



**SANFORD  
UNDERGROUND  
RESEARCH  
FACILITY**

ATTACHMENT B  
GENERAL CONDITIONS - DRAFT

**SOUTH DAKOTA SCIENCE AND TECHNOLOGY AUTHORITY  
SANFORD UNDERGROUND RESEARCH FACILITY**

# **GENERAL CONDITIONS**

**CONTRACTOR (TBD)**

**Project Name**

**Contract #####-##**

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## **ARTICLE 1 DEFINITIONS**

**1.1 Owner:** South Dakota Science and Technology Authority

**1.2 Contractor:** The person or entity identified as such in the Agreement for Construction, including authorized representatives.

**1.3 Subcontractor:** Any individual, firm or corporation to whom the Contractor sublets any part of the contract for supplying materials and labor, or only labor, at the site of the project.

**1.4 Contract Documents:** The Request for Proposal with Instructions to Bidders and attached Exhibits, the Plans, Drawings, and Specifications, and these General Conditions.

**1.5 Contract (or Agreement):** The Contract Documents form the contract. The Contract may be amended or modified only in writing in the manner set forth in Article 13. Nothing contained in the Contract Documents shall create any contractual relationship between the Owner and any Subcontractor, Sub-subcontractor or supplier.

**1.6 Work:** The completed construction required by the Contract Documents, and every part thereof, including all labor necessary to produce such construction, and all materials and equipment incorporated or to be incorporated into such construction.

**1.7 Project:** The total construction of which the work performed under the Contract Documents may be the whole or a part.

**1.8 Drawings or Plans:** The graphic and pictorial portions of the Contract Documents showing the design, dimensions and layout of the work including, but not limited to, plan views, elevation views, details, sections, schedules, and diagrams.

**1.9 Specifications:** The written requirements for materials, equipment, construction systems, standards and workmanship.

## **ARTICLE 2 EXECUTION, CORRELATION AND INTENT**

**2.1** By executing the Agreement for Construction, the Contractor represents that Contractor has examined the Contract Documents. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work. The Contract Documents are complementary, and what is required by anyone shall be as binding as if required by all. Work not covered in the Contract Documents will not be required unless it is consistent therewith and is reasonably inferable therefrom as being necessary to produce the intended results. Words and abbreviations which have well-known technical, or trade meanings are used in the Contract Documents in accordance with such recognized

meanings. All Work mentioned or indicated in the Contract Documents shall be performed by the Contractor as part of this Contract unless it is specifically indicated in the Contract Documents that such Work is to be done by others. Should the Drawings or the Specifications disagree in themselves or with each other, the Contractor shall provide the better quality or greater quantity of work and/or materials unless otherwise directed by written change.

**2.2** The organization of the Specifications into divisions, sections and articles, and the arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of work to be performed by any trade.

**2.3** Owner assumes no liability arising out of jurisdictional issues raised or claims advanced by trade organizations or other interested parties based on the arrangement or manner of subdivision of the content of the Specifications and Drawings.

**2.4** All indications or notations which apply to one of a number of similar situations, materials or processes, shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

**2.5** Where codes, standards, requirements and publications or public and private trade associations or other bodies are referred to in the Specifications, references shall be understood to be in the latest revision prior to the date of receiving bids, except where otherwise indicated.

**2.6** Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with the quality of the surrounding Work, of the construction of the Project generally, and industry standards.

**2.7** All manufactured articles, materials, and equipment shall be applied, installed, connected, erected, used, cleaned, and conditioned in accordance with the manufacturer's written or printed directions and instructions unless otherwise indicated in the Contract Documents. A copy of the manufacturer's written or printed directions shall be provided to the Owner upon completion of the project.

### **ARTICLE 3**

#### **OWNERSHIP, USE OF DOCUMENTS, CONFIDENTIALITY OF DOCUMENTS**

##### **3.1 Ownership of Work Product**

Any plans, specifications, engineering calculations, technical data, reports, miscellaneous drawings, and all information contained therein provided by Owner, its consultants, employees, contractors and agents to the Contractor for the Contractor's performance of its obligations under this agreement are the property of the Owner. They are to be used only with respect to this Project and are not to be used for any other project. The Contractor may not disseminate these materials to any person or entity nor may the Contractor use these materials for purposes other than work for the Owner, without the express written approval of the Owner. The Owner shall not unreasonably withhold such approval for dissemination of these materials as necessary to subcontractors and suppliers.

##### **3.2 Confidentiality of Documents**

All reports, plans, specifications, engineering calculations, technical data, miscellaneous drawings, and information contained therein, provided to, or prepared by the Contractor, its owners, officers, employees, agents, consultants, suppliers, and subcontractors in connection with the Contractor's performance under this agreement are confidential and the Contractor, its owners, officers, employees,

agents, consultants, suppliers, and subcontractors shall not disclose this information to any person, individual, or entity without the express written permission of the Owner.

### **3.3 Return of Documents**

All documents covered by this Article 3 shall be delivered to the Owner at the completion of the Work. The Contractor may not retain any such documents for its own use without the express written permission of the Owner and any documents that are retained, with or without permission, shall be subject to all the requirements of this Article 3.

### **3.4 Terms to be Included in Subcontracts**

The Contractor shall include the requirements of this Article 3 in any contract it enters into with any consultants, subcontractors, suppliers, persons, individuals, or entities for the performance of any of the Contractor's obligations under this agreement.

## **ARTICLE 4 OWNER'S RIGHTS AND RESPONSIBILITIES**

### **4.1 Information and Services Required of the Owner**

**4.1.1** The Owner shall secure and pay for necessary easements, permits, and other property rights required for the construction of the Project.

**4.1.2** Information under the Owner's control shall be furnished by the Owner with reasonable promptness after receipt from the Contractor of a written request for such information.

**4.1.3** Unless otherwise provided in the Contract Documents, the Contractor will be furnished with electronic copies of the Drawings and Specifications necessary for the execution of the Work. If no electronic copies are available the Contractor will be furnished with a reasonable number of prints of Drawings and Specifications, at no cost to Contractor.

**4.1.4** The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein.

**4.2 Owner's Right to Stop the Work:** If the Contractor fails to correct defective Work as required by Article 14 or fails to carry out the Work in accordance with the Contract Documents in any material respect, the Owner, in addition to its other remedies, by a written order signed by the Owner, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the Owner to stop the Work shall not give rise to any duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

**4.3 Owner's Right to Carry Out the Work:** If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents in any material respect and fails within three working days after receipt of written notice from the Owner or in such time as may be established in written notice from Owner to commence and continue correction of such default or neglect with diligence and promptness, or if the Work is not being performed properly or in accordance with the scheduling provisions of the Contract Documents in any material respect, whether or not the Contractor is in default, the Owner may, after the expiration of such notice period and without prejudice to any other remedy it may have, make good such deficiencies. In such a case an appropriate Change Order shall be issued deducting from the payments then or thereafter due the Contractor the cost of correcting such deficiencies, including compensation for Owner's additional services made necessary by such default, neglect or failure. If the

payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner upon demand. If, in the sole judgment of the Owner, an emergency exists as a result of the Contractor's default, neglect or failure to correct defective work, which in the Owner's opinion, requires more immediate corrective action than the Contractor is able to provide, then the Owner may, without notice to the Contractor, perform such corrective work or cause it to be performed by others. The Owner shall also have the right to carry out the Work, or any part thereof, during the period of any work stoppage without terminating the Contract. If the Owner wishes to exercise this right it will give the Contractor three days notice of its intent to do so. In any such case, an appropriate deductive Change Order shall be issued in accordance with Article 13, the amount of which shall not exceed an amount which equals the estimated direct cost, including the Owner's fees, of performing the work which the Owner elects to perform and the proportionate amount of the Contractor's fee associated therewith.

**4.4 Owner's Right to Access for Observation or Other Work:** The Owner reserves the right to access any part of the Work, at any time, for the purpose of observation, or testing, or to install other work, either with its own forces or with separate contractors. Such access is not to be construed to mean partial occupancy by Owner, and no claim for additional compensation by the Contractor because of such access or installation of work will be considered. Contractor shall cooperate with Owner during Owner's access or performance of work.

**4.5 Owner's Representative:** Owner's Representative on this project is:

**SDSTA REPRESENTATIVE**

South Dakota Science and Technology Authority  
630 East Summit Street  
Lead, SD 57754

Business: 605.722.xxxx

[EMAIL@sanfordlab.org](mailto:EMAIL@sanfordlab.org)

## **ARTICLE 5 CONTRACTOR'S RESPONSIBILITIES**

**5.1 Review of Contract Documents:** The Contractor shall carefully study and compare the Contract Documents and shall at once report to the Owner any error, inconsistency or omission Contractor may discover. The Contractor shall not be liable to the Owner for any damage resulting from any such errors, inconsistency or omission Contractor may discover and report, nor for any damage resulting from any such errors, inconsistencies or omissions which Contractor could not reasonably have discovered. The Contractor shall perform no portion of the Work at any time without Contract Documents.

