



Contract # MA4258

# STATE OF UTAH COOPERATIVE CONTRACT

1. CONTRACTING PARTIES: This contract is between the Division of Purchasing and the following Contractor:

<u>Schneider Electric Buildings Americas, Inc.</u>		
Name		
<u>Schneider Electric 8100 S Akron St</u>		
Address		
<u>Centennial</u>	<u>CO</u>	<u>80112</u>
City	State	Zip

LEGAL STATUS OF CONTRACTOR

- Sole Proprietor
- Non-Profit Corporation
- For-Profit Corporation
- Partnership
- Government Agency

Contact Person Jordan Lerner Phone # 206-406-5239 Email jordan.lerner@se.com  
Vendor # VC0000142478 Commodity Code #83101

2. CONTRACT PORTFOLIO NAME: Energy Performance Contract Services

3. PROCUREMENT: This contract is entered into as a result of Solicitation #CH23-14.

4. CONTRACT PERIOD: Effective Date: 5/8/2024 Termination Date: 8/26/2028 unless terminated early or extended in accordance with the terms and conditions of this contract. Renewal options (if any): None.

5. Prompt Payment Discount (if any): None. Price Guarantee Period (if any): One Year.

6. Administrative Fee, as described in the Solicitation and Attachment A: 0.25%.

7. ATTACHMENT A: State of Utah Standard Terms and Conditions, as modified by the parties, for  Goods  Services, or  IT  
ATTACHMENT B: DFCM General Conditions (For reference only) May be required if DFCM is end user. Redline negotiations will take place at time of service.

ATTACHMENT C: Scope of Work

ATTACHMENT D: Pricing Sheet

ATTACHMENT E: Cost and Pricing

ATTACHMENT F: End User Agreement

**Any conflicts between Attachment A and the other Attachments will be resolved in favor of Attachment A.**

8. DOCUMENTS INCORPORATED INTO THIS CONTRACT BY REFERENCE BUT NOT ATTACHED:

- a. All other governmental laws, regulations, or actions applicable to the goods and/or services authorized by this contract.
- b. Utah State Procurement Code, Procurement Rules, the Solicitation, and Contractor's response to the Solicitation.

9. Each person signing this Agreement represents and warrants that he/she is duly authorized and has legal capacity to execute and deliver this Agreement and bind the parties hereto. Each signatory represents and warrants to the other that the execution and delivery of the Agreement and the performance of each party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on the parties and enforceable in accordance with its terms.

IN WITNESS WHEREOF, the parties sign and cause this contract to be executed. Notwithstanding verbal or other representations by the parties, the "Effective Date" of this Contract shall be the date provided within Section 4 above.

### CONTRACTOR

DocuSigned by:  
  
 746DA2182CF04AF...  
 Contractor's Signature

<u>Jordan Lerner</u>	<u>vice president</u>	<u>5/9/2024</u>
Print Name	Title	Date

### STATE

DocuSigned by:  
  
 C38BE9DAC528424...  
 Director, Division of Purchasing

5/10/2024  
 Date

**ATTACHMENT A: STANDARD TERMS AND CONDITIONS FOR SERVICES  
STATE OF UTAH COOPERATIVE CONTRACT**

This is a State of Utah Cooperative Contract ("State Cooperative Contract") for services (including professional services), meaning the furnishing of labor, time, or effort by a contractor. This State Cooperative Contract is the result of a cooperative procurement for the benefit of Eligible Users and may be used by Eligible Users without the Eligible Users signing a participating addendum.

(Terms negotiated and agreed to by both parties: 1b,e, n, 4, 8, 12, 15, 17, 26, 28, 34, 35, 36, 38, 46 & 47)

1. **DEFINITIONS:** The following terms shall have the meanings set forth below:
  - a) "**Confidential Information**" means information that is deemed as confidential under applicable state and federal laws, including personal information. The Eligible Users shall have the right to identify, during and after this Contract, additional types of categories of information that must be kept confidential under federal and state laws by Contractor.
  - b) "**Contract**" means: (i) this State Cooperative Contract; (ii) the Contract Signature Page(s), including all referenced attachments and documents incorporated by reference, (iii) the Utah Standard Terms and Conditions, as modified by the parties; and (iv) the Solicitation and the Proposal when accepted and signed by the Division. The format of the Contract, as described in the prior sentence, will be at the sole option of the Division. Additionally, the term "Contract" may include any purchase orders issued by the Division that result from this Contract.
  - c) "**Contract Signature Page(s)**" means the State of Utah cover page(s) that the Division and Contractor sign.
  - d) "**Contractor**" means the individual or entity delivering the Services identified in this Contract. The term "Contractor" shall include Contractor's agents, officers, employees, and partners.
  - e) "**Custom Deliverable**" means the Work Product that Contractor is required to deliver to the Eligible User under this Contract. Custom Deliverables shall be considered a work made for hire under federal, state, and local laws; and all interest and title shall be transferred to and owned by the Eligible User, except for Background IP as defined below.
  - f) "**Division**" means the State of Utah Division of Purchasing.
  - g) "**Eligible User(s)**" means those authorized to use State Cooperative Contracts and includes the State of Utah's government departments, institutions, agencies, political subdivisions (e.g., colleges, school districts, counties, cities, etc.), and, as applicable, nonprofit organizations, agencies of the federal government, or any other entity authorized by the laws of the State of Utah to participate in State Cooperative Contracts.
  - h) "**End User Agreement**" means any agreement that Eligible Users are required to sign in order to participate in this Contract including an end user agreement, customer agreement, memorandum of understanding, statement of work, lease agreement, service level agreement, or any other named separate agreement.
  - i) "**Services**" means the furnishing of labor, time, or effort by Contractor pursuant to this Contract. Services shall include, but are not limited to, all of the deliverable(s) and Custom Deliverable that result from Contractor performing the Services pursuant to this Contract. Services include those professional services identified in Section 63G-6a-103 of the Utah Procurement Code.
  - j) "**Proposal**" means Contractor's response to the Division's Solicitation.
  - k) "**Solicitation**" means the documents used by the Division to obtain Contractor's Proposal.
  - l) "**State of Utah**" means the State of Utah, in its entirety, including its institutions, agencies, departments, divisions, authorities, instrumentalities, boards, commissions, elected or appointed officers, employees, agents, and authorized volunteers.
  - m) "**Subcontractors**" means subcontractors or subconsultants at any tier that are under the direct or indirect control or responsibility of the Contractor, and includes all independent contractors, agents, employees, authorized resellers, or anyone else for whom the Contractor may be liable at any tier, including a person or entity that is, or will be, providing or performing an essential aspect of this Contract, including Contractor's manufacturers, distributors, and suppliers.
  - n) "**Work Product**" means every invention, modification, discovery, design, development, customization, configuration, improvement, process, software program, work of authorship, documentation, formula, datum, technique, know how, secret, or intellectual property right whatsoever or any interest therein (whether patentable or not patentable or registerable under copyright or similar statutes or subject to analogous protection) that is specifically made, conceived, discovered, or reduced to practice by Contractor or Contractor's Subcontractors (either alone or with others) pursuant to this Contract. Notwithstanding anything in the immediately preceding sentence to the contrary, Work Product does not include any Eligible User intellectual property, Contractor's intellectual property (that it owned or licensed prior to this Contract) or Third Party intellectual property.
2. **GOVERNING LAW AND VENUE:** This Contract shall be governed by the laws, rules, and regulations of the State of Utah. Any action or proceeding arising from this Contract shall be brought in a court of competent jurisdiction in the State of Utah. Venue shall be in Salt Lake City, in the Third Judicial District Court for Salt Lake County.
3. **LAWS AND REGULATIONS:** At all times during this Contract, Contractor and all Procurement Items delivered and/or performed under this Contract will comply with all applicable federal and state constitutions, laws, rules, codes, orders, and regulations, including applicable licensure and certification requirements. If this Contract is funded by federal funds, either in whole or in part, then any federal regulation related to the federal funding, including CFR Appendix II to Part 200, will supersede this Attachment A.
4. **RECORDS ADMINISTRATION:** Contractor shall maintain or supervise the maintenance of all records necessary to properly account for Contractor's performance and the payments made by Eligible Users to Contractor under this Contract. These records shall be retained by Contractor for at least six (6) years after final payment, or until all audits initiated within the six (6) years have been completed, whichever is later. Contractor agrees to allow, at no additional cost, State of Utah auditors, federal auditors, Eligible Users or any firm identified by the Division, access to all such records with at least ten (10) business days' prior notice, during normal business hours, and without disruption to Contractor's business. Contractor must refund to the Division any overcharges brought to Contractor's attention by the Division or the Division's auditor and Contractor is not

permitted to offset identified overcharges by alleged undercharges to Eligible Users.

5. **CERTIFY REGISTRATION AND USE OF EMPLOYMENT "STATUS VERIFICATION SYSTEM":** This "Status Verification System" requirement, also referred to as "E-Verify", only applies to contracts issued through a Request for Proposal process and to sole sources that are included within a Request for Proposal.
  1. Contractor certifies as to its own entity, under penalty of perjury, that Contractor has registered and is participating in the Status Verification System to verify the work eligibility status of Contractor's new employees that are employed in the State of Utah in accordance with applicable immigration laws.
  2. Contractor shall require that each of its Subcontractors certify by affidavit, as to their own entity, under penalty of perjury, that each Subcontractor has registered and is participating in the Status Verification System to verify the work eligibility status of Subcontractor's new employees that are employed in the State of Utah in accordance with applicable immigration laws.
  3. Contractor's failure to comply with this section will be considered a material breach of this Contract.
6. **CONFLICT OF INTEREST:** Contractor represents that none of its officers or employees are officers or employees of the Division or of the State of Utah, unless disclosure has been made to the Division.
7. **INDEPENDENT CONTRACTOR:** Contractor and Subcontractors, in the performance of this Contract, shall act in an independent capacity and not as officers, employees, or agents of the State Entity or the State of Utah.
8. **INDEMNITY:** Contractor shall be fully liable for the actions of its agents, employees, officers, partners, and Subcontractors, and shall fully indemnify, defend, and save harmless the Division, Eligible Users, and the State of Utah from all claims, losses, suits, actions, damages, and costs of every name and description arising out of Contractor's performance of this Contract to the extent caused by any intentional wrongful act or negligence of Contractor, its agents, employees, officers, partners, or Subcontractors, without limitation; provided, however, that the Contractor shall not indemnify for that portion of any claim, loss, or damage arising hereunder due to the fault of the Division, Eligible Users, or the State of Utah.
9. **EMPLOYMENT PRACTICES:** Contractor agrees to abide by the following employment laws: (i) Title VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), which prohibits discrimination against any employee or applicant for employment or any applicant or recipient of services, on the basis of race, religion, color, or national origin; (ii) Executive Order No. 11246, as amended, which prohibits discrimination on the basis of sex; (iii) 45 CFR 90, which prohibits discrimination on the basis of age; (iv) Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disabilities; and (v) Utah's Executive Order 2019-1, dated February 5, 2019, which prohibits unlawful harassment in the workplace. Contractor further agrees to abide by any other laws, regulations, or orders that prohibit the discrimination of any kind by any of Contractor's employees.
10. **AMENDMENTS:** This Contract may only be amended by the mutual written agreement of the parties, provided that the amendment is within the Scope of Work of this Contract and is within the scope/purpose of the original solicitation for which this Contract was derived. The amendment will be attached and made part of this Contract. Automatic renewals will not apply to this Contract, even if listed elsewhere in this Contract.
11. **DEBARMENT:** Contractor certifies that it is not presently nor has ever been debarred, suspended, or proposed for debarment by any governmental department or agency, whether international, national, state, or local. Contractor must notify the State Entity within thirty (30) days if debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in any contract by any governmental entity during this Contract.
12. **TERMINATION:** This Contract may be terminated, with cause by either party, in advance of the specified expiration date, upon written notice given by the other party. The party in violation will be given ten (10) days after written notification to commence remedial measures to correct and cease the violations, after which this Contract may be terminated for cause immediately and subject to the remedies below. This Contract may also be terminated without cause (for convenience), in advance of the specified expiration date, by the Division, upon thirty (30) days written termination notice being given to the Contractor. The Division and the Contractor may terminate this Contract, in whole or in part, at any time, by mutual agreement in writing. On termination of this Contract, all accounts and payments will be processed according to the financial arrangements set forth herein for Services properly performed prior to date of termination.
 

