



# GENERAL CONDITIONS

August 31, 2020

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# GENERAL CONDITIONS

**August 31, 2020**

THESE GENERAL CONDITIONS (“General Conditions”) are part of and subject to the Contractor’s Agreement (defined below) between DFCM (defined below) and Contractor (defined below).

## **ARTICLE 1. GENERAL PROVISIONS.**

### **1.1 DEFINITIONS.**

**ARCHITECT/ENGINEER OR A/E.** “Architect / Engineer” or “A/E” means the person or entity practicing as a design professional, including architect, engineer, interior designer, and/or landscape architect, retained under separate agreement with DFCM to act on behalf of DFCM according to the Contract Documents (defined below) and the A/E’s employees, representatives and consultants. For Work (defined below) where there is no A/E hired by DFCM, references in these General Conditions to A/E shall be deemed to refer to DFCM’s Representative.

**ADDENDA.** “Addenda” means the written or graphic instruments issued prior to the execution of the Contractor’s Agreement (defined below) that clarify, correct, or change the bidding documents or the Contract Documents.

**A/E’s SUPPLEMENTAL INSTRUCTION OR ASI.** “A/E’s Supplemental Instruction” or “ASI” means a supplemental instruction issued by the A/E to Contractor that results in a clarification, correction, or minor change in the Work and does not affect the Contract Time (defined below) or the Contract Price (defined below).

**AMENDMENT.** “Amendment” means any document or communication that changes (or purports to change) the terms of Contractor’s Agreement and/or the General Conditions, except as to: (1) scope of the Work; (2) Contract Price; and/or (3) Contract Time. With the exception of Supplemental General Conditions (defined below), no Amendment shall be valid and/or binding on DFCM unless: (1) the Amendment is set forth in a separate document, clearly titled “Amendment”; and (2) the Amendment is specifically and expressly accepted in writing by the Director (defined below).

**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” means collectively the bid bond, performance bond, payment bond, and any other instruments of security.

**CHANGE ORDER.** “Change Order” means a written instrument signed by both DFCM and Contractor, issued after the execution of the Contractor’s Agreement on DFCM’s form, authorizing: (1) a change in the Work; (2) an adjustment of the Contract Price; and/or (3) an adjustment of the Contract Time.

**CLAIM.** “Claim” means a dispute, demand, assertion or other matter submitted by 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”) (defined below) shall not be considered a “Claim”. A request for an amendment of the Contract Documents, requested Change Order or a Construction Change Directive (“CCD”) (defined below) is not a PRE or Claim unless agreement cannot be reached, and the procedures of these General Conditions are followed.

**CONSTRUCTION CHANGE DIRECTIVE.** “Construction Change Directive” means a written order signed by DFCM, issued after execution of the Contractor’s Agreement, directing Contractor to perform a change in the Work and stating a proposed basis for adjustment, if any, in the Contract Price and/or Contract Time.

**CONTRACT DOCUMENTS.** “Contract Documents” means collectively Contractor’s Agreement, these General Conditions of Contractor’s Agreement, applicable Supplemental General Conditions, Drawings (defined below), Specifications (defined below), Addenda, other documents listed in the Contractor’s Agreement, authorized Amendments and Supplementary Conditions and Modifications (defined below) 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 representations which are memorialized in writing and documented as an attachment to the Contractor’s Agreement.

**CONTRACT PRICE.** “Contract Price” means the total amount payable by DFCM to Contractor for performance of the Work, including any authorized changes in the Work.

**CONTRACT TIME.** “Contract Time” means the time within which Contractor shall complete the Work, including any authorized changes in the Work

**CONTRACTOR.** “Contractor” means the person or entity identified as such in the Contractor’s Agreement. As used in the Contract Documents, “Contractor” includes Contractor’s employees, agents, representatives, subcontractors at any tier, and any other third party hired by Contractor to perform a portion of the Work and is referred to throughout the Contract Documents as if singular in number.

**CONTRACTOR’S AGREEMENT.** “Contractor’s Agreement” means, unless the context requires otherwise, the agreement executed by the Contractor and DFCM for the Work.

**DAY.** “Day” or “days” means 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 which fails to meet generally accepted craft standards, or which has been damaged.

**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 a particular function described in the Contract Documents.

**DFCM.** “DFCM” means the State of Utah, Division of Facilities Construction and Management. Unless the context requires otherwise, DFCM is the “Owner” as that term is commonly understood in the construction industry.

**DRAWINGS.** “Drawings” means 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 includes drawings, elevations, sections, details, schedules, and diagrams, including electronic copies.

**EXECUTIVE DIRECTOR.** “Executive Director” means the Executive Director of the Utah Department of Administrative Services, including unless otherwise stated, the Executive Director’s duly authorized designee.

**FINAL COMPLETION.** “Final Completion” means the date when all Work to be performed by Contractor has been completed and accepted in writing by DFCM.

**INSPECTION.** “Inspection” or its derivatives means a review of the Work, 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.** “Modification” means: (1) a Change Order; (2) a Construction Change Directive; or (3) an ASI. Contractor’s Agreement may be amended or modified only by: (1) an authorized Amendment; or (2) a Modification.

**NOTICE TO PROCEED.** “Notice to Proceed” means a document prepared by DFCM that authorizes Contractor to commence Work. It shall be deemed issued upon being sent by DFCM to Contractor’s address specified in Contractor’s Bid.

**PRELIMINARY RESOLUTION EFFORT OR PRE.** “Preliminary Resolution Effort” or “PRE” means the processing of a request for preliminary resolution or any similar notice about an issue 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 Contractor to illustrate materials or equipment for some portion of the Work.

**PROPOSAL REQUEST OR PR.** “Proposal Request” or “PR” means a request made by DFCM to Contractor requesting a proposal to resolve an issue as part of the Change Order process.

**PROPOSED CHANGE ORDER OR PCO.** “Proposed Change Order” or “PCO” means a request by Contractor submitted to the DFCM Representative to commence the Change Order 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 any other matter for which Contractor intends to seek an increase in the Contract Price and/or extension of the Contract Time.

**REQUEST FOR INFORMATION OR RFI.** “Request for Information” or “RFI” means a written request from Contractor to the A/E seeking information, direction, or clarification related to the Contract Documents, including Drawings and/or Specifications.

**RULE.** “Rule”, unless the context requires otherwise, means a rule of the Utah Administrative Code.

**SALES TAX AND/OR USE TAX.** “Sales Tax” and/or “Use Tax”, unless the context requires otherwise, means 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 that illustrate materials, equipment or workmanship and establish standards by which the Work shall be judged.

**SHOP DRAWINGS.** “Shop Drawings” means drawings, diagrams, schedules and other data specially prepared for the Work by Contractor, or a subcontractor at any tier, manufacturer, supplier or distributor to illustrate some portion of the Work.

**SPECIFICATIONS.** “Specifications” means 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 any person or entity under contract with Contractor to provide services or labor for the Work. “Subcontractor” includes a trade contractor or specialty contractor. “Subcontractor” does not include suppliers who provide only materials, equipment or supplies to Contractor or a Subcontractor. 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 “Sub-subcontractor” means a person or entity that has a contract with a Subcontractor to provide services or labor for the Work and also includes all lower tier sub-subcontractors. The terms “Subcontractor” and “Sub-subcontractor” do not include a separate contractor retained by DFCM or subcontractors or sub-subcontractors of a separate contractor retained by DFCM.

**SUBSTANTIAL COMPLETION.** “Substantial Completion” and its derivatives means the date certified in accordance with *Section 9.3* when the Work, or a designated portion thereof, is sufficiently complete, and any lack of completion or performance does not materially interfere with DFCM’s intended use of the Work, in accordance with the Contract Documents, so that 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 that DFCM intends to use or occupy the Work.

**SUPPLEMENTAL GENERAL CONDITIONS.** “Supplemental General Conditions” means the Supplemental General Conditions identified on DFCM’s website, [dfcm.utah.gov](http://dfcm.utah.gov), applicable to the Work, if any, that supplements these General Conditions. Supplemental General Conditions are authorized Amendments.

**SUPPLEMENTARY CONDITIONS.** “Supplementary Conditions” means the part of the Contract Documents, if any, that amends or supplements these General Conditions and/or applicable Supplemental General Conditions. Supplementary Conditions, if authorized, are an Amendment.

**WORK.** “Work” means the construction, services, supervision, labor, tools, equipment, materials, products and transportation, to be furnished by Contractor, so as to fulfill the Contractor’s obligations as required by the Contract Documents.

## **ARTICLE 2. DFCM.**

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

**2.1.1 DFCM’S REPRESENTATIVE.** DFCM shall designate a representative authorized to act on behalf of DFCM with respect to the Work (“DFCM’s Representative”). Unless the context requires otherwise, “DFCM’s Representative” is the “Owner’s representative” as that term is commonly understood in the construction industry. DFCM’s Representative shall have authority to review and approve the Work, including

the time schedule for completion, and the authority (but not a duty) to stop the Work for any reason, including, without limitation, unsafe conditions, or to direct Contractor to remedy, repair, or replace any Work, if necessary, to ensure its proper execution. DFCM and DFCM's Representative shall endeavor to render decisions pertaining to documents submitted by the A/E and/or Contractor to avoid a delay in the orderly and sequential progress of the Work. Contractor shall be responsible for time lost and the cost of correcting Work that in DFCM's judgment was executed improperly. DFCM shall be the final interpreter of the Contract Documents; the decision of DFCM in the absence of arbitrary or capricious conduct shall be conclusive. Notwithstanding anything to the contrary in the Contract Documents, DFCM's approval shall not relieve Contractor of Contractor's sole responsibility for the Work.

**2.1.2 SPECIALISTS AND INSPECTORS.** DFCM shall provide building inspection services in accordance with the applicable building codes, including routine and special inspections unless otherwise noted in the Contract Documents. 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's or specialist's activities in no way relieve Contractor from the responsibilities set forth in the Contract Documents.

**2.1.3 SURVEYS AND LEGAL DESCRIPTION.** Except to the extent not applicable to the type of Work to be performed pursuant to Contractor's Agreement, DFCM shall furnish surveys describing physical characteristics, legal limitations and utility locations for the Work site, and a legal description of the Work site. The Contractor shall be entitled to rely on the accuracy of such survey information furnished by DFCM but shall exercise proper precautions relating to the safe performance of the Work. The Contractor recognizes that the exact location of underground or hidden utilities, plumbing and electrical runs may be somewhat different from the location indicated on such surveys furnished by DFCM or in the Contract Documents. The Contractor shall exercise reasonable skill and care to locate underground or hidden utilities, plumbing and electrical runs that are to remain to prevent damage thereto. The Contractor shall review the survey information provided by DFCM and shall promptly provide written notice to DFCM of any survey information that Contractor knows or discovers to be inaccurate.

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

**2.1.5 COPIES OF CONTRACT DOCUMENTS.** Unless otherwise provided in the Contract Documents, DFCM shall provide or make available to Contractor, free of charge, paper or electronic copies of Contract Documents, as determined by DFCM, as are reasonably necessary for execution of the Work. DFCM's website may also provide Contract Documents for the Work.

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

**2.2.1 DFCM'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS.** DFCM reserves the right to enter into contracts with third parties in connection with the Work and to perform construction or other activities itself on or about the Work site.

**2.2.2 COORDINATION OF WORK.** Contractor shall afford DFCM and the separate contractors or subcontractors retained by DFCM adequate opportunity for the introduction and storage of their materials and equipment and the execution of their work. Contractor shall properly connect and coordinate the Work with the work of DFCM and separate contractors or subcontractors.

**2.2.3 COORDINATION OF SCHEDULES.** Contractor shall cooperate with DFCM and any separate contractors and subcontractors hired by DFCM in performing the Work so that all portions of the Work may be completed in the shortest possible time within normal working hours. Contractor shall furnish separate contractors and subcontractors full information regarding time schedules for Contractor's Work. Contractor

shall coordinate the Work with the workers who may be retained by DFCM, all separate contractors and subcontractors, and their activities in the vicinity of the Work site.

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

**2.2.5 CONTRACTOR REMEDIAL WORK.** If Contractor causes damage to the work of DFCM or any separate contractors or subcontractors, Contractor shall promptly remedy such damage and shall use all reasonable efforts to promptly negotiate a settlement with DFCM and such separate contractors and subcontractors.

### **ARTICLE 3. A/E.**

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

**3.1.1 IN GENERAL.** The A/E shall assist DFCM in administering the Contract in accordance with the Contract Documents. The A/E shall have authority to act on behalf of DFCM, but only to the extent provided in the Contract Documents and/or A/E's agreement with DFCM.

#### **3.1.2 SITE VISITS.**

**3.1.2.1** Site visits or inspections by the A/E or DFCM shall in no way limit or affect Contractor's responsibility to comply with all the requirements and the overall design concept of the Contract Documents as well as all federal, state, and local laws, rules, regulations, ordinances and orders of public authorities applicable to the Work.

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

**3.1.3 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION.** Except as authorized by DFCM or as otherwise provided in the Contract Documents, including these General Conditions, the A/E and Contractor shall communicate through DFCM on issues regarding the timing of the Work, cost of the Work, and scope of the Work. Communications by and with the A/E's consultants shall be through the A/E. Communications by and with Subcontractors shall ordinarily be through Contractor. Communications by and with separate contractors shall be through DFCM.

**3.1.4 A/E MAY REJECT WORK, ORDER INSPECTIONS, TESTS.** The A/E shall have the 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 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; however, the A/E must obtain DFCM's prior written approval of any such additional inspections or testing. 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 Contractor, Subcontractors, their agents or employees or other persons performing portions of the Work, including separate contractors. If Contractor disputes the rejection of any

Work and the correction thereof shall involve additional cost or time, it shall be DFCM's option to accept such Work whether it shall be conforming or nonconforming.

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

**3.1.5.1** 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.

**3.1.5.2** The A/E shall review and take 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.

**3.1.5.3** The A/E's action shall be taken no later than fourteen (14) 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 Contractor or of separate contractors while allowing sufficient time in the A/E's professional judgment to permit adequate review.

**3.1.5.4** Review of such submittals shall not be 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 Contractor as required by the Contract Documents.

**3.1.5.5** The A/E's review of Contractor's submittals shall not relieve Contractor of Contractor's obligations under the Contract Documents.

**3.1.5.6** 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.

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

**3.1.5.8** When professional certification of performance characteristics of materials, systems, or equipment is the responsibility of the Contractor under the Contract Documents, the A/E shall be entitled to rely upon such certifications to establish that the materials, systems or equipment shall 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 for the Work are and shall remain the property of DFCM, and DFCM shall retain all common law, statutory, and other reserved rights with respect thereto. Said documents are intended for use as an integrated set for the Work. Neither Contractor nor A/E shall modify or use Contract Documents on any other project without the prior written consent of DFCM. Any such non-permissive use or modification by Contractor, Contractor's Subcontractors at any tier, or anyone else for whose acts Contractor is liable, shall be at Contractor's sole risk. To the fullest extent permitted by law, Contractor shall release, indemnify, hold harmless, and defend DFCM, and require all Subcontractors to release, indemnify, hold harmless, and defend DFCM, from and against any and all liabilities, claims, demands, actions, damages, losses, and expenses, including but not limited to attorney fees and costs of litigation, arising out of such non-permissive use or modification by Contractor or its Subcontractors. Contractor, including its 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 the Work. Contractor shall preserve the copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the A/E for the Work, on all copies. Submittals or distributions

necessary to meet official regulatory requirements or for other purposes relating to the Work shall not be construed as a publication in derogation of DFCM's copyright or other reserved rights.