### **5.2 Supervision and Construction Procedures**

**5.2.1** The Contractor shall supervise and direct the Work, using the skill and attention necessary to complete the Work in a workmanlike manner. The Contractor shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the contract. The Owner shall have no control over, or responsibility for, any such matters.

**5.2.2** Nothing contained in the Contract Documents shall be interpreted by implication or otherwise as a direction by the Owner to the Contractor as to construction means, methods, techniques, sequences and procedures. If there is express reference to such means, methods, techniques, sequences and procedures, it is solely for the purpose of insuring that the Work will be

produced in accordance with the desired objectives as set forth in the Contract Documents, but such express reference shall in no way relieve the Contractor of its responsibilities in connection therewith. If the Contractor does not wish to accept the responsibility for any means, techniques, sequences or procedures which are expressly set forth in the Contract Documents, then the Contractor shall notify the Owner in writing of the actual means, methods, techniques, sequences and procedures which Contractor will employ on the Work if these differ from those expressly referred to in the Contract Documents. All loss, damage or liability or cost of correcting defective Work arising from the employment of any construction means, methods, techniques, sequences or procedures shall be borne by the Contractor notwithstanding that any of the same shall have been referred to expressly in the Contract Documents.

**5.2.3** The Contractor shall be responsible to the Owner for the acts and omissions of Contractor's employees, Subcontractors, Sub-subcontractors, materialmen and suppliers and their agents and employees, and other persons performing any of the Work.

**5.2.4** The Contractor shall not be relieved from Contractor's obligations to perform the Work in accordance with the Contract Documents by the use or occupancy of part of the Work by the Owner as provided in Article 4.4, by the performance of Work related to the Project by others as provided in Article 7.1, or by inspections, tests or approvals required or performed under Article 8.7 by persons other than the Contractor.

**5.2.5** The Contractor shall coordinate and supervise the Work performed by Subcontractors to the end that the Work is carried out without conflict between trades or jurisdictional disputes and so that no Subcontractor, at any time, causes delay to the general progress of the Work. The Contractor and all Subcontractors shall at all times afford each other Subcontractor, any separate contractor, and the Owner, every reasonable opportunity for the installation of the Work and the storage of materials and shall provide access to and the use of necessary loading dock and hoist facilities, adequate storage room and necessary utilities and other services.

**5.2.6** Wherever the work of a Subcontractor is dependent upon the work of other Subcontractors, or the Contractor, the Contractor shall require the Subcontractor to:

**5.2.6.1** Coordinate Subcontractor's work with the dependent work;

**5.2.6.2** Provide necessary dependent data and requirements;

**5.2.6.3** Supply and/or install items to be built into dependent work of others;

**5.2.6.4** Make provisions for dependent work of others;

**5.2.6.5** Examine dependent drawings and specifications;

**5.2.6.6** Examine previously placed dependent work;

**5.2.6.7** Check and verify dependent dimensions of previously placed work;

**5.2.6.8** Notify Contractor of previously placed dependent work or dependent dimensions which are unsatisfactory or will prevent a satisfactory installation of Subcontractor's work; and

**5.2.6.9** Not proceed with work until the unsatisfactory dependent conditions have been corrected.

Installation of Work by a Subcontractor in any given area shall constitute acceptance by the Subcontractor and Contractor of the previously placed dependent work.

### **5.3 Labor and Materials**

**5.3.1** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities 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. The word "provide" shall mean furnish and install complete, including connections, unless otherwise specified. All connection charges, assessments or inspection fees which may be imposed by any public agency or utility company are included in the Contract Sum and shall be the Contractor's responsibility.

**5.3.2** The Contractor shall at all times enforce strict discipline and good order among Contractor's employees and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him/her. The Contractor shall be responsible to maintain and observe, and to require the Subcontractors to maintain and observe, sound labor practices, and shall require each Subcontractor to take all steps reasonably necessary to avoid labor disputes or stoppages.

**5.3.3** Except in the event of emergency, no substantial field operations shall be performed outside of regular working hours without the prior approval of the Owner. The Contractor will not be entitled to additional compensation for work performed outside of regular working hours except as otherwise expressly agreed in writing by the Owner prior to the performance of such overtime work. Additional compensation for such authorized overtime shall be limited to the direct cost of the premium portion only of such authorized overtime. No additional indirect cost or fee shall be included.

#### **5.3.4 Substitutions**

**5.3.4.1** The products, materials and equipment of manufacturers referred to in the Specifications and the Drawings are intended to establish the standard of quality and design required by the Owner; however, products, materials and equipment manufacturers, other than those specified, may be used, if equivalent and approved in writing by the Owner.

**5.3.4.2** It is deemed that the term 'or approved equal' is included after all products, materials and equipment referred to in the Specifications or the Drawings.

**5.3.4.3** The Owner will be the sole judge of equivalency of proposed substitute products, materials, and equipment.

**5.3.4.4** If the Contractor desires to use a substitute item, Contractor shall make application to the Owner in writing in sufficient time (having regard to the progress of the Work, the period of delivery of the goods concerned, and adequate time for the Owner's review) stating and fully identifying the proposed substitute, cost changes (if any), and submitting substantiating data, samples, brochures, etc. of item proposed. It is the Contractor's



responsibility to provide sufficient evidence by tests or other means to support any request for approval of substitution.

**5.3.4.5** Prior to proposing any substitute item, the Contractor shall satisfy itself that the item Contractor proposes is, in fact, equal to that specified, that it will fit into the space allocated, that it affords comparable ease of operation, maintenance and service, that its appearance, longevity and suitability for the climate and use are comparable to that specified, and that the substitution is in the Owner's best interest.

**5.3.4.6** The burden of proof that a proposed substitution is equal to a specified item shall be upon the Contractor, who shall support the request with sufficient test data and other means to permit the Owner to make a fair and equitable decision on the merits of the proposal. Any item by a manufacturer other than those cited in the Contract Documents, or of brand name or model number or of generic species other than those cited in the Contract Documents, will be considered a substitution.

**5.3.4.7** Materials and methods proposed as substitutions for specified items shall be supported by certification of their acceptance for use by an authority, person or persons having jurisdiction over the use of the specified material or method.

**5.3.4.8** Acceptance of substitutions shall not relieve the Contractor from responsibility for compliance with all the requirements of the Contract Documents. The Contractor shall be responsible at its own expense for any changes in other parts of the Work of this Contract or the work of other contractors caused by its substitutions, including cost of all design and redesign services related thereto.

**5.3.4.9** The Contract Term shall not be extended by any circumstances resulting from a proposed substitution, nor shall the Contractor be entitled to any compensation for any delay caused thereby or related thereto.

**5.3.4.10** All costs for the evaluation of proposed substitutions, whether approved or not, shall be borne by the Contractor.

**5.3.5** All materials and equipment shall be delivered, handled, stored, installed and protected to prevent damage in accordance with best current practice in the industry, in accordance with manufacturers' specifications and recommendations, and in accordance with Contract Document requirements. The Contractor will store packaged materials and equipment in their original and sealed containers, marked with the brand and manufacturer's name, until ready for use, and deliver materials and equipment in ample time to facilitate inspections and tests prior to installation. The term 'delivery' in reference to any item specified or indicated, means the unloading and storing with proper protection at the project site. Damaged materials or equipment will be rejected and removed from the site by the Contractor.

**5.3.6** Before ordering materials, equipment, or performing Work, the Contractor shall verify indicated dimensions. If a discrepancy exists, the Contractor shall notify the Owner of same immediately. The Owner will then clarify the intended design. The Contractor shall take field measurements required for the proper fabrication and installation of the Work. Upon commencement of any item of Work, the Contractor shall be responsible for dimensions related to such item of Work.

## **5.4 Guarantees/Warranty**

**5.4.1** The Contractor guarantees and warrants to the Owner that all materials and equipment furnished under this Contract will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. If required by the Owner, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

**5.4.2** The Contractor will indemnify the Owner against loss, including loss of use and lost revenues resulting from a breach of the Contractor's guaranty and warranty under Article 5.4.1, whether the loss arises before or after the Owner's acceptance of the Project.

**5.4.3** Where the Contract Documents provide for equipment and material warranties in addition to the Contractor's guarantees and warranty contained in Article 5.4.1, such warranties shall at a minimum:

**5.4.3.1** Provide that the term of the warranty shall start on the date of substantial completion of the project or the date the Owner takes beneficial occupancy of any portion of the project that requires the use or start-up of the warranted equipment or material, whichever date occurs first.

**5.4.3.2** Provide for complete repair or replacement of defective equipment or material.

**5.4.3.3** Provide all materials, shipping, and labor necessary to repair or replace defective equipment or material at no expense to the Owner.

**5.4.3.4** Provide that any replacement parts used in repairing or replacing defective equipment or material shall be new or in a like-new condition.

**5.4.3.5** Provide for the complete repair or replacement of defective equipment or material within two weeks after receiving written notice of the defect; provided however, that the Owner can, at its sole discretion, grant an extension of time for good cause shown.