Contractor shall be compensated for the Services properly performed under this Contract up to the effective date of the notice of termination. Contractor agrees that in the event of such termination for cause or without cause, Contractor's sole remedy and monetary recovery from the State Entity or the State of Utah is limited to full payment for all Services properly performed as authorized under this Contract up to the date of termination as well as any reasonable monies owed as a result of Contractor having to terminate other contracts necessarily and appropriately entered into by Contractor pursuant to this Contract. In no event shall the State Entity be liable to the Contractor for compensation for any services neither requested by the State nor satisfactorily performed by the Contractor. In no event shall the State Entity's exercise of its right to terminate this Contract for convenience relieve the Contractor of any liability to the State Entity for any damages or claims arising under this Contract prior to the date of such termination.
13. **NONAPPROPRIATION OF FUNDS, REDUCTION OF FUNDS, OR CHANGES IN LAW:** Upon thirty (30) days written notice delivered to the Contractor, this Contract may be terminated in whole or in part at the sole discretion of the Division, if the Division reasonably determines that: (i) a change in Federal or State legislation or applicable laws materially affects the ability of either party to perform under the terms of this Contract; or (ii) that a change in available funds affects the Divisions or the Eligible User's ability to pay Contractor. A change of available funds as used in this paragraph includes, but is not limited to, a change in Federal or State funding, whether as a result of a legislative act or by order of the President or the Governor.
 

If a written notice is delivered, the Eligible User will reimburse Contractor for the Services properly performed until the effective date of said notice. The Division, the Eligible User, and the State of Utah will not be liable for any performance, commitments, penalties, or liquidated damages that accrue after the effective date of said written notice.
14. **SALES TAX EXEMPTION:** The Services under this Contract will be paid for from the Eligible User's funds and may be used

in the exercise of the Eligible User's essential functions. Upon request, the Eligible User will provide Contractor with its sales tax exemption number. It is Contractor's responsibility to request the Eligible User's sales tax exemption number. It also is Contractor's sole responsibility to ascertain whether any tax deduction or benefits apply to any aspect of this Contract.

15. **CONTRACTOR'S INSURANCE RESPONSIBILITY.** The Contractor shall maintain the following insurance coverage:
- a. Workers' compensation insurance during the term of this Contract for all its employees and any Subcontractor employees related to this Contract. Workers' compensation insurance shall cover full liability under the workers' compensation laws of the jurisdiction in which the work is performed at the statutory limits required by said jurisdiction.
  - b. Commercial general liability [CGL] insurance from an insurance company authorized to do business in the State of Utah. The limits of the CGL insurance policy will be no less than one million dollars (\$1,000,000.00) per person per occurrence and three million dollars (\$3,000,000.00) aggregate.
  - c. Commercial automobile liability [CAL] insurance from an insurance company authorized to do business in the State of Utah. The CAL insurance policy must cover bodily injury and property damage liability and be applicable to all vehicles used in your performance of Services under this Agreement whether owned, non-owned, leased, or hired. The minimum liability limit must be \$1 million per occurrence, combined single limit. The CAL insurance policy is required if Contractor will use a vehicle in the performance of this Contract.

Certificate of Insurance, showing up-to-date coverage, shall be on file with the State before the Contract may commence.

Failure to provide proof of insurance as required will be deemed a material breach of this Contract. Contractor's failure to maintain this insurance requirement for the term of this Contract will be grounds for immediate termination of this Contract.

16. **RESERVED.**

17. **END USER AGREEMENT:** If Eligible Users are required by Contractor to sign an End User Agreement before participating in this Contract, then a copy of the End User Agreement must be attached to this Contract. The term of the End User Agreement shall not exceed the term of this Contract, and the End User Agreement will automatically terminate upon the completion or termination of this Contract. An End User Agreement must reference this Contract, and may not be amended or changed unless approved in writing by the Division. Eligible Users will not be responsible or obligated for any early termination fees if the End User Agreement terminates as a result of completion or termination of this Contract.
18. **LARGE VOLUME DISCOUNT PRICING:** Eligible Users may seek to obtain additional volume discount pricing for large orders provided Contractor is willing to offer additional discounts for large volume orders. No amendment to this Contract is necessary for Contractor to offer discount pricing to an Eligible User for large volume purchases.
19. **ELIGIBLE USER PARTICIPATION:** Participation under this Contract by Eligible Users is voluntarily determined by each Eligible User. Contractor agrees to supply each Eligible User with Services based upon the same terms, conditions and prices of this Contract.
20. **INDIVIDUAL CUSTOMERS:** Each Eligible User that purchases Services from this Contract will be treated as if they were individual customers. Each Eligible User will be responsible to follow the terms and conditions of this Contract. Contractor agrees that each Eligible User will be responsible for their own charges, fees, and liabilities. Contractor shall apply the charges to each Eligible User individually. The Division is not responsible for any unpaid invoice.
21. **QUANTITY ESTIMATES:** The Division does not guarantee any purchase amount under this Contract. Estimated quantities are for Solicitation purposes only and are not to be construed as a guarantee.
22. **PUBLIC INFORMATION:** Contractor agrees that this Contract, related purchase orders, related pricing documents, and invoices will be public documents, and may be available for public and private distribution in accordance with the State of Utah's Government Records Access and Management Act (GRAMA). Contractor gives the Division, the Eligible Users, and the State of Utah express permission to make copies of this Contract, related purchase orders, related pricing documents, and invoices in accordance with GRAMA. Except for sections identified in writing and expressly approved by the Division, Contractor also agrees that the Contractor's Proposal to the Solicitation will be a public document, and copies may be given to the public as permitted under GRAMA. The Division, Eligible Users, and the State of Utah are not obligated to inform Contractor of any GRAMA requests for disclosure of this Contract, related purchase orders, related pricing documents, and invoices.
23. **DELIVERY:** Time is of the essence for all deliveries made under this Contract. All deliveries under this Contract will be F.O.B. destination with all transportation and handling charges paid for by Contractor. Responsibility and liability for loss or damage will remain with Contractor until final inspection and acceptance, when responsibility will pass to the Eligible User, except as to latent defects or fraud. Contractor's failure to provide the Services by the required delivery date is deemed a material breach of this Contract. Contractor shall be responsible for the customary industry standard in packing and shipping any goods relating to these Services.
24. **REPORTS AND FEES:**
1. **Administrative Fee:** Contractor agrees to provide a quarterly administrative fee to the State in the form of a check, EFT or online payment through the Division's Automated Vendor Usage Management System. Checks will be payable to the "State of Utah Division of Purchasing" and will be sent to State of Utah, Division of Purchasing, Attn: Cooperative

Contracts, PO Box 141061, Salt Lake City, UT 84114-1061. The Administrative Fee will be the amount listed in the Solicitation and will apply to all purchases (net of any returns, credits, or adjustments) made under this Contract.

2. **Quarterly Reports:** Contractor agrees to provide a quarterly utilization report, reflecting net sales to the State during the associated fee period. The report will show the dollar volume of purchases by each Eligible User. The quarterly report will be provided in secure electronic format through the Division's Automated Vendor Usage Management System found at: <https://statecontracts.utah.gov/Vendor>.
  3. **Report Schedule:** Quarterly utilization reports shall be made in accordance with the following schedule:
 

<u>Period End</u>	<u>Reports Due</u>
March 31	April 30
June 30	July 31
September 30	October 31
December 31	January 31
  4. **Fee Payment:** After the Division receives the quarterly utilization report, it will send Contractor an invoice for the total quarterly administrative fee owed to the Division. Contractor shall pay the quarterly administrative fee within thirty (30) days from receipt of invoice.
  5. **Timely Reports and Fees:** If the quarterly administrative fee is not paid by thirty (30) days of receipt of invoice or quarterly utilization reports are not received by the report due date, then Contractor will be in material breach of this Contract.
25. **ORDERING:** Orders will be placed by the Eligible User directly with Contractor. All orders will be shipped promptly in accordance with the terms of this Contract.
  26. **ACCEPTANCE AND REJECTION:** The Eligible User shall have thirty (30) days after delivery of the Services to perform an inspection of the Services to determine whether the Services conform to the standards specified in the Solicitation and this Contract prior to acceptance of the Services by the Eligible User.
 

If Contractor delivers nonconforming Services, the State Entity may, at its option and at Contractor's expense: (i) return any deliverable related to the Services for a full refund; (ii) require Contractor to promptly correct or reperform the nonconforming Services subject to the terms of this Contract; or (iii) obtain replacement Services from another source, subject to Contractor being responsible for any cover costs. The foregoing shall be Contractor's sole responsibility in connection with nonconforming Services.
  27. **INVOICING:** Contractor will submit invoices within thirty (30) days after the delivery date of the Service(s) to the Eligible User. The contract number shall be listed on all invoices, freight tickets, and correspondence relating to this Contract. The prices paid by the Eligible User will be those prices listed in this Contract, unless Contractor offers a discount at the time of the invoice. It is Contractor's obligation to provide correct and accurate invoicing. The Eligible User has the right to adjust or return any invoice reflecting incorrect pricing.
  28. **PAYMENT:** Payments are to be made within thirty (30) days after a correct invoice is received. All payments to Contractor will be remitted by mail, electronic funds transfer, or by a Purchasing Card (major credit card). If payment has not been made after sixty (60) days from the date a correct invoice is received by the Eligible User, then interest may be added by Contractor as prescribed in the Utah Prompt Payment Act. The acceptance by Contractor of final payment, without a written protest filed with the Eligible User within ten (10) business days of receipt of final payment, shall release the Division, the Eligible User, and the State of Utah from all claims and all liability to the Contractor except for any outstanding claims that are unresolved at time of final payment. The Eligible User's payment for the Services shall not be deemed an acceptance of the Services and is without prejudice to any and all claims that the Division, Eligible User, or the State of Utah may have against Contractor. The State of Utah, the Division, and the Eligible User will not allow the Contractor to charge end users electronic payment fees of any kind.
  29. **TIME IS OF THE ESSENCE:** Services shall be completed by any applicable deadline stated in this Contract. For all Services, time is of the essence. Contractor shall be liable for all reasonable damages to the Eligible User and the State of Utah, and anyone for whom the State of Utah may be liable, as a result of Contractor's failure to timely perform the Services required under this Contract.
  30. **CHANGES IN SCOPE:** Any changes in the scope of the Services to be performed under this Contract shall be in the form of a written amendment to this Contract, mutually agreed to and signed by both parties, specifying any such changes, fee adjustments, any adjustment in time of performance, or any other significant factors arising from the changes in the scope of Services.
  31. **PERFORMANCE EVALUATION:** The Eligible User may conduct a performance evaluation of Contractor's Services, including Contractor's Subcontractors, if any. Results of any evaluation may be made available to the Contractor upon Contractor's request.
  32. **STANDARD OF CARE:** The Services of Contractor and its Subcontractors shall be performed in accordance with the standard of care exercised by licensed members of their respective professions having substantial experience providing similar services which similarities include the type, magnitude, and complexity of the Services that are the subject of this Contract. Contractor shall be liable to the Eligible User and the State of Utah for claims, liabilities, additional burdens, penalties, damages, or third party claims (e.g., another Contractor's claim against the State of Utah), to the extent caused by wrongful acts, errors, or omissions that do not meet this standard of care.
  33. **REVIEWS:** The Division and Eligible Users reserve the right to perform plan checks, plan reviews, other reviews, and/or comment upon the Services of Contractor. Such reviews do not waive the requirement of Contractor to meet all of the terms and conditions of this Contract.
  34. **INDEMNIFICATION RELATING TO INTELLECTUAL PROPERTY:** Contractor will indemnify and hold the Division, the Eligible User, and the State of Utah harmless from and against any and all damages, expenses (including reasonable attorneys'

fees), claims, judgments, liabilities, and costs in any action or claim brought against the Division, the Eligible User, or the State of Utah for infringement of a third party's copyright, trademark, trade secret, or other proprietary right. The parties agree that if there are any limitations of Contractor's liability, such limitations of liability will not apply to this section. The foregoing obligations do not apply when the claim of infringement results from or is related to: (i) Work Product, Custom Deliverables, or Services provided pursuant to End User's designs, drawings or specifications; (ii) Work Product, Custom Deliverables, or Services stored, used or maintained otherwise than in accordance with Contractor's instructions or recommendations or other than for the End Users internal business purpose; (iii) claims of infringements resulting from combining Work Product, Custom Deliverable, or Services provided hereunder with any other item not furnished by Contractor (iv) modifications to the Work Product, Custom Deliverables, or Services without prior written consent of Contractor; (v) parts supplied or designed by End Users or third parties; and (vi) End User's failure to use corrections or enhancements made available by Contractor.