#### **ARTICLE 4. CONTRACTOR.**

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

**4.1.1 REVIEW OF DOCUMENTS.** Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by DFCM and shall at once report to DFCM and A/E all errors, omissions, inconsistencies and/or ambiguities discovered. Contractor shall not be liable to DFCM or A/E for damage resulting from errors, omissions, inconsistencies and/or ambiguities in the Contract Documents unless Contractor recognized such error, omission, inconsistency and/or ambiguity or a contractor of ordinary skill and expertise for the type of Work involved would have readily so recognized such error, omission, inconsistency and/or ambiguity, and Contractor failed to report such to DFCM and A/E. If Contractor performs any Work without such notice to DFCM and A/E and prior to resolution of the error, omission, inconsistency and/or ambiguity, Contractor shall be responsible for such performance and shall bear the costs for correction.

**4.1.2 REVIEW OF FIELD CONDITIONS.** Contractor shall take field measurements, verify field conditions and carefully compare such field measurements and conditions and other information known to Contractor, or information that a contractor of ordinary skill and expertise for the type of Work involved would have known, before commencing Work. Contractor shall immediately report to DFCM and A/E all errors, omissions, inconsistencies and/or ambiguities discovered. If Contractor performs any Work without such notice to DFCM and A/E and prior to resolution of the error, omission, inconsistency and/or ambiguity, Contractor shall be responsible for such performance and shall bear the costs for correction.

**4.1.3 SUBSURFACE INVESTIGATIONS.** If DFCM has provided the Contractor with reports of subsurface investigations and/or tests of soils at the Work site ("Geotechnical Report") as part of the Contract Documents, the Contractor may rely upon the accuracy of the technical data contained in such Geotechnical Report at the locations where the data was obtained and to the depth indicated. However, Contractor acknowledges that the conditions indicated in any Geotechnical Report of any subsurface investigations and/or tests of soils at the Work site may not be representative of conditions existing at locations and/or at depths other than where data was obtained or that conditions different than those indicated by such Geotechnical Report may exist at the Work site. Contractor shall not be entitled to any increase in the Contract Price and/or increase in the Contract Time based on any data, opinion and/or recommendation in any Geotechnical Report and/or any inaccuracy, incompleteness, mistake and/or error in any Geotechnical Report except to the extent that Contractor is entitled to an increase in the Contract Price and/or extension of the Contract Time for a concealed or unknown condition as provided in Section 7.1.5.

**4.1.4 PERFORM IN ACCORDANCE WITH CONTRACT DOCUMENTS AND SUBMITTALS.** Contractor shall perform the Work in accordance with the Contract Documents and submittals to which no exception has been taken in accordance with the Contract Documents.

**4.1.5 PERFORMANCE TO PRODUCE THE COMPLETE SYSTEM AND INTENDED RESULTS.** The Contract Documents shall be read as a whole and wherever possible, the provisions shall 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 Contractor, whether or not specifically set forth in the Contract Documents, for the Contract Price and within the Contract Time. Performance by Contractor shall be required to the extent consistent with and reasonably inferable from the Contract Documents as being necessary to allow the Work to function for its intended use.

**4.1.6 INTENT AND HIERARCHY.** The Contract Documents are complimentary, and what is required by one Contract Document or provisions thereof, shall be as binding as if required by all the Contract

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:

**4.1.6.1** A Modification or authorized Amendment (including authorized Supplementary Conditions) shall govern over all Contract Documents listed in Sections 4.1.6.2 – 4.1.6.6 or previous Modifications or authorized Amendments (including authorized Supplementary Conditions).

**4.1.6.2** The Contractor’s Agreement shall govern over all Contract Documents listed in Sections 4.1.6.3 - 4.1.6.6.

**4.1.6.3** Supplemental General Conditions shall govern over all Contract Documents listed in Sections 4.1.6.4 – 4.6.1.6.

**4.1.6.4** These General Conditions shall govern over the Contract Documents listed in Sections 4.1.6.5 – 4.1.6.6.

**4.1.6.5** The Drawings and Specifications shall govern over the Contract Documents listed in Section 4.1.6.6.

**4.1.6.6** Attachments to the Contractor’s Agreement, Contractor’s management plan, bidding/proposal documents, including the Instructions to Bidders/Proposers, Notice to Contractors and the Bid/Proposal Form and/or documented interview information, if any, are Contract Documents, binding on Contractor, but are subordinate to the Contract Documents listed in Sections 4.1.6.1 – 4.1.6.5.

**4.1.6.7** An Addendum shall govern over all other Contract Documents and any previously issued Addendum.

**4.1.6.8** In case of a conflict or ambiguity within the same level of hierarchy of described documents, DFCM reserves the right to revise the documents to select the most stringent requirement unless the preponderance of the Contract Documents indicate a less stringent requirement.

**4.1.7 DIVIDING WORK AND CONTRACTOR REPRESENTATION.** Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings, shall not control Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade. Contractor shall ensure that the Subcontractors at any tier, manufacturers and suppliers engaged or to be engaged by Contractor, are and shall be familiar with the requirements for performance by them of their obligations.

**4.1.8 PLANNING AND PRIORITY.** Contractor shall plan and schedule the Work and shall maintain the schedule to Substantially Complete the Work within the Contract Time.

## **4.2 SUPERVISION AND REPRESENTATIVES.**

**4.2.1 SUPERVISION AND CONTROL.** Contractor shall supervise and direct the Work using Contractor’s best skill and attention to complete the Work within the Contract Time. 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, except to the extent that the Contract Documents specifically and expressly state otherwise.

**4.2.2 PERSONS PERFORMING WORK.** Contractor shall perform the Work using qualified employees, consultants, and Subcontractors selected and paid for by Contractor, adequately trained in the requirements of their particular jobs, and skilled in the Work assigned to them. Contractor shall use all

reasonable efforts to maintain a stable project team and minimize changes in key members of the team where loss of key members could have an adverse impact on the Contract Time. Any change in key personnel assigned to the Work must be approved by DFCM in writing.

**4.2.3 DESIGNATED REPRESENTATIVES.** Contractor shall employ a competent superintendent and necessary assistants, fluent in spoken and written English, who shall be at the Work site during performance of the Work. Contractor's superintendent shall maintain communication between DFCM, the A/E, and Contractor and be responsible for the management of Contractor's activities and deliverables described in the Contract Documents, as well as management of any third-party resources hired by Contractor to provide services or products under the Contract Documents. Contractor's superintendent shall represent Contractor, and communications given to the superintendent shall be as binding as if given to Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed in writing on written request in each case.

**4.2.4 DISCIPLINE AND COMPETENCE.** Contractor shall enforce safety procedures, strict discipline, and good order among Contractor's employees, Contractor's Subcontractors, agents, representatives and other persons performing the Work under the Contract Documents. If DFCM reasonably determines that a particular person does not follow safety procedures, is unfit or unskilled for the assigned Work, disregards instructions, ignores the environmental restraints of the Work, or jeopardizes the goodwill between DFCM and the public, Contractor shall immediately replace the person upon receipt of DFCM's request to do so and shall not employ the person again on the Work.

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

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

**4.2.7 INSPECTIONS AND APPROVALS.**

**4.2.7.1** All Work performed by Contractor shall be subject to the inspection and approval of DFCM to determine whether the Work is in accordance with the Contract Documents. Contractor shall permit and facilitate inspection of the Work at all times by DFCM, DFCM's representatives and governmental authorities having jurisdiction.

**4.2.7.2** Contractor shall be responsible for requesting inspections for various stages and portions of the Work required under the Contract Documents in a timely manner in accordance with the process and document requirements of the applicable inspection authority. In the event Work is not in a condition to be inspected at the time scheduled for the inspection of such Work for causes for which the Contractor is responsible, Contractor shall bear all associated costs and expenses without reimbursement by DFCM.

**4.2.7.3** If any of the Work is required to be inspected or approved by the terms of the Contract Documents, 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.

**4.2.7.4** Contractor shall work with the inspector to maintain an Open Issues Log and Contractor shall proceed diligently to resolve all open issues.

**4.3 PAYMENT BY CONTRACTOR.** Except to the extent it is otherwise stated in the Contract Documents, Contractor shall provide and pay for all supervision, labor, tools, equipment, materials and transportation, including, without limitation: construction equipment and machinery; water; heat; utilities; 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.

**4.4 TAXES AND OTHER PAYMENTS TO GOVERNMENT.** Contractor shall pay Sales Tax and/or Use Tax, consumer, employment-related and similar taxes related to the Work or portions thereof provided by Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect. Contractor shall comply with the laws and regulations regarding the payment of Sales Tax 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 Contractor properly relies upon a provision(s) of the bidding or proposal documents indicating exemption from State of Utah Sales Tax and/or Use Tax, and if State of Utah Sales Tax and/or Use Tax subsequently becomes due, then 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 otherwise required in the Contract Documents, it shall not be necessary for Contractor to obtain or pay for local building permits, plan check fees, electrical permits, plumbing permits, connection fees, or impact fees, nor shall it be necessary to pay fees for inspections pertaining thereto.

**4.5.2 COMPLIANCE, NOTICES.** Contractor shall comply with and give notices required by all federal, state, and local laws, rules, regulations, ordinances, and orders of public authorities applicable to the Work.

**4.5.3 CORRELATION OF CONTRACT DOCUMENTS AND LAW.** It is not Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable federal, state and/or local laws, rules, regulations, ordinances, and/or orders of public authorities having jurisdiction. However, if Contractor observes, or if such would be 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, Contractor shall promptly notify the A/E and DFCM in writing, and necessary changes shall be accomplished by appropriate Modification and/or Amendment.

**4.5.4 FAILURE TO GIVE NOTICE.** If Contractor, or any Subcontractor, performs Work without complying with the requirements of this Section 4.5, Contractor shall assume responsibility for such Work and shall bear the appropriate amount of the applicable costs of correction.

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

### **4.6.1 PROGRESS AND COMPLETION.**

**4.6.1.1** Time is of the essence in this Contract. By executing the Contractor's Agreement, 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.

**4.6.1.2** Contractor shall commence and complete the Work within the Contract Time and pursuant to the schedule, an initial version of which shall be prepared and provided by Contractor to DFCM and the A/E for approval, as it may be modified with DFCM's consent. Unless and except to the extent that preliminary Work at the Work site is authorized in writing by DFCM, Contractor shall not prematurely commence the Work at the Work site or elsewhere until DFCM issues a Notice to Proceed or prior to the effective date of insurance required by Article 10 to be furnished by Contractor, whichever is later. Contractor shall proceed expeditiously with adequate forces to achieve Substantial Completion within the Contract Time. All other Work shall be completed no later than the date established for Final Completion. Contractor shall notify DFCM when Contractor considers the entire Work to be completed. DFCM shall be entitled to a final inspection to determine whether the Work has been completed in accordance with the Contract Documents. The date of Substantial Completion shall be established by a certificate of Substantial Completion issued by the A/E or a written acknowledgement of Substantial Completion signed by DFCM.

**4.6.1.3 INITIAL CONTRACT TIME.** Unless otherwise specified in the bidding documents, the initial Contract Time shall be the time identified in the Contractor's Agreement.

### **4.6.2 SCHEDULE PREPARATION.**

**4.6.2.1** Promptly after being awarded the Work, Contractor shall prepare and submit for DFCM's and the A/E's approval, a planned progress schedule for the Work. Contractor shall plan and schedule the Work to facilitate the Work and shall maintain a schedule to place proper priority to sequence the Work to complete the Work within the Contract Time. Contractor shall commence and complete the Work by the dates set forth in the agreed upon schedule and Contractor's Agreement.

**4.6.2.2** The schedule shall include a time-line for procurement, fabrication, construction, and testing activities, including interdependence of items necessary to complete the Work, duration of activities, interim completion dates, milestones, closeout and commissioning, submittals, and critical path.

**4.6.2.3** Contractor shall advise and consult with DFCM during progress of the Work and keep DFCM fully informed as to the status of the Work at intervals as required by DFCM. Contractor shall provide DFCM with a daily listing of personnel and equipment used on the Work. If the Work is not on schedule, Contractor shall immediately advise DFCM in writing of Contractor's proposed action to bring it on schedule.

**4.6.2.4** DFCM may take reasonable exception to activity duration, activity placement, construction logic, and time frame for any element of the Work to be scheduled and may recommend revisions.

### **4.6.3 SCHEDULE SUBMITTAL.**

**4.6.3.** Contractor shall develop the CPM schedule using Primavera, MS Project or Phoenix unless otherwise authorized by DFCM. The critical path shall be identified, including the critical paths for interim completion dates and milestones.

**4.6.3.2** Contractor shall update the schedule at least once a month and submit the updated schedule with each Application for Payment.

**4.6.3.3** No progress payments shall be approved until Contractor has submitted a detailed CPM schedule covering the first ninety (90) days of the Work with a general CPM schedule for the entire Work. The detailed schedule for the entire Work shall be completed prior to the second Application for Payment, unless otherwise authorized in writing by DFCM.

#### **4.6.4 SCHEDULE CONTENT REQUIREMENTS.**

**4.6.4.1** The schedule shall indicate the duration of activities and 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, commissioning, submittals and approvals of submittals or other documents. Work items of DFCM, other contractors, utilities, and other third parties that may affect or be affected by Contractor shall be included.

**4.6.4.2** If DFCM is required by the Contract Documents to furnish any materials, equipment, or other items to be incorporated into the Work by Contractor, Contractor shall submit, with the first schedule submittal, a letter clearly indicating the dates that such items are required at the Work site.

**4.6.4.3** The schedule shall indicate an early Substantial Completion date for the Work that is no later than the Work's required Substantial Completion date.

**4.6.4.4** The schedule, including duration of all activities, shall be given in calendar days and indicate all of the following:

**4.6.4.4.1** Interfaces with the Work of outside contractors (e.g., utilities, power, and any separate contractors retained by DFCM);

**4.6.4.4.2** Description of activity including activity number/numbers;

**4.6.4.4.3** Estimated duration time for each activity and remaining duration;

**4.6.4.4.4** Early start, late start, early finish, late finish date, and predecessor/successors including stop-start relationships with lead and lag time for each activity – all activities shall have a predecessor and a successor, except for the start milestone and finish milestone;

**4.6.4.4.5** Total Float and Free Float available to each path of activities;

**4.6.4.4.6** Actual start date for each activity begun;

**4.6.4.4.7** Actual finish date for each activity completed;

**4.6.4.4.8** The percentage complete of each activity in progress or completed;

**4.6.4.4.9** Identification of all critical path activities;

**4.6.4.4.10** The critical path for the Work, with the 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. Except as may otherwise be explicitly and specifically provided in the Contract Documents, no more than forty-percent (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. Near critical path activities shall also be identified;

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

**4.6.4.4.12** Additional requirements, if any, as specified in the Supplemental General Conditions and/or authorized Supplementary Conditions.

**4.6.5 INTERIM COMPLETION DATES AND MILESTONES.** The schedule must include contractually specified interim completion dates and milestones (which completion milestones must have a “finish on or before” soft constraint added). The milestones and completion dates indicated are considered essential to the satisfactory performance of the Contractor’s Agreement and to the coordination of all Work. The milestone dates listed are not intended to be a complete listing of all Work or of interfaces with other contractors.

**4.6.6 FLOAT TIME.** “Total Float” is defined as the amount of time that an activity can be delayed from its early without delaying Substantial Completion. “Free Float” is the amount of time that an activity can be delayed without delaying the early start date of any successor activity. Total Float time and Free Float time shall belong to the project and DFCM and Contractor have the right to use the Total Float time and/or Free Float Time for non-critical path activities until Contractor has reallocated such time on a newly submitted schedule.

**4.6.7 UPDATES.** Prior to any approval of an Application for Payment, DFCM, A/E, and Contractor shall review Contractor’s schedule compared to the Work completed. The amount of Work completed shall be approved by DFCM as supported by the schedule of values and as verified by the determination of Work completed. If necessary, Contractor shall then update and submit to DFCM the schedule with the Application for Payment; all of which shall be in accordance with DFCM’s approval. All updates shall be provided in electronic and hard copy formats. At each scheduled meeting with DFCM, Contractor shall provide a four week look ahead, with long lead items identified. If the Work is not on schedule, Contractor shall immediately advise DFCM in writing of Contractor’s proposed action to bring it on schedule.