**5.4.3.6** Provide for no limitation of liability should the Contractor and/or manufacturer fail to repair or replace defective equipment or material within the time specified in Article 5.4.3.5 or should the remedy of repair or replacement otherwise fail.

**5.4.3.7** Be construed under South Dakota law.

**5.4.3.8** Provide that any legal action brought on the warranty shall be brought only in a South Dakota court.

**5.5 Taxes:** The Contractor shall pay all sales, consumer, use, excise, and other similar taxes for the Work or portions thereof which are to be provided by the Contractor which are legally enacted at the time bids are received, whether or not yet effective.

## **5.6 Permits, Fees and Notices**

**5.6.1** The Contractor shall secure and pay for all permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work which are customarily secured after execution of the Contract, and which are legally required at the time the bids are received.

**5.6.2** The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the performance of the Work and shall indemnify the Owner against all costs, fines and damages, and all actions, claims and proceedings, due to its failure to do so.

**5.6.3** The Contractor and its Subcontractors shall acquaint themselves with all codes governing their work and shall complete the Work in conformance with all codes governing their work.

**5.6.4** It is not the responsibility of the Contractor to make certain that the Contract Documents are in accordance with applicable laws, statutes, building codes and regulations. If the Contractor observes that any of the Contract Documents are at variance therewith in any respect, Contractor shall promptly notify the Owner in writing, and any necessary changes shall be accomplished by appropriate modification.

**5.6.5** If the Contractor performs any Work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to the Owner, Contractor shall assume full responsibility therefor and shall bear all costs attributable thereto.

**5.7 Contractor's Representative:** The Contractor shall employ a competent Representative and necessary assistants, all of whom are acceptable to the Owner and who shall be in attendance at the Project site during the progress of the Work. The Contractor's Representative shall represent the Contractor and all communications given to the Contractor's Representative shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be confirmed on written request in each case. The Contractor's Representative shall not be changed without the Owner's consent. The Contractor's Representative in this Project is **NAME (email)**.

## **5.8 Shop Drawings, Product Data and Samples**

**5.8.1** Shop Drawings are drawings, diagrams, schedules or other data specially prepared for the Work by the Contractor or any Subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.

**5.8.2** Product Data are illustrations, standard schedules, performance charts, instructions brochures, diagrams and other information furnished by the Contractor to illustrate a material, product or system for some portion of the Work.

**5.8.3** Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

**5.8.4** The Contractor shall submit a schedule for submittal of Shop Drawings, Product Data and Samples to the Owner for review. The Contractor shall review, approve and submit to the Owner, with reasonable promptness and in such sequence as to cause no delay in the Work or in the work of any separate contractor, all Shop Drawings, Product Data and Samples required by the Contract Documents.

**5.8.4.1** The Owner reserves the right to review Shop Drawings, Product Data, Samples and submittals in a sequence consistent with the sequence of erection, installation and assembly of the various elements of the Work.

**5.8.4.2** No extension of time will be granted, nor will any consideration be given to claims arising out of the Contractor's failure to submit any Shop Drawing, Product Data, Samples or related submittals according to the schedule or otherwise in a manner which does not allow adequate lead time for Owner's review, or does not allow ample time for revision, resubmission and subsequent review by the Owner as required.

**5.8.4.3** Composite Drawing: In the interest of coordinating and expediting the work in critical areas, i.e. exterior wall components, mechanical/electrical systems, and other areas so requested by the Owner, the Contractor shall prepare and submit, to the Owner for review, Composite Drawings embodying the Work of the various trades and/or Subcontractors involved. After review, the Contractor shall distribute prints or reviewed Composite Drawings to affected trades and/or Subcontractors. The Contractor shall require that the involved trades and/or Subcontractors cooperate in preparation of the Composite Drawings to assure proper coordination between trades and/or Subcontractors. The participating trades and/or Subcontractors shall indicate their approval on these drawings.

**5.8.5** By approving and submitting Shop Drawings, Product Data and Samples, the Contractor represents that Contractor has determined and verified all materials, field measurement, and field construction criteria related thereto, checked the Shop Drawings, Product Data, and Samples for complete dimensional accuracy; that Contractor has checked to insure that work contiguous with and having bearing on the Work shown on the Shop Drawings is accurately and clearly shown, that Contractor has checked the Shop Drawings against the Composite Drawings prepared by the Contractor, that the Work has been coordinated and that the equipment will fit into the assigned spaces, and that Contractor has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

**5.8.5.1** Any Shop Drawing, Product Data or Sample submitted without Contractor's approval will not be processed for review by the Owner, but will be returned to the Contractor for compliance with the above procedures, in which event it will be deemed that the Contractor has not complied with the provisions herein specified and the Contractor shall bear the risk of all delays as if no Shop Drawing, Product Data and Sample had been submitted.

**5.8.5.2** Shop Drawings shall bear a coordination and approval stamp signed by the Contractor and each contiguous Subcontractor, which shall confirm the representations set forth in Article 5.8.5. Shop Drawings shall bear the seal of a registered professional engineer when required by the Specifications or state law.

**5.8.6** The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data or Samples, to revisions other than those requested by the Owner on previous submittals. Unless such written notice has been given, the Owner's action on a resubmitted Shop Drawing, Product Data, or Sample shall not constitute review and action of any changes not requested on the prior submittal.

**5.8.7** No portion of the Work requiring submission of a Shop Drawing, Product Data or Sample shall be commenced until the submittal has been approved by the Owner. All such portions of the Work shall be in accordance with approved submittals.

## **5.9 Use of Site**

**5.9.1** The Contractor shall confine operations at the Site to areas permitted by law, ordinances, permits and the Contract Documents, and shall not unreasonably encumber the Site with any unnecessary or surplus materials or equipment or debris.

**5.9.2** Notwithstanding the designation of construction limits or the indication of temporary fences or barricades, the provisions of the Contract Documents governing certain portions or phases of the Work may require that certain operations be carried out beyond such designated limits. Trenching, utility work, site development, landscaping and all other Work, if required beyond such designated limits, shall be scheduled in such a manner as to cause or occasion a minimum of inconvenience or disturbance or interference with the normal operation of the Owner, abutters, and the public. The Contractor shall obtain the Owner's prior approval for such operations, prosecute such operations expeditiously, and restore the affected area and other areas needed for access to their original condition immediately upon completion of such operations, unless otherwise specified herein.

**5.9.3** All operations shall be carried out so as to avoid endangering any adjacent facility or property, or interrupting, restricting or otherwise infringing or interfering with the use thereof.

**5.9.4** The Contractor shall confine operations at the site to work related activities.

## **5.10 Cutting and Patching of Work**

**5.10.1** The Contractor shall be responsible for all cutting, fitting or patching that may be required to complete the Work or to make its several parts fit together properly.

**5.10.2** The Contractor shall not damage or endanger any portion of the Work or the work of the Owner or any separate contractors or adjacent facilities by cutting, patching or otherwise altering any work, or by excavation. The Contractor shall not cut or otherwise alter the work of the Owner or any separate contractor except with the written consent of the Owner and of such separate contractor. The Contractor shall not unreasonably withhold from the Owner or any separate contractor its consent to cutting or otherwise altering the Work.

**5.10.3** Structural elements of the Work shall not be cut, patched or otherwise altered or repaired without prior written authorization by the Owner.

**5.10.4** Authorization to proceed with remedial operations for any damaged or defective element or portion of the Work shall not constitute a limitation or a waiver of the Contractor's right to require the removal and replacement of any Work which fails to fulfill the requirements of the Contract Documents.

## **5.11 Cleaning Up**

**5.11.1** The Contractor at all times shall keep the Site and related area free from accumulation of waste materials or rubbish caused by Contractor's operations. At the completion of the Work, Contractor shall remove all waste materials and rubbish from and about the Project site as well as

tools, construction equipment, machinery and surplus materials. All waste and rubbish shall be removed from the Site at least weekly and more often if necessary.

**5.11.2** If the Contractor fails to maintain a clean and safe Project and/or fails to clean up at the completion of the Work, the Owner may do as provided in Article 4.3 and the cost thereof shall be charged to the Contractor.

**5.12 Communications:** The Contractor shall forward all communications to the Owner through Owner's Representatives set forth in Article 4.5.

**5.13 Royalties and Patents:** The Contractor shall pay all royalties and license fees, and shall defend all suits or claims for infringement of any patent rights and shall save the Owner harmless from loss on account thereof, except that the Owner shall be responsible for all such loss when a particular manufacturer or manufacturers are specified, but if the Contractor has reason to believe that the design, process or product specified is an infringement of a patent, Contractor shall be responsible for such loss unless he promptly gives such information to the Owner in writing.

#### **5.14 Indemnification**

**5.14.1** To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the Owner, and its consulting engineers, and their respective successors, agents and employees from and against all claims, damages, liabilities, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (including the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any tortious act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligations shall not be construed to negate, abridge or otherwise reduce any other right or obligation or indemnity which would otherwise exist as to any party or person described in this Article 5.14.

