



# **GENERAL CONDITIONS**

May 25, 2005

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# GENERAL CONDITIONS

May 25, 2005

## ARTICLE 1. GENERAL PROVISIONS.

### 1.1 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 a Contract 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.

**ADDENDA.** "Addenda" means the written or graphic instruments issued prior to the opening of Bids which clarify, correct or change the bidding documents or the Contract Documents.

**ASI.** "ASI" shall mean a Supplemental Instruction issued by the A/E to the Contractor which may result in clarifications or minor changes in the Work and does not affect the contract time or the contract amount.

**BID.** "Bid" means the offer or proposal of the bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

**BONDS.** "Bonds" mean the bid bond, performance and payment bonds and other instruments of security.

**CHANGE ORDER.** "Change Order" means a written instrument signed by the DFCM and Contractor, stating their agreement for changes of the Contract 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 Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. 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 the 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. The DFCM may by Construction Change Directive, without

invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions; even if it may impact the Contract Sum and Contract Time.

**CONTRACT.** The Contract Documents form the Contract for Construction. The term "Contract" 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 the DFCM and a Subcontractor or (3) between any persons or entities other than the DFCM and Contractor.

**CONTRACT DOCUMENTS.** The term "Contract Documents" means the Contractor's Agreement between the DFCM and Contractor (hereinafter referred to as "Contractor's Agreement"), the Conditions of the Contract (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 Contract.

**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.

**DRAWINGS.** The "Drawings" are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location and dimensions of the Work, and generally include the drawings, elevations, sections, details, schedules and diagrams.

**EXECUTIVE DIRECTOR.**

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

**INSPECTION.** The word "inspection" or its derivatives shall mean a review of the Project, including but not limited to a visual review of the Work completed to date to ascertain if the Work is in accordance with the Contract Documents, including all applicable building codes and construction standards.

**MODIFICATION.** A "Modification" is (1) a Change Order (2) Construction Change Directive or (3) ASI. The Contract may be amended or modified only by (1) a written amendment executed by both the DFCM and Contractor, or (2) by a Modification.

**NOTICE TO PROCEED.** A "Notice to Proceed" is a document prepared by the DFCM and by its terms authorizes the Contractor to commence Work on the Project. It is deemed issued upon being sent by the DFCM to the Contractor's specified address within the bid or proposal.

**PARTIAL USE.** "Partial Use" means placing a portion of the Work in service for the purpose for which it is intended (or a related purpose) before reaching Substantial Completion for all the Work. This partial use does not constitute "substantial completion".

**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.

**PRODUCT DATA.** "Product Data" means illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

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

**PROJECT MANUAL (FOR**

**CONSTRUCTION).** The "Project Manual" is the volume assembled for the Work and may include the bidding/proposal requirements, sample forms, General or Supplementary Conditions of the Contract and Specifications.

**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 Contract 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 Contract 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.

**SALES TAX and/or USE TAX.** Sales Tax and/or Use Tax, unless the context requires otherwise, shall mean the sales tax and/or use tax collected or to be collected by the Utah State Tax Commission and shall include any sales and/or use tax that the Utah State Tax Commission collects on behalf of any special district, local government or political subdivision.

**SAMPLES.** "Samples" mean physical examples, which illustrate materials, equipment or workmanship and establishes standards by which the Work will be judged.

**SHOP DRAWINGS.** "Shop Drawings" means drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

**SPECIFICATIONS.** The "Specifications" are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards, installation and workmanship for the Work, and performance of related systems and services.

**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.

**SUBSTANTIAL COMPLETION.** "Substantial Completion" is the date certified in accordance with Article 9.2 and means the date the Work or designated portion thereof is sufficiently complete,

and any lack of completion or performance does not reasonably interfere with the DFCM's intended use of the Project, in accordance with the Contract Documents so that the DFCM can occupy and use the Work for its intended use. DFCM's "intended use" or "occupy" as used in this definition, shall include any intended use or occupation by any agency or entity for which DFCM has intended to so occupy the Project.

**SUPPLEMENTARY CONDITIONS OR SUPPLEMENTARY GENERAL**

**CONDITIONS.** "Supplementary Conditions" or "Supplementary General Conditions" means the part of the Contract Documents which amends or supplements these General Conditions.

**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 2. DFCM.**

**2.1 INFORMATION AND SERVICES REQUIRED OF THE DFCM.**

**2.1.1 DFCM'S REPRESENTATIVE.**

The DFCM shall designate a DFCM Representative authorized to act in the DFCM's behalf with respect to the Project. The DFCM or such authorized representative shall render decisions within a reasonable time pertaining to documents submitted by the A/E and/or Contractor in order to avoid a compensable delay in the orderly and sequential progress of the Project.

**2.1.2 SPECIALISTS AND**

**INSPECTORS.** The DFCM will provide certified building inspection services in accordance with the adopted Building Codes. This includes 'routine' and 'special' inspections unless otherwise noted in the A/E Agreement. The DFCM may assign an inspector or specialist to note deviations from, or necessary adjustments to, the Contract Documents or to report deficiencies or defects in the Work. The inspector or specialist's activities in no way relieves the

Contractor of the responsibilities set forth in the Contract Documents.

### **2.1.3 SURVEYS AND LEGAL**

**DESCRIPTION.** The DFCM shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall review this information, including the surveys and any provided soils tests, and compare such information with observable physical conditions and the Contract Documents.

**2.1.4 PROMPT INFORMATION AND SERVICES.** Upon receipt of a written request from the Contractor, the DFCM shall furnish information or services under the DFCM's control with reasonable promptness to avoid delay in the orderly progress of the Work.

### **2.1.5 COPIES OF DRAWINGS AND PROJECT MANUALS**

**(FOR CONSTRUCTION).** Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals (for construction) as are reasonably necessary for execution of the Work. DFCM's Web Page may also provide referenced documents for the Project.

**2.1.6 OTHER DUTIES.** The foregoing is in addition to other duties and responsibilities of the DFCM enumerated herein and especially those in respect to Article 2.2 (Construction by DFCM or by Separate Contractors), Article 8 (Payments and Completion) and Article 10 (Insurance and Bonds).

## **2.2 CONSTRUCTION BY DFCM OR BY SEPARATE CONTRACTORS**

### **2.2.1 DFCM'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS.**

**(1) IN GENERAL.** The DFCM reserves the right to perform construction or operations related to the Project with the DFCM's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or

substantially similar to these including those portions related to insurance and waiver of subrogation.

**(2) COORDINATION AND REVISIONS.** The DFCM shall provide for coordination of the activities of the DFCM's own forces and of each separate Contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the DFCM in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule and Contract Sum deemed necessary after a joint review and agreement by the DFCM. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the DFCM until subsequently revised.

### **2.2.2 MUTUAL RESPONSIBILITY.**

**(1) CONTRACTOR COORDINATION.** The Contractor shall afford the DFCM and separate contractor(s) a reasonable opportunity for delivery and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

**(2) REPORTING PROBLEMS TO DFCM.** If part of the Contractor's Work depends on work by the DFCM or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report in writing to the DFCM apparent defects in workmanship that would render it unsuitable for proper execution. Failure of the Contractor to make said report shall constitute an acknowledgment that the DFCM's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects in workmanship not then reasonably discoverable.

**(3) COSTS.** Costs caused by delays or by improperly timed activities or defective construction shall be borne by the responsible party in accordance with the procedures and provisions of the Contract Documents.

**(4) CONTRACTOR**

**REMEDIAL WORK.** The Contractor shall promptly remedy damage caused by the Contractor to completed or partially completed Work or to property of the DFCM or separate contractors and subcontractors as provided in Article 6.

**ARTICLE 3. A/E.**

**3.1 A/E'S ADMINISTRATION OF THE CONTRACT.**

**3.1.1 IN GENERAL.** The A/E assists the DFCM with the administration of the Contract as described in the Contract Documents. The A/E shall have the authority to act on behalf of the DFCM only to the extent provided in the Contract Documents or A/E's Agreement.

**3.1.2 SITE VISITS.**

(1) Site visits or inspections by the A/E, the DFCM or any DFCM representative shall in no way limit or affect the Contractor's responsibility to comply with all the requirements and the overall design concept of the Contract Documents as well as all applicable laws, statutes, ordinances, resolutions, codes, rules, regulations, orders and decrees.

**(2) WRITTEN REPORT.**

The A/E shall promptly submit to the DFCM a written report subsequent to each site visit.

**3.1.3 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION.**

Except as authorized by the DFCM Representative or as otherwise provided in the Contract Documents, including these General Conditions, the A/E and Contractor shall communicate through the DFCM Representative on issues regarding the timing of the Work, cost of the Work or scope of the Work. Contractor shall comply with communication policies agreed upon at any pre-construction meeting with the DFCM. Communications by and with the A/E subconsultants shall be through the A/E. Communications by and with Subcontractors shall be through the Contractor. Communications

by and with separate contractors shall be through the DFCM.

**3.1.4 A/E MAY REJECT WORK, ORDER INSPECTION, TESTS.** The A/E shall have the responsibility and authority to reject Work which, based upon the A/E's knowledge or what may be reasonably inferred from the A/E's site observations and review of data, does not conform to the Contract Documents. Whenever the A/E considers it necessary or advisable for implementation of the intent of the Contract Documents, the A/E shall have the responsibility and authority to require additional inspections or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed, provided, however, the A/E must obtain the DFCM's prior written approval of any such additional inspections or testing. However, neither this authority of the A/E nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the A/E to the Contractor, Subcontractors, their agents or employees or other persons performing portions of the Work, including separate contractors. If the Contractor disputes the rejection of any Work and the correction thereof shall involve additional cost or time, it shall be the DFCM's option to accept such Work whether it be conforming or nonconforming.

**3.1.5 A/E REVIEW CONTRACTOR'S SUBMITTALS.**

(1) Contractor shall submit shop drawings, product data, and samples and other submittals required by the Contract Documents to the A/E as required by the approved submittal schedule.

(2) The A/E shall review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the purpose of checking for conformance with the information and design concepts expressed in the Contract Documents. A/E action taken on a submittal shall not constitute a Modification of this Agreement.

(3) The A/E's action shall be taken no later than 15 days following A/E's receipt of the submittal, unless agreed to otherwise by Contractor and DFCM, in order to avoid a delay in the Work of the Contractor or of separate contractors while allowing sufficient time in the A/E's professional judgment to permit adequate review.

(4) Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents.

(5) The A/E's review of the Contractor's submittals shall not relieve the Contractor of the obligations under the Contract Documents.

(6) The A/E's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the A/E, of any construction means, methods, techniques, sequences or procedures.

(7) The A/E's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

(8) When professional certification of performance characteristics of materials, systems or equipment is required by the Contract Documents, the A/E shall be entitled to rely upon such certifications to establish that the materials systems or equipment will meet the performance criteria required by the Contract Documents.

**3.2 OWNERSHIP AND USE OF A/E'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS.** All Drawings, Specifications and other documents prepared by the A/E are and shall remain the property of the DFCM, and DFCM shall retain all common law, statutory and other reserved rights with respect thereto. Said documents were prepared and are intended for use as an integrated set for the Project which is the subject of this Contractor's

Agreement. The Contractor shall not modify or use Contract Documents on any other project without the prior written consent of the DFCM and A/E. Any such non-permissive use or modification, by Contractor, the Contractor's Subcontractors at any tier or anyone for whose acts the Contractor is liable, shall be at Contractor's sole risk. Contractor shall hold harmless and indemnify the DFCM from and against any and all claims, actions, suits, costs, damages, loss, expenses and attorney fees arising out of such non-permissive use or modification by the Contractor. The Contractor and Subcontractors are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the A/E appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the A/E. Submittals or distributions necessary to meet official regulatory requirements or for other purposes relating to completion of the Project are not to be construed as a publication in derogation of the DFCM's copyright or other reserved rights.

## **ARTICLE 4. CONTRACTOR**

### **4.1 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR.**

**4.1.1 REVIEWING CONTRACT DOCUMENTS, INFORMATION, REPORTING ERRORS, INCONSISTENCIES OR OMISSIONS.** The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the DFCM pursuant to Article 2.1 hereinabove and shall at once report to the DFCM and A/E errors, inconsistencies or omissions discovered. The Contractor shall not be liable to the DFCM or A/E for damage resulting from errors, inconsistencies or omission in the Contract Documents, unless the Contractor recognized such error, inconsistency or omission or a Contractor of ordinary skill and expertise for the type of Work involved would have readily so recognized such error, inconsistency or omission, and the Contractor

failed to report such to the DFCM and A/E. If the Contractor performs any construction activity without such notice to the DFCM and A/E and prior to the resolution of the error, inconsistency or omission, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

**4.1.2 FIELD CONDITIONS.** The Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor, or information which a Contractor of ordinary skill and expertise for the type of Work involved would have known, before commencing activities. Errors, inconsistencies or omissions discovered shall be reported to the DFCM and A/E at once. If the Contractor performs any construction activity without such notice to the DFCM and A/E and prior to the resolution of the error, inconsistency or omission, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

**4.1.3 PERFORM IN ACCORDANCE WITH CONTRACT DOCUMENTS AND SUBMITTALS.** The Contractor shall perform the Work in accordance with the Contract Documents and submittals approved in accordance with the Contract Documents

**4.1.4 PERFORMANCE TO PRODUCE THE COMPLETE SYSTEM AND INTENDED RESULTS.** Performance by the Contractor shall be required to the extent consistent with the Contract Documents and reasonably inferable from the Contract Documents as being necessary to allow the system to function within its intended use.

**4.1.5 INTENT AND HIERARCHY.** The Contract Documents should be read as a whole and wherever possible, the provisions should be construed in order that all provisions are operable. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are

complimentary, and what is required by one Document or provisions thereof shall be as binding as if required by all the Documents or provisions thereof. In case of an irreconcilable conflict between provisions within a Contract Document or between Contract Documents, the following priorities shall govern as listed below:

(1) A particular Modification shall govern over all Contract Document provisions or Modifications issued prior to said particular Modification.