35. **OWNERSHIP IN INTELLECTUAL PROPERTY:** The Division, the Eligible User, and Contractor agree that each has no right, title, or interest, proprietary or otherwise, in the intellectual property owned or licensed by the other, unless otherwise agreed upon by the parties in writing. All Services, documents, records, programs, data, articles, memoranda, and other materials not developed or licensed by Contractor prior to the execution of this Contract, but specifically manufactured under this Contract for use with Eligible User's proprietary system, shall be considered work made for hire, and Contractor shall transfer any ownership of same to the Eligible User.
36. **OWNERSHIP IN CUSTOM DELIVERABLES:** In the event that Contractor provides Custom Deliverables to the Eligible User, pursuant to this Contract, Contractor grants the ownership in Custom Deliverables, which have been developed and delivered by Contractor exclusively for the Eligible User and are specifically within the framework of fulfilling Contractor's contractual obligations under this contract. Custom Deliverables shall be deemed work made for hire, such that all Intellectual Property Rights (as defined below), title and interest in the Custom Deliverables shall pass to the Eligible User, to the extent that the Custom Deliverables are not recognized as work made for hire, Contractor hereby assigns to the Eligible User any and all copyrights in and to the Custom Deliverables, subject to the following:
1. Contractor has received payment for the Custom Deliverables,
  2. Each party will retain all rights to patents, utility models, mask works, copyrights, trademarks, trade secrets, and any other form of protection afforded by law to inventions, models, designs, technical information, and applications ("Intellectual Property Rights") that it owned or controlled prior to the effective date of this contract or that it develops or acquires from activities independent of the services performed under this contract ("Background IP"), and
  3. Contractor will retain all right, title, and interest in and to all Intellectual Property Rights in or related to the services, or tangible components thereof, including but not limited to (a) all know-how, intellectual property, methodologies, processes, technologies, algorithms, software, or development tools used in performing the Services (collectively, the "Utilities"), and (b) such ideas, concepts, know-how, processes and reusable reports, designs, charts, plans, specifications, documentation, forms, templates, or output which are supplied or otherwise used by or on behalf of Contractor in the course of performing the Services or creating the Custom Deliverables, other than portions that specifically incorporate proprietary or Confidential Information or Custom Deliverables of the Eligible User (collectively, the "Residual IP"), even if embedded in the Custom Deliverables.
  4. Custom Deliverables, not including Contractor's Intellectual Property Rights, Background IP, and Residual IP, may not be marketed or distributed without written approval by the Eligible User.
- Contractor agrees to grant to the Eligible User a perpetual, irrevocable, royalty-free license to use Contractor's Background IP, Utilities, and Residual IP, as defined above, solely for the Eligible User and the State of Utah to use the Custom Deliverables. The Eligible User reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use, for the Eligible User's and the State of Utah's internal purposes, such Custom Deliverables. For the deliverables delivered that consist of Contractor's scripts and code and are not considered Custom Deliverables or Work Product, for any reason whatsoever, Contractor grants the Eligible User a non-exclusive, non-transferable, irrevocable, perpetual right to use, copy, and create derivative works from such, without the right to sublicense, for the Eligible User's and the State of Utah's internal business operation under this Contract. The Eligible User and the State of Utah may not participate in the transfer or sale of, create derivative works from, or in any way exploit Contractor's Intellectual Property Rights, in whole or in part.
37. **ASSIGNMENT:** Contractor may not assign, sell, transfer, subcontract or sublet rights, or delegate any right or obligation under this Contract, in whole or in part, without the prior written approval of the Division.
38. **DEFAULT AND REMEDIES:** Any of the following events will constitute cause for the Division to declare Contractor in default of this Contract: (i) Contractor's non-performance of its contractual requirements and obligations under this Contract; or (ii) Contractor's material breach of any term or condition of this Contract. The Division may issue a written notice of default providing a ten (10) day period in which Contractor will have an opportunity to commence with a cure. Time allowed for cure will not diminish or eliminate Contractor's liability for damages. If the default remains after Contractor has been provided the opportunity to cure, the Division may do one or more of the following: (i) exercise any remedy provided by law or equity; (ii) terminate this Contract; (iii) impose liquidated damages, if liquidated damages are listed in this Contract; (iv) debar/suspend Contractor from receiving future contracts from the Division or the State of Utah; or (v) demand a full refund of any payment that an Eligible User has made to Contractor under this Contract for Services that do not conform to this Contract.
39. **FORCE MAJEURE:** Neither party to this Contract will be held responsible for delay or default caused by fire, riot, act of God, and/or war which is beyond that party's reasonable control. The Division may terminate this Contract after determining such delay will prevent successful performance of this Contract.
40. **CONFIDENTIALITY:** If Confidential Information is disclosed to Contractor, Contractor shall: (i) advise its agents, officers,

employees, partners, and Subcontractors of the obligations set forth in this Contract; (ii) keep all Confidential Information strictly confidential; and (iii) not disclose any Confidential Information received by it to any third parties. Contractor will promptly notify the Division and the relevant Eligible User of any potential or actual misuse or misappropriation of Confidential Information.

Contractor shall be responsible for any breach of this duty of confidentiality, including any required remedies and/or notifications under applicable law. Contractor shall indemnify, hold harmless, and defend the Division, the Eligible User, and the State of Utah, including anyone for whom the Division, the Eligible User, or the State of Utah is liable, from claims related to a breach of this duty of confidentiality, including any notification requirements, by Contractor or anyone for whom the Contractor is liable.

Upon termination or expiration of this Contract, Contractor will return all copies of Confidential Information to the Eligible User or certify in writing, that the Confidential Information has been destroyed. This duty of confidentiality shall be ongoing and survive the termination or expiration of this Contract.

41. **PUBLICITY:** Contractor shall submit to the Eligible User for written approval all advertising and publicity matters relating to this Contract. It is within the Eligible User's sole discretion whether to provide approval, which must be done in writing.
42. **CONTRACT INFORMATION:** During the duration of this Contract, the State of Utah Division of Purchasing is required to make available contact information of Contractor to the State of Utah Department of Workforce Services. The State of Utah Department of Workforce Services may contact Contractor during the duration of this Contract to inquire about Contractor's job vacancies.
43. **PROCUREMENT ETHICS:** Contractor understands that a person who is interested in any way in the sale of any supplies, services, construction, or insurance to the State of Utah is violating the law if the person gives or offers to give any compensation, gratuity, contribution, loan, reward, or any promise thereof to any person acting as a procurement officer on behalf of the State of Utah, or to any person in any official capacity who participates in the procurement of such supplies, services, construction, or insurance, whether it is given for their own use or for the use or benefit of any other person or organization.
44. **WAIVER:** A waiver of any right, power, or privilege shall not be construed as a waiver of any subsequent right, power, or privilege.
45. **ATTORNEY'S FEES:** In the event of any judicial action to enforce rights under this Contract, the prevailing party shall be entitled its costs and expenses, including reasonable attorney's fees, incurred in connection with such action.
46. **DISPUTE RESOLUTION:** Prior to either party filing a judicial proceeding, the parties agree to participate in the mediation of any dispute. The Division, after consultation with the Eligible User and Contractor, may appoint an expert or panel of experts to assist in the resolution of a dispute. If the Division appoints such an expert or panel, the Eligible User and Contractor agree to cooperate in good faith in providing information and documents to the expert or panel in an effort to resolve the dispute. EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION, OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS CONTRACT,
47. **ORDER OF PRECEDENCE:** In the event of any conflict in the terms and conditions in this Contract, the order of precedence shall be: (i) End User Agreement; (ii) this Attachment A; (iii) Contract Signature Page(s); (iv) the State of Utah's additional terms and conditions, if any; (v) any other attachment listed on the Contract Signature Page(s); (vi) Contractor's terms and conditions that are attached to this Contract, if any; and (vii) Contractor's attachments, if any. Any provision attempting to limit the liability of Contractor or limit the rights of the Division, Eligible Users, or the State of Utah must be in writing and attached to this Contract or it is rendered null and void. Contractor's terms and conditions on its Sales Orders, Invoices, website, etc., will not apply to this Contract.
48. **SURVIVAL OF TERMS:** Termination or expiration of this Contract shall not extinguish or prejudice the Division's or the Eligible User's right to enforce this Contract with respect to any default of this Contract or defect in the Services that has not been cured.
49. **SEVERABILITY:** The invalidity or unenforceability of any provision, term, or condition of this Contract shall not affect the validity or enforceability of any other provision, term, or condition of this Contract, which shall remain in full force and effect.
50. **ENTIRE AGREEMENT:** This Contract constitutes the entire agreement between the parties and supersedes any and all other prior and contemporaneous agreements and understandings between the parties, whether oral or written.
51. **ANTI-BOYCOTT ACTIONS:** In accordance with Utah Code 63G-27 et seq., Contractor certifies that it is not currently engaged in any "economic boycott" nor a "boycott of the State of Israel" as those terms are defined in Section 102. Contractor further certifies that it has read and understands 63G-27 et. seq., that it will not engage in any such boycott action during the term of this Contract, and that if it does, it shall promptly notify the State in writing.



# GENERAL CONDITIONS

August 03, 2020

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# GENERAL CONDITIONS

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**August 03, 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 Government Operations, 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 9.2 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 contractors 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 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 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;

**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.) 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 REPORT TO BUILDING BOARD.** DFCM may report on the Claim to the Utah State Building Board.

**7.8.15 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.

**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 punch list, 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 punch list indicates that the Work is not Substantially Complete, the initial punch list shall be returned to Contractor with written comments. If DFCM and A/E determines that the initial punch list 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 punch list 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 punch list 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 punch list accompanying the Certificate (“Punchlist Completion Date”). The Certificate of Substantial Completion shall require approval by DFCM. If there is a punch list, Contractor shall proceed promptly to complete and correct items on the punch list. Failure to include an item on the punch list 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 punch list items are corrected and completed. Once all punch list 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 punch list 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 punch list 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 Builder’s Risk 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 State of Utah Property Insurance Form available on DFCM’s website, [dfcm.utah.gov](http://dfcm.utah.gov). Builder’s Risk Insurance coverage will cover the full value of an Eligible Project on a replacement cost basis. Builder’s Risk Insurance coverage will commence on the date a Notice to Proceed is issued by DFCM for an Eligible Project and terminate upon Substantial Completion of the Eligible Project.

**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), Contractor’s share of any such deductible shall be limited to \$5,000.00.

**10.2.3 DUTIES IN THE EVENT OF LOSS.** In the event of a covered Builder’s Risk Insurance loss on an Eligible Project, it will be the obligation of the Utah Division of Risk Management and/or the State of Utah’s property insurance carrier’s loss adjuster to inspect damages, determine the responsible parties and pursue insurance recovery as promptly as practicable so that Eligible Project damage can be repaired or replaced. Contractor shall fully cooperate with the Utah Division of Risk Management and/or the State of Utah’s insurance carrier’s loss adjuster in providing requested information with reasonable promptness. If Contractor does not cooperate as required by this Section, Contractor shall be responsible for payment of all or a portion of the Builder’s Risk Insurance loss pertaining to the unsubstantiated portion of the loss.

**10.2.4 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 10.2.4 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.

**10.2.5 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.

**10.2.6 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 10.2.4 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.

**1. Introduction**

This contract provides the State (of Utah), specifically the Division of Facilities and Construction Management and the Governor's Office of Energy Development ESPC Program (EPCP), Energy Services Companies (ESCOs) as-needed ESPC services. The ESCO contractor will be eligible to provide services to state agencies/institutions, local governments and school districts that may choose to participate in the program.

The primary intent of this contract is four-fold:

- a. Energy services ESPCs (ESPC) to implement comprehensive energy-efficiency projects in existing buildings
- b. To provide State of Utah eligible users the opportunity to procure services of qualified firms in a timely and cost-effective way
- c. Ensure minimum qualifications of ESCOs are met to implement successful ESPC projects
- d. To offer qualified firms the opportunity of equal access to work generated in the State of Utah

The State provides a standardized process with clear direction and accountability for all eligible users in the development, implementation, measurement and verification of ESPC projects by defining roles and responsibilities; formalizing process steps; establishing maximum cost schedules; providing contract templates; and establishing measurement and verification guidelines.

Potential eligible users include state entities and political subdivisions as allowed under current state statute ESPC enables these eligible users to accomplish energy projects without using capital budgets, paying for projects through resulting savings.