**4.6.8 SCHEDULE OF SUBMITTALS.** Contractor shall prepare and keep current, for the A/E’s and DFCM’s review and approval, a schedule of submittals required by the Contract Documents, which shall be coordinated with Contractor’s construction schedule and allow the A/E a reasonable time to review the submittals. The submittal schedule shall be included as part of the construction schedule. Submittals requiring expedited review must be clearly identified as such in the schedule of submittals. Contractor shall coordinate and agree upon a submittal schedule with A/E. If a submittal does not pass a second review, then a meeting will be held to determine a path to proceed and expedite approval. Contractor shall notify A/E in writing if expedited review of a submittal is critical.

**4.6.9 SCHEDULE RECOVERY.** If the Work represented on the critical path falls behind more than seven (7) days, Contractor shall redo the schedule within seven (7) days, showing how the Contractor shall recover the time. Contractor’s schedule must have an approved baseline schedule before the schedule may be updated. A narrative that addresses the changes in the schedule from the previously submitted schedule shall be submitted along with the updated schedule in electronic .pdf format and on the written request of DFCM in native electronic copy format of the scheduling software utilized by Contractor. Contractor shall comply with the most recent schedules.

#### **4.6.10 SCHEDULE CHANGES.**

**4.6.10.1** The Contract Time may only be shortened or extended by a Change Order or Construction Change Directive.

**4.6.10.2** Should Contractor, after approval of the complete detailed construction schedule, desire to change Contractor's plan of construction, Contractor shall submit its requested revisions to 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 completion dates, and the reasons for the revisions. Requested changes to the approved baseline schedule shall include a narrative that addresses the requested changes. If the requested changes are acceptable to DFCM, which acceptance shall not be unreasonably withheld, they shall be incorporated into the schedule in the next reporting period by Contractor. If after Contractor submits a request for change in the schedule, DFCM does not agree with the request, DFCM shall schedule a meeting with Contractor to discuss the differences.

**4.6.10.3** The critical path schedule, as the term is used in these General Conditions, shall be based on the current version of Contractor's schedule for the Work and accepted by DFCM just prior to the an asserted change in the Work, asserted delay, suspension, or interruption. If Contractor believes it is entitled to an extension of Contract Time under the Contract Documents, Contractor shall submit a PCO in accordance with Section 7.2 to the A/E and DFCM 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.

#### **4.6.11 EXCUSABLE DELAY.**

**4.6.11.1** If Contractor is unreasonably delayed in the progress of the Work on the critical path schedule by an act or neglect of DFCM; or separate contractors retained by DFCM; or by a Force Majeure Delay (defined below) that DFCM reasonably determines may justify delay beyond the date for Substantial Completion, then the Contract Time shall be extended by Change Order for the period of time caused by such delay. The Contract Price shall not be increased, and the Contract Time shall not be extended for any delays that are concurrent with Contractor delays.

**4.6.11.1.1** For purposes of the Contractor's Agreement, a Force Majeure Delay shall mean a delay to the commencement or the progress of the Work by reason of events or causes beyond the control of DFCM, the Contractor, and the Contractor's Subcontractors and Sub-subcontractors of any tier, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Notwithstanding anything to the contrary set forth herein, Force Majeure Delays shall not include: (1) labor disputes confined to the Work site or relating solely to the Work that are due to a breach of a collective bargaining agreement by the Contractor or its Subcontractors or Sub-subcontractors of any tier, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable; (2) adverse weather conditions, except as provided in Section 4.6.11.2; (3) a failure of the Contractor or its Subcontractors or Sub-subcontractors of any tier, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, to comply with any laws, codes or orders of governmental authorities with jurisdiction of the Work; or (4) any financial inability of the Contractor or its Subcontractors or Sub-subcontractors of any tier, or anyone directly or indirectly employed by them, to perform their obligations under the Contract Documents.

**4.6.11.1.2** Delays which according to the schedule do not affect any critical path milestone dates or the completion dates shown on the schedule at the time of the delay shall not be the basis for a change in the Contract Time.

**4.6.11.1.3** Contractor shall immediately take all steps reasonably possible to lessen the adverse impact of delay. Notwithstanding the foregoing, to the extent any of the causes for delay were caused by Contractor, reasonably foreseeable by Contractor, or avoidable by Contractor, then to such extent the delay shall not be cause for a change in the Contract Price and/or Contract Time. For purposes of this Section, "Contractor" shall include all Subcontractors and others under the responsibility of the Contractor.

**4.6.11.1.4** The determination of the total amount of time extension, if any, shall be based upon the current schedule in effect at the inception of the change and/or delay and upon all data relevant to the extension as supported by appropriate substantiating relative data in the project record. Once approved, such data shall be incorporated in the next monthly update of the schedule by Contractor.

**4.6.11.2** The Contract Price shall not be increased and the Contract Time shall not be extended for normal bad weather or any weather that is reasonably foreseeable at the time of entering into the Contractor's Agreement. The Contract Time as stated in the Contract Documents includes due allowance for days on which Work cannot be performed out of doors. Contractor acknowledges that Contractor may lose days due to weather conditions. The Contract Time may be extended at no cost to DFCM if all of the following are met, which must be established by Contractor:

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

**4.6.11.2.2** There are no concurrent delays for which Contractor is responsible;

**4.6.11.2.3** Contractor took all reasonable steps to alleviate the impact of the weather and made reasonable attempts to prevent the delay and despite such reasonable actions of Contractor, the weather impacted the critical path as described above; and

**4.6.11.2.4** In connection with the weather event for which delay is claimed by Contractor, the weather was either exceptionally adverse, such as a tornado, severe wind storm, or severe hail storm, or one of the following occurred:

**4.6.11.2.4.1** for any day between November 1 and March 31 for which delay is claimed by Contractor, the recorded minimum temperature at the Work site, as verifiably documented by Contractor, fell below the mean minimum temperature for the station closest to the Work site ("Proximate Station") for the applicable month according to the Western Regional Climate Center Website, <http://www.wrcc.dri.edu/summary> ("WRCCW"), as shown on the *Average of Minimum Temperature* chart on the WRCCW for the Proximate Station, less the mean extreme minimum temperature for the Proximate Station for the applicable month, as shown on the *Minimum of Minimum Temperature Chart* on the WRCCW for the Proximate Station, divided by Two (2);

**4.6.11.2.4.2** for any day between November 1 and March 31 for which delay is claimed by Contractor, the recorded maximum temperature at the Work site, as verifiably documented by Contractor, fell below the mean minimum temperature as shown on the *Average of Minimum Temperature* chart on the WRCCW for the Proximate Station;

**4.6.11.2.4.3** for any day for which delay is claimed by Contractor, the recorded precipitation at the Work site, as verifiably documented by Contractor, exceeded seventy-five percent (75%) of the daily extreme for the applicable month as shown on the *POR – Daily Precipitation Average and Extreme* chart on the WRCCW for the Proximate Station;

4.6.11.2.4.4 for any day for which delay is claimed by Contractor, the recorded snowfall at the Work site, as verifiably documented by Contractor, exceeded seventy-five percent (75%) of the daily extreme for the applicable month as shown on the *POR – Daily Snowfall Average and Extreme* chart on the WRCCW for the Proximate Station.

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

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

4.6.12.1.1 The delay is caused by DFCM for a reason not permitted by the Contract Documents; and

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

4.6.12.2 To the extent of the compensable delay, Contractor's total entitlement for all compensable delay damages is the computed result of the following formula: Contract Price 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 Contractor is entitled to receive a markup under Sections 7.4.2.5.1 or 7.4.2.5.2 this provision shall be inapplicable, and the markup shall be deemed to include all the compensable delay damages provided by this Section.

4.6.12.3 The length and extent of compensable delay shall be determined, with the use of the Work's critical path schedule by ascertaining the number of additional days added to the Contract Time are needed in order to perform the Work in accordance with the Contract Documents as a result of the delay, suspension, or interruption after receipt of the written notice received by the A/E and DFCM under Section 4.6.12.1.2.

4.6.12.4 Notwithstanding any other provision of these General Conditions, to the extent a non-compensable delay occurs at the same time as a compensable delay, DFCM shall not be responsible for any compensation to Contractor and the Contract Price shall not be increased for the period of the non-compensable delay.

4.6.13 **TIME EXTENSION REQUESTS.** Contractor shall notify DFCM within seven (7) days of a potential delay and Contractor shall request any and all Contract Time extensions within twenty-one (21) days after Contractor knew or should have known about the delay. Contractor must support any request for a Contract Time extension with a critical path schedule analysis.

#### **4.6.14 LIQUIDATED DAMAGES.**

4.6.14.1 Time is of the essence in the Contract Documents. DFCM will suffer damages that are difficult to ascertain for each calendar day the date for Substantial Completion is delayed. Therefore, as agreed damages and not as a penalty, DFCM may offset from any payments due Contractor the sum stated in the Contractor's Agreement, as augmented in Section 4.6.14.2 in the case of continuing delay, for each day Substantial Completion is delayed beyond the date established for Substantial Completion of the Work by the Contract Documents.

4.6.14.2 For each day subsequent to the fourteenth (14<sup>th</sup>) day after the date established for Substantial Completion of the Work by the Contract Documents, the liquidated damages amount stated in the Contractor's

Agreement shall be increased by ½ percent (0.5%) of the amount stated in the Contractor's Agreement for each day Substantial Completion is delayed beyond the date established for Substantial Completion of the Work by the Contract Documents.

**4.6.14.3** The sum for liquidated damages due DFCM by Contractor has been agreed upon by reason of the inconvenience and added costs of administration, engineering, supervision, and other expenses resulting from Contractor's default.

**4.6.14.4** To the extent liquidated damages exceed any amounts that would otherwise be due Contractor, Contractor shall be liable for such excess to DFCM.

**4.6.14.5** Notwithstanding any other provision of these General Conditions, the availability of liquidated damages to DFCM shall not limit 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.

**4.6.15 NO WAIVER OF DFCM'S RIGHTS.** Permitting 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 DFCM of any of its rights under the Contract Documents, including the right to liquidated damages or any other remedies or compensation.

**4.7 DOCUMENTS AND SAMPLES AT THE SITE, CERTIFYING "AS-BUILTS".** Contractor shall maintain at the Work site one record copy of the Drawings, Specifications, Addenda, authorized Amendments and 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 items shall be available to the A/E and shall be delivered to the A/E for submittal to DFCM upon completion of the Work, signed by Contractor, certifying that they show complete and exact "as-built" conditions, stating sizes, kind of materials, piping, conduit locations, and similar matters. All notes of encountered or changed conditions shall be included.

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

**4.8.1 NOT CONTRACT DOCUMENTS.** Shop Drawings, Product Data, Samples and other submittals are not Contract Documents. The submittal shall demonstrate, for those portions of the Work for which the submittal is required, the way Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents.

**4.8.2 PROMPTNESS.** Contractor shall coordinate submittals prepared by Subcontractors and Sub-subcontractors, review, approve, and submit to the A/E, Shop Drawings, Product Data, Samples and other submittals required by the Contract Documents with reasonable promptness and according to an agreed submittal schedule in such sequence as to cause no delay in the Work, or the activities of DFCM, or separate contractors.

**4.8.3 NOT PERFORM UNTIL A/E APPROVES.** Contractor shall not perform any portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples, mock-ups where required or other submittals (including deferred submittals) until the applicable submittal has been approved in writing by the A/E. Contractor shall perform the Work in accordance with the approved submittals. Submittals marked "No-exceptions taken" or its equivalent by the A/E are considered approved for purposes of this Section 4.8.3.

**4.8.4 REPRESENTATIONS BY CONTRACTOR.** By approving and submitting Shop Drawings, Product Data, Samples, and other submittals, Contractor represents that Contractor has determined and verified materials, field measurements, field construction criteria, manufacturer installation instructions and

procurement and delivery dates related thereto and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

**4.8.5 CONTRACTOR'S LIABILITY.** 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 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. Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or other submittals by the A/E's review and approval.

**4.8.6 DIRECT SPECIFIC ATTENTION TO REVISIONS.** Contractor shall direct specific attention in writing to all revisions on resubmitted Shop Drawings, Product Data, Samples, or other submittals, except those requested by the A/E and indicated on previous submittals.

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

**4.8.8 PROFESSIONAL SERVICES.** The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, DFCM and the A/E will specify performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed Design Professional (as that term is defined in Section 4.8.8.1 of these General Conditions), whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Each Design Professional providing such services shall carry professional errors and omissions insurance in an amount of at least Two Million Dollars (\$2,000,000.00) per claim/annual aggregate with a deductible or self-insured retention of not greater than One Hundred Thousand Dollars (\$100,000.00), unless different amounts are authorized by DFCM in writing. Shop Drawings and other submittals related to the Work designed or certified by such Design Professional, if prepared by others, shall bear such Design Professional's written approval when submitted to the A/E. DFCM and the A/E shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such Design Professional, provided DFCM and A/E have specified to the Contractor performance and design criteria that such services must satisfy. Pursuant to this Section 4.8, the A/E will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents.

**4.8.8.1** A "Design Professional" is any and all employees or independent contractors directly or indirectly employed by the Contractor, a Subcontractor or a Sub-subcontractor of any tier to perform any professional design services required by the Contract Documents. The Contractor or its Subcontractors or Sub-subcontractors of any tier employing the Design Professional shall require the Design Professional to agree in writing to be bound by the terms of the Contract Documents insofar as they apply to the design services of the Design Professional in the performance of the Work.

**4.8.8.2** The Contractor hereby assigns to DFCM all common law, statutory and other rights that the Contractor may have in the drawings, specifications and other documents prepared by the Design Professional for the Work (the "Design Documents"), including all copyrights. The Contractor shall endeavor to obtain a similar assignment to DFCM by the Design Professional and by the Subcontractors or Sub-subcontractors of

any tier employing the Design Professional of their common law, statutory and other rights (including copyrights) in the Design Documents. At the date of final payment or upon the earlier termination of the Contractor's Agreement, the Contractor shall promptly deliver to DFCM hardcopy originals of all Design Documents and all Design Documents in reproducible (not read only) electronic media.

**4.8.8.3** The Contractor shall require and hereby represents and warrants to DFCM that the Design Professional is appropriately registered with and licensed by the State of Utah to perform the services required by the Contract Documents to be performed by the Design Professional.

**4.8.8.4** All services provided by the Design Professional shall be performed consistent with the professional skill and care ordinarily provided by other design professionals: (1) with the same or similar license; and (2) providing the same or similar design professional service (A) in the same or similar locality, (B) at the same or similar time and (C) under the same or similar circumstances, provided that, if the nature of the project reasonably requires specialized design expertise, the Design Professional shall perform design professional services consistent with such specialized design expertise.

**4.8.8.5** Notwithstanding any approval of DFCM or A/E of any Design Documents, the Contractor shall be responsible for assuring that all Design Documents (whether prepared by a Design Professional employed by the Contractor, a Subcontractor or a Sub-subcontractor of any tier) are technically adequate and accurate and are in accordance with all laws, ordinances, codes, regulations or other requirements of governmental authorities having jurisdiction of the Work applicable to the Work on the day of the issuance of such documents and on the day of the use of such documents on the Work.

**4.8.8.6** The Contractor shall be responsible and liable to DFCM for any and all losses, costs, and/or expenses incurred by DFCM arising out of, related to and/or connected with errors or omissions in the services provided hereunder by the Design Professional, to the extent that such errors or omissions were caused by the failure of the Design Professional to perform services consistent with the requirements of Section 4.8.8.4 or by other fault of the Design Professional, whether or not such losses, costs and/or expenses were caused by any negligence or other fault of the Contractor. This responsibility and liability shall survive completion of the Work or termination of the Contractor's Agreement.