(2) Attachments to the Contractor's Agreement resulting from the Selection process including any management plan or documented interview information shall govern over addenda, the General Conditions, plans and specifications.

(3) A particular Addendum shall govern over all other Contract Document provisions issued prior to said particular Addendum. Subsequent Addenda shall govern over all prior Addenda.

(4) The Supplementary General Conditions shall govern over the General Conditions.

(5) These General Conditions shall govern over all other Contract Documents except for the Supplementary General Conditions, Addenda, Modifications and Attachments resulting from the selection process.

(6) The drawings and specifications shall not govern over any of the documents listed above.

(7) In case of a conflict or ambiguity within the same level of hierarchy of described documents, DFCM reserves the right to select the most stringent requirement unless the preponderance of the contract indicates the less stringent requirement.

**4.1.6 DIVIDING WORK AND CONTRACTOR REPRESENTATION.** Organization of the specifications into divisions, sections and articles, and arrangement of Drawings, shall not control the Contractor in

dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade. Contractor represents that the Subcontractors, Sub-subcontractors, manufacturers and suppliers engaged or to be engaged by it are and will be familiar with the requirements for performance by them of their obligations.

#### **4.1.7 PLANNING AND PRIORITY.**

The Contractor shall plan and schedule its work to facilitate the Project and shall maintain a work schedule to place proper priority to sequence work to complete the project timely.

### **4.2 SUPERVISION AND CONSTRUCTION PROCEDURES.**

#### **4.2.1 SUPERVISION AND**

**CONTROL.** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over the construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, except to the extent that the Contract Documents expressly and specifically state otherwise.

#### **4.2.2 RESPONSIBILITY.**

The Contractor shall be responsible to the State of Utah and DFCM for acts and omissions of the Contractor's employees, Subcontractors, and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor or on behalf of the Contractor.

#### **4.2.3 NOT RELIEVED OF**

**OBLIGATIONS.** The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the DFCM or its agents in the DFCM's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor or for those that the Contractor is liable.

#### **4.2.4 INSPECTIONS AND APPROVALS.**

(1) The Contractor is responsible for requesting inspections for various

stages and portions of the Work required under the Contract Documents in a timely manner.

(2) If any of the Work is required to be inspected or approved by the terms of the Contract Documents by any public authority, the Contractor shall timely request such inspection or approval to be performed in accordance with Article 9. Except as provided in Article 9, work shall not proceed without any required inspection and the associated authorization to proceed. Contractor shall promptly notify DFCM if the inspector fails to appear at the site.

### **4.3 LABOR AND MATERIALS.**

#### **4.3.1 PAYMENT BY CONTRACTOR.**

Except to the extent it is otherwise stated in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipments, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities, supplies, consumables and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

#### **4.3.2 DISCIPLINE AND**

**COMPETENCE.** The Contractor shall enforce strict discipline and good order among the Contractor's employees, its Subcontractors, agents, representatives and other persons performing under the Contract Documents. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

#### **4.4 TAXES AND OTHER PAYMENTS TO GOVERNMENT.**

The Contractor shall pay sales, consumer, use, employment-related and similar taxes related to the Work or portions thereof provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect. The Contractor shall comply with the laws and regulations regarding the payment of Sales and/or Use Tax and any exemptions. The procurement documents may have a provision regarding specific items which are exempt from State of Utah Sales Tax and/or Use Tax. Any such

exemption shall be used only for the items and the project specified in the procurement documents. Any such exemption does not apply to taxes levied by the federal government or any taxing entity outside of the State of Utah. If a Contractor properly relies upon a provision(s) of the bidding or proposal documents, and if State of Utah Sales and/or Use Tax subsequently becomes due, then the Contractor shall be paid such tax amount not included in the bid/proposal amount due to the reliance upon such provision.

#### **4.5 PERMITS, FEES, NOTICES, LABOR AND MATERIALS.**

**4.5.1 PERMITS AND FEES.** Unless required in the Supplementary General Conditions or an Addendum, it will not be necessary for the Contractor to obtain or pay for local building permits, plan check fees, electrical permits, plumbing permits, connection fees, or impact fees, nor will it be necessary to pay fees for inspections pertaining thereto.

**4.5.2 COMPLIANCE WITH PUBLIC AUTHORITIES, NOTICES.** The Contractor shall comply with and give notices required by laws, ordinances, resolutions, rules, regulations and lawful orders of public authorities bearing on the performance of the Work.

**4.5.3 CORRELATION OF CONTRACT DOCUMENTS AND ENACTMENTS.** It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, resolutions, building codes, and rules and regulations. Notwithstanding this, if the Contractor observes, or if such is readily observable to a Contractor of ordinary skill and expertise for the type of Work involved, that a portion of the Contract Documents is at variance therewith, the Contractor shall promptly notify the A/E and DFCM in writing, and necessary changes shall be accomplished by appropriate Modification.

**4.5.4 FAILURE TO GIVE NOTICE.** If the Contractor, or any Subcontractor thereof performs Work without complying with the requirements of this Article 4.5 hereinabove, the Contractor shall assume appropriate responsibility

for such Work and shall bear the appropriate amount of the attributable costs.

**4.6 SUPERINTENDENT.** The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

#### **4.7 TIME AND CONTRACTOR'S CONSTRUCTION SCHEDULES.**

##### **4.7.1 PROGRESS AND COMPLETION.**

(1) **TIME IS OF THE ESSENCE; COMPLETE WITHIN CONTRACT TIME.** Time is of the essence. By executing the Contractor's Agreement, the Contractor confirms that the Contract Time is adequate to perform the Work. The Contractor shall proceed expeditiously with adequate forces to achieve Substantial Completion within the Contract Time.

(2) **NOTICE TO PROCEED AND INSURANCE.** The Contractor shall not prematurely commence operations on the site or elsewhere prior to the issuance of a Notice to Proceed by the DFCM or prior to the effective date of insurance required by Article 10 to be furnished by the Contractor, whichever is the latter.

**4.7.2 SCHEDULE PREPARATION.** The Contractor, promptly after being awarded the Contract, shall prepare and submit for the DFCM's and A/E's review, a reasonably detailed CPM schedule for the Work. The schedule shall indicate the order, sequence, and interdependence of all items known to be necessary to complete the Work including construction, procurement, fabrication, and delivery of materials and equipment, submittals and approvals of samples, shop drawings, procedures, or other documents. Work items of the DFCM, other Contractors, utilities and other third parties that may affect or

be affected by the Contractor shall be included. If the DFCM is required, by the Contract Documents, to furnish any materials, equipment, or the like, to be incorporated into the Work by the Contractor, Contractor shall submit, with the first schedule submittal, a letter clearly indicating the dates that such items are required at the Project Site. The critical path should be identified, including the critical paths for interim completion dates and milestones. The CPM schedule shall be developed using Primavera, MS Project, or Suretrack unless otherwise authorized by the DFCM Representative. The Contractor's schedule shall be updated at least once a month and submitted with each pay request.

#### **4.7.3 INITIAL CONTRACT TIME.**

Unless otherwise specified in the bidding documents, the initial Contract Time is the time identified in the Contractor's Agreement.

**4.7.4 INTERIM COMPLETION DATES AND MILESTONES.** The schedule must include contractually specified interim completion dates and milestones. The milestone completion dates indicated are considered essential to the satisfactory performance of this Contract and to the coordination of all Work on the Project. The milestone dates listed are not intended to be a complete listing of all Work under this Contract or of interfaces with other Project Contractors.

**4.7.5 SCHEDULE CONTENT REQUIREMENTS.** The schedule shall indicate an early completion date for the Project that is no later than the Project's required completion date. The schedule, including all activity duration's shall be given in calendar days. The Schedule shall also indicate all of the following:

- (1) Interfaces with the work of outside contractors (e.g., utilities, power and with any separate Contractor);
- (2) Description of activity including activity number/numbers;
- (3) Estimated duration time for each activity;

(4) Early start, late start, early finish, late finish date, and predecessor/successors including stop-start relationships with lead and lag time for each activity;

(5) Float available to each path of activities;

(6) Actual start date for each activity begun;

(7) Actual finish date for each activity completed;

(8) The percentage complete of each activity in progress or completed;

(9) Identification of all critical path activities;

(10) The critical path for the Project, with said path of activities being clearly and easily recognizable on the time-scaled network diagram. The path(s) with the least amount of float must be identified. Unless otherwise authorized by the DFCM Representative, no more than 40% of all activities may be identified as critical path items. The relationship between non-critical activities and activities on the critical path shall be clearly shown on the network diagram;

(11) Unless otherwise authorized by the DFCM Representative, all activities on the schedule representing construction on the site may not have a duration longer than 14 days. Construction items that require more than 14 days to complete must be broken into identifiable activities on the schedule with durations less than 14 days. The sum of these activities represents the total length required to complete that construction item; and

(12) Additional requirements as specified in the Supplemental General Conditions.

**4.7.6 DFCM'S RIGHT TO TAKE EXCEPTIONS.** The DFCM reserves the right to take reasonable exception to activity duration, activity placement, construction logic or time frame for any element of the Work to be scheduled.

**4.7.7 FLOAT TIME.** Float or slack time is defined as the amount of time between the earliest start date and the latest start date or between the earliest finish date and the latest finish date of a chain of activities on the Schedule. By a proposal request or modification delivered to the Contractor, the DFCM has the right to use the float time for non-critical path activities until the Contractor has reallocated such time on a newly submitted schedule.

**4.7.8 INITIAL SCHEDULE SUBMISSION.** No progress payments will be approved until the Contractor has submitted a Project detailed CPM schedule covering the first 90 days of the Work with a general CPM schedule for the entire project. The detailed schedule for the entire project is to be completed prior to the second pay request unless otherwise authorized in writing by the DFCM Representative.

**4.7.9 UPDATES.** Prior to any approval of a pay request, the DFCM, A/E and Contractor shall review the Contractor's schedule compared to the Work completed. The DFCM approves the amount of Work completed as supported by the schedule of values and as verified by the determination of Work completed. If necessary, the Contractor shall then update and submit to the DFCM the schedule with the pay request; all of which in accordance with the DFCM's approval. All updates shall be provided in electronic and hard copy formats. At each scheduled meeting with the DFCM Representative, the Contractor shall provide a "three week look ahead" with long lead items identified.

**4.7.10 SCHEDULE OF SUBMITTALS.** The Contractor shall prepare and keep current, for the A/E's and DFCM's review, a schedule of submittals required under the Contract Documents which is coordinated with the Contractor's construction schedule and allows the A/E a reasonable time to review the submittals. This submittal schedule is to be included as part of the construction schedule. Submittals requiring expedited review must be clearly identified as such in the schedule of submittals.

**4.7.11 SCHEDULE RECOVERY.** If the Work represented by the critical path falls behind

more than 7 days, the project schedule shall be redone within 14 days showing how the Contractor shall recover the time. A narrative that addresses the changes in the schedule from the previously submitted schedule shall be submitted along with the schedule in both hard copy (appropriate report formats to be determined by the DFCM Representative) and electronic copy. The Contractor shall comply with the most recent schedules.

**4.7.12 SCHEDULE CHANGES AND MODIFICATIONS.**

(1) **CONTRACT TIME CHANGE REQUIRES MODIFICATION.** The Contract Time may only be shortened or extended by a written modification fully executed by the DFCM.

(2) **CONTRACTOR REORDERING, RESEQUENCING AND CHANGING ACTIVITY DURATIONS.** Should the Contractor, after approval of the complete detailed construction schedule, desire to change his plan of construction, he shall submit his requested revisions to the DFCM and the A/E along with a written statement of the revisions including a description of the sequence and duration changes for rescheduling the work, methods of maintaining adherence to intermediate milestones and the contract completion date and the reasons for the revisions. If the requested changes are acceptable to the DFCM, which acceptance shall not be unreasonably withheld, they will be incorporated into the Schedule in the next reporting period. If after submitting a request for change in the Contract Schedule, the DFCM does not agree with the request, the DFCM will schedule a meeting with the Contractor to discuss the differences.

(3) **CHANGES IN CONTRACT TIME.** The critical path schedule as the term is used in the provisions herein shall be based on the current version of the Contractor's schedule for the Project and accepted by the DFCM just prior to the commencement of the modification, asserted delay, suspension or interruption. If the Contractor believes it is entitled to an extension of Contract Time under the Contract Documents, the Contractor shall submit a

PCO in accordance with Article 7.2 to the A/E and the DFCM Representative accompanied by an analysis ("Requested Time Adjustment Schedule") in accordance with the Contract Documents for time extensions. The "Requested Time Adjustment Schedule" shall include "fragnets" that represent the added or changed work to the Schedule. The impact on unchanged activities caused by the changes and/or delays being analyzed shall be included in these fragnets.

A "fragnet" as used in these General Conditions and when used in the context of project scheduling is a subset of project activities that are inter-related by predecessor and successor relationships that are tied into the main schedule with identified start and completion points. Each fragnet may or may not be on the critical path. An entire schedule consists of a series of inter-related fragnets.

#### **4.7.13 EXCUSABLE DELAY.**

(1) **IN GENERAL.** If the Contractor is delayed at any time in the progress of the Work on the critical path schedule by an act or neglect of the DFCM or other causes beyond the Contractor's control or by other causes which the DFCM determines may justify delay, then the Contract Time shall be extended by Change Order. The Contractor shall immediately take all steps reasonably possible to lessen the adverse impact of such delay. Notwithstanding the above, to the extent any of the causes for delay were caused by the Contractor, reasonably foreseeable by the Contractor or avoidable by the Contractor, then to such extent the delay shall not be cause for extension of the Contract Time. For purposes of this paragraph, Contractors shall include all subcontractors and others under the responsibility of the Contractor.