**5.14.2** In any and all claims against the Owner, or any of its consultants, and their respective successors, agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Article 5.14 shall not be limited in any way by any limitation on the amount or type of damages, compensations or benefits payable by or for the Contractor or any Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**5.14.3** The Contractor agrees to defend, indemnify and save the Owner or any of Owner's consulting engineers, and their respective successors, agents or employees harmless from all costs, liabilities, damages or expenses, including reasonable attorneys' fees, incurred by them, by virtue of any claim or claims whatsoever filed by any Subcontractor, Sub-subcontractor, mechanic, laborer or materialman making claims arising from the Work by, through, or under the Contractor. The Contractor also hereby agrees to defend, indemnify and hold harmless, protect, and defend the Owner and Owner's consulting engineers, and their respective successors, agents or employees from and against any liability, claim, judgment, loss, damage, including but not limited to direct, indirect and incidental and consequential damages, attorneys' fees, court costs and expenses of

collection, occasioned in whole or in part by the failure of the Contractor, its Subcontractors, or Sub-subcontractors to comply with any of the terms or provisions of the Contract Documents.

**5.14.4** Anything in the foregoing to the contrary notwithstanding, the Contractor's obligation to indemnify as set forth above shall include any claims, damages, liabilities, losses and expenses, including but not limited to attorneys' fees, arising out of related to the use by Contractor of any of Owner's equipment, and said obligation to indemnify shall arise regardless of any tortious act or omission, or lack thereof, by Contractor.

## **5.15 Default**

**5.15.1** The Contractor shall be in default of the Contract if:

**5.15.1.1** Contractor refuses or fails to prosecute the Work in accordance with the Contract Documents in any material respect;

**5.15.1.2** Contractor fails to make proper payment to Subcontractors for materials or labor (provided Owner shall have paid to Contractor any payments due from Owner in connection with such materials or labor);

**5.15.1.3** Contractor disregards laws, ordinances, rules, building codes and regulations or orders of any public authority having jurisdiction;

**5.15.1.4** Contractor fails to coordinate its work with other contractors and Subcontractors as required under Article 7 of these General Conditions;

**5.15.1.5** Contractor fails to comply with the scheduling requirements of the Contract;

**5.15.1.6** Contractor fails to promptly replace rejected material or correct rejected workmanship; or

**5.15.1.7** Contractor fails in any material respect to observe any other terms, provisions, conditions, covenants and agreements in the Contract to be observed and performed on the part of the Contractor.

**5.15.2** In the event of any default by Contractor under the Contract, Owner shall have the right to take such measures as it deems necessary to correct the default, at the Contractor's sole cost and expense, and to deduct such costs, including but not limited to the Owner's fees, from amounts otherwise owing to the Contractor, or to terminate the Contract in accordance with Article 15.2 of the General Conditions, in addition to any and all other remedies that Owner may now or hereafter have. If the amounts owing to the Contractor are insufficient to cover the Owner's cost of corrections, the Contractor shall pay such amount promptly upon demand.

## **5.16 Use of Owner's Equipment.**

**5.16.1** If the Contractor uses Owner's equipment in connection with the Work, Contractor shall be responsible for using the equipment in a good and businesslike manner and consistent with the Owner's environmental, health and safety requirements and applicable law. If the equipment is damaged or destroyed while being used by Contractor or while in Contractor's care, custody or control, regardless of the cause or party responsible for the damage or destruction, Contractor shall

repair or replace the equipment at Contractor's expense. Nothing in the foregoing shall require the Contractor to be responsible for ordinary wear and tear.

**5.16.2** If the Contractor's use or care, custody or control of Owner's equipment results in damage or injury to Owner's property or employees, Contractor shall be liable for any such damage or injury, and Contractor shall promptly repair or replace the equipment so as not to interfere with Owner's operations.

**5.16.3** Prior to using or taking custody of any of Owner's equipment, Contractor shall provide proof reasonably acceptable to Owner that the Contractor's liability insurance will afford coverage for any claims arising out of Contractor's use or care, custody or control of Owner's equipment, and that Contractor carries property insurance that will cover Contractor's obligation to repair or replace Owner's equipment as provided herein.

**5.16.4** Nothing in this section 5.16 shall be construed to authorize Contractor to use Owner's equipment without Owner's prior written consent and upon such terms and conditions as Owner may require.

## **ARTICLE 6 SUBCONTRACTORS**

### **6.1 Definitions**

**6.1.1** A Subcontractor is a person or entity who has a direct contract with the Contractor to perform any of the Work at the site. The term Subcontractor is referred to throughout the Contract Documents and means a Subcontractor or its authorized representative. The term Subcontractor does not include any separate contractor or its subcontractors.

**6.1.2** A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform any of the Work at the site. The term Sub-subcontractor is referred to throughout the Contract Documents and means a Sub-subcontractor or an authorized representative thereof.

**6.2 Award of Subcontracts and Other Contracts for Portions of the Work.** The Contractor shall conduct an investigation of each of its proposed Subcontractor's capabilities to assure each is responsible and has the requisite experience, skill, physical plant, and financial strength necessary to perform each Subcontractor's respective Work. The Contractor shall not contract with any Subcontractor that is not responsible or does not have the requisite experience, skill, physical plant, and financial strength necessary to perform its part of the Work.

### **6.3 Subcontractual Relations**

**6.3.1** The Contractor shall not include any provisions in its contracts with its Subcontractors which will in any way prejudice the rights of the Owner under the Contract between the Owner and the Contractor.

**6.3.2** The Subcontract agreement shall require the Subcontractor to consent to any assignment of the Subcontract to the Owner in the event of a default by the Contractor hereunder.



**6.3.3** Nothing in Article 6 shall be construed to create a privity of contract between the Owner and any Subcontractor.

- 6.4 Notification of Subcontractors to Owner.** Contractor shall provide to Owner a listing of every Subcontractor that Contractor intends to employ on the Project and include: Company name, representative name, phone number, and email address.

## **ARTICLE 7**

### **WORK BY OWNER OR BY SEPARATE CONTRACTORS**

#### **7.1 Owner's Right to Perform Work and to Award Separate Contracts**

**7.1.1** The Owner reserves the right to perform work related to the Project with its own forces, and to award separate contracts in connection with such work. Such work may include Work assigned to the Contractor under the Contract Documents, which Work is not being performed properly or in accordance with the scheduling provisions of the Contract Documents, whether or not the Contractor is in default under Article 5.15.1 and whether or not the Owner has terminated the Contract under Article 15.2. If the Owner elects to exercise this right it will do so upon reasonable notice to the Contractor. There shall be an appropriate adjustment in amounts payable to the Contractor to reflect the Work undertaken by the Owner, which the parties shall confirm by Change Order in accordance with Article 13. If the Contractor claims that the delay involved is because of action or inaction by the Owner, Contractor shall make such claim as provided elsewhere in the Contract Documents.

**7.1.2** The Owner will provide for the coordination of the work of its own forces and of each separate contractor with the Work of the Contractor, who shall cooperate therewith as provided in Article 7.2.

#### **7.2 Mutual Responsibility**

**7.2.1** The Contractor shall afford the Owner and separate contractors reasonable opportunity and all required facilities for the introduction and storage of their materials and equipment and the execution of their work and shall connect and coordinate its Work with theirs as required by the Contract Documents.

**7.2.2** If any part of the Contractor's Work depends for proper execution or results upon the work of the Owner or any separate contractor, the Contractor shall, prior to proceeding with the Work, promptly report to the Contractor any apparent discrepancies or defects in such other work that render it unsuitable for such proper execution and results. Failure of the Contractor to report shall constitute an acceptance of the Owner's or separate contractor's work as fit and proper to receive the Work, except as to defects which may subsequently become apparent in such work by others.

**7.2.3** Any costs caused by defective or ill-timed work shall be borne by the party responsible therefor.

**7.2.4** Should the Contractor wrongfully cause damage to the work or property of the Owner or of a separate contractor, or to other work on the site, the Contractor shall promptly remedy such damage.

**7.2.5** Should the Contractor wrongfully cause damage to the work or property of any separate contractor, the Contractor shall upon due notice promptly attempt to settle with such other contractor by agreement, or otherwise to resolve the dispute. If such separate contractor sues or initiates an arbitration proceeding against the Owner on account of any damage alleged to have been caused by the Contractor, the Owner shall notify the Contractor who shall participate in the defense of such proceedings at the Contractor's expense, and if any judgment or award against the Owner arises therefrom, the Contractor shall pay or satisfy it and shall reimburse the Owner for all attorneys' fees and court or arbitration costs which the Owner has incurred.

**7.3 Owner's Right to Clean Up:** If a dispute arises between the Contractor and separate contractors as to their responsibility for cleaning up the Project Site and related areas on a routine basis as required by Article 5.11, the Owner may clean up and charge the cost thereof to the contractors responsible therefor as the Owner shall determine to be just.