**4.8.8.7** The Contractor shall indemnify and hold harmless DFCM and the other Indemnified Parties (as defined in Section 4.12) from and against any and all third-party claims, demands, losses, liabilities, judgments, costs, expenses and/or attorney fees arising of, related to and/or connected with errors or omissions in the services provided hereunder by the Design Professional, to the extent that such errors or omissions were caused by the failure of the Design Professional to perform services consistent with the requirements of Section 4.8.8.4 or by other fault of the Design Professional, whether or not such third-party claims, demands, losses, liabilities, judgments, costs, expenses and/or attorney fees were caused by any negligence or other fault of the Contractor. This indemnity is in addition to the indemnity provided in Section 4.12 and shall survive completion of the Work or termination of the Contractor's Agreement.

**4.8.8.8** The Contractor's or its Subcontractor's or Sub-subcontractor of any tier's agreement with the Design Professional for design services in the performance of the Work shall state that DFCM and its successors and assigns are intended third-party beneficiaries of such agreement and such agreement with the Design Professional shall require the Design Professional to deliver to DFCM a separate agreement wherein the Design Professional shall expressly contract with DFCM to provide the Design Professional's professional services consistent with the standard of care established by Section 4.8.8.4.

**4.8.8.9** The Contractor shall indemnify, defend and hold harmless DFCM and the other Indemnified Parties (as defined in Section 4.12 of these General Conditions) from and against any and all claims, demands, losses, liabilities, judgments, costs, expenses and/or attorney fees caused by any suits or claims of infringement of any patent rights or copyrights for materials, methods or systems depicted upon or required by Design Documents

prepared by the Design Professional. This indemnity is in addition to the indemnity provided in Sections 4.11 and 4.12 of these General Conditions and shall survive completion of the Work or termination of the Contractor's Agreement.

#### **4.9 USE OF SITE.**

**4.9.1 IN GENERAL.** Contractor shall confine its equipment, the storage of materials, and the operations of its workers at the Work site to areas permitted by the Contract Documents, laws, rules, regulations, ordinances, orders, and permits and shall not unreasonably encumber the Work site with materials or equipment. Contractor shall take all reasonable steps to secure the Work site and protect the Work from any damage. Upon completion of the Work, Contractor shall leave the Work site free and clear of all waste materials, rubbish, tools, equipment, and surplus materials. Contractor shall at all times keep the Work site free from spilled liquids and chemicals, toxic or otherwise. If such a spill occurs while Contractor has control of the Work site, Contractor shall be responsible to clean the affected areas on or about the Work site and pay all associated costs, fines, and penalties. Notwithstanding the foregoing, Contractor shall not be responsible for any damage to the Work site or the Work to the extent caused by DFCM or DFCM's agents.

#### **4.9.2 ACCESS TO NEIGHBORING PROPERTIES.**

**4.9.2.1** Contractor shall not, except as provided in the Contract Documents or with DFCM's advance written consent when necessary to perform the Work, interfere with access to properties neighboring the Work site by the owners of such properties and their respective tenants, agents, invitees and guests.

**4.9.2.2** Various federal, state, and local agencies and private landowners may own or control lands and facilities either crossed by or adjacent to the Work site. DFCM shall secure and pay for all necessary rights of access to the Work site. Contractor shall comply with all stipulations provided by DFCM and shall maintain a cooperative relationship with all agencies and landowners. Contractor shall not retain on the Work site any person who in the judgment of DFCM prejudices or tends to endanger this cooperation. Contractor shall not enter into any agreement with such agencies or landowners related to the Work without prior approval by DFCM.

**4.10 ACCESS TO WORK.** Contractor shall provide DFCM and the A/E access to the Work in preparation and progress, at all times and wherever located.

**4.11 INTELLECTUAL PROPERTY LICENSES.** Contractor shall obtain and pay for all royalties and other license fees for all equipment, property, or processes of Contractor used or purchased in connection with performance of the Work. Contractor shall defend suits or claims for infringement of intellectual property rights and shall hold DFCM and the 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 Contractor has reason to believe that the required design, process or product is an infringement of any third party's intellectual property right, Contractor shall be responsible for such defense or loss unless such information is promptly furnished to DFCM in writing.

**4.12 INDEMNIFICATION.** To the fullest extent permitted by law, Contractor shall release, indemnify, hold harmless, and defend the State of Utah, the State of Utah's institutions, agencies (including, but not limited to, DFCM), departments, divisions, authorities, and instrumentalities, boards, commissions, elected or appointed officers, employees, agents and authorized volunteers (collectively "Indemnified Parties") from and against any and all claims, liabilities, demands, actions, damages, losses and expenses of any nature whatsoever, including, but not limited to, attorneys' fees and defense costs (collectively "Liabilities"), and including those events covered under the blanket Contractual Liability Coverage required under the Contract Documents, arising out of, related to, or connected with any act or omission in the performance of the Work, including the Work of all Subcontractors and their employees, provided that any Liabilities are caused in whole or in part by

the negligent, intentional, or other wrongful act or omission of Contractor, any Subcontractor, their employees, 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 an Indemnified Party. Without relieving Contractor of any obligation under the Contract, the Indemnified Parties shall have the right, at their option, to fully participate in the investigation, defense and settlement of any Liabilities.

**4.12.1 NOT EXCLUSIVE.** The foregoing obligations in this Section 4.12 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 the Contract Documents.

**4.12.2 NOT LIMITED.** The foregoing obligations in this Section 4.12 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 benefit 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 SUBCONTRACTING WORK PERMITTED; CONDITIONS.**

**5.1.1.1** Contractor may subcontract portions of the Work.

**5.1.1.2** DFCM reserves the right to reject on reasonable ground any Subcontractor. Contractor shall not contract with any person or entity to whom DFCM has made reasonable objection. Contractor shall not be required to contract with anyone to whom Contractor has made reasonable and timely objection, provided that any additional costs associated with Contractor replacing a Subcontractor objected to by Contractor with a replacement Subcontractor not objectionable to Contractor shall be at no cost to DFCM.

**5.1.2 SUBSEQUENT CHANGES.** After execution of Contractor's Agreement Subcontractors listed by Contractor in accordance with Utah Code § 63A-5b-605 and Rule R23-1-615 may be changed by Contractor only in accordance with the requirements of Utah Code § 63A-5b-605 and R23-1-615.

**5.1.2.1** DFCM shall pay the additional costs for a DFCM-requested change in Subcontractor if all of the following conditions are met:

**5.1.2.1.1** If DFCM in writing requests the change of a Subcontractor;

**5.1.2.1.2** The original Subcontractor is a responsible subcontractor that meets the requirements of the Contract Documents; and

**5.1.2.1.3** The original Subcontractor did not withdraw as a Subcontractor on the Work.

**5.1.2.2** In all other circumstances, Contractor shall pay the additional cost for a change in a Subcontractor.

**5.1.3 BUSINESS AND LICENSING REQUIREMENTS.** All Subcontractors used by Contractor shall have secured, at their own expense, all necessary professional accreditations, registrations, and licenses in the state of Utah.

**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 Contractor to have Subcontractors at any tier be required to have a performance and/or payment bond at Contractor's expense.

**5.1.5 SUBCONTRACTOR DEFAULT INSURANCE.** If the Contract Price includes any amount to compensate the Contractor for Subcontractor Default Insurance ("SDI"), then, notwithstanding anything in the Contract Documents to the contrary:

**5.1.5.1** DFCM shall be added to the SDI by a financial interest endorsement reasonably acceptable to DFCM at no cost to DFCM;

**5.1.5.2** If the Contract Documents provide for Contractor contingency, no Contractor contingency may be expended for any Subcontractor default or for any expenses and/or losses arising out of, connected with and/or related to any Subcontractor default;

**5.1.5.3** Contractor shall in no event be entitled to an increase in the Contract Price and/or extension of the Contract Time for a Subcontractor default or for expense, losses and/or delays arising out of, connected with and/or related in any way to a Subcontractor default; and

**5.1.5.4** The cost of SDI is included in Contractor's overhead and profit for purposes of Article 7.

## **5.2 SUBCONTRACTUAL RELATIONS.**

**5.2.1 CONTRACTOR FULLY RESPONSIBLE.** Subcontracting any portion of the Work shall not relieve Contractor of Contractor's obligations or duties under the Contract Documents, Contractor shall be fully responsible and liable to DFCM for the acts and omissions of all Subcontractors at any tier and their employees and agents and Contractor shall maintain complete control over all Subcontractors. Neither the consent of DFCM to a Subcontractor proposed by Contractor, nor anything contained in the Contract Documents shall be deemed to create a contractual relationship between a Subcontractor at any tier and DFCM.

**5.2.2 COMPLY WITH CONTRACT DOCUMENTS.** By appropriate enforceable agreement Contractor shall require each Subcontractor to be bound to Contractor by the terms of the Contract Documents, and to assume toward Contractor all the obligations and responsibilities that Contractor, by the Contract Documents, assumes towards DFCM and the A/E.

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

**5.2.4 SUB-SUBCONTRACTORS.** Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors and to require such Sub-subcontractors to enter into similar agreements with lower tier Sub-subcontractors that comply with the requirements of Sections 5.2.2 and 5.2.3.

**5.2.5 DOCUMENT COPIES.** Contractor shall make available to each proposed Subcontractor, prior to execution of the Subcontractor agreement, copies of the Contract Documents to which the Subcontractor shall be bound. Contractor shall require Subcontractors to make copies of applicable portions of the Contract Documents available to their respective proposed Sub-subcontractors.

**5.3 CONTINGENT ASSIGNMENT OF SUBCONTRACTS TO DFCM.** Contractor contingently assigns each Subcontractor agreement with a Subcontractor for a portion of the Work to DFCM, provided that

the assignment is effective only after termination of the Contractor's Agreement by DFCM for cause pursuant to Section 12.2 or stoppage of the Work by DFCM pursuant to Section 12.5, and only for those Subcontractor agreements that DFCM accepts by notifying the Subcontractor in writing. Contractor shall remain liable for all obligations incurred under assigned Subcontractor agreements prior to DFCM's acceptance of such assignment.

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

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

**6.1.1 CONTRACTOR RESPONSIBILITY.** Contractor shall be solely responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Work. Contractor shall seek to minimize the risk of bodily injury, property damage, and environmental harm by taking all reasonable precautions to protect:

**6.1.1.1** All persons at and/or in proximity to the Work site;

**6.1.1.2** Materials and equipment to be incorporated in the Work, whether in storage on or off the Work site, under the care, custody, or control of Contractor or a Subcontractor;

**6.1.1.3** Property and structures located at the Work site and adjacent to the Work site, whether or not such property and structures are part of the Work, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction; and

**6.1.1.4** The environment.

**6.1.2 SAFETY PROGRAM, PRECAUTIONS.** Contractor shall institute and provide to DFCM a project specific safety program at the start of the Work to minimize accidents. The program shall continue to the final completion of the Work and conform to applicable laws, rules, and regulations. including without limitation. the Utah Occupational Safety and Health Rules as published by the Utah Labor Commission - UOSH Division at Utah Administrative Code, R614. Contractor shall post signs, erect barriers, and provide those items necessary to implement the safety program. As soon as Contractor proceeds with the Work, Contractor shall have all workers and all visitors on the Work site wear safety hard hats, as well as all other appropriate safety apparel such as safety glasses and shoes, and obey all safety laws, rules, and regulations. Contractor shall post a sign in a conspicuous location indicating the necessity of wearing hard hats, and Contractor shall loan such hard hats to visitors. Contractor shall maintain a clean and orderly Work site.

**6.1.3 COMPLIANCE WITH LAWS.** Contractor shall give notices and comply with applicable laws, rules, regulations, ordinances, and orders of public authorities applicable to the safety of persons and property and their protection from damage, injury and loss. In particular, Contractor shall comply with all applicable provisions of federal, state and municipal safety laws, rules and regulations, specifically including, without limitation, building codes, to prevent accidents and injury to persons on, about or adjacent to the Work site.

**6.1.4 ERECT AND MAINTAIN SAFEGUARDS.** As required by existing conditions at the Work site and proper and safe performance of the Work, Contractor shall erect and maintain safeguards for safety and protection, including effective fences, danger signs, barricades and other warnings against hazards. Contractor shall also promulgate safety regulations and notify owners and users of adjacent sites and/or utilities before performing Work that may impact such adjacent sites and/or utilities.

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

**6.1.6 PROMPT REMEDY.** Contractor shall promptly remedy any damage and loss (other than damage or loss insured under property insurance required by Section 10.2) to persons, property and/or the environment arising in conjunction with the Work caused in whole or in part by Contractor, Subcontractors, or any person or entity for whose acts Contractor is responsible, without cost or expense to DFCM.

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

**6.1.8 LOAD SAFETY.** Contractor shall not load or permit any part of the construction or Work site to be loaded so as to endanger its safety and/or the safety of persons at or in the vicinity of the Work site.

**6.1.9 OFF-SITE RESPONSIBILITY.** In addition to its other obligations under this Article 6, the Contractor shall, at Contractor's 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 Contractor or by Contractor's 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, Contractor shall act, at Contractor's discretion, to prevent threatened damage, injury or loss. Contractor shall promptly notify DFCM of the action taken.

**6.2 HAZARDOUS MATERIALS.** In the event Contractor encounters at the Work site material reasonably believed to be asbestos, polychlorinated biphenyl (PCB), or any other hazardous waste or substance that may endanger the health of persons performing Work or being at the Work site that is not part of the Work and/or disclosed by the Contract Documents, Contractor shall immediately stop Work in the area affected and immediately report the condition to DFCM and the A/E by phone with a follow-up email. Contractor shall resume the Work in the affected area upon written direction provided by DFCM. Except to the extent provided otherwise in the Contract Documents, or if the presence of hazardous materials is due to the fault of Contractor, Contractor shall not be required to perform, without Contractor's consent, any Work relating to asbestos, polychlorinated biphenyl (PCB), or any other hazardous waste or substance.

**6.3 HISTORICAL AND ARCHEOLOGICAL CONSIDERATIONS.** In the event Contractor discovers 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, Contractor shall cease any Work that would interfere with such discovery and immediately report the condition to DFCM and the A/E by phone with a follow-up email. Contractor shall resume the Work upon the direction of DFCM. Contractor shall ensure cooperation with any DFCM-recognized archaeologist or other cultural/historical expert.

**6.4 CONTRACTOR LIABILITY.** If Contractor fails in any of its obligations in Sections 6.2 through 6.3, Contractor shall be liable for any damages to DFCM, the State of Utah, or any third party resulting from such noncompliance. Contractor shall also be liable for any mitigation or restoration effort resulting from such noncompliance. To the extent all the following is met, the presence of hazardous material or cultural, historical, or archeological material at the Work site shall qualify as a concealed or unforeseen condition under Section 7.1.5:

**6.4.1** The presence of such material is not reasonably foreseeable given the site conditions that Contractor is or should have been aware of;

- 6.4.2** The presence of such material is not identified in any part of the Contract Documents;
- 6.4.3** Contractor has undertaken all proper action to mitigate any impact of the discovery of such material on the Contract Time and/or Contract Price;
- 6.4.4** The discovery of such material increases the Contract Time and/or Contract Price from what is stated in the Contract Documents; and
- 6.4.5** The requirements of Section 7.1.5 and the Contract Documents are met.

## **ARTICLE 7. MODIFICATIONS, PRs & PCOs, PRE AND CLAIM 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 Contractor's Agreement, and without invalidating the Contract Documents, by ASI, Change Order or Construction Change Directive, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents. Contractor must have a written Change Order or Construction Change Directive executed by DFCM under this Article 7 prior to proceeding with any Work for which Contractor intends to request an increase in the Contract Price and/or an extension of the Contract Time.