The determination of the total number of days extension will be based upon the current construction schedule in effect at the inception of the change and/or delay and upon all data relevant to the extension as it exists in the project record. Once approved, such data shall be incorporated in the next monthly update of the schedule.

Contractor acknowledges and agrees that delays in work items which, according to the schedule analysis, do not affect any milestone dates or the

Contract completion dates shown on the CPM at the time of the delay, will not be the basis for a contract extension.

(2) **WEATHER-RELATED EXCUSABLE DELAYS.** Completion time will not be extended for normal bad weather or any weather that is reasonably foreseeable at the time of entering into the contract. The time for completion as stated in the contract documents includes due allowance for calendar days on which Work cannot be performed out of doors. The Contractor acknowledges that it may lose days due to weather conditions. Contract time may be extended at no cost to the DFCM if all of the following are met which must be established by the Contractor:

(a) That the weather prevented Work from occurring that is on the critical path for the project based upon a critical path schedule previously submitted to the DFCM and to the extent accepted by the DFCM;

(b) There are no concurrent delays attributed to the Contractor;

(c) The Contractor took all reasonable steps to alleviate the impact of the weather and took reasonable attempts to prevent the delay and despite such reasonable actions of Contractor, the weather impacted the critical path as described above; and

(d) One of the following occurred:

1. The weather was catastrophic, such as a tornado, hurricane, severe wind storm, severe hail storm; or

2. Based on the full history of information published from the closest station as indicated from the Western Regional Climate Center (Desert Research Institute 2215 Raggio Parkway Reno, Nevada 89512, and as may be described on the website at <http://www.wrcc.dri.edu/summary/>), one or more of the following occurred:

a. For any day between November 1 and March 31, the

minimum temperature fell below the average minimum temperature plus the extreme low temperature recorded for the month divided by 2.

b. For any day between November 1 and March 31, the maximum temperature fell below the monthly average for the minimum temperature.

c. The daily precipitation exceeded 75% of the historical one day maximum for the month.

d. The snowfall for the month exceeded 175% of the historical average snow fall for the month.

#### **4.7.14 COMPENSABLE DELAY, SUSPENSION OR INTERRUPTION.**

##### **(1) BASIC CONDITIONS.**

In addition to the other requirements of the Contract Documents, a compensable delay, suspension or interruption of the work occurs only when the following are met:

(a) Is wholly unanticipated by the parties at the time of execution of the Contractor's Agreement or is caused by the breach of a fundamental obligation of the Contract Documents attributable to the DFCM; and

(b) The Contractor delivers a written notice to A/E and DFCM within seven (7) days that the Contractor knows or should have known of the condition giving rise to the purported compensable delay, disruption, suspension or interruption, and said continuation affects the Contract Time as indicated by the last submitted and reasonable critical path schedule.

(2) **COMPENSABLE DELAY FORMULA.** To the extent of the compensable delay, the Contractor's total entitlement for all compensable delay damages is the computed result of the following formula: Contract Sum divided by Contract Time (in calendar days); the result of which is then multiplied by 0.05; and the result of which is multiplied by the number of calendar days of compensable days allowed under these General Conditions that are beyond the Contract

Time. Notwithstanding any other provision of these General Conditions or the Contract Documents, to the extent the Contractor is entitled to receive the 10% or 15% markup under Article 7.4, this provision shall be inapplicable and the markup shall be deemed to include all the compensable delay damages provided by this paragraph.

(3) **PERIOD OF COMPENSABLE DELAY, SUSPENSION OR INTERRUPTION.** The length and extent of compensable delay, shall be determined, with the use of the Project's critical path schedule, by ascertaining the number of additional days to the Contract Time that are needed in order to perform the Work in accordance with the Contract Documents as a result of the continuation of the aforesaid delay, disruption, suspension or interruption after receipt of the written notice received by the A/E and DFCM under Section 4.7.14(1)(b) above.

(4) **CONCURRENT DELAY.** Notwithstanding any other provision of these General Conditions, to the extent a non-compensable delay occurs at the same time as a compensable delay, the DFCM shall not be responsible for any compensation for the period of the non-compensable delay.

**4.7.15 TIME EXTENSION REQUESTS.** Any time extension shall be requested within 21 days after the Contractor knew or should have known about the delay and shall be supported by the critical path schedule analysis.

#### **4.7.16 LIQUIDATED DAMAGES.**

(1) **IN GENERAL.** Should the Contractor fail to complete the Work within the Contract Time, there shall be deducted from any amount due or that may become due the Contractor, the sum as stated in the Contractor's Agreement. Such sum is fixed and agreed upon by the DFCM and Contractor as liquidated damages due the DFCM by reason of the inconvenience and added costs of administration, engineering, supervision and other costs resulting from the Contractor's default, and not as a penalty. Actual damages related to delay can not be ascertained at

the time of execution of the Contract. To the extent that the liquidated damages exceed any amounts that would otherwise be due the Contractor, the Contractor shall be liable for such excess to the DFCM. DFCM may seek enforcement of such obligation by legal action, and if such is necessary, shall recover the related costs and attorney fees. Notwithstanding any other provision of these General Conditions, the availability of liquidated damages to the DFCM shall not limit the DFCM's right to seek damages or other remedies available under law or equity to the extent such damages or remedies are not based upon delay.

(2) **NO WAIVER OF DFCM'S RIGHTS.** Permitting the Contractor to continue any part of the Work after the time fixed for completion or beyond any authorized extension thereof, shall in no way operate as a waiver or estoppel on the part of the DFCM of any of its rights under the Contract Documents, including the right to liquidated damages or any other remedies or compensation.

**4.8 DOCUMENTS AND SAMPLES AT THE SITE, CERTIFYING "AS-BUILTS".** The Contractor shall maintain at the site for the DFCM, one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked weekly to record changes and selections made during construction, as well as approved Shop Drawings, Product Data, Samples and similar submittals. These aforesaid items shall be available to the A/E and shall be delivered to the A/E for submittal to the DFCM upon completion of the Work, signed by the Contractor, certifying that they show complete and exact "as-built" conditions, stating sizes, kind of materials, vital piping, conduit locations and similar matters. All notes of encountered or changed conditions shall be included.

#### **4.9 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES.**

##### **4.9.1 NOT CONTRACT DOCUMENTS.**

Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The submittal shall demonstrate, for those portions of the Work for which the submittal is required,

the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents.

**4.9.2 PROMPTNESS.** The Contractor shall review, approve and submit to the A/E, Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work, or the activities of the DFCM or separate contractors.

**4.9.3 NOT PERFORM UNTIL A/E APPROVES.** The Contractor shall perform no portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved in writing by the A/E. Such Work shall be in accordance with the approved submittals.

**4.9.4 REPRESENTATIONS BY CONTRACTOR.** By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

**4.9.5 CONTRACTOR'S LIABILITY.** The Contractor shall not be relieved of responsibility for deviations from the requirements of the Contract Documents by the A/E's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the A/E in writing of such deviation at the time of the submittal and the A/E has given written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the A/E's review and comment.

**4.9.6 DIRECT SPECIFIC ATTENTION TO REVISIONS.** The Contractor shall direct specific attention in writing to all revisions on resubmitted Shop Drawings, Product Data, Samples or similar submittals, except those

requested by the A/E and indicated on previous submittals.

#### **4.9.7 INFORMATIONAL**

**SUBMITTALS.** Informational submittals upon which the A/E is not expected to take responsive action may be so identified in the Contract Documents.

#### **4.9.8 RELIANCE ON**

**PROFESSIONAL CERTIFICATION.** When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the DFCM and A/E shall be entitled to rely upon the accuracy and completeness of such calculations and certifications. If a professional stamp is required, the professional shall be licensed in the State of Utah unless otherwise approved by the DFCM in writing. Likewise, the Contractor is entitled to rely upon the accuracy and completeness of the calculations made by the A/E in developing the Contract Documents, unless a Contractor of ordinary skill and expertise for the type of Work involved would know that such is inaccurate or incomplete and therefore must immediately notify the DFCM in writing.

#### **4.10 USE OF SITE.**

**4.10.1 IN GENERAL.** The Contractor shall confine operations at the site to areas permitted by the Contract Documents, law, ordinances, resolutions, rules and regulations, and permits and shall not unreasonably encumber the site with materials or equipment. Contractor shall take all reasonable means to secure the site, protect the site and protect the Work from any damage. The site shall be left free and clear of refuse, equipment, materials, etc. and the site shall not be subject to spilled liquids and chemicals, toxic or otherwise. Should such an incident occur while the Contractor has control of the site, the Contractor shall be responsible to clean the site and pay all associated costs, fines and penalties. Notwithstanding this, Contractor is not responsible for any damage to the site or the Work to the extent caused by the DFCM or the DFCM's agents.

**4.10.2 ACCESS TO NEIGHBORING PROPERTIES.** The Contractor shall not, except

as provided in the Contract Documents or with the DFCM's advance written consent when necessary to perform the Work, interfere with access to properties neighboring the Project site by the owners of such properties and their respective tenants, agents, invitees and guests.

**4.11 ACCESS TO WORK.** The Contractor shall provide the DFCM and A/E access to the Work in preparation and progress, wherever located.

**4.12 ROYALTIES AND PATENTS.** The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of patent rights and shall hold the DFCM and A/E harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the DFCM in writing.

#### **4.13 INDEMNIFICATION.**

##### **4.13.1 IN GENERAL.**

(1) To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the State of Utah, the State of Utah's institutions, agencies, departments, divisions, authorities, and instrumentalities, boards, commissions, elected or appointed officers, employees, agents, authorized volunteers (hereinafter the above listing of entities and persons is referred to as "indemnities") from and against every kind and character of claims, damages, losses and expenses, including but not limited to attorneys' fees, and including those events covered under the blanket Contractual Liability Coverage required under the Contract Documents, arising out of or resulting from any act or omission in the performance of the Work including the work of all the Subcontractors and their employees, provided that any such claim, damage, loss or expense is caused in whole or in part by the negligent or wrongful act or omission

of the Contractor, any Subcontractor, and their employees, provided that any such claim, damage loss or expense is caused in whole or in part by the negligent or intentional act or omission of the Contractor, any Subcontractor, or anyone directly or indirectly employed or the agent of any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. The Contractor 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, to participate in the defense of any such action without relieving the Contractor of any obligation hereunder. Notwithstanding any of the above, to the extent the Contractor is complying with a written directive from the DFCM, that is not based on the Contractor's recommendation, the Contractor shall not be held liable under the indemnification provision of this Agreement if the Contractor has promptly disagreed with the written directive by delivering such objection to the DFCM in writing.

(2) 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 Contract Documents.

(3) In claims against any person or entity indemnified under this Article 4.13 by an employee of the Contractor, Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Article 3.13 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or Subcontractor under workers' or workmen's compensation acts, disability benefits acts or other employee benefit acts.

## **ARTICLE 5. SUBCONTRACTORS.**

### **5.1 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK.**

#### **5.1.1 APPROVAL REQUIRED.**

(1) Listing of Subcontractors shall be as required by U.C.A. 63A-5-208 as amended and/or as stated in the Contract Documents, including but not limited to the "DFCM Subcontractors List Form".

(2) The Contractor shall not contract with a proposed person or entity to whom the DFCM has made a reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**5.1.2 BUSINESS AND LICENSING REQUIREMENTS.** All Subcontractors used by the Contractor shall comply with all applicable business and licensing requirements.

**5.1.3 SUBSEQUENT CHANGES.** After the lapse of twenty-four (24) hours from the bid opening, the Contractor may change its listed Subcontractors only in accordance with Rule R 23-1 and the Contract Documents and with written approval of the Director of the Division of Facilities Construction and Management.

(1) DFCM will pay the additional costs for a DFCM requested change in subcontractor if all of the following are met:

(a) If the DFCM in writing requests the change of a subcontractor;

(b) The original subcontractor is a responsible subcontractor that meets the requirements of the Contract Documents; and

(c) The original subcontractor did not withdraw as a subcontractor on the project.

(2) In all other circumstances, the Contractor shall pay the additional cost for a change in a subcontractor.

**5.1.4 BONDING OF SUBCONTRACTORS.** Subcontractors as identified by DFCM in the procurement documents, may be required to submit

performance and payment bonds to cover the full extent of their portion of the Work. This provision does not in any way limit the right of the Contractor to have subcontractors at any tier be required to have a performance and/or payment bond.

## **5.2 SUBCONTRACTUAL RELATIONS.**

**5.2.1 COMPLY WITH CONTRACT DOCUMENTS.** By appropriate enforceable agreement, and to the extent it can be practically applied, the Contractor shall require each Subcontractor to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes towards the DFCM and A/E.

**5.2.2 RIGHTS.** Each Subcontractor agreement shall preserve and protect the rights of the DFCM and A/E under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the Subcontractor agreement, the benefit of all rights and remedies against the Contractor that the Contractor, by the Contract Documents, has against the DFCM.

**5.2.3 SUB-SUBCONTRACTORS.** The Contractor shall require each Subcontractor to enter into similar agreements with its Subcontractors which complies with the requirements of Paragraphs 5.2.1 and 5.2.2 hereinabove.

**5.2.4 DOCUMENT COPIES.** The Contractor shall make available to each proposed Subcontractor, prior to execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound. Subcontractors shall similarly make copies of applicable portions of the Contract Documents available to their respective proposed Subcontractors.

## **5.3 CONTINGENT ASSIGNMENT OF SUBCONTRACTS.**

**5.3.1 CONDITIONS FOR ASSIGNMENT TO DFCM.** Each subcontract agreement for a subcontractor at any tier for a portion of the Work is assigned by the Contractor to the DFCM provided that the assignment is effective only after termination of the Contract by the DFCM for cause pursuant to Article 12.2 or stoppage of the Work by DFCM pursuant to Article 12.5, and only for those subcontract agreements which the DFCM accepts by notifying the Subcontractor in writing. The subcontract shall be equitably adjusted to meet the new conditions of the work.