## **ARTICLE 8 MISCELLANEOUS PROVISIONS**

**8.1 Governing Law:** The Contract shall be governed by South Dakota Law.

**8.2 Successors and Assigns:** The Owner and the Contractor each binds itself, its successors, assigns and legal representatives to the other party hereto and to the successors, assigns and legal representatives of such other party in respect to all covenants, agreements and obligations contained in the Contract Documents. The Contractor shall not assign the Contract or sublet it as a whole without the written consent of the Owner, nor shall the Contractor assign any money due or to become due to it hereunder, without the previous written consent of the Owner.

**8.3 Written Notice:** All notices, demands and other communications hereunder shall be in writing and shall be deemed to have been given if sent pursuant to Article VII of the Agreement for Construction.

**8.4 Claims for Damages:** Should either party to the Contract suffer injury or damage because of any act or omission of the other party or of any of its employees, agents or others for whose acts it is legally liable, claim shall be made in writing to such other party within 14 days after the first observance of such injury or damage.

**8.5 Payment and Performance Bond:** Before commencing the Work, the Contractor shall provide a Payment and Performance Bond in accordance with the requirements of the Instructions to Bidders.

### **8.6 Rights and Remedies**

**8.6.1** The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. This provision relates particularly to the Contractor's obligations under Article 14.2.2.

**8.6.2** No action or failure to act by the Owner or Contractor shall constitute a waiver of any right or duty afforded either of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

### **8.7 Tests**

**8.7.1** If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any portion of the Work to be inspected, tested or approved, the Contractor shall give the Owner timely notice of its readiness so the Owner may observe such inspection, testing or approval. The Contractor shall perform and bear all costs of such inspections, tests and approvals, unless otherwise provided.

**8.7.1.1** Where certain testing and inspection requirements are set forth in the various sections of the Contract Documents to be performed at the expense of the Owner, the Owner will retain the services of testing laboratories, agencies, or consultants, to perform such tests or inspections and render such services as may be required to verify that the work fulfills the requirements and intent of the Contract Documents. Such services will be performed in a manner consistent with the requirements of the Owner and the various agencies having jurisdiction over the Work and in accordance with reasonable standards of architectural and engineering practice.

**8.7.1.2** The Owner reserves the right to modify the scope of or to re-allocate any of the testing and inspection services specified in the various sections of the Contract Documents to be performed by a testing laboratory, agency or consultant retained by the Owner in connection with the Work when it can be satisfactorily established that such adjustment in scope is consistent with the intent of the Contract Documents. In the event that the Contractor shall not concur with such modification of scope or re-allocation of such services, Contractor shall immediately notify the Owner in writing.

**8.7.2** If the Owner determines that any Work requires special inspection, testing, or approval which Article 8.7.1 does not include, Owner will, by written authorization, order the performance of such services by qualified independent testing laboratories, agencies or consultants as may reasonably be required or instruct the Contractor to order such special inspection, testing or approval, and the Contractor shall give notice as provided in Article 8.7.1. If such special inspection or testing reveals a failure of the Work to comply with the requirements of the Contract Documents, the Contractor shall bear all costs thereof, including the cost of the tests, correction of the Work, and the cost of retesting; otherwise, the Owner shall bear such costs, and an appropriate Change Order shall be issued.

**8.7.2.1** If Owner's observation or any inspection or testing undertaken pursuant to Article 8.7 reveals a failure in any one of a number of identical or similar items or elements incorporated in the Work to comply with (1) the requirements of the Contract Documents or, (2) with respect to the performance of the Work, with laws, ordinances, rules, regulations, building codes or orders of any public authority having jurisdiction, the Owner will have the authority to order inspection and/or testing of all such items or elements of the Work, or of a representative number of such items or elements of the Work, as Owner may in its reasonable opinion consider necessary or advisable, and the Contractor shall bear all costs thereof, including the cost of the tests, correction of the Work, and the cost of retesting made necessary thereby.

**8.7.3** Required certificates of inspection, testing or approval shall be secured by the Contractor and promptly delivered to the Owner.

**8.7.3.1** The Contractor shall obtain and deliver promptly to the Owner any certificates of final inspection of any part of the Work or operating permits for any mechanical or

electrical apparatus, such as elevators, escalators, boilers, air compressors, fire alarms, etc., which may be required by law to permit full use and occupancy of the premises by the Owner. Except as is otherwise provided in Article 9.1.3, receipt of such permits or certificates by the Owner shall be a condition precedent to Completion of the Work.

**8.7.3.2** Copies of reports issued as a result of services performed at the expense of the Owner pursuant to the provisions of this Article will be distributed to all parties to the Contract.

**8.7.4** If the Owner is to observe the inspections, tests or approvals required by the Contract Documents, Owner will do so promptly and, where practicable, at the source of supply.

**8.7.5** In connection with testing and inspection services performed at the expense of the Owner, the Contractor shall provide samples of materials and/or elements of the Work required as test specimens and shall provide incidental labor and facilities at the site reasonably required in support of such services.

**8.7.6** The cost of testing services required solely for the convenience of the Contractor in its scheduling and performance of the Work shall be borne by the Contractor.

**8.7.7** The cost of testing services related to remedial operations performed to correct deficiencies in the Work shall be borne by the Contractor.

**8.7.8** If, during the course of the performance of any testing, inspection, control, balancing, adjusting, or similar work by the Contractor or an agent of the Contractor, it is the opinion of the Owner that the Contractor or said agent has failed to perform such work in a satisfactory manner, the Contractor shall, at its own expense, retain the services of a service organization which is satisfactory to the Owner for the performance of such work.

**8.7.9** Contractor agrees to use the E-Verify System ([www.uscis.gov](http://www.uscis.gov)) to verify the employment eligibility of all employees assigned to this Contract and all new hires working in the United States, and to provide E-Verify documentation to the SDSTA within ten (10) days of execution of this Contract. If Contractor is a sole proprietorship with no employees, E-Verify is not required. Contractor further agrees to maintain an active registration, during the term of the Contract, with the System for Award Management ([www.sam.gov](http://www.sam.gov)).

**8.7.10** SDSTA is required by a Cooperative Agreement (CA) with the U.S. Department of Energy's Office of Science to control access to the facility by foreign nationals and to provide protection against any potential compromise of information, equipment or technology. In order to comply with these requirements, SDSTA has adopted a Foreign Access Policy and Foreign Access Procedure. The Contractor is responsible to ensure compliance with the Foreign Access Policy and Foreign Access Procedure. Without limiting the generality of the foregoing, before a SURF visit or assignment can occur, proof of identity and citizenship are required for all foreign national visitors to verify the foreign national's identity and authority to work (when applicable for the activities involved) in the United States. If foreign nationals will be visiting SURF in association with this contract, the Contractor must notify the SDSTA Representative in advance to ensure compliance with SDSTA's Foreign Access Policy and Foreign Access procedure, and to with any other applicable DOE and SDSTA requirements. Failure to provide appropriate documentation when required, or providing fraudulent documentation, will result in suspension of access approval, removal from SURF, possible cancellation of future access, and possible termination of this Contract for cause. Any changes to the Foreign Access Policy, Foreign Access Procedure, or other DOE or SDSTA requirements implemented after the effective date of this Contract are hereby deemed incorporated into this Contract by reference without the need for a further writing.

## **8.8 Litigation/Arbitration**

**8.8.1** Unless otherwise specifically provided in this Agreement, all claims, counter-claims, disputes or other matters in question between the Owner and the Contractor arising out of, or relating to this Agreement, or the breach thereof, will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State of South Dakota. Notice of a request for arbitration shall be sent in writing to the other party to this Agreement within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall a request for arbitration be made after the applicable statute of limitations for such claim under South Dakota Law has run. If the party receiving the notice of request does not agree to arbitration in writing within 10 calendar days, it will be deemed that the parties do not mutually agree to arbitrate the matter. A request to arbitrate shall not be deemed a condition precedent to the institution of legal proceedings. If the parties agree to arbitrate, the provisions of SDCL Chapter 21-25A shall apply.

**8.8.2** The Contractor shall carry on the Work and maintain its progress during any dispute or arbitration or litigation proceedings, and the Owner shall continue to make payments to the Contractor to the extent required by the Contract Documents and South Dakota Law.

## **ARTICLE 9 TIME**

### **9.1 Definitions**

**9.1.1** The Contract Time is the period of time allotted in the Contract Documents for Substantial Completion of the Work as defined in Article 9.1.3, including authorized adjustments thereto.

**9.1.2** The date of commencement of the Work is the date established in the Notice to Proceed.

**9.1.3** The date of Substantial Completion of the Work is the date certified by the Owner when construction is sufficiently completed in accordance with the Contract Documents so that the Owner can occupy and utilize the Project for the use for which it is intended, and such Work is fully completed in accordance with the Contract Documents except for minor items, adjustments or corrections which have no material effect upon the utilization, function or intrinsic values of the entire Project, including all of its mechanical, electrical and other systems and facilities.