**7.1.2 BY WHOM ISSUED.** The A/E or DFCM may issue ASIs not involving an adjustment in the Contract Price or an extension of the Contract Time which are not inconsistent with the intent of the Contract Documents. A Change Order or Construction Change Directive shall be issued by DFCM. The A/E shall prepare Change Orders and Construction Change Directives with specific documentation and data for DFCM's approval and execution in accordance with 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 Contractor shall proceed promptly, unless otherwise provided in the ASI, Change Order or Construction Change Directive.

**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 shall cause a substantial inequity to DFCM or Contractor, the applicable unit prices may be equitably adjusted.

**7.1.5 CONCEALED OR UNKNOWN CONDITIONS.** Contractor must file a written notice with DFCM within seven (7) calendar days of the date that Contractor knew or should have known of a site condition described below or Contractor shall be deemed to waive any right to file any PCO, PRE, or Claim for an increase in the Contract Price and/or extension of the Contract Time related to such condition:

**7.1.5.1** If Contractor encounters unknown and reasonably unforeseeable subsurface or otherwise concealed physical conditions, including hazardous or historical/cultural/archeological materials under Article 6, which differ materially from those indicated by the Contract Documents or which would have been revealed by a reasonably thorough site inspection; or

**7.1.5.2** If 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.

**7.1.6 INCREASE IN CONTRACT TIME.** To the extent DFCM and/or the State of Utah is damaged by the failure of Contractor to provide the notice required by Section 7.1.5 after the Contractor knows or should

have known of such site condition, 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.

## **7.1.7 ALLOWANCES.**

**7.1.7.1** The Contractor has included in the Contract Price all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as DFCM may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

**7.1.7.2** Unless otherwise provided in the Contract Documents:

**7.1.7.2.1** Allowances shall cover the cost to the Contractor of materials and equipment delivered at the Work site and all required taxes, less applicable trade discounts;

**7.1.7.2.2** Allowances shall cover the Contractor's costs of unloading and handling at the Work site, labor, installation costs and other expenses contemplated for allowance items of the Work, including the Contractor's overhead and profit.

**7.1.7.2.3** Whenever costs are more than or less than allowances, the Contract Price for the Work shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 7.1.7.2.1 and (2) changes in Contractor's costs under Section 7.1.7.2.2.

**7.1.7.3** Materials and equipment under an allowance shall be selected by DFCM with reasonable promptness.

## **7.2 CONTRACTOR INITIATED REQUESTS.**

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

**7.2.2 PROPOSED CHANGE ORDER ("PCO").** Within seven (7) days after Contractor knows or should know of a situation or condition for which Contractor anticipates requesting an increase in the Contract Price and/or extension of the Contract Time, Contractor must file a Proposed Change Order ("PCO") with DFCM, or Contractor shall be deemed to waive any right to claim an increase in the Contract Price and/or extension of the Contract Time related to such situation or condition. The PCO shall include all documentation supporting the PCO available to Contractor at the time of filing and Contractor shall thereafter diligently pursue the supplementation(s) of such documentation and promptly deliver such supplementation(s) to DFCM.

**7.2.2.1** One of the following may occur after a PCO is filed with DFCM:

**7.2.2.1.1** DFCM, after considering any input by the A/E, may reach an agreement with Contractor and issue a Change Order.

**7.2.2.1.2** DFCM, after considering any input by the A/E, may issue a Construction Change Directive.

**7.2.2.1.3** If DFCM, after considering any input by the A/E, disagrees with Contractor's PCO, DFCM may seek additional information or verification from Contractor, the A/E, or other sources, and may negotiate with

Contractor, may issue a Change Order upon such later agreement, may issue or retract an issued PR, or may issue a Construction Change Directive.

**7.2.2.2** If a Construction Change Directive is issued which identifies DFCM's position in regard to a Contract Price and/or Contract Time adjustment or if a PCO is denied by DFCM, Contractor must file a PRE no later than twenty-one (21) days after Contractor's receipt of the Construction Change Directive or such denial of the PCO. Failure to timely file a PRE shall be deemed to waive any right to an increase in the Contract Price and/or extension of the Contract Time related to a Construction Change Directive beyond that identified by DFCM in the Construction Change Directive, if any, or denial of the PCO. Such waiver shall entitle DFCM to convert a Construction Change Directive into a Change Order, whether or not executed by Contractor.

**7.2.2.3** If a Construction Change Directive leaves open the determination of an increase in the Contract Price and/or extension of the Contract Time related to a change in the Work, then the time period for commencement of filing the PRE shall not accrue until such time as DFCM has conveyed to Contractor DFCM's position as to increase, if any, in the Contract Price and/or extension, if any, of the Contract Time as a result of the change in the Work.

**7.2.2.4** The Contractor must continually cooperate with DFCM in providing data, documentation and efforts to resolve any issues related to a PCO.

**7.2.3** **SUBSTITUTIONS.** The Contractor may make substitutions only with the consent of DFCM, after evaluation by the A/E and in accordance with a Change Order. Substitutions will be considered after the award of the Contractor's Agreement only when a PCO is submitted by the Contractor to substitute a non-specified product for a product specified in the Contract Documents, under the following conditions:

**7.2.3.1** The PCO is accompanied by complete data on the proposed substitution substantiating compliance with the design intent and performance requirements of the Contract Documents, including product identification and description, performance and test data, references and samples where applicable, comparison of the proposed substitution with the products specified or named in the Contract Documents, and the impact of the substitution upon the Contract Time.

**7.2.3.2.** The PCO is accompanied by accurate cost data on the proposed substitution and comparison with the products specified, whether or not modification of the Contract Price is to be a consideration.

**7.2.3.3** The Contractor is responsible for any additional costs for the A/E's additional services caused by the evaluation of the proposed substitution and/or the substitution of products.

**7.2.3.4** The PCO for substitution by the Contractor shall constitute a certification by the Contractor that the Contractor has investigated the proposed substitute product and determined that it is equal or superior in all respects to that specified; the cost data presented by the Contractor is complete and includes all related costs under the Contract Documents, including the A/E's additional services; the Contractor waives all claims for additional costs related to the substitution which subsequently become apparent; the Contractor will provide the same guarantee or warranty for the substituted product that the Contractor would have provided for the product specified in the Contract Documents; and the Contractor will coordinate the installation of the accepted substitute, making such changes as may be required for the Work to be properly completed in all respects.

**7.2.3.5** Substitutions will not be considered by the A/E or DFCM if they are intended or implied by submittals of Shop Drawings, Product Data or Samples without a PCO for substitution or when for their implementation they require a substantial revision of the Contract Documents in order to accommodate their use.

**7.3 PROPOSAL REQUEST INITIATED BY DFCM.** DFCM may submit a Proposal Request to Contractor seeking information, data, impact on the Contract Price and/or impact on the Contract Time for a change in the Work or other modification to the Contract Documents. The PR shall provide a time limit for Contractor to file a response with the A/E and DFCM. If a proposal is not timely provided by Contractor, DFCM may calculate a Change Order under Section 7.4.2. Upon timely receipt of a proposal, one of the following shall occur:

**7.3.1 IF AGREEMENT, CHANGE ORDER ISSUED.** DFCM, 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 DFCM disagrees with Contractor's proposal, after considering any input from the A/E, DFCM may seek additional information or verification from Contractor or other sources, may negotiate with 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 that identifies DFCM's position in regard to the increase, if any in the Contract Price and/or extension, if any, of the Contract Time, Contractor must file a PRE within twenty-one (21) days of Contractor's receipt of the Construction Change Directive, or Contractor shall be deemed to waive any right for an increase in the Contract Price and/or extension of the Contract Time as a result of the issuance of the Construction Change Directive beyond that identified by DFCM in the Construction Change Directive, if any. Such waiver shall entitle DFCM to convert the Construction Change Directive into a Change Order, whether or not executed by Contractor. If the Construction Change Directive leaves open the determination of an increase, if any, in the Contract Price and/or extension, if any, of the Contract Time related to the change in the Work, then the time period for commencement of filing the PRE shall not accrue until such time as DFCM has conveyed to Contractor DFCM's position as to the increase, if any, in the Contract Price and/or extension, if any, of the Contract Time resulting from the change in the Work.

## **7.4 CHANGE ORDERS.**

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

**7.4.2 DFCM RESOLUTION OF PRICE IN THE ABSENCE OF AN AGREEMENT UNDER SECTION 7.4.1.** In the absence of an agreement under Section 7.4.1, the adjustment in Contract Price 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 Section shall be limited to the following:

**7.4.2.1** 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;

**7.4.2.2** Costs of materials, on-site temporary facilities, supplies, and equipment (except hand tools) required for or incorporated into the Work;

**7.4.2.3** Rental costs of machinery, equipment, tools (except hand tools), and on-site temporary facilities, whether rented from Contractor or others;

**7.4.2.4** Costs of permits and other fees, sales, use or similar taxes related to the Work; and

**7.4.2.5** Overhead and profit. The markups stated herein for overhead and profit are intended to cover the Contractor's profit and all indirect costs associated with a change in the Work. Items covered by such markups include, but are not limited to: home office expenses, branch office and field office overhead expense of any

kind; project management; estimating, engineering; coordinating; expediting; purchasing; billing and invoicing; detailing; legal, accounting, data processing or other administrative expenses; computer and telephone costs (including computer and phone allowances); shop drawings; liability insurance premium, auto insurance premium, performance and payment bond premium and SDI; vehicle costs (including vehicle allowances); ESOP related costs; and warranty expense costs. The cost for the use of small tools is also to be considered covered by such markups. Small tools shall be defined as tools and equipment (power or non-power) with an individual purchase cost of less than Seven Hundred Fifty Dollars (\$750).

**7.4.2.5.1** The maximum markup percentage to be paid to any contractor (regardless of tier) including Contractor, a Subcontractor and/or Sub-subcontractor on self-performed work shall be a single markup percentage not-to-exceed fifteen percent (15%) of the net increased direct cost of: (A) direct labor and allowable labor burden costs applicable to the change in the Work; (B) the net cost of material and installed equipment incorporated into the change in the Work, and (C) net rental cost of major equipment and related fuel costs necessary to complete the change in the Work;

**7.4.2.5.2** With respect to pricing the portion of Change Orders involving work performed by lower tier contractors, including Subcontractors and Sub-subcontractors, the maximum markup percentage allowable to the Contractor, Subcontractor or Sub-subcontractor supervising the lower tier contractor's work shall not exceed seven percent (7%) of the net increase of all approved changes in the Work performed by all contractors combined for any particular Change Order.

**7.4.2.5.3** Contractor agrees to include these limitations on Change Order pricing in Contractor's subcontracts with Subcontractors and shall likewise require all of Contractor's Subcontractors to include the same provisions in all sub-subcontracts with their respective Sub-subcontractors of any tier.

**7.4.3 CREDITS.** The amount of credit to be allowed by Contractor to DFCM for a deletion or change in the Work which results in a net decrease in the Contract Price shall be actual net cost as confirmed to DFCM based upon corroboration by an appropriate source, provided, however, the application of the markup percentages referenced in Section 7.4.2.5 for overhead and profit will apply only to additive change orders. In those instances where a change in the Work involves both additive and deductive work, the additions and deductions will be netted and the markup percentage adjustments will be applied to the net additive amount, if any.

**7.4.4 EFFECT OF A CHANGE ORDER.** A Change Order signed by the Contractor constitutes the Contractor's agreement that, when implemented by DFCM, the adjustment in the Contract Price, if any, and/or the adjustment in the Contract Time, if any, for the change in the Work shall fully and finally compensate the Contractor and its Subcontractors and Sub-subcontractors of any tier for any and all additional costs, damages or expenses arising directly or indirectly out of the change in the Work described in the Change Order.

**7.4.4.1** All Change Orders shall be conclusively presumed to constitute settlement of all Claims for direct or indirect damages of the Contractor, its Subcontractors and their respective Sub-subcontractors of any tier arising out of the change in the Work. This shall include, but is not limited to, any and all so-called "delay," "equitable adjustment," "impact," "cumulative impact," "acceleration," "constructive acceleration," "inefficiency," "interference," "indirect," "ripple" or "consequential" claims, costs or damages and all direct or indirect costs pertaining to the Contractor's home office, branch offices, or field site office and all other costs and effects whatsoever relating to the change in the Work.

**7.4.4.2** Any statement unilaterally added by the Contractor to a Change Order or contained in any transmittal or separate correspondence wherein the Contractor unilaterally attempts to reserve rights to seek any further increases in the Contract Price and/or further extensions of the Contract Time for a change in the Work that is the subject of the Change Order and/or arising out of, related to and/or connected with the change in the Work described in the Change Order shall be null and void.

## **7.5 CONSTRUCTION CHANGE DIRECTIVES.**

**7.5.1 WHEN USED AND CONTRACTOR'S RIGHT TO CHALLENGE.** Without invalidating the Contractor's Agreement, DFCM reserves the right to unilaterally issue, in DFCM's sole discretion, a Construction Change Directive that requires Contractor to proceed with a change in the Work. DFCM may order minor changes within the scope of Work without granting an adjustment in the Contract Price or an extension of the Contract Time if such minor changes within the scope of Work are consistent with the intent of the Contract Documents. In order to expedite the Work and avoid or minimize delays in the Work that may affect the Contract Price or Contract Time, the Contract Documents shall be amended as described below. If the Construction Change Directive leaves open the determination of an increase, if any, in the Contract Price and/or extension, if any, of the Contract Time related to the change in the Work, then the Construction Change Directive shall indicate the timeframe(s) in which Contractor shall provide further information to resolve such open issue(s). When DFCM and Contractor agree upon an increase, if any, in the Contract Price and/or extension, if any, in the Contract Time related to a Construction Change Directive, the parties shall execute a Change Order. Additionally, the Construction Change Directive may be converted to a Change Order under Section 7.2.2.2 or Section 7.3.2.

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

**7.5.3 INTERIM PAYMENTS BY DFCM.** Pending the final determination of the increase in the Contract Price, if any, associated with a Construction Change Directive, DFCM shall pay any undisputed amount to Contractor.

**7.6 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 Contractor an ASI after approval from DFCM is obtained.

## **7.7 PROCEDURE FOR PRELIMINARY RESOLUTION EFFORTS.**

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

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

**7.7.2.1** Issuance of a Construction Change Directive that states the adjustment in Contract Price and/or Contract Time, if any, if Contractor disagrees with such adjustment;

**7.7.2.2** Issuance of a statement of DFCM's position with respect to the adjustment in Contract Price and/or Contract Time, if any, in a previously issued Construction Change Directive that left open the adjustment in Contract Price and/or Contract Time, if Contractor disagrees with such statement;

**7.7.2.3** Issuance of a denial of a PCO by DFCM;

**7.7.2.4** In the case of a Subcontractor, after the expiration of the time period for the Contractor/Subcontractor PRE process under Section 7.7.5; or

**7.7.2.5** Except as provided in Section 7.2.2, when Contractor knows or should have known about any other issue where Contractor seeks an adjustment in the Contract Price, Contract Time and/or other relief from 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 filing of the PRE:

**7.7.3.1** A description of the issue;

**7.7.3.2** The potential impact on the Work, Contract Price and/or Contract Time; and

**7.7.3.3** An indication of the relief sought.

**7.7.4 SUPPLEMENTATION.** Additional detail of the content requirement under Section 7.7.3 shall be provided later if the detail is not yet available at the initial filing as follows:

**7.7.4.1** While the issue is continuing or the impact is being determined, Contractor shall provide a written updated status report every thirty (30) days or as otherwise reasonably requested by DFCM; and

**7.7.4.2** After the issue is concluded and/or the impact is determinable, complete information, including any impacts on Contract Price, Contract Time and/or other relief requested, if any, must be provided to DFCM within twenty-one (21) days of the earlier of the date the issue is concluded or the impact is determinable.