## **ARTICLE 6. PROTECTION OF PERSONS AND PROPERTY.**

### **6.1 SAFETY OF PERSONS AND PROPERTY.**

**6.1.1 CONTRACTOR RESPONSIBILITY.** The Contractor shall be solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take all reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

(1) Employees on the Work and other persons who may be affected thereby;

(2) The Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or a Subcontractor; and

(3) Other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

**6.1.2 SAFETY PROGRAM, PRECAUTIONS.** The Contractor shall institute a safety program at the start of construction to minimize accidents. Said program shall continue to the final completion of the Project and conform to applicable laws and regulations including the Utah Occupational Safety and Health Rules and

Regulations as published by the Utah Industrial Commission - UOSH Division. The Contractor shall post signs, erect barriers, and provide those items necessary to implement the safety program. As soon as the Contractor proceeds with the Work, the Contractor shall have all workers and all visitors on the site wear safety hard hats, as well as all other appropriate safety apparel such as safety glasses and shoes, and obey all safety rules and regulations and statutes. The Contractor shall post a sign in a conspicuous location indicating the necessity of wearing hard hats and the Contractor shall loan such hats to visitors.

#### **6.1.3 COMPLIANCE WITH LAWS.**

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss. In particular, the Contractor shall comply with all applicable provisions of Federal, State and municipal safety laws, rules and regulations as well as building codes to prevent accidents or injury to persons on, about, or adjacent to the premises where the Work is being performed.

**6.1.4 ERECT AND MAINTAIN SAFEGUARDS.** The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including effective fences, posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

**6.1.5 UTMOST CARE.** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

**6.1.6 PROMPT REMEDY.** The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Paragraph 6.1.1 of these General Conditions caused in whole or in part by the Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them, or by

anyone for whose acts they may be liable and for which the Contractor is responsible under said Paragraph 6.1.1, except to the extent such damage or loss is directly due to errors in the Contract Documents or caused by agents or employees of the A/E or DFCM. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under the Contract Documents.

#### **6.1.7 SAFETY DESIGNEE.**

The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents, damage, injury or loss. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the DFCM and A/E.

#### **6.1.8 LOAD SAFETY.**

The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

#### **6.1.9 OFF-SITE RESPONSIBILITY.**

In addition to its other obligations under this Article 6, the Contractor shall, at its sole cost and expense, promptly repair any damage or disturbance to walls, utilities, streets, ways, sidewalks, curbs and the property of the State and third parties (including municipalities and other governmental agencies) resulting from the performance of the Work, whether by it or by its Subcontractors at any tier. The Contractor shall not cause materials, including soil and debris, to be placed or left on streets or ways.

#### **6.1.10 EMERGENCIES.**

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Contractor shall promptly notify the DFCM Representative of the action taken.

**6.2 HAZARDOUS MATERIALS.** In the event the Contractor encounters on the site material reasonably believed to be asbestos or polychlorinated biphenyl (PCB) or any other hazardous waste or substance which may endanger the health of those persons performing the Work or being on the site, the Contractor shall immediately stop Work in the area affected and

immediately report the condition to the DFCM Representative and A/E by phone with a follow-up document in writing. The Work in the affected area shall be resumed when written direction is provided by the DFCM Representative. Except to the extent provided otherwise in the Contract Documents or if the presence of hazardous materials is due to the fault of the Contractor, the Contractor shall not be required to perform without the Contractor's consent, any Work relating to asbestos, polychlorinated biphenyl (PCB) or any other hazardous waste or substance.

DFCM shall procure a licensed abatement contractor qualified to remove the hazardous material. The abatement contractor shall submit notification of demolition to the Utah Division of Air Quality. Abatement contractor shall pay the notification fee. A copy of the hazardous material survey report shall be available to all persons who have access to the construction site.

**6.3 HISTORICAL AND ARCHEOLOGICAL CONSIDERATIONS.** In the event the Contractor knows or should have known of any cultural, historical or archeological material that is either recognized as an item to be protected under Federal, State, or local law or regulation, or is an item of obvious value to the State of Utah, the Contractor shall cease any work that would interfere with such discovery and immediately report the condition to the DFCM Representative and A/E by phone with a follow-up document in writing. Work shall resume based upon the direction of the DFCM Representative. Contractor cooperation with any DFCM recognized archaeologist or other cultural/historical expert is required.

**6.4 CONTRACTOR LIABILITY.** If the Contractor fails in any of its obligations in Articles 6.1 through 6.3 above, the Contractor shall be liable to any damages to DFCM, the State of Utah or any third party resulting from such noncompliance. The Contractor shall also be liable for any mitigation or restoration effort resulting from such noncompliance. To the extent all the following is met, the Contractor may treat the discovery of such material similarly to an unforeseen condition:

6.4.1 The discovery of such material is reasonably unforeseeable given the site conditions that the Contractor should have been aware;

6.4.2 The presence of such material was not identified in any part of the Contract Documents;

6.4.3 The Contractor has undertaken all proper action to mitigate any impact of such discovery on the critical path or monies related to the Project;

6.4.4 The discovery affects the critical path or contract price from that which was contemplated by the Contract Documents; and

6.4.5 The requirements of 7.1.5 and the Contract documents are met.

**ARTICLE 7. MODIFICATIONS, REQUEST FOR INFORMATION, PROPOSED CHANGE ORDER, PRELIMINARY RESOLUTION EFFORTS AND CLAIMS PROCESS.**

**7.1 MODIFICATIONS: IN GENERAL.**

**7.1.1 TYPES OF MODIFICATIONS AND LIMITATIONS.** Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or ASI, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents. The Contractor must have a written Modification executed by DFCM under this Article 7 prior to proceeding with any Work sought to be an extra.

**7.1.2 BY WHOM ISSUED.** A Change Order or Construction Change Directive shall be issued by the DFCM Representative. An ASI is issued by the A/E or by the DFCM Representative.

The A/E shall prepare Change Orders and Construction Change Directives with specific documentation and data for the DFCM's approval and execution in accordance with the Contract Documents, and may issue ASIs 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.

**7.1.3 CONTRACTOR TO PROCEED UNLESS OTHERWISE STATED.** Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or ASI.

**7.1.4 ADJUSTING UNIT PRICES.** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of Work proposed will cause a substantial inequity to the DFCM or Contractor, the applicable unit prices may be equitably adjusted.

**7.1.5 SPECIAL NOTICES REQUIRED IN ORDER TO BE ELIGIBLE FOR ANY CONTRACT MODIFICATION.** In order to be eligible for any Modification under this Article 7, the Contractor must have met the following special notice requirements:

(1) **CONCEALED OR UNKNOWN CONDITIONS.** The Contractor must file a written notice with the DFCM Representative within seven (7) calendar days of that the Contractor knew or should have known of a site condition described below or the Contractor shall be deemed to waive any right to file any PCO, PRE or Claim for additional monies or time related to such condition:

(a) If the Contractor encounters unknown and reasonably unforeseeable subsurface or otherwise concealed physical conditions, including hazardous or historical/cultural materials under Article 6, which differ materially from those indicated by the Contract Documents or a site inspection; or

(b) If the Contractor encounters unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognized

as inherent in construction activities of the character provided for in the Contract Documents.

(2) **INCREASE IN CONTRACT TIME.** If the Contractor encounters a situation in which the Contractor knows or should have known that such situation would cause a delay, disruption, interruption, suspension or the like to the Project, the Contractor must file a notice with the DFCM Representative within seven (7) working days of when the Contractor knew or should have known of such circumstance or the Contractor shall be deemed to waive any right to file any PCO, PRE or Claim for additional monies or time related to such circumstance. To the extent the DFCM and/or the State of Utah is damaged by the failure of the Contractor to provide such notice after the Contractor knows or should have known of such circumstance, the Contractor shall be liable for liquidated damages attributable thereto, as well as any damages to the State of Utah and/or DFCM that are allowable in addition to liquidated damages.

**7.2 CONTRACTOR INITIATED REQUESTS.**

**7.2.1 THE REQUEST FOR INFORMATION, RFI, PROCESS AND TIME TO FILE.** The Contractor may file an RFI with the A/E regarding any concern which will assist the Contractor in the proper completion of the Work including, but not limited to issues related to the Contract Documents, plans and specifications. The RFI shall be filed with the A/E in a timely manner so as not to prejudice the DFCM as to the quality, time or money related to the Work.

**7.2.2 PROPOSED CHANGE ORDER (“PCO”).** Within twenty-one (21) days after the Contractor knows or should have known of a situation or concern where the Contractor is going to request additional monies or time, the Contractor must file a Proposed Change Order (“PCO”) with the DFCM Representative, or the Contractor shall be deemed to waive any right to claim additional monies or time related to such situation or concern. The PCO shall include all available documentation supporting the PCO available to the Contractor at the time of filing and the Contractor shall thereafter diligently pursue the

supplementation(s) of such documentation and promptly deliver such supplementation(s) to the DFCM Representative.

(1) **DFCM**

**REPRESENTATIVE RESPONSE.** One of the following may occur after a PCO is filed with the DFCM Representative:

(a) The DFCM Representative, after considering any input by the A/E, may reach an agreement with the Contractor and issue a Change Order.

(b) The DFCM, after considering any input by the A/E, may issue a Construction Change Directive.

(c) If the DFCM Representative, after considering any input by the A/E, disagrees with the Contractor's PCO, the DFCM representative may seek additional information or verification from the Contractor, the A/E or other sources, may negotiate with the Contractor, may issue a Change Order upon such later agreement, may retract the PR, or may issue a Construction Change Directive.

(d) If a Construction Change Directive is issued which identifies the DFCM Representative's position in regard to the subject contract sum and/or time adjustment or if the PCO is denied by the DFCM Representative, the Contractor must file a PRE under Article 7.7 below no later than twenty-one (21) days after the Contractor's receipt of the Construction Change Directive or such denial of the PCO. Failure to file a PRE in these instances shall be deemed to waive any right to additional time or money related to the PCO, Construction Change Directive or denial of the PCO. Such waiver shall entitle the DFCM to convert the Construction Change Directive into a Change Order, whether or not executed by the Contractor.

If the Construction Change Directive leaves open the determination of additional time or money related to the directed change, then the time period for commencement of filing the PRE shall not accrue until such time as the DFCM has conveyed to the Contractor a position as to the time and money owing as a result of the directed change.

The A/E must continually work with the DFCM in providing data, documentation and efforts to resolve the issues related to the PR.

**7.3 PROPOSAL REQUEST INITIATED BY DFCM.** DFCM may file a Proposal Request with the Contractor seeking information, data and/or pricing relating to a change in the contract time and or monies owing for particular scope changes or other modifications to the Contract Documents. The PR shall provide a time limit for the Contractor to file a response with the A/E and the DFCM Representative. If a proposal is not timely provided by the Contractor, DFCM may calculate the Change Order under Article 7.4.2 below. Upon such timely receipt of the proposal, one of the following shall occur:

**7.3.1 IF AGREEMENT, CHANGE ORDER ISSUED.** The DFCM Representative, after considering any input by the A/E, may reach an agreement with the Contractor and issue a Change Order.

**7.3.2 IF DISAGREEMENT.** If the DFCM Representative disagrees with the Contractor's proposal, after considering any input from the A/E, the DFCM representative may seek additional information or verification from the Contractor or other sources, may negotiate with the Contractor, may issue a Change Order upon such later agreement, may retract the PR, or may issue a Construction Change Directive. If a Construction Change Directive is issued which identifies the DFCM representative's position in regard to the subject contract sum and/or time adjustment, the Contractor must file a PRE within twenty-one (21) days of the Contractor's receipt of the Construction Change Directive, or the Contractor shall be deemed to waive any such request for additional time or money as a result of the issuance of the Construction Change Directive. Such waiver shall entitle the DFCM to convert the Construction Change Directive into a Change Order, whether or not executed by the Contractor. If the Construction Change Directive leaves open the determination of additional time or money related to the directed change, then the time period for commencement of filing the PRE shall not accrue until such time as the DFCM has conveyed

to the Contractor a position as to the time and money owing as a result of the directed change.

#### **7.4 EVALUATION OF PROPOSAL FOR ISSUING CHANGE ORDERS.**

**7.4.1 ADJUSTING SUM BASED UPON AGREEMENT.** If the Change Order provides for an adjustment to the Contract Sum, the adjustment shall be based on the mutual agreement of the Contractor and DFCM, including any terms mandated by unit price agreements or other terms of the Contract Documents.

**7.4.2 DFCM RESOLUTION OF SUM AND STANDARDS IN THE ABSENCE OF AN AGREEMENT UNDER PARAGRAPH 7.4.1.** In the absence of an agreement under Paragraph 7.4.1 above, the adjustment shall be based on an itemized accounting of costs and savings supported by appropriate data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Paragraph shall be limited to the following:

- (1) All direct and indirect costs of labor; including workers compensation insurance, social security and other federal and state payroll based taxes, and payroll based fringe benefits paid by Contractor so long as they are reasonable and no higher than that charged to other clients;
- (2) Costs of materials, on-site temporary facilities, supplies and equipment (except hand tools) required for or incorporated into the work;
- (3) Rental costs of machinery, equipment, tools (except hand tools), and on-site temporary facilities, whether rented from the Contractor or others;
- (4) Costs of permits and other fees, sales, use or similar taxes related to the Work;
- (5) Additional costs of field supervision and field office personnel directly attributable to the change; and

(6) Overhead and profit by the following liquidated formula which is not a penalty but a reasonable calculation agreed upon at the time of execution of the Contractor's Agreement, and provided by formula herein due to the fact that the actual amount due for said overhead and profit cannot easily be ascertained at the time of such execution. The markups in 7.4.2(6)(a) and (b) below are to cover the Contractor's additional payment and performance bond premiums, insurance premiums not specified under Paragraph 7.4.2(1), home office and on-site overhead and profit. Overhead and profit includes, but is not limited to the Contractor's Project Manager and Cost Estimator. Each request for pricing shall stand on its own and not be combined with other requests for pricing in determining the allowed markup described below. A particular request for pricing shall include all items reasonably related together and determinable at the time of the request. If several unrelated requests for pricing are grouped together in a single Change Order, each request for pricing will be considered separately for purposes of calculating the markup under the following formula:

- (a) A markup of 15% shall be applied to the cost of each individual charge up to \$20,000 in cost, but in no case shall the markup be less than \$150;
- (b) A markup of 10% shall be applied to the portion of the cost of each individual charge in excess of \$20,000;
- (c) Subcontractors at any tier shall be entitled to markup their costs related to a Change Order with the same percentages as specified in Paragraphs 7.4.2(6)(a) and (b) above, except that the minimum markup shall be \$50 for any individual change.