**2. Scope of Work****a. Energy Performance Contract Project Phases**

- Investment Grade Audit and Project Development: The ESCO and the Facility Owner will execute a Technical Energy Audit and Project Statement Agreement. This agreement sets specific expectations and provides a detailed process for both the ESCO and the Facility Owner. The agreement also defines the deliverables to the Facility Owner and establishes the basis for the Energy Performance Contract to follow. It incorporates current state statutes and directives that directly relate to performance contracting.
- The investment grade audit will identify and evaluate cost-saving measures and define the proposed project scope, cost, savings and cash-flow over the proposed financing term. A project statement will present aggregated measures that can be financed through guaranteed savings.

**b. Energy Performance Contract Implementation**

- Upon satisfactory completion of the Investment Grade Audit, the Facility Owner will have the option to execute an Energy Performance Contract with the ESCO to implement the recommended project. The Energy Performance Contract will define the final agreed-upon scope of work and all its associated costs and mutual responsibilities between the ESCO and the Facility Owner, as well as improvement measures, the equipment and labor costs associated with them, and all guaranteed energy and maintenance cost savings. It incorporates current state statutes and directives directly related to performance contracting: The ESCO will solicit financing companies on behalf of the Facility Owner. A separate financing agreement will be developed including ESCO payment schedules and lender financing terms and schedules. Upon execution of the Energy Performance Contract, the ESCO proceeds to the final design, construction, and commissioning of the improvement measures.

## Scope of Work

## Attachment: C

### c. Performance Period

- The Energy Performance Contract Performance Period begins upon construction completion and acceptance by the facility owner. The Energy Performance Contract will include several services the ESCO will provide until the end of the contract, including but not limited to measurement and verification of savings, the savings guarantee, staff training, and, possibly, contract maintenance services.).

## Attachment D - Pricing Sheet

	Schneider Electric Buildings Americas, Inc.
1- Audit fee per square foot	\$0.15
2 - Fee for ASRHAE Level 1 Analysis	\$0.04
3 - Fee for ASRHAE Level 2 Analysis	\$0.10
4 - Fee for ASRHAE Level 3 Analysis	\$0.24
5 - Markup percentage on project costs	40.00%
6 - Markup percentage for services	50.00%



Attachment E - Cost and Pricing



# Cost and Pricing Approach

## Contingency

Level of contingency budget for lighting, electrical, mechanical, controls projects, and other projects. How applying contingency to cover changes in work scope and subcontractor change orders. All unused contingency funds will revert to the Eligible users or be applied to additional work scope through a change order approved by the Eligible users.

Our firm, fixed price can have either an owner held, or Schneider Electric held contingency to avoid any specific cost overages for unforeseen issues. The percentage or level of contingency held is determined by the complexity of the project. Generally, we would carry between 0-4% contingency on a project and would only be spent with customer approval.

## Equipment/Labor Cost Competition

Company's process to solicit bids on equipment/labor or to ensure price/cost competition and the best value for the Eligible users.

Based on the final scope of work, we will work with Utah clients to establish a list of qualified subcontractors. From this list, we will conduct a competitive bidding process to select the subcontractor providing not only the most competitive price but also the best value to the client. We use an objective scoring methodology to evaluate each subcontractor bid using weighted ranking criteria. Best value is determined by factors such as qualifications, safety record, small or disadvantaged business status, experience, local presence, ability to perform the work, service capabilities, and price reasonableness. Our policy is to use local businesses as much as possible, while maintaining quality and best value.

## Open Book Pricing

Open book pricing is full disclosure by the contractor to the Eligible users of all costs and markups for materials, labor, and services received during the project development, implementation, and performance period phases. Open book pricing will be required such that all costs, including all costs of subcontractors and vendors, are fully disclosed.

Schneider Electric provides transparent open book pricing for our projects. To help understand how our project is priced, we clearly identify our major costs, including equipment, subcontracting, labor hours and rates, and

## State of Utah

Energy Performance Contracting Services

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overhead and profit with a client. We can review our pricing with the client to answer any questions and ensure all stakeholders are comfortable with the pricing approach.

All of our ESPC projects are firm, fixed price proposals. Therefore, our projects have no change orders, unless initiated by the client. It is the responsibility of Schneider Electric to ensure the project meets the performance requirements within the price provided in the proposal. This ensures that their ESPC will be completed within the budget expected.

## Best Value

ESPC best value, rebates other financial incentives or grants.

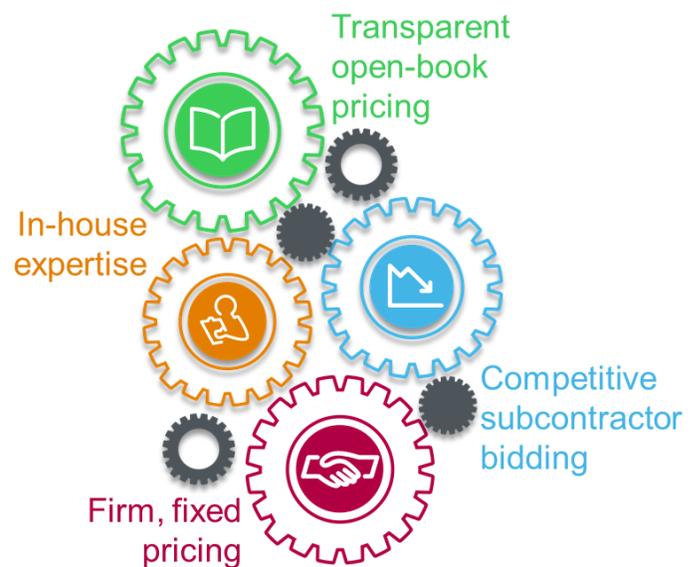
At Schneider Electric, we take a unique approach to performance contracting that will enable our clients to achieve far more than they thought possible. **Our approach goes beyond the scope of traditional performance contracting to deliver bold strategies that enable their vision, mission, and goals.**

At Schneider Electric, best value is we keep our project costing approach very simple. No gimmicks or creative accounting - our **transparent open-book pricing** lets you see exactly what we see, as we work with the cities to coauthor the solution. To help you understand how your project is priced, we clearly identify our major costs, including equipment, subcontracting, labor hours and rates, and overhead and profit. We can review our pricing with the City to answer any questions and ensure all stakeholders are comfortable with the pricing approach.

Schneider Electric's best-value pricing approach

From the first visioning session through your guarantee period, Utah clients will have a fully integrated team of knowledgeable and skilled experts at your side who are well-versed in the unique requirements of their organization. Maintaining this **in-house expertise** under one roof eliminates layers of markup and results in streamlined development, a more cohesive team, and a single point of accountability for you.

The **competitive subcontractor bidding** component of our approach is also very important when it comes to cost management. Many ESCO's have a set of preferred subcontractors or self-perform the majority of the work themselves. As a result, they do not obtain competitive pricing and provide no "reality check" to the effectiveness of their pricing. This may be a necessary tactic for firms who lack significant in-house expertise, but at Schneider Electric, this approach provides the best possible competitive pricing and maximizes the amount of money we're able to keep in the community through local subcontractors.



## State of Utah

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Lastly, all of our ESPC projects are **firm, fixed price proposals**. Therefore, our projects have no change orders, unless initiated by the client. It is the responsibility of Schneider Electric to ensure the project meets the performance requirements within the price provided in the proposal. This ensures that a client's ESPC will be completed within the budget expected.

## GRANT AND REBATE SERVICES

Schneider Electric has an established Grants and Rebates team which provides federal and state funding reporting and consulting, program and project management, and grant writing services.

### Service Model

State and Federal grant applications have evolved. Instead of requiring a single writer with little oversight, today a grant program requires several steps including discovery and evaluation, the application writing process, and post-submission documentation to ensure an award is secured. Schneider Electric offers a comprehensive program that maximizes the ability to secure funding for our projects. We work with our clients from kick-off through the post-submission period to ensure available grants for project funding will get the attention and support they deserve.

- After years of experience, we understand key barriers clients face: **Awareness:** Clients may know their facility needs, but they may not be aware of all the funding available.
- **Time and Resources:** They may be aware of the grant funding that could further their project, but they may not have the time or resources to apply.
- **Competition:** Or, they may even have someone willing to tackle the grant response, but they might not have the latest information to create a competitive application.



We have helped secure our clients **\$50M** in the past 6 months through our grants and rebates services.

Schneider Electric is here to help. We have cultivated knowledge around grant funding cycles, project management, and program management over the last two decades, and have honed a comprehensive method that helps our clients develop a long-term funding strategy.

Many federal grants allow for only a short time period of 45-60 days to learn the submission criteria and turn around an application. Some applications can even take an estimated 400 hours (fifty 8-hour days) to complete. Utah clients can save countless hours of time and develop applications prior to federal funding guidance being released by utilizing our proprietary materials and methodology. These materials are comprised of a series of guides, templates and spreadsheets that directly mimic what the applicant will see in application portals, allowing the applicant to have a head start on gathering content and creating your narrative.

### Qualifications:

- 20+ years' experience specializing in grant management and writing, program development and relationship management with underserved communities in the USA.
- 83.3% Success rate. Simply put, working with us raises your odds of receiving funding compared to the national average of ~58% success rate.

**State of Utah**

Energy Performance Contracting Services

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- Approximately 30-40% of applications in a grant program will be rejected prior to scoring because they omit certain details, documentation or inadequately explain a problem or solution. With a keen eye to detail, that 30-40% rejection rate is reduced to 0%.

**State and Federal Grant Programs Available to Utah Clients**

Below are several grant opportunities that are currently available to the public. Our team can provide Utah clients with a thorough overview of each program and strategize around securing funds.

GRANT OPPORTUNITY	POTENTIAL SCOPE	TOTAL FUNDING	MAXIMUM GRANT FUNDING AVAILABLE
Energy Efficiency and Conservation Block Grant Program (EECBG)	-District-wide LED retrofits, - HVAC & Building Automation - Misc. Efficiency Improvements	\$550M through IIJA*	~\$5M
SEC. 40109 – State Energy Program	Campus-wide Building Efficiency Upgrades	\$500M total, 2022-2026	~\$2M
SEC. 40107 – Deployment of Technology to Enhance Grid Flexibility	Solar Photovoltaic (PV)	\$3B total, 2022-2026	~\$10M
SEC. 11401 – Grants for Charging and Fueling Infrastructure	Electric Vehicle (EV) Charging Stations	\$2.5B total, 2022-2026	~\$5M
Charging and Fueling Infrastructure Grants	Electric Vehicle (EV) Charging Stations	\$7.5B	~\$12M
Department of Transportation Bus and Bus Facilities Program	New Low-or-No Emission Buses, Accompanying Infrastructure. Rehabilitation of Bus Facilities	~\$300M Annually	\$30M

\*Infrastructure Investment and Jobs Act

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# Investment Grade Audit Agreement

This Investment Grade Audit Agreement (“Agreement”), dated **[INSERT DATE]** (“Effective Date”), is entered into by and between Schneider Electric Buildings Americas, Inc. (“ESCO”) and **[INSERT CUSTOMER NAME]** (“Customer”).

WHEREAS, Customer wishes to engage ESCO to perform an Investment Grade Audit to (i) identify energy conservation measures (“ECMs”) that are available to and appropriate for Customer’s facilities, (ii) determine the guaranteed savings that would result from implementing such ECMs as part of a comprehensive energy conservation improvement program, and (iii) propose a scope of work and project price for ESCO’s implementation of such ECMs.

NOW, THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, ESCO and Customer agree with the following terms and conditions:

- Section A -- General Terms and Conditions**
- Section B -- Audit Services**
- Section C – Facilities**

IN WITNESS WHEREOF, the individual signing this Agreement on behalf of its respective party represents that s/he has the authority to execute this Agreement as a duly authorized representative of such party as set forth below.

**[INSERT CUSTOMER NAME]**

**Schneider Electric Buildings Americas, Inc.**

By	_____	By	_____
	(Signature)		(Signature)
Print Name	_____	Print Name	_____
Title	_____	Title	_____
Date	_____	Date	_____

## Section A: General Terms and Conditions

### 1. Entire Agreement

This Agreement constitutes the entire understanding between ESCO and Customer and supersedes all prior oral or written understandings relating to the subject matter herein. This Agreement may not be amended or modified except by written instrument signed by a duly authorized representative of each party.