**7.7.5 SUBCONTRACTORS.** Contractor must include the provisions of this Section 7.7.5 in Contractor's subcontract with each Subcontractor and require each Subcontractor to do likewise in each Subcontractor's sub-subcontracts with Sub-subcontractors. At Contractor's discretion, Contractor may allow a Sub-subcontractor at the second tier and beyond to submit a PRE directly to Contractor.

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

**7.7.5.1.1** The Subcontractor must have attempted to resolve the issue with Contractor, including the submission of a PRE with Contractor.

**7.7.5.1.2** The Subcontractor must file a copy of the PRE with DFCM;

**7.7.5.1.3** The PRE to Contractor must meet the time, content, and supplementation requirements of Sections 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 negotiation;

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

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

**7.7.5.1.6** Upon such PRE being submitted, Contractor shall cooperate with DFCM in reviewing the issue;

**7.7.5.1.7** DFCM shall not be obligated to consider any submission which is not in accordance with any provision of this Section 7.7.5;

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

**7.7.5.1.9** Notwithstanding any provision of this Section 7.7.5, a Subcontractor shall be entitled to pursue a payment bond claim.

**7.7.6 INFORMATION AND MEETINGS.** DFCM 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 DFCM, Contractor shall proceed diligently with performance of the Work and DFCM shall continue to make payments of undisputed amounts in accordance with the Contract Documents.

**7.7.8 DECISION.** DFCM shall issue to Contractor, and any other third party brought into the process by DFCM as being potentially liable to DFCM, a written decision providing the basis for the decision on the issues presented by all of the parties within thirty (30) days of receipt of all the information required under Sections 7.7.3 and 7.7.4.

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

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

**7.7.11 IF DECISION NOT ISSUED.** If the decision is not issued within the thirty (30) day period, stated in Section 7.7.8 including any agreed to extensions, the issue may be pursued as a Claim.

**7.7.12 PAYMENT FOR PERFORMANCE.**

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

**7.7.12.2** Payment to Contractor in accordance with any final decision shall be made by DFCM consistent with the Contract Documents.

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

**7.7.12.4** Payment to Contractor for a Subcontractor issue submitted by the Contractor shall be paid by Contractor to Subcontractor in accordance with the subcontract between Contractor and Subcontractor.

**7.7.12.5** Any payment or performance determined owing by Contractor to 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 Contractor is not satisfied with the decision, Contractor, or other party brought into the process by DFCM, may submit a Claim in accordance with this Section 7.8 as a prerequisite for any further consideration by 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 DFCM, the Subcontractor that had its issue considered under Section 7.7.5 may submit the issue as a Claim by filing it with Contractor and DFCM within the same timeframe and with the same content requirements as required of a Claim submitted by Contractor under this Section 7.8.2. DFCM shall consider the Claim as being submitted by Contractor on behalf of the Subcontractor. Under no circumstances shall any provision of these General Conditions or the Contract Documents be construed so as to create any contractual relationship between DFCM and any Subcontractor.

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

**7.8.2.2** The Director shall not be obligated to consider any submission which is not in accordance with this Section 7.8.2.

**7.8.2.3** The Subcontractor may accompany 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 Contractor separately, and it shall be the responsibility of Contractor to keep the Subcontractor informed of any such meetings and matters discussed.

**7.8.2.4** Notwithstanding any provision of this Section 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 of DFCM, but in no case more than twenty-one (21) days after the decision is issued on the PRE under Section 7.7.8 or no more than twenty-one (21) days after the thirty (30) day period under Section 7.7.11 has expired with a decision not issued.

**7.8.4 CONTENT REQUIREMENT.** The written Claim shall include:

**7.8.4.1** A description of the issues in dispute;

**7.8.4.2** The basis for the Claim, including documentation and analysis required by the Contract Documents and applicable law and rules that allow for the proper determination of the Claim;

**7.8.4.3** A detailed cost estimate for any amount sought, including copies of any related invoices; and

**7.8.4.4** 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, Contractor shall proceed diligently with performance of the Contract and DFCM shall continue to make payments of undisputed amounts 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:

**7.8.7.1** A single expert and/or hearing officer qualified in the field that is the subject of the Claim;

**7.8.7.2** An expert panel, consisting of members that are qualified in a field that is the subject of the Claim;

**7.8.7.3** An arbitration process which may be binding if agreed to by the parties to the Claim;

**7.8.7.4** A mediator; or

**7.8.7.5** 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 is available at <https://rules.utah.gov>.

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

#### **7.8.10 PAYMENT OF CLAIM.**

**7.8.10.1** 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.

**7.8.10.2** 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 have 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 is completed.

**7.8.10.3** 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.

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

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

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

**7.8.10.7** The execution of a customary release document by the claimant related to any payment may be required as a condition of making the payment. Unless expressly and specifically released in writing by DFCM, settlement of a Claim by DFCM shall not be deemed a waiver of Claims reserved under Section 8.8.3.

#### **7.8.11 ALLOCATION OF COSTS OF CLAIM RESOLUTION PROCESS.**

**7.8.11.1** In order to file a Claim, a claimant must pay a Fifteen Hundred Dollar (\$1,500.00.00) filing fee to DFCM. When the Claim is a pass-through from a Subcontractor in accordance with Section 7.7.5, the payment of the fee shall be made by the Subcontractor.

**7.8.11.2** 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.

**7.8.11.3** 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.

**7.8.11.4** Each party shall be responsible for its own attorney fees.

**7.8.12 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 Section 7.8.

**7.8.13 IMPACT ON FUTURE SELECTIONS.**

**7.8.13.1** The presentation of a good faith and non-frivolous issue or Claim shall not be considered by DFCM in DFCM’s selection process for a future award of contract; and

**7.8.13.2** 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 DFCM’s evaluation of performance.

**7.8.14\* DFCM’S RIGHT TO HAVE ISSUES, DISPUTES OR CLAIMS CONSIDERED.** As stated in Rule R23-26-1(6), Sections 7.7 and 7.8 do not limit the right of DFCM to have any of DFCM’s issues, disputes or claims considered. DFCM reserves all rights to pursue DFCM’s 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, Contractor shall cooperate with such expert or panel process.

*Section 7.8.14 as of 07122023.*

**ARTICLE 8. PAYMENTS AND COMPLETION.**

**8.1 SCHEDULE OF VALUES.** With the first Application for Payment, Contractor shall submit to the A/E and DFCM 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 schedule of values must consist of a detailed and specific breakdown of values actually associated with the various items of Work and shall in no event be “frontloaded”. The A/E shall make recommendations to DFCM regarding the schedule of values including any suggested modifications. When approved, including any approved modifications, by DFCM, it shall be the basis for future Contractor Applications for Payment. Contractor shall be entitled to reasonably reallocate values in the schedule of values with prior written notice to DFCM. 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:

**8.2.1.1** 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 form approved and provided by DFCM.

**8.2.1.2** The Application for Payment shall be supported by such data substantiating Contractor’s right to payment as DFCM or the A/E may require.

**8.2.1.3** The Application for Payment may include requests for payment pursuant to approved Change Orders or Construction Change Directives.

**8.2.1.4** The Application for Payment shall not include requests for payment for portions of the Work performed by a Subcontractor when Contractor does not intend to pay that Subcontractor because of a dispute or other reason.

**8.2.1.5** In executing the Application for Payment, Contractor shall attest that Subcontractors involved with prior Applications for Payment have been paid, unless Contractor provides a detailed explanation why such

payment has not occurred. DFCM reserves the right to require Contractor to submit a Utah Conditional Waiver and Release Upon Progress Payment form 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 Work site for subsequent incorporation into the Work. If approved in advance by DFCM and A/E, payment may similarly be made for materials and equipment suitably stored off-site at a location agreed upon in writing. Payment for materials and equipment stored on or off-site shall be conditioned upon compliance by Contractor with procedures satisfactory to DFCM to establish DFCM's title to such materials and equipment or otherwise protect DFCM's interest, and shall include applicable insurance, storage, and transportation to the Work site for such materials and equipment stored off-site. DFCM may require copies of invoices or other suitable documentation.

**8.2.3 WARRANTY OF TITLE.** Contractor warrants that title to all Work covered by an Application for Payment shall pass to DFCM no later than the time for payment. 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 DFCM shall, to the best of 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, DFCM may, as a result of the claims resolution process, withhold any payment to Contractor if and for so long as Contractor fails to perform any of its obligations under the Contract Documents 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 seven (7) days after receipt of Contractor's Application for Payment, either issue to DFCM a Certificate for Payment, with a copy to the Contractor, for such amount as the A/E determines due or notify Contractor and DFCM in writing of the A/E's reasons for withholding certification in whole or in part as provided in Section 8.4.1. If the A/E fails to act within said seven (7) day period, Contractor may file the Application for Payment directly with DFCM and DFCM shall thereafter have twenty-one (21) days from the date of DFCM's receipt to resolve the amount to be paid and to pay the undisputed amount. The accuracy of 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 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 for Payment 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 shall further constitute a representation that 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: (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences or procedures; (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by DFCM to substantiate Contractor's right to payment; (4) ascertained how or for what purpose Contractor used money previously paid on account of Contract Price; or (5) 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 DFCM, if in the A/E's judgment the representations to DFCM required in Section 8.3.2 cannot be made. If the A/E is unable to certify payment in the amount of the Application for Payment, the A/E shall notify Contractor and DFCM as provided in Section 8.3.1. If Contractor and the A/E cannot 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 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 DFCM from loss because of:

**8.4.1.1** Defective Work not remedied;

**8.4.1.2** Third party claims filed or reasonable evidence indicating probable filing of such claims;

**8.4.1.3** Failure of Contractor to make payments properly to Subcontractors or for labor, materials, or equipment;

**8.4.1.4** Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Price;

**8.4.1.5** Damage to DFCM or another contractor;

**8.4.1.6** Reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance of the Contract Price would not be adequate to cover actual or liquidated damages for the anticipated delay; or

**8.4.1.7** 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 Section 8.4.1 for withholding certification are removed, certification shall be made for such related amounts.

**8.4.3 CONTINUE WORK EVEN IF CONTRACTOR DISPUTES A/E'S DETERMINATION.** If Contractor disputes any determination by the A/E or the result of the claims resolution process with regard to any Certification of Payment, Contractor nevertheless shall expeditiously continue to prosecute the Work.

**8.4.4 DFCM NOT IN BREACH.** DFCM shall not be deemed to be in breach of Contractor's Agreement by reason of the withholding of any payment pursuant to any provision of the Contract Documents provided 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.**

**8.5.1.1** Except as provided in Section 8.3.1, DFCM shall pay any undisputed amount within twenty-eight (28) 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.

**8.5.1.2** Except as otherwise provided by law, if any payment is late based upon the provisions of the Contract Documents, Contractor shall be paid interest at the rate stated in Utah Code § 15-6-3.

**8.5.2 CONTRACTOR AND SUBCONTRACTOR RESPONSIBILITY.** Contractor shall promptly and no later than the date established in Utah Code § 15-6-5 pay each Subcontractor, upon receipt of payment from DFCM, out of the amount paid to Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled. Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payment to its Sub-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 a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by 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 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 DEFECTIVE WORK.** A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Work by 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 Contractor and certification by the A/E, 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, DFCM may retain until final completion up to twice the fair market value of the Work that has not been completed in accordance with the Contract Documents, or, in the absence of applicable Contract Documents, generally accepted craft standards.

**8.7 PARTIAL OCCUPANCY OR USE.**

**8.7.1 IN GENERAL.** 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 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 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 Contractor considers a portion to be Substantially Complete, Contractor shall prepare and submit a list to the A/E as previously provided for herein. Consent of Contractor to partial occupancy or use shall not be unreasonably withheld. Contractor shall have continuing responsibility to protect the Work site and the Work during such partial occupancy or use and shall be responsible for damage except to the extent caused solely by DFCM during such partial occupancy or use. The stage of progress of the Work shall be determined by written agreement between DFCM and Contractor.

**8.7.2 INSPECTION.** Immediately prior to such partial occupancy or use, 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 DFCM, partial occupancy or use of a portion of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

**8.7.4 INSURANCE.** Partial occupancy or use shall not commence until the insurance company or companies providing property insurance under Section 10.2 have provided any required consent to such partial

occupancy or use by endorsement or otherwise. DFCM shall take reasonable steps to obtain any required consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

## **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 Section 8.8.2 as precedent to 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 Contractor submits to the A/E the following to the extent required by DFCM:

**8.8.2.1** An affidavit that payrolls, bills for material and equipment, and other indebtedness connected with the Work (less amounts withheld by DFCM) have been paid or otherwise satisfied;

**8.8.2.2** 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 shall not be canceled or allowed to expire until at least twenty-eight (28) days prior written notice, by certified mail, return receipt requested, has been given to DFCM;

**8.8.2.3** A written statement that Contractor knows of no reason that the insurance shall not be renewable to cover the period required by the Contract Documents;

**8.8.2.4** If requested by the surety in a timely manner or by DFCM, consent of surety, to final payment;

**8.8.2.5** 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;

**8.8.2.6** Other data establishing payment or satisfaction of obligations, such as a Utah Waiver and Release Upon Final Payment form from Contractor, Subcontractors and Sub-subcontractors, receipts, other releases and waivers of liens, claims, security interests, or encumbrances arising out of Contractor's Agreement, to the extent and in such form as may be designated by DFCM. If a Subcontractor or Sub-subcontractor refuses to furnish a release or waiver required by DFCM, DFCM may require consent of surety to the final payment. If liens, claims, security interests, or encumbrances remain unsatisfied after payments are made, Contractor shall refund to DFCM all money that DFCM may be compelled to pay in discharging such liens, claims, security interests or encumbrances including all costs and reasonable attorney fees; and

**8.8.2.7** A written statement demonstrating how Contractor shall distribute interest earned on retention to Subcontractors as required by Utah Code § 13-8-5.

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

**8.8.3.1** Liens, Claims, security interests, or encumbrances arising out of the Contract Documents and unsettled;

**8.8.3.2** Failure of the Work to comply with the requirements of the Contract Documents;

**8.8.3.3** Terms of warranties required by the Contract Documents; or

**8.8.3.4** Claims arising within the one-year period for correction of the Work and Claims to the extent not barred by Utah Code § 78B-2-225 and/or Utah Code § 78B-4-513.

**8.8.4 DELAYS NOT CONTRACTOR'S FAULT.** If, after Substantial Completion of the Work, Final Completion is materially delayed through no fault of Contractor or by issuance of Change Orders affecting final completion, DFCM shall, upon application by Contractor and certification by the A/E, and without terminating Contractor's Agreement, 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. Unless otherwise stated by DFCM in writing, the making of final payment shall constitute a waiver of claims by DFCM as provided in Section 8.8.3 for that portion of that Work fully completed and accepted by DFCM.

**8.8.5 WAIVER BY ACCEPTING FINAL PAYMENT.** Acceptance of final payment by 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.

**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, rules, regulations, 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 DFCM in writing, DFCM shall contract for such tests, inspections, and approvals with an independent entity, or with the appropriate public authority, and 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, Contractor shall, at least two (2) working days prior to the time of the desired inspection, and following the procedures established by DFCM, request such inspection or approval to be performed. 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:

**9.1.2.1** The inspection or approval was requested in a timely manner as provided in Section 9.1.1;

**9.1.2.2** Contractor received written confirmation from the inspection entity that the inspection was scheduled;

**9.1.2.3** Contractor has contacted or attempted to contact the inspector to confirm whether the inspector is able to perform the inspection as scheduled;

**9.1.2.4** If the inspector informs Contractor that the inspector is unable to perform the inspection as scheduled or if Contractor is unable to contact the inspector, Contractor shall attempt to contact the A/E or DFCM for instruction; and

**9.1.2.5** Contractor has documented the condition of the Work prior to being covered through photos or other means.

**9.1.3 NONCONFORMING WORK.** If procedures for testing, inspection, or approval under Section 9.1.1 reveal failure of portions of the Work to comply with the requirements established by the Contract

Documents, Contractor shall bear all costs made necessary by such failure including those of repeated procedures and compensation for DFCM's expenses, including the cost of retesting for verification of compliance if necessary, until 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 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 delay in the Work.