**7.4.3 CREDITS.** The amount of credit to be allowed by the Contractor to the DFCM for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed to DFCM based upon corroboration by an appropriate source.

**7.5 CONSTRUCTION CHANGE DIRECTIVES.**

**7.5.1 WHEN USED AND CONTRACTOR’S RIGHT TO CHALLENGE.**

A Construction Change Directive may be issued by the DFCM Representative in the case of a need for the Work to commence. If the Construction Change Directive leaves open the determination of additional time or money related to the directed change, then the Construction Change Directive shall indicate the timeframe(s) in which further information is to be provided to resolve the matter. At any time that the DFCM and the Contractor agree upon the time and money related to a Construction Change Directive, a Change Order shall be executed by the parties. Additionally, the Construction Change Directive may be converted to a Change Order under Paragraph 7.2.2 or Article 7.3 above.

**7.5.2 PROCEED WITH WORK AND NOTIFY DFCM ABOUT ADJUSTMENT METHOD.** Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved.

**7.5.3 INTERIM PAYMENTS BY DFCM.** Pending the final determination of the total cost of the Construction Change Directive, DFCM shall pay any undisputed amount to the Contractor.

**7.6 A/E’S SUPPLEMENTAL INSTRUCTION (Commonly referred to as an “ASI”).** The A/E may at any time that is consistent with maintaining the quality, safety, time, budget and function of the Work, issue to the Contractor a supplemental instruction (“ASI”) after approval from the DFCM Representative is obtained. The Contractor must file with the DFCM Representative a PCO under Paragraph 7.2.2 above, within 21 calendar days of the Contractor’s receipt of the ASI, or the Contractor shall be deemed to have waived any right to additional time or monies as a result of such ASI.

**7.7 PROCEDURE FOR PRELIMINARY RESOLUTION EFFORTS.**

**7.7.1 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 the DFCM. The labeling of the notice or request shall not preclude the consideration of the issue by the DFCM.

**7.7.2 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 that defines the time and sum due the Contractor but the Contractor disagrees with such assessment;

(2) Issuance of DFCM’s position in regard to a Construction Change Directive that originally left open the time and/or sum due to the Contractor;

(3) Issuance of a denial of a PCO by DFCM;

(4) In the case of a Subcontractor, after the expiration of the time period for the Contractor/Subcontractor PRE process under Paragraph 7.7.5 below; or

(5) 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.

**7.7.3 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.

#### **7.7.4 SUPPLEMENTATION.**

Additional detail of the content requirement under Paragraph 7.7.3 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 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.

#### **7.7.5 SUBCONTRACTORS.**

(1) Under no circumstances shall any provision of these Contract Documents be intended or construed to create any contractual relationship between the DFCM and any Subcontractor.

(2) The Contractor must include the provisions of this Paragraph 7.7.5 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 2<sup>nd</sup> 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 the 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 7.7.2, 7.7.3 and 7.7.4. 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 contract, 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. The 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 7.7;

(h) The Subcontractor may accompany the Contractor in participating with the 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 7.7.5, a Subcontractor shall be entitled to pursue a payment bond claim.

#### **7.7.6 PRE RESOLUTION**

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

**7.7.7 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 Contract and the DFCM shall continue to make payments in accordance with the Contract Documents.

**7.7.8 DECISION.** The DFCM shall issue to the Contractor, and any other party brought into the process by the DFCM Representative as being liable to the 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 7.7.3 and 7.7.4.

**7.7.9 DECISION FINAL UNLESS CLAIM SUBMITTED.** The decision by the 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.

**7.7.10 EXTENSION REQUIRES MUTUAL AGREEMENT.** Any time period specified in this Article 7.7 may be extended by mutual agreement of the Contractor and the DFCM.

**7.7.11 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.

#### **7.7.12 PAYMENT FOR PERFORMANCE.**

(1) Except as otherwise provided in the Contract Documents, any final decision where the 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 the DFCM in accordance with the contract 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 the 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 the DFCM shall be made in accordance with the Contract Documents.

#### **7.8. RESOLUTION OF CLAIM.**

**7.8.1 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 the DFCM, may submit a Claim in accordance with this Article 7.8 as a prerequisite for any further consideration by the DFCM or the right to any judicial review of the issue giving rise to the claim.

**7.8.2 SUBCONTRACTORS.** In order for a Subcontractor to have its issue considered in the Claim process by the DFCM, the Subcontractor that had its issue considered under Paragraph 7.7.5 may submit the issue as a Claim by filing it with the Contractor and the DFCM within the same timeframe and with the same content requirements as required of a Claim submitted by the Contractor under this rule. The 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 Paragraph 7.8.2.

(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 7.8, a Subcontractor shall be entitled to pursue a payment bond claim.

**7.8.3 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 Paragraph 7.7.8 or no more than twenty-one (21) days after the thirty (30) day period under Paragraph 7.7.11 has expired with a decision not issued, whichever is later.

**7.8.4 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 contract 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.

**7.8.5 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.

**7.8.6 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 Contract and the DFCM shall continue to make payments in accordance with the Contract Documents.

**7.8.7 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.

**7.8.8 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.

**7.8.9 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 the DFCM, has not exhausted its administrative remedies if such an administrative appeal is not undertaken.

**7.9 PAYMENT OF CLAIM.**

7.9.1 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.

7.9.2 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.

7.9.3 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.

7.9.4 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 the DFCM.

7.9.5 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 the DFCM.

7.9.6 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.

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

**7.10 ALLOCATION OF COSTS OF CLAIM RESOLUTION PROCESS.**

7.10.1 In order to file a Claim, a claimant must pay a \$1500 filing fee to the DFCM. When the Claim is a pass-through from a Subcontractor in accordance with Paragraph 7.7.5, the payment of the fee shall be made by the Subcontractor.

7.10.2 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.

7.10.3 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.

7.10.4 Each party is responsible for its own attorney fees.

**7.11 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 this Article 7.

**7.12 IMPACT ON FUTURE SELECTIONS.**

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

7.12.2 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 the DFCM's evaluation of performance.

**7.13 REPORT TO BUILDING BOARD.** The DFCM may report on the claim to the Utah State Building Board.

**7.14 DFCM'S RIGHT TO HAVE ISSUES, DISPUTES OR CLAIMS CONSIDERED.** As stated in Rule R23-26-1(6), Articles 7.7 through 7.13 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.

**ARTICLE 8. PAYMENTS AND COMPLETION.**

**8.1 SCHEDULE OF VALUES.** With the first Application for Payment, the Contractor shall submit to the A/E and the DFCM Representative a schedule of values allocated to all the various portions of the Work. The Schedule of Values shall be submitted on the form approved and provided by DFCM. The A/E shall make recommendations to the DFCM Representative

regarding the Schedule of Values including any suggested modifications. When approved, including any approved modifications, by the DFCM Representative, it shall be the basis for future Contractor Applications for Payments. The Contractor shall not be entitled to payment until receipt and acceptance of the Schedule of Values.

**8.2 APPLICATIONS FOR PAYMENT.**

**8.2.1 IN GENERAL.** The following general requirements shall be met:

(1) The Contractor shall submit to the A/E an itemized Application for Payment for Work completed in accordance with the schedule of values and that reflects retainage as provided for in the Contractor's Agreement. The Application for Payment shall be on a special form approved and provided by DFCM.

(2) Such application shall be supported by such data substantiating the Contractor's right to payment as the DFCM or A/E may require. Said data may include, but is not limited to, copies of requisitions from Subcontractors.

(3) Such applications may include requests for payment pursuant to approved Change Orders or Construction Change Directives.

(4) Such applications may not include requests for payment for portions of the Work performed by a subcontractor when the Contractor does not intend to pay to a Subcontractor because of a dispute or other reason.

(5) In executing the Application for Payment, the Contractor shall attest that subcontractors involved with prior applications for payment have been paid, unless the Contractor provides a detailed explanation why such payment may not have occurred. DFCM reserves the right to require the Contractor to submit a payment waiver from one or more subcontractors.

**8.2.2 PAYMENT FOR MATERIAL AND EQUIPMENT.** Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment

delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the DFCM and A/E, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the DFCM to establish the DFCM's title to such materials and equipment or otherwise protect the DFCM's interest, and shall include applicable insurance, storage and transportation to the site for such materials and equipment stored off the site. The DFCM may require copies of invoices or other suitable documentation.

**8.2.3 WARRANTY OF TITLE.** The Contractor warrants that title to all Work covered by an Application for Payment will pass to the DFCM no later than the time for payment. The Contractor further warrants that upon submittal of an Application for Payment, all Work for which Certificates for Payment have been previously issued and payments received from the DFCM shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, or other persons or entities making a claim by reason of having provided labor, materials and/or equipment relating to the Work.

**8.2.4 HOLDBACK BY DFCM.** Notwithstanding anything to the contrary contained in the Contract Documents, the DFCM may, as a result of the claims resolution process, withhold any payment to the Contractor hereunder if and for so long as the Contractor fails to perform any of its obligations hereunder or otherwise is in default under any of the Contract Documents.

### **8.3 CERTIFICATES FOR PAYMENT.**

**8.3.1 ISSUED BY A/E.** The A/E shall within ten (10) days after receipt of the Contractor's Application for Payment, either issue to the DFCM a Certificate for Payment, with a copy to the Contractor, for such amount as the A/E determines due, or notify the Contractor and DFCM in writing of the A/E's reasons for withholding certification in whole or in part as

provided in Paragraph 8.4.1. If the A/E fails to act within said ten (10) day period, the Contractor may file the Application for Payment directly with the DFCM Representative and the DFCM will thereafter have twenty (20) days from the date of the DFCM's receipt to resolve the amount to be paid and to pay the undisputed amount. The accuracy of the Contractor's Applications for Payment shall be Contractor's responsibility, not A/E's.

#### **8.3.2 A/E'S REPRESENTATIONS.**

The A/E's issuance of a Certificate for Payment shall constitute a representation to the DFCM that to the best of the A/E's knowledge, information and belief, based upon the A/E's observations at the site, the data comprising the Application for Payment, and what is reasonably inferable from the observations and data, that the Work has progressed to the point indicated in the Application and that the quality of the work is in accordance with the Contract Documents. The foregoing representations are subject to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed by the A/E. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment shall not be a representation that the A/E has (a) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (b) reviewed construction means, methods, techniques, sequences or procedures, (c) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the DFCM to substantiate the Contractor's right to payment, (d) ascertained how or for what purpose the Contractor used money previously paid on account of Contract Sum, or (e) any duty to make such inquiries.

### **8.4 DECISIONS TO WITHHOLD CERTIFICATION.**

**8.4.1 WHEN WITHHELD.** The A/E may decide not to certify payment and may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the DFCM, if in the A/E's judgment the representations to the DFCM required in

Paragraph 8.3.2 above can not be made. If the A/E is unable to certify payment in the amount of the Application, the A/E shall notify the Contractor and DFCM as provided in Paragraph 8.3.1 above. If the Contractor and A/E can not agree on a revised amount, the A/E shall promptly issue a Certificate for Payment for the amount to which the A/E makes such representations to the DFCM. The A/E may also decide not to certify payment or, because of subsequently discovered evidence or observations, may nullify the whole or part of a Certificate for Payment previously issued, to such extent as may be necessary in the A/E's opinion to protect the DFCM from loss because of:

- (1) Defective Work not remedied;
- (2) Third party claims filed or reasonable evidence indicating probable filing of such claims;
- (3) Failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- (4) Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- (5) Damage to the DFCM or another contractor;
- (6) Reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- (7) Failure to carry out the Work in accordance with the Contract Documents.

**8.4.2 CERTIFICATION ISSUED WHEN REASONS FOR WITHHOLDING REMOVED.** When the reasons stated in Paragraph 8.4.1 for withholding certification are removed, certification will be made for such related amounts.

**8.4.3 CONTINUE WORK EVEN IF CONTRACTOR DISPUTES A/E'S DETERMINATION.** If the Contractor disputes

any determination by the A/E or the result of the claims resolution process with regard to any Certification of Payment, the Contractor nevertheless shall expeditiously continue to prosecute the Work.

**8.4.4 DFCM NOT IN BREACH.** The DFCM shall not be deemed to be in breach of this Contract by reason of the withholding of any payment pursuant to any provision of the Contract Documents provided the DFCM's action or such withholding is consistent with the results of the dispute resolution process.

## **8.5 PROGRESS PAYMENTS.**

### **8.5.1 IN GENERAL, INTEREST OR LATE PAYMENTS.**

(1) Except as provided in Paragraph 8.3.1, the DFCM shall pay any undisputed amount within thirty (30) days of the date that the application for payment was submitted to the A/E. In no event shall DFCM be required to pay any disputed amount.

(2) Except as otherwise provided by law, if any payment is late based upon the provisions of the Contract Documents, the Contractor 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.