### 2. Services

As described more fully in Section B, ESCO will conduct an Investment Grade Audit of certain Customer Facilities (defined below) in order to (i) identify ECMs that are available to and appropriate for such Facilities, (ii) determine the guaranteed savings that would result from implementing such ECMs as part of a comprehensive energy conservation improvement program, and (iii) propose a scope of work and project price for ESCO's implementation of such ECMs (the "IGA"). Upon conclusion of the IGA, ESCO will provide Customer with a report describing the scope and results of such IGA (the "IGA Report"). ESCO will endeavor to identify as many ECMs for Customer's Facilities as possible, however the IGA is not intended to serve as a comprehensive inspection of Customer's Facilities. In order to facilitate the IGA and to assist ESCO in identifying and recommending ECMs appropriate for Customer's Facilities, Customer is responsible for providing ESCO with all such access, knowledge and history as may be relevant to ESCO's analysis, including, without limitation, with respect to Customer's Facilities, systems, and equipment, as well as its accounting, maintenance, and operation practices.

### 3. Confidentiality

Neither party shall disclose to others any Confidential Information. "Confidential Information" shall mean all information or material, whether revealed orally, visually, or in tangible or electronic form, that is competitively sensitive material not generally known to the public that relates to the business of a party to this Agreement, or any of their respective interest holders, unless such information: (i) was already rightfully known and in possession of the receiving party at the time of disclosure by the disclosing party; or (ii) is in or has or will be entered into the public domain through no breach of this Agreement or other wrongful act of the receiving party; or (iii) has been rightfully received by the receiving party from a third party who is not known by the receiving party to be under obligation of confidentiality to disclosing party and without breach of this Agreement; or (iv) is independently developed by receiving party without reference to the Confidential Information; or (v) is approved for release by written authorization from the disclosing party. This confidentiality obligation shall terminate two (2) years from the date of this Agreement.

### 4. Insurance

ESCO and Customer shall each maintain insurance coverage, including without limitation, workers' compensation and employer's liability at statutory limits and commercial general liability insurance covering public liability and property damage with limits generally required for its respective industry with not less than \$1,000,000 each occurrence, \$2,000,000 general aggregate. Such insurance shall be with reputable and financially responsible carriers authorized to transact business in the state in which the Facilities are located and the services are being performed with an A.M. Best's rating of at least A- VII.

### 5. Governing Law

This Agreement will be governed, interpreted and construed by, under and in accordance with the laws, statutes and decisions of the state in which the Facilities are located, without regard to its choice of law provisions.

### 6. Ownership of Work Products

All drawings, specifications and other documents and electronic data furnished by ESCO to Customer under this Agreement ("Work Products") are deemed to be instruments of service and ESCO shall retain the ownership and property interest therein, including the copyrights and intellectual property thereto. Drawings, specifications, and other documents and materials and electronic data are furnished for use solely with respect to a guaranteed Energy Savings Contract with ESCO. Work Products may not be shared with any third parties without the written permission of ESCO, except to the extent required by law.

## **Section B: Audit Services**

### **ESCO agrees to provide Customer with the following:**

- A. An IGA of each of the facilities described under Section C (each, a “Facility”; collectively, the “Facilities”);
- B. An IGA Report setting forth:
  - a. a list of the ECMs recommended for each Facility;
  - b. a description, based upon the information made available to ESCO during the IGA, of how the recommended ECMs would interact with the existing equipment in the Facilities;
  - c. a financial analysis calculating the impact the ECMs would have on annual cash flow;
  - d. a utility analysis outlining the impact the ECMS would have on Customer’s utility expenses;
  - e. a proposed scope of work to be performed by ESCO (the “Project”); and
  - f. proposed pricing for ESCO’s performance of the Project, which such pricing will be honored by ESCO for sixty (60) days following delivery of ESCO’s IGA Report to Customer;
- C. An Energy Services Contract to be entered into if Customer elects to move forward with the Project; and
- D. Applicable schedules to the Energy Services Contract, such as a Performance Assurance Support Services (PASS) Agreement and a Savings Guarantee.

### **Customer agrees to provide ESCO with the following:**

- A. A list of any requirements and/or specifications that Customer expects to be included in and/or associated with the scope of work;
- B. Complete access to the Facilities (including remote network access as appropriate) and to information concerning the Facilities, including without limitation such Facility access and information as will enable ESCO to accurately perform an energy efficiency analysis, measure actual energy use, take equipment inventory, determine operating schedules, and identify known operational deficiencies;
- C. Access to key personnel to discuss operating requirements;
- D. Copies or loans of building plans and other such documents for the purpose of facilitating ESCO’s understanding of the Facility characteristics and the current sequences of operation; and
- E. All other insight, knowledge and history as may be relevant to ESCO’s analysis, particularly with respect to the operation, maintenance and energy efficiency of the Facilities, as well as disclosure of all known or suspected deficiencies, defects and malfunctions of or affecting the Facilities or the systems, components and equipment therein.

### **Customer is under no payment obligation under this Agreement, provided at least one of the following conditions is met:**

- A. Customer executes an Energy Services Contract with ESCO within sixty (60) days after receiving the Investment Grade Audit Report; or
- B. ESCO is unable to guarantee annual energy cost savings that meet or exceed the annual cost of the proposed Project over a term not to exceed **XX** years;

If none of the above conditions are met, Customer agrees to pay ESCO \$ **\_\_\_\_\_** for the Investment Grade Audit service within sixty (60) days after receiving the IGA Report. This cost is equivalent to **\_\_\_\_\_** cents per square foot audited. The square footage to be audited is **\_\_\_\_\_** (see attached list of Facilities under Section C).

**Section C: Facilities**

[To be inserted or attached.]

# ENERGY SERVICES CONTRACT

This is an Energy Services Contract (this "Contract") by and between Schneider Electric Buildings Americas, Inc. ("ESCO") and [Customer Legal Name Here] ("Customer"), dated \_\_\_\_\_, 20\_\_ (the "Effective Date ") whereby ESCO agrees to provide and perform the energy conservation measures ("ECMs") set forth in the Contract Documents including the Schedules and Exhibit(s) listed below and incorporated fully herein, subject to the terms and conditions set forth herein:

**Schedule A: Scope of Work**

**Schedule B: Performance Assurance Support Services Agreement**

**Schedule B: Exhibit A – Performance Assurance Support Services**

**Schedule C: Performance Guarantee**

**Schedule D: Measurement & Verification ("M&V") Plan**

**Schedule E: Customer Responsibilities for Performance Guarantee**

**Customer Legal Name Here  
[Include State]**

**Schneider Electric Buildings  
Americas, Inc.**

By \_\_\_\_\_  
(Signature)

By \_\_\_\_\_  
(Signature)

Print Name \_\_\_\_\_

Print Name \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

## DEFINITIONS

1. "Actual Savings" is defined as the sum of the total savings realized using the procedures for measured of savings as set forth in Schedule D plus all adjustments and non-measured savings.
2. "Annual Savings Guarantee" is the amount of the Actual Savings that is guaranteed by ESCO for a twelve (12) month period beginning on the Savings Guarantee Commencement Date and any subsequent twelve (12) month anniversary thereafter.
3. "Change Order" is defined as a written change to the Project executed by both parties.
4. "Contract Documents" consist of this Contract with the terms and conditions set forth herein, the Schedules identified above, and any mutually agreed upon written modification issued after execution of this Contract as provided in a Change Order. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by ESCO. The Contract Documents are correlative and complimentary, and ESCO'S performance shall be required only to the extent consistent with the Contract Documents.
5. "Date of Commencement" is the later of the date first written above or the date funding occurs.
6. "Day" as used herein shall mean calendar day unless otherwise specifically designated.
7. "Excess Savings" is the amount of Actual Savings in excess of the Performance Guarantee to date including any savings achieved during construction.

8. "Guarantee Year" is the twelve (12) month period beginning on the Savings Guarantee Commencement Date and each subsequent twelve (12) month anniversary thereafter.
9. "Performance Guarantee" is the sum of the Annual Savings Guarantee for each year of the guarantee term as set forth in Schedule C unless terminated earlier in accordance with the Contract Documents.
10. "Performance Period" is defined as the period beginning on the Savings Guarantee Commencement Date and extending through the time period as defined in the Performance Guarantee.
11. "Project" refers to scope of work, as set forth in Schedule A: Scope of Work, made to facilities of Customer.
12. "Savings Guarantee Commencement Date" means the first day of the first utility billing period following the month in which ESCO delivers to Customer the project warranty letter.
13. "Substantial Completion" refers to and shall mean the date the individual scopes of work are sufficiently implemented in accordance with the Contract Documents that Customer may utilize the Project for the use for which it is intended, and is fully complete except for minor items, adjustments and/or corrections.
14. "Warranty Period" is for one (1) year from the dates set forth in the project warranty letter .
15. "Work" means the services required by the Contract Documents, whether completed or partially completed and, includes all labor, materials, equipment and services provided or to be provided by ESCO to fulfill ESCO'S obligations. The Work may constitute the whole or a part of the Project.

# TERMS AND CONDITIONS OF IMPLEMENTATION PORTION OF CONTRACT

## ARTICLE 1 – DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

1.1 ESCO projects it will achieve Substantial Completion of the Work within XXX days from Date of Commencement (the “Contract Time”), subject to adjustments of this Contract Time as provided in the Contract Documents.

## ARTICLE 2 – CONTRACT PRICE AND PAYMENTS

2.1 The total of all implementation contract payments shall be \$PROJECT COST (the “Contract Price”). ESCO shall invoice Customer for construction progress payments which shall be paid to ESCO monthly based on the percentage completion of items delineated on a “Schedule of Values” completed during the prior month. The Schedule of Values will be developed by ESCO and provided to Customer at the beginning of project implementation. The Schedule of Values will be based upon the project cost less the Project Mobilization Payment. Payment of invoice is due thirty (30) days after the invoice application date. If receipt of any payment exceeds the thirty (30) days after the invoice application date, Customer shall pay to ESCO a 1% late penalty per month and ESCO reserves the right to terminate this Contract due to non-payment upon seven (7) days prior written notice.

2.2 Within ten (10) days of the Date of Commencement, Customer shall make payment to ESCO for expenses incurred to date, including but not limited to engineering, development, expenses and project mobilization expenses, of 10% of the Contract Price for project start-up and mobilization, equipment and material procurement, bonds and other expenses. The costs incurred to date and the project mobilization expenses is the total “Project Mobilization Payment” in the amount of not to exceed 25% of the implementation contract payment total of the Contract Price.

2.3 For the initial one (1) year beginning at the Savings Guarantee Commencement Date, Customer shall receive the services as described in the Performance Assurance Support Services Agreement at no additional cost. Thereafter, the Performance Assurance Support Services Agreement shall automatically renew for a period of one (1) year, whereby Customer can maintain the current service, upgrade the level of service, or terminate, as provided for in Schedule B.

2.4 Final payment for the Work shall not become due until ESCO has delivered to Customer a complete release of all liens arising out of this Contract covering all labor, materials, and equipment for which a lien could be filed, or a bond satisfactory to Customer to indemnify Customer against such lien.

2.5 The making of final payment shall constitute a waiver of claims by Customer except those arising from (1) liens, claims, security interests or encumbrances arising out of the Contract and which are unsettled, (2) failure of the Work to comply with the requirements of the Contract Documents, or (3) terms of special warranties required by the Contract Documents.

## ARTICLE 3 – CUSTOMER

3.1 Except for permits and fees that are explicitly the responsibility of ESCO under the Contract Documents, Customer shall secure and pay for necessary approvals, inspections, easements, assessments and charges required for the use or occupancy of permanent structures or permanent changes in facilities, including, but not limited to inspections for concrete and/or earthen compaction, where applicable.

3.2 If ESCO fails to correct Work that is not in material accordance with the requirements of the Contract Documents within the Warranty Period (“Defective Work”) or repeatedly fails to carry out the Work in

accordance with the Contract Documents, Customer shall provide written notice to ESCO detailing any alleged deficiencies. If the noticed deficiencies are not resolved or if ESCO does not diligently commence to address such deficiencies within thirty (30) days of receipt of the written notice, Customer may order ESCO to stop the Work, or any portion thereof, until the cause for such order has been eliminated. However, the right of Customer to stop the Work shall not give rise to a duty on the part of Customer to exercise this right for the benefit of ESCO or any other person or entity.

3.3 Customer agrees to repair or replace as necessary any defective existing equipment that is intended to be reused.

3.4 Information under Customer's control shall be furnished by Customer with reasonable promptness as requested by ESCO.

3.5 Customer shall notify ESCO in writing of any or all uses or restrictions in usage of all areas of Customer's facility or the location of the Project.

3.6 The foregoing are in addition to any other duties and responsibilities of Customer set forth herein or in any other Contract Documents, including but not limited to those duties and responsibilities set forth in Schedule E.