## **9.2 UNCOVERING OF WORK.**

**9.2.1 UNCOVER UNINSPECTED WORK.** Except as provided in Section 9.2.3, 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 Contractor's expense without change in the Contract Price and/or Contract Time.

**9.2.2 OBSERVATION PRIOR TO COVERING.** Except as provided in Section 9.2.3, if DFCM or the A/E has requested in writing to observe conditions prior to any Work being covered or if such observation is required by the Contract Documents, and the Work is covered without such observation, Contractor shall be required to uncover and appropriately replace the Work at Contractor's expense without change in the Contract Price and/or Contract Time. If Contractor requests an inspection and DFCM or the A/E, including any inspector of each, does not appear, Contractor shall immediately notify DFCM of such failure to appear, but shall not cover the Work without such inspection.

**9.2.3 WHEN AN INSPECTOR FAILS TO APPEAR OR A/E OR DFCM DID NOT MAKE PRIOR REQUEST.** If Work is performed by Contractor without an inspection as provided in Section 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 required by the Contract Documents, the A/E or DFCM may request to see such Work and it shall be uncovered by Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement, shall, by appropriate Change Order, be charged to DFCM. If such Work is not in accordance with the Contract Documents, Contractor shall pay such costs unless the condition was caused by DFCM or a separate contractor in which event DFCM shall be responsible for payment of such costs.

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

**9.3.1 SUBSTANTIAL COMPLETION INSPECTION.** Prior to requesting a Substantial Completion inspection, Contractor shall prepare a comprehensive initial punchlist, including unresolved items from prior inspections, for review by DFCM and the A/E to determine if the Work is ready for a Substantial Completion inspection. If DFCM and A/E determine that the initial punchlist indicates that the Work is not Substantially Complete, the initial punchlist shall be returned to Contractor with written comments. If DFCM and A/E determines that the initial punchlist indicates that the Work may be Substantially Complete, the A/E shall promptly organize and perform a Substantial Completion inspection in the presence of DFCM and all appropriate authorities.

**9.3.1.1** If the A/E reasonably determines that the initial punchlist prepared by Contractor substantially understates the amount of the Work remaining to be completed and the Work is not Substantially Complete, the A/E shall report this promptly to DFCM, and upon concurrence of DFCM, Contractor shall be assessed the costs of the inspection and punchlist review incurred by the A/E and DFCM.

**9.3.1.2** 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 DFCM and Contractor for security, maintenance, heat, utilities, damage to the Work, and insurance; and shall fix the time within which Contractor shall finish all items on the punchlist accompanying the Certificate (“Punchlist Completion Date”). The Certificate of Substantial Completion shall require approval by DFCM. If there is a punchlist, Contractor shall proceed promptly to complete and correct items on the punchlist. Failure to include an item on the punchlist does not alter the responsibility of Contractor to complete all Work in accordance with the Contract Documents.

**9.3.1.3** 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. Written warranties shall state the length of the warranty, which must comply with the Contract Documents.

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

**9.3.1.5** Except to the extent DFCM otherwise approves in advance and in writing, 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. Contractor shall also provide or obtain any required approvals for occupancy. Contractor shall be responsible for the guaranty of all Work, whether performed by it or by its Subcontractors and Sub-subcontractors at any tier.

**9.3.2 FINAL COMPLETION INSPECTION.** Prior to requesting a final inspection, Contractor shall verify all punchlist items are corrected and completed. Once all punchlist items are corrected and completed, Contractor shall notify DFCM and request a final inspection. DFCM shall notify the A/E and perform a final inspection. When all punchlist items are completed, a final Application for Payment shall be provided by Contractor, certified by the A/E, and processed by DFCM.

**9.3.3 PUNCHLIST COMPLETION.** As compensation to DFCM for administrative costs incurred by DFCM as a result of delay in final project close-out, for each day subsequent to the Punchlist Completion Date that Contractor fails to complete the punchlist and subject to Section 8.8.4, Contractor shall pay to DFCM five percent (5%) of the liquidated damages amount stated in the Contractor’s Agreement.

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

**9.4.1 CONTRACTOR CORRECT THE WORK.** Contractor shall correct Work rejected by the A/E, an 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. 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 Section 9.2.1 or by terms of an applicable special warranty or guaranty required by the Contract Documents, any of the Work is found not to be in accordance with the requirements of the Contract Documents, including failure to perform for its intended purpose, Contractor shall correct it promptly after receipt of written notice from DFCM to do so, unless DFCM has previously given 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 Contractor under this Section 9.4.2 shall be operative notwithstanding the acceptance of the Work under the Contract Documents, the issuance of a final certificate of payment, partial or total occupancy and/or termination of Contractor's Agreement. DFCM shall give notice of observed defects with reasonable promptness; however, failure to give such notice shall not relieve Contractor of its obligation to correct the Work. 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 DFCM's right to pursue any available remedies against Contractor, including, but not limited to, DFCM's right to pursue a cause of action for defective construction against Contractor within the time period established by Utah Code § 78B-2-225.

## **9.4.3 REMOVAL OF WORK.**

**9.4.3.1** Contractor shall promptly remove from the Work site all Work that DFCM and/or the A/E determines as being in nonconformance with the Contract Documents, whether incorporated or not.

**9.4.3.2** Contractor shall promptly replace and re-execute any Work not in accordance with the Contract Documents without change in the Contract Price and/or Contract Time.

**9.4.3.3** Contractor shall bear the expense of correcting destroyed or damaged construction, whether completed or partially completed, by DFCM or separate contractors destroyed or damaged by such removal or replacement.

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

**9.4.3.5** If Contractor does not correct the nonconforming Work within a reasonable time, fixed by written notice, DFCM may correct it in accordance with Section 2.2.2 of these General Conditions.

**9.4.4 NOT LIMIT OTHER OBLIGATIONS.** Nothing contained in this Section 9.4 shall be construed to establish a period of limitation with respect to other obligations that Contractor may have under the Contract Documents. Establishment of the time period of one year as described in Section 9.4.2 relates only to the specific obligation of 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 Contractor's liability with respect to 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:

**9.5.1.1** Contractor warrants to DFCM that materials and equipment furnished under the Contract Documents shall be of good quality and new, except to the extent otherwise required or expressly permitted by the Contract Documents.

**9.5.1.2** Contractor also warrants to DFCM that the Work shall be free from defects not inherent in the quality required or expressly permitted and that the Work shall conform with the requirements of the Contract Documents. Work not conforming to said requirements, including substitutions not implemented by Change Order, Construction Change Directive, or ASI as provided in Article 7, may be considered defective at DFCM's option.

**9.5.2 EXCLUSION.** Unless due to the negligent or intentional act or omission of Contractor or those under the Contractor's control, or as otherwise stated in the Contract Documents, Contractor's guaranty excludes remedy for damage or defect caused by abuse, modifications not executed by 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, Contractor shall furnish satisfactory evidence as to the type and quality of materials and equipment.

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

**ARTICLE 10. INSURANCE AND BONDS.**

**10.1 CONTRACTOR'S LIABILITY INSURANCE.**

**10.1.1 IN GENERAL.** The Contractor shall purchase and maintain in a company or companies lawfully authorized to do business in the State of Utah such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations and completed operations under the Contract and for which Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by a Sub-subcontractor or anyone directly employed by them, or by anyone for whose acts they may be liable:

**10.1.1.1** Claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed;

**10.1.1.2** Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

**10.1.1.3** Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;

**10.1.1.4** Claims for damages insured by usual personal injury liability coverage;

**10.1.1.5** Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

**10.1.1.6** Claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;

**10.1.1.7** Claims for bodily injury or property damage arising out of completed operations;

**10.1.1.8** Claims involving contractual liability insurance applicable to the Contractor's obligations under Section 4.12; and

**10.1.1.9** If the Contract Documents require the Contractor to provide and/or the Contractor provides professional services, claims for damages because of negligent errors or omissions in the performance of professional services.

**10.1.2 COVERAGE.** Without limiting Contractor's obligations or liabilities hereunder, the Contractor shall, at its sole expense, purchase and maintain the following insurance coverages required by Section 10.1.1 of these General Conditions from insurers authorized to do business in the state of Utah and rated "A-" or better with a financial size category of class VII or larger by the A.M. Best Company. The following insurance coverages required by Section 10.1.1 of these General Conditions shall be procured with the following terms and insurance limits unless otherwise agreed in writing by DFCM and the Contractor:

**10.1.2.1** Commercial General Liability Insurance covering all liabilities for personal injury and property damage arising in connection with the Work, with limits of liability of Five Million Dollars (\$5,000,000.00) per each occurrence and in the aggregate.

**10.1.2.2** Workers Compensation Insurance in compliance with all applicable laws of each jurisdiction in which the Work will be performed.

**10.1.2.3** Employers Liability Insurance covering all liabilities for personal injuries of the Contractor's employees, with limits of liability of Five Million Dollars (\$5,000,000.00) for each occurrence and in the aggregate.

**10.1.2.4** If the Contract Documents require the Contractor to provide and/or the Contractor provides professional services, Professional Liability Insurance with limits of liability of Two Million Dollars (\$2,000,000.00) for each claim and in the aggregate with a retroactive or effective date not later than the effective date of the Contractor's Agreement and with a deductible or self-insured retention of not greater than One Hundred Thousand Dollars (\$100,000.00) per claim.

**10.1.2.5** Automobile Liability Insurance, including coverages of owned, non-owned and hired vehicles covering all liabilities for personal injury and property damage arising from the use of motor vehicles, with combined single limits of liability of Two Million Dollars (\$2,000,000.00) for each occurrence and in the aggregate.

**10.1.2.6** If the Contractor is unable to obtain the insurance required by this Section 10.1, Contractor may carry excess liability insurance and/or umbrella insurance that, when combined with Contractor's primary coverage in a given category of insurance, brings the total coverage in such category to be not less than the amount required by this Section 10.1 for that category of insurance.

**10.1.3 ENDORSEMENTS.** The Contractor shall provide the following coverage endorsements for each category of insurance required by this Section 10.1, except in the case of Workers' Compensation Insurance, Employers' Liability Insurance and Professional Liability Insurance:

**10.1.3.1** An endorsement including DFCM as an additional insured;

**10.1.3.2** An endorsement including a cross liability clause, noting that each of the parties comprising the insured shall be considered as a separate entity, the insurance applies as if a separate policy has been issued to each party, and no “insured-versus-insured” exclusion exists in the policy.

**10.1.3.3** An endorsement waiving all expressed or implied rights of subrogation against DFCM and the State of Utah.

**10.1.4 TERMS.** Except as otherwise expressly provided in Section 10.1.2, the insurance of the Contractor required to be maintained pursuant to this Section 10.1 shall be on the following terms:

**10.1.4.1** All insurance shall begin no later than the effective date of the Contractor’s Agreement and shall continue until the final completion of the Work and for a period of two (2) years following the final completion of the Work, provided, however, if the Contractor’s Agreement is terminated prior to the final completion of the Work, such insurance shall continue for a period of two (2) years following the termination of the Contractor’s Agreement.

**10.1.4.2** Before performing any of the Work and after each time the policies are renewed or varied, the Contractor shall provide to DFCM certificates of insurance and endorsements consistent with this Section 10.1.4 and Sections 10.1.1, 10.1.2 and 10.1.3 of these General Conditions. If required by DFCM the Contractor shall deliver copies of the insurance policies providing the insurance coverages required by this Section 10.1, and all endorsements thereto.

**10.1.4.3** All insurance shall not be varied to the detriment of DFCM, cancelled or allowed to lapse until thirty (30) days’ prior written notice has been given to DFCM.

**10.1.5 FAILURE TO PROVIDE.** Should the Contractor at any time neglect or refuse to provide the insurance required by this Section 10.1, or should such insurance be canceled, DFCM shall have the right, but not the obligation, to procure the same at the cost and expense of the Contractor, and the cost thereof may be deducted by DFCM from any monies then due or thereafter to become due to the Contractor. If DFCM or the other Indemnified Parties are damaged by the failure of the Contractor to purchase or maintain insurance as required by this Section 10.1, the Contractor shall bear all reasonable costs, expenses and damages incurred by DFCM and/or the other Indemnified Parties arising from such failure to purchase or maintain the insurance required by this Section 10.1.

**10.1.6 CERTIFICATES.** The acceptance of delivery of any Certificates of Insurance or copies of insurance policies required to be purchased and maintained pursuant to the Contract Documents does not constitute approval or agreement by the recipient that the insurance requirements have been met or that those Certificates of Insurance or insurance policies comply with the Contract Documents.

**10.1.7 NO LIMITATION.** The Contractor shall procure such insurance coverages and such insurance limits for its insurance coverages that the Contractor, in its sole discretion, after consultation with its insurance and risk advisors, determines to be sufficient for Contractor’s purposes given the risks of the project. This Section 10.1 sets forth DFCM’s minimum insurance requirements; the Contractor may procure additional or broader insurance coverages or greater insurance limits than required by Section 10.1 at Contractor’s expense. Nothing in Section 10.1 or elsewhere in the Contract Documents is intended to limit the Contractor’s liability to DFCM or the Indemnified Parties to liabilities covered by the insurance coverages required by Section 10.1 or to the minimum insurance limits required of such insurance coverages by Section 10.1.

## **10.2 “BUILDER’S RISK” INSURANCE.**

**10.2.1 IN GENERAL.** Provided that the Contractor’s Agreement is for new buildings, structures, or construction projects, or for the alteration or repair of, or addition to existing buildings, structures, or improvements (an “Eligible Project”), DFCM shall maintain insurance to protect the interest of the Contractor, Subcontractors, or Sub-subcontractors subject to all of the terms, conditions, limitations, exclusions, waivers and/or endorsements stated in the Commercial Property Policy Declarations and Scheduled Forms available on DFCM’s website, [dfcm.utah.gov](http://dfcm.utah.gov) (“Builder’s Risk Insurance”).

**10.2.2 DEDUCTIBLE.** To the extent that the Builder’s Risk Insurance provides for a deductible (including, without limitation, a specific loss deductible, cumulative loss deductible and/or sub-deductible), with respect to any damages or losses to property covered by the Builder’s Risk Insurance caused in whole or in part by the negligence, breach of contractual duty or other fault of DFCM (or those for whom DFCM is responsible, including the A/E and the A/E’s consultants) or the Contractor (or those for whom the Contractor is responsible, including the Contractor’s Subcontractors and Sub-subcontractors of any tier), any deductible applicable to such covered damages or losses to property shall be paid by the party, whether DFCM or the Contractor, legally responsible for the negligence, breach of contractual duty or other fault that caused the losses or damages. If both DFCM and the Contractor are legally responsible in part for the negligence, breach of contractual duty or other fault that caused such losses or damages to property, DFCM and the Contractor shall pay any deductible applicable to such covered damages or losses to property in proportion to their comparative fault. With respect to any damages or losses to property covered by the Builder’s Risk Insurance caused by an act of nature, such as the weather or other natural disasters, and not caused in whole or in part by the negligence, breach of contractual duty or other fault of DFCM (or those for whom DFCM is responsible, including the A/E and the A/E’s consultants) or the Contractor (or those for whom the Contractor is responsible, including the Contractor’s Subcontractors and Sub-subcontractors of any tier), DFCM and Contractor shall each pay half of the amount of any deductible to such covered damages or losses to property.