**8.5.2 CONTRACTOR AND SUBCONTRACTOR RESPONSIBILITY.** The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the DFCM, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payment to its Subcontractors in a similar manner.

**8.5.3 INFORMATION FURNISHED BY A/E OR DFCM TO SUBCONTRACTOR.**

The A/E or DFCM shall, on request, furnish to the Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the A/E and DFCM on account of portions of the Work done by such Subcontractor.

**8.5.4 DFCM AND A/E NOT LIABLE.**

Neither the DFCM or A/E shall have an obligation to pay, monitor or enforce the payment of money to a Subcontractor, except to the extent as may otherwise be required by law.

**8.5.5 CERTIFICATE, PAYMENT OR USE NOT ACCEPTANCE OF IMPROPER WORK.**

A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the DFCM shall not constitute acceptance of Work that is not in accordance with the Contract Documents.

**8.6 PAYMENT UPON SUBSTANTIAL COMPLETION.**

Upon Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the A/E, the DFCM shall make payment, reflecting adjustment in retainage, if any, for such Work or portion thereof as provided in the Contract Documents. To the extent allowed by law, the DFCM may retain up to 200% of the fair market value of the work that has not been completed in accordance with the Contract Documents.

**8.7 PARTIAL OCCUPANCY OR USE.**

**8.7.1 IN GENERAL.** The DFCM may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is Substantially Complete, provided the DFCM and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the

Work and commencement of the warranties required by the Contract Documents. When the Contractor considers a portion to be substantially complete, the Contractor shall prepare and submit a list to the A/E as previously provided for herein. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. Contractor shall have continuing responsibility to protect the site and the Work during such partial occupancy and shall be responsible for damage except to the extent caused solely by the DFCM during such partial occupancy or use.

The stage of progress of the Work shall be determined by written agreement between the DFCM and Contractor.

**8.7.2 INSPECTION.** Immediately prior to such partial occupancy or use, the DFCM, Contractor and A/E shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**8.7.3 NOT CONSTITUTE ACCEPTANCE.** Except to the extent it is agreed upon in writing by the DFCM, partial occupancy or use of a portion or portion of the Work shall not constitute acceptance of Work not complying with the requirement of the Contract Documents.

**8.8 FINAL PAYMENT.**

**8.8.1 CERTIFICATE FOR PAYMENT.** The A/E's final Certificate for Payment shall constitute a further representation that the conditions listed in Paragraph 8.8.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**8.8.2 CONDITIONS FOR FINAL PAYMENT.** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the A/E the following to the extent required by the DFCM Representative:

- (1) An affidavit that payrolls, bills for material and equipment, and other indebtedness connected with the Work for which the DFCM or the State of Utah's property might be responsible or encumbered (less amounts

withheld by DFCM) have been paid or otherwise satisfied;

(2) A current or additional certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days prior written notice, by certified mail, return receipt requested, has been given to the DFCM;

(3) A written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents;

(4) If requested by surety in a timely manner or by DFCM, consent of surety, to final payment;

(5) Receipt of Record Drawings, Specifications, Addenda, Change Orders and other Modifications maintained at the site; the warranties, instructions, operation and maintenance manuals, and training videos required to be furnished by the Contract Documents;

(6) Other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the DFCM. If a Subcontractor refuses to furnish a release or waiver required by the DFCM, the DFCM may require consent of Surety to the final payment. If such liens, claims, security interests or encumbrances remain unsatisfied after payments are made, the Contractor shall refund to the DFCM all money that the DFCM may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees; and

(7) A written statement demonstrating how the Contractor will distribute interest earned on retention to Subcontractors as required by Section 13.8.5, U.C.A.

**8.8.3 WAIVER OF CLAIMS: FINAL PAYMENT.** The making of final payment shall constitute a waiver of Claims by the DFCM except those arising from:

(1) Liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;

(2) Failure of the Work to comply with the requirements of the Contract Documents;

(3) Terms of warranties required by the Contract Documents; or

(4) The one-year guaranty period and any corrected Work.

**8.8.4 DELAYS NOT CONTRACTOR'S FAULT.** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, the DFCM shall, upon application by the Contractor and certification by the A/E, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims. Unless otherwise stated by the DFCM in writing, the making of final payment shall constitute a waiver of claims by the DFCM as provided in Paragraph 8.8.3 for that portion of that Work fully completed and accepted by the DFCM.

**8.8.5 WAIVER BY ACCEPTING FINAL PAYMENT.** Acceptance of final payment by the Contractor or a Subcontractor shall constitute a waiver of Claims by that payee except those Claims previously made in writing and identified by that payee as unsettled at the time of final Application for Payment. Such waivers shall be in addition to the waiver described in Paragraph 8.8.3.

**ARTICLE 9. TESTS AND INSPECTIONS, SUBSTANTIAL AND FINAL COMPLETION, UNCOVERING, CORRECTION OF WORK AND GUARANTY PERIOD.**

**9.1 TESTS AND INSPECTIONS.**

**9.1.1 IN GENERAL.** Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations, resolutions or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise specifically set forth in the Contract Documents or agreed to by the DFCM in writing, the DFCM shall contract for such tests, inspections and approvals with an independent entity, or with the appropriate public authority, and the DFCM shall bear all related costs of tests, inspections and approvals except as provided below. If any of the Work is required to be inspected or approved by the terms of the Contract Documents or by any public authority, the Contractor shall, at least two working days prior to the time of the desired inspection, and following the procedures established by the DFCM, request such inspection or approval to be performed. The Contractor shall give the A/E timely notice of when and where tests and inspections are to be made so that the A/E may observe such procedures.

**9.1.2 FAILURE OF AN INSPECTOR TO APPEAR.** Work shall not proceed without any required inspection and the associated authorization by DFCM to proceed unless the following procedures and requirements have been met:

(1) The inspection or approval was requested in a timely manner as provided in Paragraph 9.1.1;

(2) The Contractor received written confirmation from the inspection entity that the inspection was scheduled;

(3) The Contractor has contacted or attempted to contact the inspector to confirm that the inspector is unable to perform the inspection as scheduled;

(4) If the inspector has confirmed that it is unable to perform the inspection as scheduled or if the Contractor is unable to contact the inspector, the contractor shall attempt to contact the State Building Official or DFCM Representative for instruction; and

(5) The Contractor has documented the condition of the work prior to being covered through photos or other means.

**9.1.3 NONCONFORMING WORK.** If such procedures for testing, inspection or approval under Paragraph 9.1.1 reveal failure of portions of the Work to comply with the requirements established by the Contract Documents, the Contractor shall bear all costs made necessary by such failure including those of repeated procedures and compensation for the DFCM's expenses, including the cost of retesting for verification of compliance if necessary, until the DFCM accepts the Work in question as complying with the requirements of the Contract Documents.

**9.1.4 CERTIFICATES.** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the A/E.

**9.1.5 A/E OBSERVING.** If the A/E is to observe tests, inspections or approvals required by the Contract Documents, the A/E shall do so with reasonable promptness and, where practicable, at the normal place of testing.

**9.1.6 PROMPTNESS.** Tests, inspections and arrangements for approvals conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## **9.2 INSPECTIONS: SUBSTANTIAL AND FINAL.**

**9.2.1 SUBSTANTIAL COMPLETION INSPECTION.** Prior to requesting a substantial completion inspection, the Contractor shall prepare a comprehensive initial punchlist, including unresolved items from prior inspections, for review by the DFCM and A/E to determine if the Project is ready for a substantial completion inspection. If the DFCM determines that the initial punchlist indicates that the Project is not substantially complete, the initial punchlist will be returned to the Contractor with written comments. If the DFCM determines that the initial punchlist indicates that the Project may be substantially complete, the A/E shall promptly organize and

perform a Substantial Completion inspection in the presence of the DFCM and all appropriate authorities.

(1) If the A/E reasonably determines that the initial punchlist prepared by the Contractor substantially understates the amount of the Work remaining to be completed and the Project is not substantially complete, the A/E shall report this promptly to the DFCM, and upon concurrence of the DFCM, the Contractor will be assessed the costs of the inspection and punchlist preparation incurred by the A/E and the DFCM.

(2) When the Work or designated portion thereof is Substantially Complete, the A/E shall prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion; shall establish responsibilities of the DFCM and Contractor for security, maintenance, heat, utilities, damage to the work and insurance; and shall fix the time within which the Contractor shall finish all items on the punchlist accompanying the Certificate. The Certificate of Substantial Completion shall require approval by the DFCM Representative. If there is a punchlist, the Contractor shall proceed promptly to complete and correct items on the list. Failure to include an item on the punchlist does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

(3) Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof except to the extent as provided otherwise in the Contract Documents or if such warranty is related to an item where the work is not complete. Such warranty documents shall state the length of the warranty, which must comply with the Contract Documents.

(4) The Certificate of Substantial Completion shall be submitted by the A/E to the DFCM and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

(5) Except to the extent the DFCM Representative otherwise approves in

advance and in writing, the Contractor shall submit the following documents in order to achieve Substantial Completion: written warranties, guarantees, operation and maintenance manuals, and all complete as-built drawings. The Contractor must also provide or obtain any required approvals for occupancy. The Contractor is responsible for the guaranty of all Work, whether performed by it or by its Subcontractors at any tier.

### **9.2.2 FINAL COMPLETION**

**INSPECTION.** Prior to requesting a final inspection, the Contractor shall verify all punchlist items are corrected/completed. Once all punchlist items are corrected/completed the Contractor shall notify the DFCM and request a final inspection. The DFCM shall notify the A/E and perform a final inspection. Two final inspections may be allowed due to required weather changes required to complete some items. When all punchlist items are completed a final pay request will be provided by the Contractor, authorized by the A/E and processed by the DFCM.

### **9.3 UNCOVERING OF WORK.**

**9.3.1 UNCOVER UNINSPECTED WORK.** Except as provided in Paragraph 9.3.3, if a portion of the Work is covered prior to an Inspector's approval to proceed, it must, be uncovered for the Inspector's inspection and be replaced at the Contractor's expense without change in the Contract Time.

**9.3.2 OBSERVATION PRIOR TO COVERING.** Except as provided in Paragraph 9.3.3, if the DFCM or the A/E has requested in writing to observe conditions prior to any Work being covered or if such observation is specified in the Contract Documents, and the Work is covered without such observation, the Contractor shall be required to uncover and appropriately replace the Work at the Contractor's expense without change in the Contract Time. If the Contractor requests an inspection and the DFCM or A/E, including any inspector of each, does not appear, the Contractor shall immediately notify the DFCM of such lack of appearance, but shall not cover the Work without such inspection.

**9.3.3 WHEN AN INSPECTOR FAILS TO APPEAR OR A/E OR DFCM DID NOT MAKE PRIOR REQUEST.**

If Work is performed by the Contractor without an inspection as provided in Paragraph 9.1.2 or if a portion of the Work has been covered which the A/E or DFCM has not specifically requested to observe prior to its being covered or such observation is not specified by the Contract Documents, the A/E or DFCM may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement, shall, by appropriate Change Order, be charged to the DFCM. If such Work is not in accordance with the Contract Documents, the Contractor shall pay such costs unless the condition was caused by the DFCM or a separate contractor in which event the DFCM shall be responsible for payment of such costs.

**9.4 CORRECTION OF WORK AND GUARANTY PERIOD.**

**9.4.1 CONTRACTOR CORRECT THE WORK.** The Contractor shall correct Work rejected by the A/E, Inspector or DFCM, or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear the costs of correcting such rejected Work, including additional testing and inspections and compensation for the A/E's and Inspector's services and expenses made necessary thereby.

**9.4.2 GUARANTY AND CORRECTION AFTER SUBSTANTIAL COMPLETION.** If within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date for commencement of warranties established under Paragraph 9.2.1 or by terms of an applicable special warranty or guaranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, including failure to perform for its intended purpose, the Contractor shall correct it promptly after receipt of written notice from the DFCM to do so unless the DFCM has previously given the Contractor a written acceptance of such condition. The period of one

year shall be extended with respect to portions of the Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work. This obligation of the Contractor under this Paragraph 9.4.2 shall be operative notwithstanding the acceptance of the Work under the Contract, the final certificate of payment, partial or total occupancy and/or termination of the Contract. The DFCM shall give notice of observed defects with reasonable promptness, however, failure to give such notice shall not relieve the Contractor of its obligation to correct the Work at the cost that the Contractor would have incurred if the DFCM did so report with reasonable promptness. All corrected Work shall be subject to a one-year guaranty period the same in all respects as the original Work, except that such guaranty period shall commence from the time of Substantial Completion of the corrected Work. This guaranty period does not affect the DFCM's right to pursue any available remedies against Contractor.

**9.4.3 REMOVAL OF WORK.**

(1) The Contractor shall promptly remove from the premises all Work that the DFCM and/or the A/E determines as being in nonconformance with the Contract Documents, whether incorporated or not.

(2) The Contractor shall promptly replace and re-execute the Work in accordance with the Contract Documents and without expense to the DFCM.

(3) The Contractor shall bear the expense of correcting destroyed or damaged construction, whether completed or partially completed, of the DFCM or of other contractors destroyed or damaged by such removal or replacement.

(4) If the Contractor does not remove such rejected Work within a reasonable time, fixed by written notice, the DFCM may have the materials removed and stored at the expense of the Contractor.

(5) If the Contractor does not correct the nonconforming Work within a

reasonable time, fixed by written notice, the DFCM may correct it in accordance with Paragraph 12.2.2 of these General Conditions.

**9.4.4 NOT LIMIT OTHER OBLIGATIONS.** Nothing contained in this Article 9.4 shall be construed to establish a period of limitation with respect to other obligations which the Contractor may have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 9.4.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

**9.5 ADDITIONAL WARRANTIES.**

**9.5.1 IN GENERAL.** In addition to any other provisions of this Article 9, the following warranties shall apply:

(1) The Contractor warrants to the DFCM that materials and equipment furnished under the Contract will be of good quality and new, except to the extent otherwise required or expressly permitted by the Contract Documents.