3.7 Customer shall provide facility access adequate to the requirements of ESCO and their subcontractors. Keys, access cards, and/or escorts will be provided for all facilities involved in the scope of Work in a quantity sufficient to facilitate execution of scopes at multiple locations with multiple trades. Customer assumes all liability and risk of loss for providing such access. Customer is subject to change orders for delays resulting from limited or restricted access for scheduled or previously coordinated work. Keys and/or access cards will be issued to ESCO project personnel and subcontractor site foreman or lead personnel as necessary.

#### **ARTICLE 4 – ESCO**

4.1 ESCO shall supervise and direct the Work, using ESCO'S skill and attention. ESCO shall be solely responsible for and have control over means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

4.2 Unless otherwise provided in the Contract Documents, ESCO shall provide and pay for labor, materials, tools, equipment and machinery necessary for the proper execution and completion of the Work.

4.3 ESCO warrants to Customer for a period of one (1) year from the corresponding dates of each project substantial completion letter per scope of work that the materials and equipment manufactured by ESCO will be of good quality and new unless the Contract Documents require or permit otherwise, and further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. ESCO'S warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by or for ESCO, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. ESCO shall repair or replace defective material or equipment and re-perform Work to correct any defect within the Warranty Period. ESCO does not warrant products not manufactured by ESCO, but it will pass on to Customer any manufacturer's warranty to the extent permitted. THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES AND REMEDIES WHETHER STATUTORY, EXPRESS OR IMPLIED (INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OR TRADE), AND ESCO WILL NOT BE RESPONSIBLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES OF CUSTOMER UNLESS REQUIRED BY APPLICABLE STATE LAW. ESCO'S RESPONSIBILITY IN WARRANTY OR CONTRACT SHALL NOT

EXCEED THE CONTRACT PRICE PAID FOR THE SPECIFIC PRODUCT OR SERVICE THAT GIVES RISE TO THE CLAIM EXCLUDING THIRD PARTY CLAIMS FOR PERSONAL INJURY, DEATH OR PROPERTY DAMAGE OR AS MAY BE REQUIRED BY LAW.

4.4 Unless otherwise provided in the Contract Documents, ESCO shall pay sales, consumer, use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other permits, licenses and inspections necessary for proper execution and completion of the Work.

4.5 ESCO shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work.

4.6 ESCO shall keep the premises and surrounding areas free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, ESCO shall remove from and about Project waste materials, rubbish, ESCO'S tools, equipment, machinery and surplus material.

4.7 ESCO shall provide Customer access to the Work in preparation and progress wherever located.

4.8 ESCO shall pay all royalties and license fees, shall defend Customer from suits or claims for infringement of patent rights, and shall hold Customer harmless from loss on account thereof.

4.9 Except to the extent of the negligence or willful misconduct of Customer, or its agents, representatives, employees, officers, directors or assigns, ESCO shall indemnify and hold harmless Customer, and agents and employees thereof from and against all third party claims, damages, losses and expenses, including, but not limited to, reasonable attorney's fees, arising out of or resulting from performance of the Work provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (including the Work itself), but only to the extent caused in whole or in part by negligent acts or omissions of ESCO, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable.

4.10 NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, ESCO SHALL NOT BE LIABLE IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY) OR OTHERWISE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES WHATSOEVER. CUSTOMER AGREES TO THE FOREGOING TO THE EXTENT PERMITTED BY THE CONSTITUTION AND LAWS OF THE STATE OF UTAH. The remedies of Customer set forth herein are exclusive where so stated and the total cumulative liability of ESCO with respect to this Contract or anything done in connection therewith, such as the use of any product covered by or furnished under the Contract, whether in contract, in tort (including negligence or strict liability) or otherwise, shall not exceed the Contract Price for the specific product, equipment, material or service work performed that gives rise to the claim, excluding third party claims for personal injury, death or property damage or as may be required by law.

## **ARTICLE 5 – DISPUTE RESOLUTION**

5.1 To the extent allowed by applicable law, any controversy or claim arising out of or relating to this Contract, or Contract Documents, or any breach thereof, shall be settled by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

5.2 The arbitration proceeding location shall be in the county in which the Project is located.

## **ARTICLE 6 – SUBCONTRACTS**

6.1 A Subcontractor is a person or entity who has a direct contract with ESCO to perform a portion of the Work at the site.

6.2 Unless otherwise stated in the Contract Documents or the bidding requirements ESCO, if requested in writing by Customer, shall furnish in writing to Customer the names of the Subcontractors to whom ESCO plans to award Work. Contracts between ESCO and Subcontractors shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to ESCO by the terms of the Contract Documents, and to assume all the obligations and responsibilities which ESCO, by the Contract Documents, assumes toward Customer.

## **ARTICLE 7 – CHANGES IN THE WORK**

7.1 Customer may request changes in Work consisting of additions, deletions or modifications, whereby, the Contract Price, Contract Time and/or Performance Guarantee shall be adjusted accordingly. Such changes in the Work shall be authorized by written Change Order that shall be mutually agreed to and signed by Customer and ESCO. The parties shall negotiate in good faith and use their best efforts to execute any Change Order, and any Change Order must be fully executed in writing by Customer and ESCO prior to any actual changes being implemented.

7.2 The cost or credit to Customer from a change in the Work shall be determined by mutual agreement and, in the absence of a mutual agreement being reached within a reasonable amount of time after the request for such Change Order was made, the cost or credit to Customer shall be decided by the dispute resolution process as provided in the Contract Documents.

7.3 In the event of any suspension or delay due to the acts or omissions of Customer or Customer directives to stop Work for any reason, through no fault of ESCO, the Contract Time for Substantial Completion shall be extended to reflect such period of interruption and the Contract Price shall be equitably adjusted to recover ESCO'S costs of demobilization, delay and remobilization related to such suspension or delay. ESCO agrees it will cooperate with Customer and mitigate such costs to the extent and efforts commercially reasonable. If such suspension or delay continues for more than ninety (90) consecutive days, through no act or fault of ESCO, ESCO may terminate this Contract and recover from Customer payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination and damages.

## **ARTICLE 8 – TIME**

8.1 The date of Substantial Completion is the date certified by ESCO in accordance with Article 9.3.

8.2 If ESCO is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any other causes which are beyond the control of ESCO, then the parties hereto agree to execute a Change Order allowing for a mutually agreeable extension of time for performance of ESCO'S Work to cover such delay.

8.3 **DISCLAIMER:** Customer acknowledges that the prevailing COVID-19 epidemic/pandemic and the evolving situation surrounding the same may trigger stoppages, hindrances and/or delays in ESCO's (or its subcontractors' or suppliers') ability or capacity to perform the contracted work and/or to produce, deliver, install or service any applicable products, irrespective of whether such stoppages, hindrances and/or delays are due to measures imposed by authorities or deliberately implemented by ESCO (or its subcontractors or suppliers) as preventive or curative measures to avoid harmful contamination or exposure of ESCO's (or its subcontractors' or suppliers') employees. Customer therefore recognizes that such circumstances shall be considered as a cause for excusable delay and shall not expose ESCO to contractual sanctions (including without limitation delay penalties, liquidated damages or other damages) or termination for default.

## **ARTICLE 9 – PAYMENTS AND COMPLETION**

9.1 Payments shall be made as provided in Article 2 of the Contract.

9.2 Payments may be withheld on account of (1) Defective Work not remedied per Article 3.2, (2) failure of ESCO to make payments properly to the Subcontractors or for labor, materials or equipment, or (3) repeated failure to carry out the Work in accordance with the Contract Documents.

9.3 Upon Substantial Completion of each portion of the Work, ESCO will issue a project substantial completion letter per scope of work to Customer.

9.4 Final payment shall not become due until ESCO has delivered to Customer a complete release of all liens arising out of this Contract covering all labor, materials, and equipment for which a lien could be filed.

9.5 The making of final payment shall constitute a waiver of claims by Customer except those arising from (1) liens, claims, security interests or encumbrances arising out of the Contract and which are unsettled, (2) failure of the Work to comply with the requirements of the Contract Documents, or (3) terms of special warranties required by the Contract Documents.

## **ARTICLE 10 – PROTECTION OF PERSONS AND PROPERTY**

10.1 ESCO shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. ESCO shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to (1) employees on the Work and other persons who may be affected thereby, (2) the Work and materials and equipment to be incorporated therein, and (3) other property at the site or adjacent thereto.

10.2 ESCO shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss.

10.3 The scope of work or service to be performed by ESCO pursuant to this Contract, and the compensation to be paid to ESCO hereunder for Work or services performed, expressly exclude any Work or service of any nature associated or connected with the identification, abatement, cleanup, control or removal of environmentally hazardous materials beyond what is specifically defined and identified in Schedule A of this Contract. "Hazardous Materials" to include, but not be limited to, asbestos and PCBs discovered in or on the premises. Customer agrees that all duties and obligations in connection with any hazardous materials located in or on the premises, other than those defined in Schedule A, are strictly the responsibility of Customer. Customer will provide any hazardous materials testing documentation and reports, and information from previous sources or vendors used in hazardous materials testing. Customer warrants and represents to the best of Customer's knowledge there are no hazardous materials in or on the premises which will affect, be affected by, come in contact with, or otherwise impact upon or interfere with the Work to be performed by ESCO pursuant to this Contract.

10.4 Should ESCO become aware or suspect the presence of hazardous materials beyond those to be addressed in Schedule A during performance of its Work under this Contract, ESCO will be authorized to cease Work in the affected area immediately, and will promptly notify Customer of the conditions discovered. Should ESCO stop Work because of the discovery or suspicion of hazardous materials, the time for performance of ESCO'S Work or service will be extended to cover the period required for abatement, cleanup, or removal of the hazardous materials. ESCO will not be held responsible for any claims, damages, costs, or expenses of any kind associated with the period during which ESCO has stopped Work as a result of hazardous materials. If appropriate, ESCO will be entitled to an equitable adjustment of the Contract Price for any increased costs or other charges incurred by ESCO in connection with the existence of its rights under this paragraph.

10.5 Customer will be responsible for taking all necessary steps to correct, abate, clean up, or control hazardous materials not addressed by ESCO in Schedule A in accordance with all applicable statutes and regulations. Customer specifically agrees, to the extent allowed by state law, to indemnify and to hold ESCO, its officers, agents and employees harmless from and against any and all claims, demands, damages, or causes of action in any way arising out of the release of hazardous materials into the air, soil, or any water system or water course, or any actions taken in connection with same, or any failure to act.

## **ARTICLE 11 – INSURANCE AND BONDS**

11.1 ESCO shall maintain adequate levels and types of insurance coverage appropriate to its business and profession and as may be required by applicable law and the Contract Documents. Such insurance shall be in companies authorized to do business in the jurisdiction in which the Project is located with an A.M. Best's rating of at least A- VII and as a minimum shall include Workers' Compensation and Employer's Liability at statutory limits, Automobile Liability covering all owned, hired and other non-owned vehicles and Commercial General Liability covering public liability, property damage and completed operations with limits not less than \$2,000,000 per occurrence. Certificates of such insurance shall be provided to Customer prior to commencement of the Work.

11.2 If required in the Contract Documents, and upon Customer's request and expense, ESCO shall provide payment and performance bonds for 100% of the Contract Price to secure the faithful performance of the Work, compliance with the terms of this Contract and to insure ESCO'S payment obligations to its Subcontractors and suppliers related to the Work. Notwithstanding any provision to the contrary herein, any payment and performance bonds associated with this Contract guarantee only the performance of the installation portion of the Contract, and shall not be construed to guarantee the performance of: (1) any efficiency or energy savings guarantees, (2) any support or maintenance service agreement, or (3) any other guarantees or warranties with terms beyond one (1) year in duration from the completion of the installation portion of the Contract.

## **ARTICLE 12 – TERMINATION OF THE CONTRACT**

12.1 If Customer fails to make payments to ESCO as required in this Contract, through no fault of ESCO, ESCO may, upon seven (7) days written notice to Customer, terminate the Contract and recover from Customer payment for all Work executed and for proven loss with respect to materials, equipment, tools, and machinery, including reasonable overhead, profit and damages applicable to the Project.

12.2 If Customer (1) fails or neglects to maintain Customer responsibilities as set forth in Schedule E, or (2) fails to fulfill any of its other obligations or responsibilities under the Contract Documents, ESCO may, after delivery of written notice and providing Customer seven (7) days to cure, terminate the Contract, including, but not limited to the termination of any obligation of ESCO to provide the Performance Guarantee.