**9.1.4** The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically designated.

### **9.2 Progress and Completion**

**9.2.1** All time limits stated in the Contract Documents, including the Construction Completion Schedule, if applicable, are of the essence of the Contract.

**9.2.2** The Contractor shall begin the Work on the date of commencement as defined in Article 9.1.2. Contractor shall carry the Work forward expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

### **9.3 Delays and Extensions of Time**

**9.3.1** If the Contractor is delayed at any time in the progress of the Work by any act or neglect of the Owner, or by any employee of the Owner, or by changes in the Construction Completion Schedule required by the Owner, or by any separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes not caused by the labor practices of the Contractor or any Subcontractor in contravention of applicable labor practices, fire, unusual delay in transportation, severe and unusual weather conditions not reasonably anticipatable, unavoidable casualties, or any other causes beyond the Contractor's control and not occurring due to the fault or neglect of the Contractor, any Subcontractor or any other person for whose acts the Contractor is responsible, then the Contract Time shall be extended by Change Order for such reasonable time as the Owner shall determine, or the Owner may elect to require the Contractor to accelerate the Work, in which case the Contract Sum shall be increased by a Change Order in the amount of the direct cost to the Contractor (exclusive of overhead and profit of necessary overtime labor).

**9.3.2** Any claim for extension of time shall be made in writing to the Owner not more than 10 days after the commencement of the delay; otherwise, it shall be waived. In the case of continuing delay only one claim is necessary. The Contractor shall provide an estimate of the probable effect on such delay on the progress of the Work.

**9.3.2.1** Such claims shall set forth in detail the nature of the circumstances which form the basis for each such claim, the date upon which each such alleged cause of delay began, or began to affect the timely prosecution of the Work, and ended, or ceased to have an adverse effect upon the timely prosecution of the Work, and the number of days extension of time requested as a consequence of each such alleged cause of delay. The Contractor shall provide such supporting documentation as the Owner may require, including, where appropriate, a revised Construction Completion Schedule indicating all of the activities affected by the circumstances which form the basis for the claim.

**9.3.2.2** The Contractor shall not be entitled to a separate extension of time as a consequence of each one of a number of causes of delay which may have a concurrent or interrelated effect on the progress of the Work.

**9.3.2.3** The Owner shall have the right to defer its decision or decisions with reference to any claim or claims for an extension of time made pursuant to the provisions of this Article until the facts or circumstances which form the basis for such claim or claims may be fully assessed to the Owner's reasonable satisfaction.

**9.3.2.4** Notwithstanding the provisions of Article 9.3.2, claims for an extension of time arising out of authorized changes in the Work shall be made in writing prior to or concurrent with the submission of the Contractor's proposal pursuant to such change. No extension of time arising out of changes in the Work will be granted subsequent to the date upon which the Contractor is authorized to proceed with such change or changes in the Work unless specific provisions governing a subsequent determination of an extension of time have been incorporated in such authorization to proceed with such change or changes in the Work. No claim for damages or separate compensation for delay arising from such change in the Work shall be recognized or be deemed valid, it being understood that any additional cost to the Contractor arising from such change shall be included in the amended Contract Sum set forth in such Change Order.

**9.3.2.5** Time extensions will not be granted for rain, wind, snow, or other natural phenomena of normal intensity for the locality where work is performed. Determinations of

the extent of delay attributable to unusual weather phenomena shall be made by comparing the weather for the contract period involved with the average of the preceding 5 year climactic range during the same period on the calendar. National Oceanic and Atmospheric Administration National Weather Service statistics for the locality or area where the work is performed shall be used to determine the 5 year average weather conditions. Time extensions for weather delays do not entitle the Contractor to "extended overhead" recovery.

**9.3.3** If no agreement is made stating the dates upon which interpretations shall be furnished, then no claim for delay shall be allowed on account of failure to furnish such interpretations until 15 days after a written request is made for them, and not then unless such claim is reasonable.

**9.3.4** Should the Contractor fail to substantially complete the Work within the time agreed upon in the Contract Documents, or within such extra time as may have been allowed by increases in the Contract or by formally approved extensions granted by the Owner, the Contractor and the Contractor's surety shall be liable for and shall pay the Owner the sums stipulated in the Agreement for Construction as liquidated damages for each calendar day of delay until the Work is substantially complete. This sum is not a penalty but is liquidated damages due the Owner from the Contractor by reason of inconvenience to the Owner, added cost of engineering and supervision, and other items which have caused an expenditure of funds resulting from the Contractor's failure to complete the Work within the time specified in the Contract. In addition to liquidated damages, if any delay on the part of the Contractor, any Subcontractor or Sub-subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable results in any claim by third parties against the Owner arising out of such delay, the Contractor shall pay, satisfy, and discharge all losses, damages and expenses arising out of such claims, including attorneys' fees, and shall indemnify and hold harmless the Owner and its agents and employees from and against all costs, fees, losses, damages, and expenses arising out of such claims enforced against the Owner.

**9.3.5** No extension of time will be granted to the Contractor for any delay other than those described in Article 9.3.1.

**9.3.5.1** Should the Contractor fail, refuse or neglect to supply a sufficiency of workers or to deliver the materials with such promptness as to prevent delay in the progress of the Work, or fail in any material respect diligently to commence and prosecute the Work and to proceed in accordance with the approved construction schedule, or if the different parts thereof are not commenced, prosecuted, finished, delivered or installed in such manner as will insure substantial completion in accordance with the approved Construction Completion Schedule, or if the Contractor shall fail in the performance of any of its obligations under this Contract in any material respect, the Owner shall have the right to direct the Contractor, upon 3 days notice at the Contractor's cost and expense, to furnish such additional labor and to expedite deliveries of materials (or the Owner may furnish such labor and expedite such deliveries at the cost of the Contractor), which labor or expediting shall, in the Owner's opinion, be sufficient to speed up and complete the Work in accordance with the Construction Completion Schedule.

**9.3.5.2** If such additional labor shall not be available, the Owner shall have the right to direct the Contractor at the latter's own cost and expense, to work overtime to such an extent as will be sufficient, in the Owner's opinion, to speed up and complete the Work as herein provided.

**9.3.6** The Contractor's right to make a claim or claims for an extension of time, as provided in Article 9.3.1, shall not preclude the Contractor's right to make a claim for delay damages arising out of the Owner's significant interference, by action or inaction, with the Contractor's Work.

## **9.4 Beneficial Occupancy**

**9.4.1** The Owner shall have the privilege of Beneficial Occupancy and the use and benefit of designated areas, subdivisions or portions of the Project prior to completion and acceptance of the entire Project, provided that such Beneficial Occupancy shall not unduly interfere with the Contractor's operations nor unduly delay Contractor in completing the entire Work. Such occupancy and use shall be further subject to the provisions set forth herein.

**9.4.2** In the event that the Owner desires to exercise the privilege of Beneficial Occupancy, Owner shall give reasonable notice to the Contractor. The Contractor shall then cooperate with the Owner in providing services and facilities reasonably required for the health, safety and comfort of the occupants and other parties lawfully present and/or entering or leaving the premises. Mutually acceptable arrangements shall be made between the Owner and the Contractor with regard to procedures, terms and conditions governing the operation and maintenance of such services and facilities as may be utilized for the benefit of the Owner. The Owner will assume proportionate and reasonable responsibility for operation of systems, equipment and/or utilities required to provide such services, in part or in total, including proportionate and reasonable expenses of operation incidental thereto. No such Beneficial Occupancy shall accelerate the commencement of any warranty period on any system but only on the particular components being utilized.

**9.4.3** The Owner's Beneficial Occupancy or use of such designated areas, subdivisions, or portions of the Work shall not constitute acceptance of systems, materials, or elements of the Work which are not in accordance with the requirements of the Contract Documents; nor relieve the Contractor from its obligations to complete the Work; nor for responsibility for loss or damage due to or arising out of defects in, or malfunctioning of, systems, materials, equipment, or elements of the Work; nor from other unfulfilled obligations or responsibilities of the Contractor under the Contract. If, however, damage results solely from any act of the Owner, the Owner will assume its proportionate responsibility for such damage.

## **ARTICLE 10 PAYMENTS AND COMPLETION**

**10.1 Contract Sum:** The Contract Sum is stated in the Agreement for Construction. Additional funds may be awarded by change order if scope is added.

**10.2 Schedule of Values:** Before the first Application for Payment, the Contractor shall submit to the Owner a schedule of values allocated to the various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Owner may require. The format and number of copies of such Applications for Payment shall be as directed by the Owner. This schedule, unless objected to by the Owner, shall be used as a basis for the Contractor's Applications for Payment.

## **10.3 Monthly Application for Payment**

**10.3.1** No later than the 3<sup>rd</sup> day of each month the Contractor shall submit to the Owner its monthly itemized Application for Payment. The Contractor shall not submit more than one pay



application per month. The monthly Application for Payment shall be on AIA Document G702, or on a form approved by Owner, and supported by such data substantiating the Contractor's right to partial payment as the Owner may require; including but not limited to receipts, releases, and waivers of liens.