**10.2.3 WAIVER OF SUBROGATION.** DFCM and Contractor waive all rights against: (1) each other and the other Indemnified Parties and any of their subcontractors, sub-subcontractors, agents and employees, each of the other; and (2) the A/E, A/E’s consultants, separate contractors described in Section 2.2, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by Builder’s Risk Insurance obtained pursuant to Section 10.2.1 and maintained during the course of construction, but only to the extent of the actual recovery of insurance proceeds by the injured party, except such rights as they have to proceeds of such insurance held by DFCM as fiduciary. DFCM or Contractor, as appropriate, shall require of the A/E, A/E’s consultants, separate contractors described in Section 2.2, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. The waiver of rights under this Section 10.2.3 shall not include: (1) subject to Section 10.2.2, the right to recover amounts deducted or excluded from the insurance proceeds in the form of deductibles paid by the injured party; and (2) claims arising out of design errors or omissions.

**10.2.4 SPECIAL HAZARDS.** If the Contractor’s Agreement is for an Eligible Project, but Contractor desires insurance coverage for risks other than those covered by the Builder’s Risk Insurance, the Contractor may obtain such insurance, however, the cost thereof shall be borne by the Contractor and shall not be included in the Contract Price.

**10.2.5 NON-ELIGIBLE PROJECTS.** If the Contractor’s Agreement is not for an Eligible Project, Contractor shall bear the risk of damage and/or loss to Contractor’s materials, equipment and other property,

until acceptance of the Work by DFCM in writing, and no protection from damage and/or loss of the Work (including, without limitation, so called “builders risk”, “course of construction”, “inland marine” and/or similar property insurance) will be provided by DFCM for the protection of Contractor. Contractor may obtain insurance to cover such risks, however, the cost thereof shall be borne by the Contractor and shall not be included in the Contract Price. Section 10.2.3 shall not apply to Non-Eligible Projects.

**10.3 PERFORMANCE BOND AND PAYMENT BOND.** The Contractor shall furnish a Performance and Payment Bond naming the Contractor as Principal and DFCM and DFCM’s designees as Obligees written on AIA Document A312 (2010) Performance Bond and Labor and Material Payment Bond forms in a penal sum of not less than the Contract Price for the Work as the Contract Price may be modified by Change Order (the “Bonds”). The cost of the Bonds, without mark-up, may be included in the Contract Price. The Contractor shall deliver the Bonds to DFCM at least three (3) days before the commencement of any Work at the Work site. Delivery of the Bonds may be accomplished *via* email. The Bonds shall be procured from a surety authorized to do business in the State of Utah and rated A- or better by the A.M. Best Company at the time of issuance of the Bonds and holding Certificates of Authority as an acceptable surety on federal bonds as listed by the United States Department of Treasury (Circular 570, as amended) in its most recent list at the time of issuance of the Bonds. The penal sum of the Bonds shall be within the maximum specified for such surety in Circular 570, as amended. The attorney-in-fact who executes the Bonds on behalf of the surety shall affix to the Bonds a certified and current copy of his or her power of attorney. If the surety on any of the Bonds furnished by the Contractor is declared a bankrupt or becomes insolvent or its rights to do business are terminated in the State of Utah or it ceases to meet the requirements of this Section 10.3, the Contractor shall within ten (10) calendar days thereafter substitute another bond and surety, both of which must be acceptable to DFCM. Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

## **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 DFCM and the A/E incorporates these General Conditions by reference and includes additional design and contract administration responsibilities.

**11.2 SUCCESSORS AND ASSIGNS.** 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. Contractor shall not assign Contractor’s Agreement without the prior written consent of DFCM, nor shall Contractor assign any amount due or to become due or any of Contractor’s rights under the Contract Documents, without prior written consent of 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 E-MAIL.** Notwithstanding any other provision of these General Conditions, written notice shall also be deemed to have been duly served by verified use of an e-mail system by using the known and operative e-mail address of the intended recipient. Service by use of the e-mail system is encouraged when timely notice shall benefit DFCM, the A/E, or Contractor. Notice shall be considered complete and verified upon the sending and confirmation of delivery using the e-mail 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 e-mail 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 NO WAIVER.** Except as expressly provided elsewhere in the Contract Documents, no action or failure to act by DFCM, the 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 Contractor or any Subcontractors be entitled to rely upon any waiver of any of these General Conditions, unless agreed to in writing by DFCM.

**11.5 NO DISCRIMINATION, NO SEXUAL HARASSMENT.** Pursuant to the laws of the United States and the State of Utah, Contractor, Subcontractors, or anyone for whose act any of them may be liable, shall 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 shall 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.

**11.6 APPLICABLE LAWS AND ENFORCEMENT.** The Contract Documents shall be governed by and construed in accordance with the laws of the State of Utah, excluding any choice of law provisions that would otherwise require application of laws of any other jurisdiction.

**11.7 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 one statement and appears in another is not intended to affect the interpretation of either statement.

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

**11.9 SEVERABILITY.** The invalidity of any provision or part of a provision of the Contract Documents shall not impair or affect in any manner the validity, enforceability, or effect of the remainder of the Contract Documents.

**11.10 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.

**11.11 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 FOR CAUSE.**

**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 Contractor's Agreement in accordance with Section 12.1.2 for any of the following reasons:

**12.1.1.1** Because DFCM has persistently failed to fulfill material obligations of DFCM under the Contract Documents with respect to matters important to the progress of the Work;

**12.1.1.2** 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;

**12.1.1.3** An act of government, such as a declaration of national emergency, making material unavailable; or

**12.1.1.4** Unavoidable casualties or other similar causes.

**12.1.2 NOTICE.** If one of the reasons for termination in Section 12.1.1 exists, the Contractor may, upon fourteen (14) additional days' written notice to DFCM and A/E, and such condition giving cause for termination still not cured, terminate Contractor's Agreement and recover from DFCM payment for Work properly executed as of the date of termination, including profit and overhead on Work properly completed as of the date of termination, on a percentage completion basis, along with Contractor's reasonable demobilization expenses incurred within seven (7) days of termination, but Contractor shall in no event be entitled to recover consequential damages as a result of such termination or profit and/or overhead on the Work not executed.

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

**12.2.1 IN GENERAL.** DFCM may terminate the Contractor's Agreement if Contractor fails to cure any of the following within a period of seven (7) days (or longer if DFCM so approves in writing) after receipt of notice from DFCM specifying the breach or failure:

**12.2.1.1** Contractor refuses or fails to supply enough properly skilled workers or proper materials;

**12.2.1.2** Contractor fails to make payment to Subcontractors for materials, equipment, or labor;

**12.2.1.3** Contractor disregards laws, ordinances, rules, regulations, or orders of a public authority having jurisdiction;

**12.2.1.4** Contractor fails to perform the Work such that the Work will be Substantially Completed within the Contract Time or Contractor fails to make progress with the Work as required by the Contract Documents;

**12.2.1.5** Contractor fails to perform the Work in accordance with the Contract Documents or is otherwise in breach of a material provision of the Contract Documents;

**12.2.1.6** As permissible by law for a reason to terminate, Contractor is adjudged bankrupt;

**12.2.1.7** As permissible by law for a reason to terminate, Contractor should make a general assignment for the benefit of creditors;

**12.2.1.8** As permissible by law for a reason to terminate, Contractor should have a receiver appointed on account of Contractor's insolvency; or

**12.2.1.9** Contractor fails to follow 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 UPON TERMINATION FOR CAUSE.** If Contractor fails to remedy the breach or failure within seven (7) days or other mutually agreed period after notice from DFCM, DFCM may, without prejudice to other remedies available to DFCM and in addition to enforcement of any other of DFCM's rights, terminate the Contractor's Agreement, take possession of the Work site and all materials, finish the Work by whatever reasonable method DFCM may deem expedient, and charge Contractor, or file a claim against Contractor's bankruptcy estate, for any additional costs incurred by DFCM to complete the Work. Contractor shall not be entitled to receive any further payment until the Work is completed, nor shall Contractor be relieved from its obligations and liabilities assumed under the Contractor's Agreement. If DFCM's costs exceed the amount of any payment(s) owed by DFCM to Contractor subject to offset by DFCM, DFCM may bill Contractor for the difference, which Contractor shall pay within twenty-eight (28) days of receipt of DFCM's invoice.

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

**12.2.3.1** Any completed portion of the Work; and

**12.2.3.2** Any partially completed portion of the Work and any parts, tools, dies, jigs, fixtures, drawings, information, and contract rights as Contractor has specifically produced or specifically acquired for the performance of such part of the Work as has been terminated; and Contractor shall, upon direction of DFCM, protect and preserve property in the possession of Contractor in which DFCM has an interest.

**12.2.4 PAYMENT.** When DFCM terminates Contractor's Agreement for one or more of the reasons stated in Section 12.2.1, DFCM may withhold payment and/or pursue all available remedies.

**12.2.5 DFCM PROTECTION IF LIENABLE.** When the Work is lienable, DFCM may withhold from amounts otherwise due Contractor for such Work such amount as DFCM determines to be necessary to protect the State against loss because of liens.

**12.2.6 CREDITS AND DEFICITS.** If the unpaid balance of the Contract Price 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 Contractor. If such cost exceeds the unpaid balance of the Contract Price, Contractor shall pay the difference to DFCM and this obligation for payment shall survive the termination of Contractor's Agreement.

**12.2.7 IF CONTRACTOR FOUND NOT IN DEFAULT OR EXCUSABLE.** If, after notice of termination of Contractor's Agreement under the provisions of Section 12.2, it is determined for any reason that Contractor was not in default under the provisions of Section 12.2, or that the default was excusable under the provisions of Section 12.2, 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 of Section 12.3.

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

**12.2.9 TIME PERIOD FOR CLAIMS.** Any PRE by Contractor for adjustment under this Section 12.2 must be asserted by Contractor, in writing, within twenty-one (21) days from the date of termination; provided that DFCM may, in its sole discretion, receive and act upon any such PRE asserted at any time prior to final payment under Contractor's Agreement.

**12.3 TERMINATION FOR CONVENIENCE OF DFCM.**

**12.3.1 IN GENERAL.** The performance of Work under Contractor's Agreement may be terminated by DFCM in accordance with this Section 12.3 in whole or in part, or from time to time, whenever DFCM shall determine that such termination is in the best interest of DFCM or any person or entity for whom DFCM is acting under Contractor's Agreement. Any such termination shall be effectuated by delivery to Contractor of a notice of termination specifying the extent to which performance of Work is terminated and the date upon which such termination becomes effective.

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

**12.3.2.1** Stop Work under Contractor's Agreement on the date and to the extent specified in the notice of termination;

**12.3.2.2** Place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the Work that is not terminated;

**12.3.2.3** Terminate all orders and subcontracts to the extent that they relate to performance of Work terminated by the notice of termination;

**12.3.2.4** Assign to DFCM in the manner, at the times, and to the extent directed by DFCM, all of the right, title, and interest of Contractor under the orders and subcontracts so terminated, in which case 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;

**12.3.2.5** Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of DFCM, which approval or ratification shall be final for all the purposes of this Section 12.3;

**12.3.2.6** Transfer title and deliver to DFCM in the manner, at the times, and to the extent, if any, directed by DFCM:

**12.3.2.6.1** 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

**12.3.2.6.2** The completed or partially completed drawings, information, and other property which, if Contractor's Agreement had been completed, would have been required to be furnished to DFCM;

**12.3.2.7** Use best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by DFCM, any property of the types referred to in Section 12.3.2.6; provided, however, that Contractor:

**12.3.2.7.1** Shall not be required to extend credit to any purchaser; and

**12.3.2.7.2** Shall dispose of any such property under the conditions prescribed by and at a price or prices approved by 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 DFCM to Contractor under Contractor's Agreement or shall otherwise be credited against the Contract Price or paid in such other manner as DFCM may direct;

**12.3.2.8** Complete performance of such part of the Work as shall not have been terminated by the notice of termination; and

**12.3.2.9** Take such action as may be necessary, or as DFCM may direct, for the protection and preservation of the property related to Contractor's Agreement which is in the possession of Contractor in which the State of Utah has or may acquire an interest.

**12.3.3 TERMINATION CLAIM.** After receipt of a notice of termination, Contractor may submit to DFCM a PRE, in the form and with certification prescribed by DFCM. Such PRE shall be submitted promptly but in no event not later than twenty-one (21) days from the effective date of termination.

**12.3.4 AGREED UPON PAYMENT.** Subject to the provisions of Section 12.3.3 above, Contractor and DFCM may agree upon the amount to be paid to Contractor by reason of the total or partial termination of Work pursuant to this Section 12.3.

**12.3.5 PAYMENT NOT AGREED UPON.** In the event Contractor and DFCM fail to agree as provided in Section 12.3.4 upon the whole amount to be paid to Contractor by reason of the termination of Work pursuant to this Section 12.3, DFCM shall pay to the Contractor the amounts determined by DFCM as follows, but without duplication of any amounts agreed upon in accordance with Section 12.3.4:

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

**12.3.5.1.1** The cost of such Work including undisputed Claim amounts;

**12.3.5.1.2** The cost of terminating, settling and paying claims arising out of the termination of Work under subcontracts or orders as provided in Section 12.3.2.5, 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 termination under Contractor's Agreement, which amounts shall be included in the cost on account of which payment is made under Section 12.3.5.1.1;

**12.3.5.1.3** An amount, as overhead and profit on Section 12.3.5.1.1 above, determined by DFCM to be fair and reasonable;

**12.3.5.1.4** The reasonable cost of the preservation and protection of property incurred pursuant to Section 12.3.2.9; and any other reasonable cost incidental to termination of Work, including expenses incidental to the determination of the amount due to Contractor as the result of the termination of Work.

**12.3.5.1.5** The total amount to be paid to Contractor under Section 12.3.5.1 above shall not exceed the Contract Price 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 DFCM shall have otherwise expressly assumed the risk of loss in writing, there shall be excluded from the amounts payable to Contractor under Section 12.3.5.1 above, the fair value of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to DFCM, or to a buyer pursuant to Section 12.3.2.7.

**12.3.6 DEDUCTIONS.** In arriving at the amount due Contractor under this Section 12.3, there shall be deducted:

**12.3.6.1** All unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of Contractor's Agreement;

**12.3.6.2** Any Claim which DFCM and/or the State of Utah may have against Contractor in connection with Contractor's Agreement; and

**12.3.6.3** The agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by Contractor or sold, pursuant to the provisions of this Section 12.3, and not otherwise recovered by or credited to DFCM.

**12.3.7 PARTIAL TERMINATION.** If the termination is partial, Contractor may file with DFCM a PRE for the amounts specified in Contractor's Agreement relating to the continued portion of Contractor's Agreement and such equitable adjustment as may be agreed upon shall be made in such amounts. Any PRE under this Section 12.3.7 must be filed within twenty-one (21) days from the effective date of the partial termination.

**12.3.8 PARTIAL PAYMENTS.** 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 Contractor in connection with the terminated portion of Contractor's Agreement whenever, in the opinion of DFCM, the aggregate of such payments shall be within the amount to which Contractor shall be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 12.3, such excess shall be payable by Contractor to DFCM upon demand, together with interest at a rate stated in Utah Code § 15-1-1, for the period until the date such excess is repaid to DFCM; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in Contractor's claim by reason of retention or other disposition of termination inventory until fourteen (14) days after the date of such retention or disposition, or such later date as determined by DFCM by reason of the circumstances.

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

**12.3.10 SUSPENSION, DELAY OR INTERRUPTION OF WORK BY DFCM FOR CONVENIENCE.** DFCM may in writing and without cause, order Contractor to suspend, delay, or interrupt the Work, in whole or in part, for such period of time as DFCM may determine to be appropriate for the convenience of DFCM.

**12.4 DFCM'S RIGHT TO STOP THE WORK.** If 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; DFCM, in writing, may order Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of DFCM to stop the Work shall not give rise to a duty on the part of DFCM to exercise this right for the benefit of Contractor or any other person or entity.