12.3 If ESCO breaches a material provision of this Contract, Customer has provided written notice to ESCO detailing the alleged breach, and within thirty (30) days of receipt of the written notice the alleged breach is either not cured or ESCO has not diligently commenced to cure such breach, Customer may make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due ESCO.

12.4 Termination of any of the Contract Documents shall release ESCO of all remaining obligations under all of the Contract Documents as of the effective date of such termination.

12.5 Any remedies provided for in this Article 12, shall not be exclusive of any additional remedies available to a party pursuant to this Contract, in equity or in the law.

## **ARTICLE 13 – OTHER CONDITIONS OR PROVISIONS**

13.1 If any provision of this Contract is determined to be invalid, illegal, or unenforceable as written, such

provision shall be construed consistent with and to the fullest extent permitted under the law, and any such determination shall not affect or impair the validity, legality and enforceability of the remaining provisions.

13.2 Nothing herein shall be deemed to establish a relationship of principal and agent between ESCO and Customer, or any of their respective agents or employees, and this Contract and the Contract Documents may not be construed as creating any form of legal association or arrangement that would impose liability upon one party for the act or failure to act of the other party.

13.3 This Contract shall be governed by the laws of the state where the Project is located.

13.4 As between Customer and ESCO, any applicable statute of limitation shall commence to run and any alleged cause of action shall be deemed to have accrued (1) not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion, or (2) not later than the date of the relevant act or failure to act by either party for acts or failures to act occurring after the date of Substantial Completion.

13.5 ESCO shall prepare and provide and Customer agrees to participate in press release(s) and business case studies limited to the business relationship with ESCO and Customer's use of ESCO's services. Customer agrees to grant ESCO the right to use Customer's trademarks, for the term contained herein, in connection with press releases, case studies or website marketing, advertisement, promotion, sale, and distribution of ESCO's services. Prior written notice of use shall be provided to Customer by ESCO and Customer's written approval is necessary for any press releases or case studies.

13.6 This Contract sets forth the entire understanding between the parties and supersedes all prior oral or written understandings relating to the subject matter herein. This Contract may not be altered or modified except by a written instrument signed by a duly authorized representative of each party.

## **SCHEDULE A SCOPE OF WORK**

Customer hereby acknowledges and agrees that the scope of work shall be limited to, and ESCO shall only perform, the following:

Scope of Work Description: (Attach additional pages as necessary)

# SCHEDULE B PERFORMANCE ASSURANCE SUPPORT SERVICES AGREEMENT

This Performance Assurance Support Services Agreement (“Agreement”), is by and between Schneider Electric Buildings Americas, Inc. (“ESCO”), and “[Customer Legal Name Here] (“Customer”). To the extent that the terms and conditions in this Agreement conflict with the terms and conditions in the Contract, the terms and conditions of this Agreement shall control. Any capitalized terms used and not defined herein are as defined in the Contract.

Customer Legal Name Here	Schneider Electric Buildings Americas, Inc.
By _____ (Signature)	By _____ (Signature)
Print Name _____	Print Name _____
Title _____	Title _____
Date _____	Date _____

## A. TERM

This Agreement shall commence at the Savings Guarantee Commencement Date and continue for one (1) year (the “Initial Term”) and shall automatically renew for additional one (1) year periods thereafter. After the Initial Term, Customer may terminate this Agreement at any time prior to thirty (30) days to the end of the then current term.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, OR IN ANY CONTRACT DOCUMENT, IN THE EVENT THAT THIS AGREEMENT IS CANCELED OR TERMINATED BY CUSTOMER FOR ANY REASON, THE PERFORMANCE GUARANTEE SET FORTH IN SCHEDULE C SHALL BE DEEMED TO HAVE BEEN MET AND FULFILLED, NULL AND VOID AND OF NO FURTHER FORCE OR EFFECT AS OF THE EFFECTIVE TERMINATION DATE OF THIS AGREEMENT AND ESCO SHALL HAVE NO FURTHER OBLIGATIONS OR LIABILITIES ASSOCIATED WITH SUCH PERFORMANCE GUARANTEE.

## B. SERVICE SCOPE AND PAYMENT

ESCO shall provide the Performance Assurance Support Services (the “Services”) to Customer as set forth in Exhibit A, Section 1 during the Initial Term.

After the end of Initial Term and each subsequent term thereafter, Customer may either (1) continue with the same level of Services as set forth in the previous term, (2) change the Services level by selecting one or more of the options as set forth in Exhibit A, Section 2 if any of this Agreement, or (3) terminate this Agreement and the Performance Guarantee in accordance with the termination provisions contained herein.

The available Services options may be amended from time to time at the sole discretion of ESCO.

1. After the Initial Term, the prices set forth in Exhibit A shall be adjusted upwards annually in accordance with the increase in Consumer Price Index ("CPI").
2. After the Initial Term, payment under this Agreement is due within thirty (30) days of the start of that year's term. ESCO reserves the right to add 1.5% per month to any balance due beyond thirty (30) days of invoice date. Customer acknowledges and understands that all charges are exclusive of any applicable federal, state, or local use, excise, sales taxes or similar fees whether charged to or against ESCO or Customer for the Services. Customer may utilize purchase orders for ease of administration and ordering purposes in implementation of this Agreement (to include: specific products or services, scope of work, quantities, price and delivery terms only), however, no pre-printed, additional, inconsistent or different terms contained or referenced in such purchase order shall have any force or effect, it being the intent of the parties that the terms of this Agreement shall apply.

### **C. ACCESS**

Services provided under this Agreement will be performed during normal working hours (normal working hours shall mean 8:00 a.m. to 5:00 p.m., local time, Monday through Friday, excluding ESCO holidays) unless specifically stated otherwise in this Agreement. However, ESCO may have the need to access Customer facilities during non-normal working hours and on holidays in order to identify and troubleshoot energy savings issues. Therefore, Customer will provide and permit ESCO reasonable access to Customer's facility and equipment to the extent necessary for ESCO'S personnel to perform the Services. Customer shall also provide access to key personnel to discuss facility operating requirements. ESCO will use commercially reasonable efforts to minimize any disturbance with Customer's operations while providing the Services.

### **D. RELATIONSHIP**

Customer and ESCO are independent contracting parties. Nothing in this Agreement shall be construed to make either party or any of its employees, the partner, joint venturer, agent, or legal representative of the other for any purpose whatsoever, nor grants either party any authority to assume or create any obligation on behalf of or in the name of the other party. As an independent contractor, the mode, manner, method and means employed by ESCO in the performance of the terms and conditions of this Agreement shall be of ESCO'S selection and under the sole control and direction of ESCO. Under the terms of this Agreement, neither Customer nor any company in which it owns a controlling interest shall be required to furnish ESCO or any of its employees with any benefits, including but not limited to severance benefits, unemployment compensation or worker's compensation.

### **E. INSURANCE**

Customer and ESCO shall each maintain insurance coverage, including without limitation, Workers' Compensation and Employer's Liability at statutory limits, Automobile Liability covering all owned, hired and other non-owned vehicles, and Commercial General Liability covering public liability and property damage with limits generally required for its respective industry and operations with not less than \$1,000,000 minimum coverage per occurrence. Such insurance shall be with reputable and financially responsible carriers authorized to transact business in the state in which the facility is located and the services are being performed with an A.M. Best's rating of at least A- VII.

### **F. LIMITATION OF LIABILITY**

NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGE OF ANY KIND, INCLUDING WITHOUT LIMITATION, LOSS OF REVENUE OR PROFIT REGARDLESS OF THE FORM OF ACTION OR THEORY OF RECOVERY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE TOTAL CUMULATIVE LIABILITY OF ESCO WITH RESPECT TO THIS AGREEMENT OR ANYTHING DONE IN

CONNECTION THEREWITH, SUCH AS THE USE OF ANY DELIVERABLE FURNISHED HEREUNDER SHALL NOT EXCEED THE PRICE PAID FOR THE SERVICE PERFORMED THAT GIVES RISE TO THE CLAIM ON WHICH SUCH LIABILITY IS BASED. CUSTOMER AGREES TO THE FOREGOING TO THE EXTENT PERMITTED BY THE CONSTITUTION AND LAWS OF THE STATE OF UTAH.

**G. EXCUSABLE DELAY**

Any delay or failure of either party to perform its obligations hereunder (with the exception of payment) shall be excused, and time to perform extended, and shall not be held liable if and to the extent that the delay or failure to perform is caused by an event or occurrence beyond the reasonable control of the party whose performance is interfered with, and without its fault or negligence and which by the exercise of due diligence, said party is unable to prevent.

**H. SUCCESSORS**

Neither this Agreement nor any rights arising hereunder may be assigned, pledged, transferred or hypothecated by ESCO without the consent of Customer; such consent cannot be unreasonably withheld. No Work performed pursuant to this Agreement may be subcontracted in whole or in part by ESCO without the prior written consent of Customer; such consent cannot be unreasonably withheld.

**I. ENTIRE AGREEMENT**

This Agreement sets forth the entire understanding between the parties and supersedes all prior oral or written understandings relating to the subject matter herein. This Agreement may not be altered or modified in any way except by written instrument signed by a duly authorized representative of each party.

**J. SEVERABILITY**

If any provision of this Agreement shall be held to be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired thereby.

**K. GOVERNING LAW**

This Agreement will be governed, interpreted and construed by, under and in accordance with the laws, statutes and decisions of the state in which the Services are to be performed, without regard to its choice of law provisions. Venue shall be in the federal, state or municipal courts serving the county in which the Services are performed.

## **SCHEDULE B: EXHIBIT A PERFORMANCE ASSURANCE SUPPORT SERVICES**

### **SECTION 1 – SERVICES DURING INITIAL TERM**

ESCO shall provide the Performance Assurance Support Services (the “Services”) defined below to Customer during the Initial Term as defined in Schedule B.

REGIONAL PASS MANAGER TO INSERT PASS SERVICES

### **SECTION 2 – SERVICES AFTER INITIAL TERM**

After the end of Initial Term and each subsequent term thereafter, Customer may either (1) renew the same level of Service as set forth in the Initial Term or previous term, (2) change the Service level by selecting one or more of the options defined below, or (3) terminate this Agreement and the Savings Guarantee in accordance with the termination provisions contained herein. All prices will be calculated at the time of renewal.

REGIONAL PASS MANAGER TO INSERT YEAR 3+ SERVICES PACKAGES, BUNDLES, AND OPTIONS

The available service options may be amended from time to time at the sole discretion of ESCO.



## SCHEDULE D MEASUREMENT & VERIFICATION PLAN

### PROJECTED ANNUAL SAVINGS

The Performance Guarantee as established in Schedule C shall consist of savings from multiple scopes of work. The projected savings from each scope of work is presented in the table below.

Facility -OR- Utility Meter	Annual Projected Savings		
	Consumption	Demand	Units

The projected savings in the table above are provided for reference only and are not intended to construe a savings guarantee by meter, facility, or energy unit. The savings guarantee is fully defined in Schedule C.

### ENERGY, WATER, AND OPERATIONS & MAINTENANCE (O&M) RATE DATA

The cost of energy in any period will be determined by applying the rates as defined below ("Baseline Energy Rates"), or the actual energy rates during the period, at the discretion of ESCO, to the energy used in a given period for each fuel type.

Utility Company:			
Rate Schedule:			
Component	Charge	Unit	Description
Determination of Billed kW:			

### COMMON ECM ASSUMPTIONS

#### WEATHER DATA SOURCE

Data for weather compensation adjustments will be actual climate data obtained from the National Weather Service Station at WEATHER STATION NAME. In the event the specified weather station is de-activated, weather data will be collected from the nearest weather station with suitable observations. If the data source becomes unavailable or a superior source is identified, ESCO may select an alternative data source with Customer's approval.

#### ANNUAL CALENDAR OF EVENTS

Provided below is a table summarizing the annual calendar of events that will be used as a basis in calculations, unless otherwise specified. In the event that there are any changes or deviations to this annual calendar, an appropriate adjustment will be made in accordance with the "Adjustment Schedule" set forth in Schedule E.

Date(s)	Event	Date(s)	Event

**BUILDING OCCUPANCY SCHEDULES**

Provided below is a table summarizing the building occupancy schedules used within the calculations, unless otherwise specified. In the event that there are any changes or deviations to this occupancy schedule, an appropriate adjustment will be made in accordance with the Adjustment Schedule set forth in Schedule E.