**10.3.1.1** In applying for payment, the Contractor shall submit its monthly payment estimate based upon the approved schedule of work for the project, itemized in such form and supported by such evidence as will show Contractor's right to the payment claimed. Claims made on account of materials delivered and suitably stored at the site, but not incorporated in the Work, shall be conditioned upon submission by the Contractor of bills of sale or such other procedure as will establish the Owner's title to such material or otherwise adequately protect the Owner's interest.

**10.3.1.2** If the Contractor chooses to apply for payment for materials which cannot be incorporated into the Work, and cannot be stored on the site, Contractor may do so provided the following conditions are met: Unless otherwise agreed to by the Owner, the material shall be stored in a bonded or insured commercial warehouse within a geographic radius of 15 miles of the construction site, with the Owner being listed on the bond or insurance certificate as the sole beneficiary in the case of loss or damage to the stored materials. The Contractor shall be responsible for all storage, insurance or transportation costs associated with the materials. Conditions of insurance will apply to applicable portions of this Article 10.3.1.2. Contractor shall provide the Owner with bills of sale or such other documents as will establish the ownership of the materials.

**10.3.1.3** Reimbursement for pre-approved travel expenses, if any, will not exceed Federal Travel Regulations (FTR) standard rates for the applicable travel location. Lodging expenses will be reimbursed at FTR rates or the actual lodging cost, whichever is less; airfare shall be reimbursed at the actual cost of a coach class ticket. No additional burdens or overheads will be applied to travel expense reimbursements.

**10.3.1.4** Applications for payment should be addressed to:

South Dakota Science and Technology Authority  
630 East Summit Street  
Lead, SD 57754

and submitted to the Owner's Representative. A scanned/emailed Application for Payment is preferred, submitted to [AP@Sanfordlab.org](mailto:AP@Sanfordlab.org). Paper copies of Applications for Payment are not necessary.

**10.3.2** The Contractor warrants that title to all Work, materials and equipment covered by an Application for Payment will pass to the Owner either by incorporation in the construction or upon the receipt of payment by the Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances, hereinafter referred to in this Article as "liens;" and that no Work, materials or equipment covered by an Application for Payment will have been acquired by the Contractor, or by any other person performing Work at the site or furnishing materials and equipment for the Project, subject to an agreement under which an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by the Contractor or such other person.

**10.3.3** Monthly applications received after the 3<sup>rd</sup> day of the month will be treated as if submitted on the 3<sup>rd</sup> day of the following month.

## **10.4 Progress Payments**

**10.4.1** Based upon the review of the Monthly Application for Payment, the Owner shall make progress payments to the Contractor in such amounts as the Owner reasonably determines are properly due less the aggregate of previous payments in each case. Payment of amounts determined to be due by the Owner under each Monthly Application for Payment shall be due to the Contractor 20 days after the 15<sup>th</sup> of each month. The Owner shall at all times retain an amount sufficient to complete the Work. Contractor shall submit a lien waiver, in a form prescribed by and in accordance with applicable law, to the Owner following each Progress Payment.

**10.4.2** The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's Work, the amount to which said Subcontractor is entitled reflecting any amounts actually withheld, if any, from payments to the Contractor on account of such Subcontractor's Work. The Contractor shall not withhold retainage from its Subcontractors unless retainage is withheld from the Contractor by the Owner. The Contractor shall, by an appropriate agreement with each Subcontractor, require each Subcontractor to make payments to his Sub-subcontractors in similar manner. Contractor shall require Subcontractors to submit lien waivers, in a form prescribed by and in accordance with applicable law, to Contractor following each Progress Payment to Contractor, and subsequent payments made to Subcontractors. Subcontractors' lien waivers to Contractor will be submitted to Owner.

**10.4.3** The Owner shall, on request, furnish to any Subcontractor, if practicable, information regarding the percentages of completion or the amounts applied for by the Contractor and the action taken thereon by the Owner on account of Work done by such Subcontractor.

**10.4.4** The Owner shall have no obligation to pay or to see to the payment of any moneys to any Subcontractor except as may otherwise be required by law.

**10.4.5** No Certification for Payment, nor any progress payment, nor any partial or entire use or occupancy of the Project by the Owner, shall constitute acceptance or approval of any Work not in accordance with the Contract Documents.

## **10.5 Payments Withheld**

**10.5.1** The Owner may decline to certify the full payment of the amount requested by the Contractor in the monthly application to the extent necessary to reasonably protect the Owner. If the Owner is unable to certify payment in the amount of the Application, Owner will, within 10 days after receipt of the monthly application, notify the Contractor in writing the reasons a certification cannot be made. If the Contractor and the Owner cannot agree on a revised amount within 5 days of Owner sending written notice, the Owner will promptly issue a Certification for Payment for the amount for which certification may be made. The Owner may also decline to certify payment because of subsequently discovered evidence or subsequent observations. Owner may nullify the whole or any part of any Certification for Payment previously issued, and may withhold payment of all or any part of an Application for Payment, to such extent as may be necessary to protect the Owner from loss because of:

**10.5.1.1** Defective work not remedied;

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

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

**10.5.1.4** Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;

**10.5.1.5** Damage to the Owner or another contractor;

**10.5.1.6** Reasonable evidence that the Work will not be completed within the Contract Time;

**10.5.1.7** Failure to carry out the Work in accordance with the Contract Documents;

**10.5.1.8** A lien or attachment is filed and such lien is not discharged within 5 days of demand from the Owner;

**10.5.1.9** Failure of the Contractor and/or of the mechanical or electrical Subcontractors to comply with the mandatory requirements for maintaining "up-to-date" Record Drawings;

**10.5.1.10** Incomplete or otherwise inadequate Application for Payment; or

**10.5.1.11** Reasonable evidence that the Contractor is in material breach of its obligations under the Contract.

**10.5.2** When the above grounds in Article 10.5.1 are removed, payment shall be made for amounts withheld because of them.

## **10.6 Substantial Completion**

**10.6.1** When the Contractor considers that the Work, or a designated portion thereof which is acceptable to the Owner, is Substantially Complete as defined in Article 9.1.3 the Contractor shall prepare for submission to the Owner a list of items to be completed or corrected. The failure to include any item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. When the Owner on the basis of an inspection determines that the Work or designated portion thereof is Substantially Complete, the Owner will then prepare a Certificate of Substantial Completion which shall establish the Date of Substantial Completion, shall state the responsibilities of the Owner and the Contractor for security, maintenance, heat, utilities and damage to the Work, and shall fix the time within which the Contractor shall complete the items listed therein. Warranties and Guarantees required by the Contract Documents shall commence on the Date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such Certificate.

**10.6.2** Upon Substantial Completion of the Work or designated portion thereof and upon application and certification by the Contractor, the Owner shall make payment, reflecting adjustment for defective or incomplete work, if any, for such Work or portion thereof, as provided in the Contract Documents. Double the amount necessary to complete the Work may be retained by the Owner.

## **10.7 Final Completion and Final Payment**

**10.7.1** Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Owner will promptly make such inspection and, if Owner determines that the Work has been completed in accordance with the terms and conditions of the Contract Documents, the entire balance will be determined to be due and payable to the Contractor.

**10.7.2** The final payment shall not become due until the Contractor submits to the Owner (1) An affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by the Owner) have been paid or will be paid with Owner's final payment to Contractor and that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Owner's interests; (2) A general release executed by Contractor waiving, upon receipt of final payment by Contractor, all claims, except those claims previously made in writing to Owner and remaining unsettled at the time of final payment, and an agreement to indemnify, defend and hold Owner harmless from and against any claims made by suppliers, Subcontractors, Sub-Subcontractors or others for work or material provided in connection with the Project or the Work; (3) All as-built documents, operating manuals, warranties and other deliverables required by the Contract Documents. All guarantees and warranties required by the Contract Documents shall include an assignment from the Contractor, Subcontractors, vendors, suppliers and manufacturers to the Owner, as well as a list of the names, addresses and telephone numbers of all subcontractors and any other entities providing these guarantees or warranties.

**10.7.3** Owner shall make final payment of all sums due to the Contractor 30 days after the completion and acceptance of the project by the Owner and Contractor's compliance with Article 10.7.2 above.

**10.7.4** The acceptance of final payment by the Contractor shall constitute a complete and unconditional waiver and release of any and all claims by the Contractor of whatever nature, and regardless whether they are then known or unknown, and a complete and unconditional release of the Owner and every person for whom the Owner is responsible for any and all matters related to the Contract or otherwise, except those claims which have been made in writing and identified by the Contractor as not having been settled at that time. After final payment, Contractor shall submit to Owner a final lien waiver in a form prescribed by and in accordance with applicable law.

## **ARTICLE 11 CONTRACTOR'S RESPONSIBILITY FOR PROJECT SAFETY**

**11.1** Contractor's Responsibility for Project Safety: Contractor's responsibility for project safety is attached hereto as Exhibit B and incorporated herein by reference.