(2) The Contractor also warrants to the DFCM that the Work will be free from defects not inherent in the quality required or permitted and that the Work will conform with the requirements of the Contract Documents. Work not conforming to said requirements, including substitutions not properly approved and authorized, may be considered defective at the DFCM's option.

**9.5.2 EXCLUSION.** Unless due to the negligent or intentional act or omission of the Contractor or those under the Contractor's control, or as otherwise stated in the Contract Documents, the Contractor's guaranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.

**9.5.3 FURNISH EVIDENCE ON REQUEST.** If requested by the A/E or DFCM, the Contractor shall furnish satisfactory evidence as to the type and quality of materials and equipment.

**9.6 ACCEPTANCE OF NONCONFORMING WORK.** If the DFCM prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the DFCM may do so in writing instead of requiring its removal and correction, in which case the Contract Sum shall be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

**ARTICLE 10. INSURANCE AND BONDS.**

**10.1 LIABILITY INSURANCE.**

**10.1.1 IN GENERAL.** To protect against liability, loss and/or expense arising from damage to property or injury or death of any person or persons incurred in any way out of, in connection with or resulting from the Work provided hereunder, Contractor shall obtain and maintain in force during the entire period of this Contract without interruption, at its own expense, the following insurance from insurance companies authorized to do business in the State of Utah in a form and content satisfactory to the DFCM and rated "A-" or better with a financial size category of (a) Class X or larger where the Contract Sum is \$1,000,000 or greater or (b) Class VII or larger where the Contract Sum is under \$1,000,000. Said rating and financial size category shall be as published by A.M. Best Company at the time the Contract is executed.

(1) 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. Employer's Liability Insurance shall provide the following limits of liability: \$100,000 for each accident; \$500,000 for Disease-Policy Limit; and \$100,000 for Disease-Each Employee. The Contractor shall require all Subcontractors to take

and maintain similar policies of Workers' Compensation Insurance.

(2) Commercial General Liability Insurance.

a. Commercial General Liability Insurance, on an "occurrence basis," including insurance for operations, independent contractors, subcontractors at any tier, products/completed operations and contractual liability specifically designating the Indemnity provisions of these General Conditions as an insured contract on the Certificate of Insurance. Such Commercial General Liability Insurance must be endorsed with a Broad Form Property Damage Endorsement (including Completed Operations) and afford coverage for explosion, collapse and underground hazards. Such Commercial General Liability Insurance shall be in limits not less than the following:

\$2,000,000 General Aggregate, plus:

i. If the Construction Value is \$25,000,000 or more, an additional \$5,000,000 umbrella policy (which covers aggregate and per occurrence) is required; or

ii. if the Construction Value is \$10,000,000 or more but less than \$25,000,000, an additional \$2,000,000 umbrella policy (which covers aggregate and per occurrence) is required.

\$1,000,000 Products-Completed Operations Aggregate  
\$1,000,000 Personal and Advertising Injury  
\$1,000,000 Each Occurrence

b. For purposes of this subparagraph 2(a), Construction Value means:

i. the Contract Sum if the work is being performed under a Standard Construction Contractor's Agreement;

ii. the Fixed Limit of Construction Costs if the work is being performed under a Construction Manager/General Contractor Agreement; or

iii. the Guaranteed Fixed contract Amount if the work is to be performed under a Design/Build Agreement.

(3) Automobile liability insurance for claims arising from the ownership, maintenance, or use of a motor vehicle. The insurance shall cover all owned, non-owned, and hired automobiles used in connection with the Work, with the following minimum limits of liability:

\$1,000,000 Combined Single Limit Bodily Injury and Property Damage Per Occurrence

(4) Aircraft Use. Contractor using its own aircraft, or employing aircraft in connection with the Work performed under this Agreement shall maintain Aircraft Liability Insurance with a combined single limit of not less than \$1,000,000 per occurrence. Said certificate shall state that the policy required by this paragraph has been endorsed to name the State of Utah as Additional Insureds.

(5) Unless otherwise provided by the procurement documents, the insurance requirements in 10.1.1(1) through (4) above do not apply to subcontractors or suppliers at any tier under the Contractor and any insurance requirements of subcontractors and suppliers at any tier is a matter between the General Contractor and such subcontractor or supplier.

**10.1.2 CONFIGURATIONS.** Any policy required by this Article may be arranged under a single policy for the full limit required, or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability Policy.

**10.1.3 CONTRACTOR LIABILITY.** Irrespective of the requirements as to insurance to be carried by Contractor as provided herein; insolvency, bankruptcy or failure of any insurance company to pay all claims accruing, shall not be held to relieve Contractor of any obligations hereunder.

**10.1.4 CERTIFICATE, NOTICE REQUIREMENTS, ADDITIONAL INSURED.** Before the Contract Agreement is executed,

certificates evidencing coverages as specified above are in effect, shall be furnished to the DFCM. Such insurance certificates shall contain provisions that no cancellation, material change therein or non-renewal shall become effective except upon thirty (30) days prior written notice to the DFCM as evidenced by return receipt, certified mail sent to DFCM. The Contractor shall notify the DFCM within thirty (30) days of any claims(s) against the Contractor, and if such claim(s) exceed 20% of the applicable required insured limits, the DFCM may require the Contractor to re-instate the policy to provide full protection at the original limits. For any risk not covered by the Worker's Compensation Policy, the State of Utah shall be named as additional insured parties. All insurance policies provided shall be primary and non-contributing with, and not in excess of, any other insurance or self-insurance available to the State of Utah.

**10.1.5 DEDUCTIBLE LIABILITY.**

Any and all deductibles in the above described policies shall be assumed by, for the account of, and at sole risk of Contractor. The allowable deductible for any of the policies required by these General Conditions shall be no more than \$1,000 or 0.1 percent of the Contract Amount, whichever is greater. When there is an FLCC, the FLCC shall be the Contract Amount for purposes of calculating the allowable deductible.

**10.1.6 ADDITIONAL REQUIREMENTS:**

(1) Any type of insurance or any increase of limits of liability not described in this Agreement which the Contractor requires for its own protection or on account of any statute, rule or regulation, shall be its own responsibility and at its own expense.

(2) The carrying of any insurance required by this Agreement shall in no way be interpreted as relieving the Contractor or Subcontractors of any other responsibility or liability under this Agreement or any applicable law, statute, rule, regulation or order.

(3) Contractor shall not violate or knowingly permit to be violated any of the

provisions of the policies on insurance required under these General Conditions.

**10.2 "BUILDER'S RISK" PROPERTY INSURANCE.**

**10.2.1 IN GENERAL.** The State shall provide "Builder's Risk" property insurance to protect the State, as well as all Contractors and Subcontractors, and include them as insureds, with respect to Work performed hereunder at the State's own cost and expense, according to the policies and forms currently in force with insurance carriers selected by the State's Risk Manager or issued by the State of Utah Risk Management Fund. The State of Utah's Risk Manager shall furnish, upon request, all parties in interest with copies of said policies authenticated by authorized agents of the insurers or the State of Utah's Risk Management Fund.

**10.2.2 INSPECTIONS, RECOMMENDATIONS.** DFCM, the Division of Risk Management and the Builder's Risk insurers shall have the right to inspect the Work. The Contractor shall comply with reasonable risk control recommendations made by insurers or the Division of Risk Management. Such inspections or recommendations do not relieve the Contractor of any of its responsibilities under the Contract Documents.

**10.2.3 DEDUCTIBLE.** The above described "Builders Risk" policies shall be subject to a total deductible of \$5,000 per loss occurrence, which shall be assumed by all Contractors or Subcontractors, in proportion to their share of the total amount of an insured loss occurrence.

**10.2.4 ADJUSTED WITH AND PAYABLE TO RISK MANAGER AS TRUSTEE.** Any insured property loss is to be adjusted with the State of Utah Risk Manager, and made payable to the State of Utah Risk Manager as trustee for the Contractor and Subcontractors, as their interests may appear, subject to the requirements of any applicable loss payable clause.

**10.2.5 WAIVER.** Contractor, including all Subcontractors, and DFCM hereby waive all rights against each other for damages caused by

perils insured against under the "Builder's Risk" insurance provided by DFCM, except such rights as Contractor may have to the proceeds of such insurance held by the State of Utah's Risk Manager as trustee. The DFCM and the Contractor each shall require similar waivers from their contractors, subcontractors, subconsultants and agents, at any tier.

**10.2.6 SPECIAL HAZARDS.** DFCM shall bear the risk of loss, delay and/or damage due to earthquake and/or flood and may either insure or self-insure that risk. If the Contractor requests in writing that insurance for other special hazards be included in the "Builder's Risk" policy, the State of Utah's Risk Manager shall, if possible, include such insurance in the policy and the cost thereof shall be charged to the Contractor by Change Order.

**10.3 PERFORMANCE BOND AND PAYMENT BOND.** The Contractor shall submit and maintain in full force and effect as required by law and the Contract Documents, at its own expense, on forms provided by the Division of Facilities Construction and Management, and include as part of the quoted total all costs involved in securing and furnishing, the bonds listed below, based on the completed cost of the Contract and effective upon execution of the Contract. Said bonds shall be from surety companies which are authorized to do business in the State of Utah, listed in the U. S. Department of Treasury Circular 570, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies, and acting within the limitation listed therein.

10.3.1 A full 100 percent performance bond covering the faithful execution of the Contract in accordance with the Contract Documents; and

10.3.2 A full 100 percent payment bond covering payment of all obligations arising under the Contract Documents, for the protection of each person supplying labor, service, equipment, or material for the performance of the Work.

10.3.3 Any required insurance required under the U.S. Terrorism Risk Insurance Act of

2002, any similar applicable law, or as such Act may be amended.

## **ARTICLE 11. MISCELLANEOUS PROVISIONS.**

### **11.1 A/E'S RESPONSIBILITIES.**

These General Conditions are not intended to provide an exhaustive or complete list of the A/E's responsibilities. A separate agreement between the DFCM and A/E incorporates these General Conditions by reference and includes additional Design responsibilities.

**11.2 SUCCESSORS AND ASSIGNS.** The DFCM and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. The Contractor shall not assign the Contract without the prior written consent of the DFCM, nor shall the Contractor assign any amount due or to become due as well as any rights under the Contract, without prior written consent of the DFCM.

### **11.3 WRITTEN NOTICE.**

#### **11.3.1 PERSONAL DELIVERY AND REGISTERED OR CERTIFIED MAIL.**

Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail, return receipt requested, to the last business address known to the party giving notice.

**11.3.2 FAX.** Notwithstanding any other provision of these General Conditions, 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 Contractor. 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.

#### **11.4 RIGHTS AND REMEDIES.**

**11.4.1 NOT LIMIT.** Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

**11.4.2 NOT WAIVER.** Except as expressly provided elsewhere in the Contract Documents, no action or failure to act by the DFCM, A/E or Contractor shall constitute a waiver of a right or duty afforded them under the Contract Documents, nor shall such action or failure to act constitute approval or acquiescence in a breach thereunder, except as any of the above may be specifically agreed to in writing. In no case shall the Contractor or any Subcontractors be entitled to rely upon any waiver of any of these General Conditions unless agreed to in writing by the DFCM.

#### **11.5 COMMENCEMENT OF STATUTORY LIMITATION PERIOD.**

**11.5.1 BEFORE SUBSTANTIAL COMPLETION.** Except as provided in 11.5.4 below, as to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.

**11.5.2 BETWEEN SUBSTANTIAL COMPLETION AND FINAL CERTIFICATION FOR PAYMENT.** Except as provided in Paragraph 11.5.4 below, as to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certification for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certification for Payment.

#### **11.5.3 AFTER FINAL CERTIFICATION FOR PAYMENT.**

Except as provided in Paragraph 11.5.4 below, as to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any guaranty provided under Article 9 the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 9.4.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or DFCM, whichever occurs last.

**11.5.4 EXCEPTION.** Notwithstanding any other provision of this Article 11.5 to the contrary, no applicable statute of limitations shall be deemed to have commenced with respect to any portion of the Work which is not in accordance with the requirements of the Contract Documents, which would not be visible or apparent upon conducting a reasonable investigation, and which is not discovered by the DFCM until after the date which, but for this Paragraph 11.5.4, would be the date of commencement of the applicable statute of limitations; the applicable statute of limitations instead shall be deemed to have commenced on the date of such discovery by the DFCM.

**11.6 NOT DISCRIMINATE, NO SEXUAL HARASSMENT.** Pursuant to the laws of the State of Utah, the Contractor, Subcontractors, or anyone for whose act any of them may be liable, will take affirmative action to 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. Contractor, Subcontractors, or anyone for whose act any of them 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.

**11.7 APPLICABLE LAWS.** The applicable laws and regulations of the State of Utah, as well as any applicable local laws and regulations not superseded or exempted by State law, shall govern the execution of the Work embodied in the Contract Documents as well as the interpretation of the Contract Documents.

**11.8 INTERPRETATION.** In the interest of brevity, the Contract Documents frequently omit modifying words such as “all” and “any” and articles such as “the” and “an”, but the fact that a modification or an article is absent from the statement and appears in another is not intended to affect the interpretation of either statement.

**11.9 VENUE.** In case of any dispute, which may arise under the Contract Documents, the place of venue shall be in the County of Salt Lake, Utah, unless otherwise agreed to by all the parties in writing.

**11.10 SEVERABILITY.** The invalidity of any part, paragraph, subparagraph, phase, provision or aspect of the Contract documents shall not impair or affect in any manner the validity, enforceability or effect of the remainder of the Contract Documents.

**11.11 CONSTRUCTION OF WORDS.** Unless otherwise stated in the Contract Documents, words, which have well-known technical or construction industry meanings, shall be construed as having such recognized meanings. Unless the context requires otherwise, all other technical words shall be construed in accordance with the meaning normally established by the particular, applicable profession or industry. All other words, unless the context requires otherwise, shall be construed with an ordinary, plain meaning.