Facility	Day Type	Daily Schedule
	Weekday	
	Weekend/Holiday	
	Summer Weekday	

**STANDARDS OF SERVICE AND COMFORT**

Provided below is a table summarizing the temperature setpoints used within the calculations, unless otherwise specified. Customer agrees to operate the conditioned spaces in the facilities within the temperature ranges scheduled in the table below. In the event that there are any changes or deviations to these standards of service and comfort, an appropriate adjustment will be made in accordance with the Adjustment Schedule set forth in Schedule E.

	Heating	Cooling
Occupied	68°F	75°F
Unoccupied	50°F	99°F

## **MEASUREMENT & VERIFICATION DETAILS**

<<<This page is intentionally left blank, and should be replaced by the project specific M&V plan modules. These can be found in the Energy Services Contract\_M&V Modules.doc file. If an M&V solution which is not included in this document is needed, seek assistance from the M&V Lead.>>>

# **SCHEDULE E CUSTOMER RESPONSIBILITIES FOR PERFORMANCE GUARANTEE**

## **GENERAL RESPONSIBILITIES**

Customer acknowledges and agrees that proper maintenance is essential to any energy conservation program. Therefore, Customer agrees to undertake the following responsibilities:

Customer agrees to: (1) provide, or cause its suppliers to provide, periodic utility invoices to ESCO within ten (10) days of receipt, (2) execute all Customer responsibilities as outlined herein, and (3) provide to ESCO reasonable access to all Customer facilities and information necessary for ESCO to perform its responsibilities. Access will include, but is not limited to, the following items:

- All buildings listed within this Contract
- All buildings served by the meters listed within this Contract
- All mechanical equipment rooms in the buildings listed within this Contract
- All temperature control and energy management systems which control part or all of any of the buildings listed within this Contract
- Personnel with responsibility for operating and/or managing any of the buildings listed within this Contract
- Monthly utility invoices and billing history for all of the meters listed within this Contract
- Construction documents, equipment inventories, and other documents that may be helpful in evaluating a cause for adjustment as listed within this Contract
- Any data from meters or sub-meters relevant to M&V associated with this Contract

Customer will solely be responsible for providing communications and/or network interface to all buildings for operation and PASS support.

Customer will perform daily facilities monitoring and promptly review any alarm summaries.

Customer will designate a "Primary Operator" of the system. The Primary Operator is defined as the individual who will be trained by ESCO during the installation period and will be responsible for daily operation and maintenance of the equipment and systems necessary to achieve the Performance Guarantee. Customer will notify ESCO within five (5) days after the departure or termination of the Primary Operator. Within ten (10) days of the departure of the current Primary Operator, Customer will designate a new Primary Operator and shall provide ESCO access to train the new Primary Operator. ESCO shall train a new Primary Operator at the sole expense of Customer on a time and materials basis.

## **MAINTENANCE RESPONSIBILITIES**

Customer agrees to use its best efforts to maintain the ECMs in original operating condition ("Original Operating Condition") with allowance for normal wear and tear. If an ECM is operating at any state other than the Original Operating Condition as defined above ("Failed ECM"), Customer agrees to (1) repair or replace the ECM immediately, and (2) contact a PASS representative at 1-800-274-5551 option 4, within 24 hours of such event. ESCO reserves the right to adjust the amount of Performance Guarantee associated with the Failed ECM for the duration of the failure in the Annual Savings Guarantee.

Customer will agree to maintain all parts of the Project site(s) where the ECM(s) reside including but not limited to components, equipment, machinery, energy management systems, structure of the facility(s), computer hardware, network and IT systems, either existing or newly installed. Customer must comply with the general maintenance requirements specified by equipment manufacturers and the maintenance tasking guidelines included in the operating and maintenance manual. Customer will be responsible to provide to

ESCO documentation that proper maintenance has been performed at ESCO'S request within fifteen (15) days of written request.

Notwithstanding anything to the contrary contained herein, all ECM(s) must be maintained in proper working condition in all cases where the performance of said ECM(s) affects or could affect the ability to achieve, measure or verify the Annual Savings Guarantee. Should Customer refuse to perform the required maintenance as required in this Contract, ESCO and Customer shall agree to one of the following means of recourse: (1) ESCO will adjust the Performance Guarantee associated with that ECM pursuant to Schedule E, or (2) ESCO may terminate this Performance Guarantee and any and all obligations and liabilities of ESCO associated therewith upon fifteen (15) days written notice.

## **ADJUSTMENT RESPONSIBILITIES**

In addition to the responsibilities of Customer set forth in this Schedule, Customer also agrees to undertake the responsibilities set forth in the Adjustment Schedule as necessary.

## **ADJUSTMENT SCHEDULE**

Below is the procedure for accounting for non-routine adjustments for any of the utility meters included in Schedule D. A non-routine adjustment is required for any change outside of those explicitly defined in Schedule D that will impact the energy use or the verified savings under this Contract. It is Customer's responsibility to notify ESCO of any changes that may necessitate a non-routine baseline adjustment and to perform the required non-routine baseline adjustment steps identified below at Customer's sole expense.

## **CUSTOMER REQUIRED NON-ROUTINE BASELINE ADJUSTMENT RESPONSIBILITIES**

If the required non-routine baseline adjustment steps are not performed, and the change is greater than the threshold limit, savings will be determined with the Assumed Savings Procedure Adjustment, as defined below. Actual Savings will be determined using the Assumed Savings Procedure Adjustment for all billing periods until the required non-routine baseline adjustment steps have been completed, or until the change which necessitated the non-routine baseline adjustment is no longer in place. If Customer fails to notify ESCO of a change necessitating a non-routine baseline adjustment or fails to provide details of the change, savings will be determined with the Assumed Savings Procedure Adjustment.

If the required non-routine baseline adjustment steps are not performed, and the change is less than the threshold limit, savings will be determined with the "Estimated Savings Procedure Adjustment". Actual Savings will be determined using the Estimated Savings Procedure Adjustment for all billing periods until the required non-routine baseline adjustment steps have been completed, or until the change which necessitated the non-routine baseline adjustment is no longer in place.

### **1. Addition of New Building or New Energy User**

- All utility services to the building or energy user which affect the energy use of any meter included in Schedule D must be sub-metered at Customer's expense.
- Threshold limit: the lesser of 10% of the area served by any affected meter, as defined in Schedule D or 20,000 ft<sup>2</sup>.

### **2. Addition to Existing Building**

- All utility services to the addition which affect the energy use of any meter included in Schedule D must be sub-metered at Customer's expense.
- Threshold limit: the lesser of 10% of the area served by any affected meter, as defined in Schedule D or 20,000 ft<sup>2</sup>.

### **3. Renovation / Modification to Existing Building or Utility Service**

- All utility services for the affected portion of the building must be sub-metered before and after the change until the effect on the energy consumption has been determined at Customer's expense.

- Threshold limit: the lesser of 10% of the area served by any affected meter, as defined in Schedule D or 20,000 ft<sup>2</sup>.

#### **4. Demolition / Abandonment of Existing Building or Utility Service**

- All utility services for the affected buildings must be sub-metered before and after the change until the effect on the energy consumption has been determined at Customer's expense.
- Threshold limit: the lesser of 10% of the area served by any affected meter, as defined in Schedule D or 20,000 ft<sup>2</sup>.

#### **5. Re-commissioning of Out of Service Building**

- All utility services for the affected buildings must be sub-metered before and after the change until the effect on the energy consumption has been determined at Customer's expense.
- Threshold limit: the lesser of 10% of the area served by any affected meter, as defined in Schedule D or 20,000 ft<sup>2</sup>.

#### **6. Change in Occupancy**

- Customer must perform, or cause to be performed, at Customer's expense, a calibrated computer simulation to account for the change. If the impact computed by the simulation is greater than 20% of the projected savings on the meter, the "Assumed Savings Procedure" listed below will be followed. In no event will the adjusted savings be reported as less than the savings achieved in the preceding project year.
- Threshold limit: 5% of the total occupant count in the base year.

#### **7. Change in Schedule**

- Customer must perform, or cause to be performed, at Customer's expense, a calibrated computer simulation to account for the change. If the impact computed by the simulation is greater than 20% of the projected savings on the meter, the Assumed Savings Procedure will be followed. In no event will the adjusted savings be reported as less than the savings achieved in the preceding project year.
- Threshold limit: 5% of the total scheduled hours for the meter as defined in Schedule D.

#### **8. Change in Set-points**

- Customer must perform, or cause to be performed, at Customer's expense, a calibrated computer simulation to account for the change. If the impact computed by the simulation is greater than 20% of the projected savings on the meter, the Assumed Savings Procedure will be followed. In no event will the adjusted savings be reported as less than the savings achieved in the preceding project year.
- Threshold limit: An average of 0.5° from the set-points defined in Schedule D.

#### **9. Change in Operational Calendar**

- Customer must perform, or cause to be performed, at Customer's expense, a calibrated computer simulation to account for the change. If the impact computed by the simulation is greater than 20% of the projected savings on the meter, the Assumed Savings Procedure will be followed. In no event will the adjusted savings be reported as less than the savings achieved in the preceding project year.
- Threshold limit: 5% of the total scheduled hours for the meter as defined in Schedule D.

#### **10. Change in Plug Load**

- Customer must perform, or cause to be performed, at Customer's expense, a simulation of energy impact to account for the change. If the computed impact is greater than 20% of the projected savings on the meter, the Assumed Savings Procedure will be followed. In no event will the adjusted savings be reported as less than the savings achieved in the preceding project year.
- Threshold limit: 1% of the base year peak 15-minute average kW for the affected meter.

#### **11. Customer Initiated ECMs**

- Customer must develop and execute an M&V plan at Customer's expense, which has been reviewed and approved by ESCO, to evaluate the impact of the change. If the impact determined by the M&V plan is greater than 20% of the projected savings on the meter, the Assumed Savings Procedure will be followed. In no event will the adjusted savings be reported as less than the savings achieved in the preceding project year.
- Threshold limit: 2% of the projected savings on any affected meter.

## **12. Missing Bills**

- Customer is required to provide ESCO with utility bills for meters defined in Schedule D within ten (10) days of receipt of each bill or provide ESCO direct access to retrieve the utility bills electronically. If utility bills are not received by ESCO within sixty (60) days of the end of the service date, the Assumed Savings Procedure will be used.

## **13. Failure to Operate ECMs According to Operational and Design Intent**

- Customer agrees to operate the ECMs according to the Operational and Design Intent of the ECMs. Failure to do so will necessitate a baseline adjustment using the Assumed Savings Procedure.

## **14. Failure to Perform Project Specific Customer Responsibilities**

- Customer agrees to perform the project specific Customer responsibilities as defined in Schedule E. Failure to do so will necessitate a baseline adjustment using the Assumed Savings Procedure.

## **15. Other Causes**

- Any change that impacts the energy use on the meters defined in Schedule D that does not fit into any of the other categories may still require a non-routine baseline adjustment. Customer will notify ESCO before any change is made so that an agreeable adjustment strategy can be determined. If no agreeable adjustment method can be reached, the Assumed Savings Procedure will be used.

## **ASSUMED SAVINGS PROCEDURE ADJUSTMENT**

- If the Actual Savings for the affected meter(s) in the prior Guarantee Year are greater than or equal to the projected savings for the affected meter(s), the Actual Savings from the prior Guarantee Year will be reported while savings are assumed for the affected meter(s).
- If the Actual Savings for the affected meter(s) in the prior Guarantee Year are less than the projected savings for the affected meter(s) and there have been less than twenty-four (24) months since the commencement of the Performance Period, Actual Savings will be reported at the projected savings level while savings are assumed for the affected meter(s).
- If the Actual Savings for the affected meter(s) in the prior Guarantee Year are less than the projected savings for the affected meter(s) and there have been twenty-four (24) months or more since the commencement of the Performance Period, Actual Savings will be reported as the average of the achieved savings over the two (2) most recent Guarantee Year plus half (1/2) of the difference between the projected savings and the average of the achieved savings over the two (2) most recent Guarantee Years.
  - If pursuant to the Assumed Savings Procedure, ESCO makes improvements to the Project beyond the original scope as defined in Schedule A., which results in an increase in the Actual Savings, an M&V plan accounting for those improvements will be executed and the resulting savings will be added to the Actual Savings.

## **ESTIMATED SAVINGS PROCEDURE ADJUSTMENT**

- At ESCO'S sole discretion, ESCO will estimate the impact of the change using computerized building simulations, manual calculations, or other generally accepted estimating procedures and may ignore any changes which fall below the threshold limit.