreement. The A/E shall execute all consents reasonably required to facilitate such assignment.

**E. ENTIRE AGREEMENT AND AMENDMENT LIMITATION.** This Agreement represents the entire and integrated agreement between the DFCM and the A/E and supersedes all prior negotiations, representations or agreements, either written or oral. This agreement may be amended only by written instrument signed by both DFCM and A/E.

**F. NOTICES.** Any notice required by this Agreement shall be served upon the recipient's designated representative by hand delivery at the last known business address, or by mail with "delivery confirmation" to the last known address. Notwithstanding any other provision of this Agreement, written notice shall also be deemed to have been duly served by verified use of a FAX system by using the known and operative calling number. Service by use of the FAX system is encouraged when timely notice will benefit the DFCM, A/E, or Subconsultant. Notice shall be considered complete and verified upon the sending and confirmation of delivery using the FAX system, if on the same day notice is also sent by registered or certified mail, return receipt requested, to the last business address known to the party giving notice, confirming the FAX delivery.

**G. WAIVERS.** No waiver by the DFCM or A/E of any default shall constitute a waiver of the same default at a later time or of a different default.

**H. APPLICABLE LAW AND VENUE.** This Agreement shall be construed in accordance with the laws of the State of Utah. Venue for any legal proceeding regarding this Agreement shall in the Salt Lake County, State of Utah.

**I. AUTHORITY TO EXECUTE.** The A/E and DFCM each represent that the execution of this Agreement and the performance thereunder is within their respective duly authorized powers.

**H. ANTI-BOYCOTT ISRAEL ACT.** In accordance with Utah Code § 63G-27-201, unless this Agreement is for a total value of less than \$100,000 or A/E has fewer than 10 full time employees: (1) the A/E certifies that the A/E is not currently engaged in a boycott of the State of Israel; and (2) the A/E agrees not to engage in a boycott of the State of Israel during the duration of this Agreement.

**IN WITNESS WHEREOF**, the parties hereto have entered into this Agreement on the day and year first written above.

**A/E:**  
Consultant's Name

APPROVED AS TO AVAILABILITY  
OF FUNDS:

\*/S/ David D. Williams, Jr.  
David D. Williams, Jr.  
DFCM Financial Director

**DIVISION OF FACILITIES  
CONSTRUCTION AND MANAGEMENT**

\*/S/ DFCM  
DFCM

APPROVED AS TO FORM:  
July 10, 2017  
By: MICHAEL J. KELLEY  
Assistant Attorney General

APPROVED FOR EXPENDITURE:  
\* /S/ Division of Finance  
Division of Finance

\*Electronic signatures are effective when the AIM Status History page is attached to this agreement following this signature page. The AIM Status History page identifies the State signature.