**11.12 NO THIRD PARTY RIGHTS.** These General Conditions create rights and duties only as between DFCM and Contractor, and DFCM and A/E. Nothing contained herein shall be deemed as creating third party beneficiary contract rights or other actionable rights or duties as between Contractor and A/E, or as between DFCM, Contractor, or A/E on the one hand, and any other person or entity.

## **ARTICLE 12. TERMINATION OR SUSPENSION OF THE CONTRACT.**

### **12.1 TERMINATION BY CONTRACTOR.**

**12.1.1 IN GENERAL.** If the Work is stopped for a period of sixty (60) days through no act or fault of the Contractor or a Subcontractor, or their agents or employees or any other persons performing portions of the Work under contract with any of the above, the Contractor, may terminate the Contract in accordance with 12.1.2 hereinbelow for any of the following reasons:

(1) Because the DFCM has persistently failed to fulfill fundamental DFCM's obligations under the Contract Documents with respect to matters important to the progress of the Work;

(2) Issuance of an order of a court or other public authority having jurisdiction which necessitates such termination, except that where the Contractor has standing, the Contractor must cooperate in efforts to stay and/or appeal such order;

(3) An act of government, such as a declaration of national emergency, making material unavailable; or

(4) Unavoidable casualties or other similar causes as listed in Paragraph 12.2.2(2) hereinbelow.

**12.1.2 NOTICE.** If one of the reasons for termination in Paragraph 12.1.1 hereinabove exist, the Contractor may, upon ten (10) additional days' written notice to the DFCM and A/E, and such condition giving cause for termination still not cured, terminate the Contract and recover from the DFCM payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages associated only with work completed prior to the notice of termination.

### **12.2 TERMINATION BY THE DFCM FOR CAUSE.**

**12.2.1 IN GENERAL.** The DFCM Director or Designee may terminate the Contract if the Contractor fails to cure any of the following within a period of ten (10) days (or longer if the DFCM so approves in writing) after receipt of notice from the DFCM specifying the cause for termination:

(1) The Contractor persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

(2) The Contractor fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

(3) The Contractor persistently disregards laws, ordinances, or rules, regulations, resolutions or orders of a public authority having jurisdiction; or

(4) The Contractor fails to perform the Work within the time specified in the Contract Documents or any authorized extension thereof or the Contractor fails to make progress with the Work as to endanger such compliance;

(5) The Contractor fails to perform the Work or is otherwise in breach of a material provision of the Contract Documents;

(6) The Contractor fails to respond promptly to the financial responsibility inquiry under the Contractor's Agreement;

(7) As permissible by law for a reason to terminate, the Contractor is adjudged bankrupt;

(8) As permissible by law for a reason to terminate, the Contractor should make a general assignment for the benefit to creditors;

(9) As permissible by law for a reason to terminate, the Contractor should have a receiver appointed on account of the Contractor's insolvency; or

(10) The Contractor fails to follow the material safety requirements and precautions either as expressly provided in the

Contract Documents or as consistent with the customary practices in the industry.

**12.2.2 DFCM'S RIGHT TO CARRY OUT THE WORK.**

(1) If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten (10) day period (or longer if approved by the DFCM in writing) after receipt of written notice from the DFCM to cure such default or neglect, the DFCM may without prejudice to other remedies the DFCM may have, correct such deficiencies, including taking over the Work and prosecuting the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the Work, such materials, appliances, and facilities as may be on the site of the Work as well as the site as necessary for its proper completion. In such case, the DFCM shall offset from payments then or thereafter due the Contractor the cost of correcting such deficiencies, including compensation for the A/E, DFCM's staff and legal counsel's additional services and expenses made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the DFCM. The Contractor shall continue performance of the Contract to the extent not terminated.

(2) Except with respect to defaults of Subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the Contract arises out of causes beyond the control and without the fault or negligence of the Contractor or anyone for whom the Contractor may be liable. Such causes may include, but are not limited to, acts of God or of the public enemy, acts of the State of Utah or federal government in either their sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor or anyone for whom the Contractor may be liable. If the failure to perform is caused by the default of a Subcontractor, and if such default arises out of causes beyond the control of both the Contractor

and the Subcontractor, and without the fault or negligence of either of them or anyone for whom either may be liable, the Contractor shall not be liable for any excess costs for failure to perform unless the supplies or services to be furnished by the Subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery or completion schedule.

**12.2.3 ITEMS REQUIRED TO BE TRANSFERRED OR DELIVERED.** The DFCM may require the Contractor to transfer title and deliver to the DFCM, in the manner and to the extent directed by the DFCM:

(1) Any completed portion of the Work; and

(2) Any partially completed portion of the Work and any parts, tools, dies, jigs, fixtures, drawings, information, and contract rights (hereinafter called "construction materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this Contract as has been terminated; and the Contractor shall, upon direction of the DFCM, protect and preserve property in the possession of the Contractor in which the DFCM has an interest.

**12.2.4 PAYMENT.** When the DFCM terminates the Contract for one or more of the reasons stated in Paragraph 12.2.1, the DFCM may withhold payment and/or pursue all available remedies.

**12.2.5 DFCM PROTECTION IF LIENABLE.** When the subject property is lienable, the DFCM may withhold from amounts otherwise due the Contractor for such completed Work or construction materials such sum as the DFCM determines to be necessary to protect the State against loss because of outstanding liens or claims for former lien holders.

**12.2.6 CREDITS AND DEFICITS.** If the unpaid balance of the Contract Sum exceeds the full cost of finishing the Work, including compensation for the A/E's services and expenses made necessary thereby, such excess shall be paid to the Contractor. If such cost exceeds the unpaid balance, the Contractor shall pay the difference to

the DFCM this obligation for payment shall survive the termination of the Contract.

**12.2.7 IF CONTRACTOR FOUND NOT IN DEFAULT OR EXCUSABLE.** If, after notice of termination of the Contract under the provisions of this Article, it is determined for any reason that the Contractor was not in default under the provisions of this Article, or that the default was excusable under the provisions of this Article, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience provisions.

**12.2.8 RIGHTS AND REMEDIES NOT EXCLUSIVE.** The rights and remedies of the DFCM provided in this Article 12.2 shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

**12.3 SUSPENSION, DELAY OR INTERRUPTION OF WORK BY THE DFCM FOR CONVENIENCE.**

**12.3.1 BY DFCM IN WRITING.** The DFCM may in writing and without cause, order the Contractor to suspend, delay or interrupt the Work in whole or in part for such period of time as the DFCM may determine to be appropriate for the convenience of the DFCM.

**12.3.2 TIME PERIOD FOR CLAIMS.** Any PRE by the Contractor for adjustment under this Article 12.3 must be asserted by the Contractor, in writing, within twenty-one (21) days from the date of termination of such suspension, delay or interruption; provided that the DFCM may, in its sole discretion, receive and act upon any such PRE asserted at any time prior to final payment under this Contract.

**12.3.3 ADJUSTMENTS.** Any adjustment in Contract Sum and Time shall be in accordance with Articles 3, 4, and 7.

**12.4 TERMINATION FOR CONVENIENCE OF THE DFCM.**

**12.4.1 IN GENERAL.**

The performance of Work under this Contract may be terminated by the DFCM in accordance with this Article 12.4 in whole, or from time to time, in part, whenever the DFCM shall determine that such termination is in the best interest of the DFCM or any person for whom the DFCM is acting under this Contract. Any such termination shall be effected by delivery to the Contractor of a notice of termination specifying the extent to which performance of Work under the Contract is terminated, and the date upon which such termination becomes effective.

#### **12.4.2 CONTRACTOR**

**OBLIGATIONS.** After receipt of a notice of termination, and except as otherwise directed by the DFCM in writing, the Contractor shall:

(1) Stop work under the Contract on the date and to the extent specified in the notice of termination;

(2) Place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the Work under the Contract as is not terminated;

(3) Terminate all orders and subcontracts to the extent that they relate to performance of Work terminated by the notice of termination;

(4) Assign to the DFCM in the manner, at the times, and to the extent directed by the DFCM, all of the right, title and interest of the Contractor under the orders and subcontracts so terminated, in which case the DFCM shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the DFCM, which approval or ratification shall be final for all the purposes of this Article 12.4;

(6) Transfer title and deliver to the DFCM in the manner, at the times, and to the extent, if any, directed by the DFCM:

(a) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of the Work terminated by the notice of termination; and

(b) The completed or partially completed drawings, information, and other property which, if the Contract had been completed, would have been required to be furnished to the DFCM;

(7) Use best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the DFCM, any property of the types referred to in Paragraph 12.4.2(6) above; provided, however, that the Contractor:

(a) Shall not be required to extend credit to any purchaser; and

(b) May acquire any such property under the conditions prescribed by and at a price or prices approved by the DFCM; and provided further that the proceeds of any such transfer of or disposition shall be applied in reduction of any payments to be made by the DFCM to the Contractor under this Contract or shall otherwise be credited to the price or cost of the Work covered by this Contract or paid in such other manner as the DFCM may direct;

(8) Complete performance of such part of the Work as shall not have been terminated by the notice of termination; and

(9) Take such action as may be necessary, or as the DFCM may direct, for the protection and preservation of the property related to this Contract which is in the possession of the Contractor in which the State has or may acquire an interest.

#### **12.4.3 TERMINATION CLAIM.**

After receipt of a notice of termination, the Contractor may submit to the DFCM a PRE, in the form and with certification prescribed by the DFCM. Such PRE shall be submitted promptly

but in no event not later than sixty (60) days from the effective date of termination.

**12.4.4 AGREED UPON PAYMENT.**

Subject to the provisions of Paragraph 12.4.3 above, the Contractor and the DFCM may agree upon the amount to be paid to the Contractor by reason of the total or partial termination of Work pursuant to this Article 12.4.

**12.4.5 PAYMENT NOT AGREED UPON.**

In the event of the failure of the Contractor and the DFCM to agree, as provided in Paragraph 12.4.4, upon the whole amount to be paid to the Contractor by reason of the termination of Work pursuant to this Article 12.4, the DFCM shall pay to the Contractor the amounts determined by the DFCM as follows, but without duplication of any amounts agreed upon in accordance with Paragraph 12.4.4:

(1) With respect to all Contract Work performed prior to effective date of the notice of termination, the total (without duplication of any items) of:

(a) The cost of such Work including undisputed Claim amounts;

(b) The cost of terminating, settling and paying claims arising out of the termination of Work under subcontracts or orders as provided in Paragraph 12.4.2(5) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by Subcontractors prior to the effective date of the notice of termination under this Contract, which amounts shall be included in the cost on account of which payment is made under Paragraph 12.4.5(1)(a) above;

(c) A sum, as overhead and profit on Paragraph 12.4.5(1)(a) above, determined by the DFCM to be fair and reasonable;

(d) The reasonable cost of the preservation and protection of property incurred pursuant to Paragraph 12.4.2(9); and any other reasonable cost incidental to termination of Work under this Contract, including expenses incidental to the determination of the amount due

to the Contractor as the result of the termination of Work under this Contract.

(2) The total sum to be paid to the Contractor under Paragraph 12.4.5(1) above shall not exceed the total Contract Sum as reduced by the amount of payments otherwise made and as further reduced by the Contract price of work not terminated. Except for normal spoilage, and except to the extent that the DFCM shall have otherwise expressly assumed the risk of loss in writing, there shall be excluded from the amounts payable to the Contractor under Paragraph 12.4.5(1) above, the fair value of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the DFCM, or to a buyer pursuant to Paragraph 12.4.2(7).

**12.4.6 DEDUCTIONS.** In arriving at the amount due the Contractor under this Article 12.4, there shall be deducted:

(1) All unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this Contract;

(2) Any Claim which the State may have against the Contractor in connection with this Contract; and

(3) The agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this Article 13.4, and not otherwise recovered by or credited to the DFCM.

**12.4.7 PARTIAL TERMINATION.** If the termination is partial, the Contractor may file with the DFCM a PRE for the amounts specified in the Contract relating to the continued portion of the Contract and such equitable adjustment as may be agreed upon shall be made in such amounts. Any PRE under this Paragraph 12.4.7 must be filed within twenty-one (21) days from the effective date of the notice of termination.

**12.4.8 PARTIAL PAYMENTS.** The DFCM may, from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs

incurred by the Contractor in connection with the terminated portion of this Contract whenever, in the opinion of the DFCM the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Article 12.4, such excess shall be payable by the Contractor to the DFCM upon demand, together with interest at a rate equal to the average rate at the time being received from the investment of state funds, as determined by the State Treasurer, for the period until the date such excess is repaid to the DFCM; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten (10) days after the date of such retention or disposition, or such later date as determined by the DFCM by reason of the circumstances.

**12.4.9 PRESERVE AND MAKE AVAILABLE RECORDS.** Unless otherwise provided for in this Contract, or by applicable law, the Contractor shall, from the effective date of termination until the expiration of three years after final settlement under this Contract, preserve and make available to the DFCM at all reasonable times at the office of the Contractor, but without direct charge to the DFCM, all books, records, documents and other evidence bearing on the costs and expenses of the Contractor under this Contract and relating to the Work terminated hereunder, or, to the extent approved by the DFCM Representative, photographs, micrographs, or other authentic reproductions thereof.

**12.5 DFCM'S RIGHT TO STOP THE WORK.** If the Contractor fails to correct Work or fails to carry out Work, as required by the Contract Documents or fails to comply with all required and customary safety precautions; the DFCM, by written order signed personally or by an agent specifically so empowered by the DFCM in writing, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the DFCM to stop the Work shall not give rise to a duty on the part of the DFCM to exercise this right for the benefit of the Contractor or any other person or entity.