## **ARTICLE 12 INSURANCE**

**12.1** During the term of this Contract, Contractor shall maintain in effect at all times, and provide proof of such coverage to the Authority, insurance as described on the attached Exhibit A, which is incorporated herein by this reference.

**12.2** Prior to the commencement of work, Contractor shall submit certificates of insurance policies to the Authority for review and approval.

**12.3** By executing this Contract, Contractor authorizes the Authority to make direct inquiry of Contractor's insurer or insurance agent concerning the status of the insurance required by this Agreement.

## **ARTICLE 13 CHANGES IN THE WORK**

**13.1 Change Orders:** This Contract may be modified or amended only in writing in the form of a Change Order signed by both parties. A Change Order is a written order to the Contractor signed by the Owner, issued after execution of the Contract, authorizing a change in the Work or an adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order. A Change Order signed by the Contractor indicates its agreement therewith.

**13.2** The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract Sum and the Contract Time being adjusted accordingly. All such changes in the Work shall be authorized by Change Order and shall be performed under the applicable conditions of the Contract Documents.

**13.3** The cost or credit to the Owner resulting from a change in the Work shall be determined in one or more of the following ways:

**13.3.1** By mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation. Such lump sum proposals shall be supported by a completely detailed analysis of the proposed change subdivided into the Work of the Contractor and/or the Work of each Subcontractor and/or Sub-subcontractors involved in the proposed change, as applicable, with each such subdivision further broken down into the following elements:

**13.3.1.1** Number of man-hours of labor to be performed by each trade, craft or classification of employee involved in the proposed change.

**13.3.1.2** The hourly rate for each such trade, craft or classification of employee, including the appropriate wage supplement for social security, old age and unemployment contributions, and such other employee benefits as may be established by statute or by written agreement negotiated by and between organizations representing such crafts or trades and representatives of their employers.

**13.3.1.3** The estimated quantity of each item or element of material and/or equipment entering into the proposed change.

**13.3.1.4** The unit cost of each such item or element of material and/or equipment.

**13.3.1.5** Rental of items or units of construction plant and equipment with a schedule of the period or periods of use of such an item or unit in connection with the proposed change.

**13.3.1.6** Rental terms and rates for each such item or unit of construction plant and equipment. Rental for equipment shall be based on the following:

**13.3.1.6.1** Hourly rental rates shall be based on 80% of the applicable rates for equipment listed in the 'Green Book', latest edition, (published by the Associated Equipment Distributors, 615 West 22nd Street, Oakbrook, Illinois, 60523).

**13.3.1.6.2** Hourly rental rates for equipment not listed in the 'Green Book' shall be based on 100% of the applicable rates for equipment listed in the 'Blue Book', latest edition (published by Dataquest, 1290 Ridder Park Drive, San Jose, California, 95131).

**13.3.1.6.3** Hourly rental rates determined from the 'Green Book' or 'Blue Book' includes all items of cost and expense to the Contractor, including, but not limited to, gas, oil, maintenance, repairs, insurance, and transportation to and from construction site.

**13.3.1.7** Power and/or other utilities entering into the proposed change.

**13.3.1.8** Rates and terms applicable to such power and/or other utilities.

**13.3.1.9** Additional premiums, if applicable, for the extension of insurance and bond coverages as required herein to the proposed change.

**13.3.1.10** Applicable federal, state and local taxes.

**13.3.1.11** Indirect Cost and Fee computed as a percentage override applied to net cost in accordance with the provisions of this Article.

**13.3.2** By unit prices stated in the Contract Documents or subsequently agreed upon;

**13.3.3** By cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee;

**13.3.4** By the method provided in Article 13.3.1.1 through 13.3.1.11.

**13.3.5** The Contractor shall require that the itemized analysis of each portion of the proposed change to be performed by a Subcontractor and/or Sub-subcontractor be prepared by each such Subcontractor and/or Sub-subcontractor in accordance with the format established herein. Copies of all such itemized analyses shall be appended to the Contractor's itemized analysis of the proposed change in the Work.

**13.3.6** For purposes of calculating Indirect Cost and Fee in relation to Change Orders, the net cost of a proposed change in the Work shall include, and unless otherwise agreed in writing prior to the performance of the proposed change, shall be limited to the fair and reasonable estimated cost of the

total of all of the individual items, elements, or components involved in proposed change in the Work (including adds and deducts) as set forth in Articles 13.3.1.1 through 13.3.1.11.

**13.3.7** For each portion of a proposed net additive change in the Work to be performed directly by the Contractor, the cost to Owner shall include an increment for the Indirect Cost and Fee of the Contractor associated with such portion of proposed change of 8% of the net cost of the Work.

**13.3.8** For each portion of a proposed net additive change in the Work to be performed directly by a Subcontractor, in addition to an increment or increments for Subcontractor's Indirect Cost and profit associated therewith of 8%, the cost to the Owner shall include a supplementary increment or increments for Contractor's Indirect Cost and Fee associated therewith of 6% of the net cost of the Work.

**13.3.9** In computing Indirect Cost and Fee, the percentage for Indirect Cost and Fee shall be taken on basic wage only. No percentage override shall be taken on social security, old age and unemployment contributions, contributions to Industry funds, education, and Training Funds and/or similar wage supplements, contributions or benefits.

**13.3.10** Items, elements or components of changes in the Work or proposed changes which shall be classified as Indirect Cost and excluded from net cost shall include, but shall not necessarily be limited to:

**13.3.10.1** All classifications of administrative, supervisory, and clerical personnel not engaged manually in the performance of the Work, including timekeepers, clerks, watchmen, and security personnel.

**13.3.10.2** Miscellaneous expense, job burden, and/or other generalized categories of cost or expense.

**13.3.10.3** Use of small tools.

**13.3.10.4** Insurance other than insurance coverage required herein.

**13.3.11** In changes in the Work involving both additions to and deductions in the Work, or any portion or element thereof, or the relocation or rearrangement of items, portions or elements thereof, or the substitution of any items, portions or elements thereof, such additions and deductions shall be balanced and the Contractor's Fee computed on the same basis for deductions as well as additions. If at the request of the Owner a number of unrelated changes in the Work are set forth individually, summarized and totaled in a single Change Order for reasons of administrative convenience, the amount or amounts of individual deductive changes in the Work set forth therein shall, in any event, be balanced against the amount or amounts of individual additive changes in computing the Contractor's Fee for the purpose of adding and deducting.

**13.3.12** If none of the methods set forth in Articles 13.3.1, .3.2 or .3.3 is agreed upon, the Contractor, provided it receives a written order signed by the Owner, shall promptly proceed with the Work involved. The cost of such Work shall then be determined by the Owner on the basis of the reasonable expenditures and savings of those performing the Work attributable to the change, including, in the case of an increase in the Contract Sum, a reasonable allowance for the Contractor's Fee. In such case, and also under Articles 13.3.3 and .3.4 above, the Contractor shall keep and present, in such form as the Owner may prescribe, an itemized accounting together with

appropriate supporting data for inclusion in a Change Order, at the end of each day, and will submit to the Owner: (a) daily time slips, submitted to Owner on a daily basis, showing the name of each worker employed on such work, the number of hours which the worker is employed thereon, the character of the worker's duties, and the wages and benefits to be paid to the worker and on his behalf, and (b) a memorandum of the equipment used in the performance of such Work, together with the rental claimed therefor. Unless otherwise provided in the Contract Documents, cost shall be limited to the following: cost of materials, including sales tax and cost of delivery; cost of labor, including social security, old age and unemployment insurance, and fringe benefits required by agreement or custom; worker's compensation insurance; bond premiums; rental value of equipment and machinery; and the additional costs of supervision and field office personnel directly attributable to the change. Pending final determination of cost to the Owner, payments on account shall be made on the basis of amounts reasonably estimated by the Owner. The amount of credit to be allowed by the Contractor to the Owner for any deletion or change which results in a net decrease in the Contract Sum will be the amount of the actual net cost as confirmed by the Owner and agreed to by the Owner. When both additions and credits covering related Work or substitutions are involved in any one change, the allowance or credit for the Contractor's Fee shall be figured on the basis of the net increase, or decrease, if any, with respect to that change.

#### **13.4 Differing Site Conditions**

**13.4.1** The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Owner of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this Contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

**13.4.2** The Owner shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the Work under this Contract, whether or not changed as a result of the conditions, the Contract Sum shall be adjusted as provided in this Article, provided that the Work has been ordered in writing by Owner as provided in Article 13.1 above. There shall be included in the adjustment to the Contract Sum under the preceding sentence a reasonable allowance for any extraordinary increase in Indirect Cost borne by the Contractor because of such additional work.

#### **13.5 Claims for Additional Cost**

**13.5.1** If the Contractor wishes to make a claim for an increase in the Contract Sum, Contractor shall give the Owner a written notice thereof within 10 days after the occurrence of the event giving rise to such claim except where claim is made in connection with deviations in Shop Drawing or Sample submittals, in which case claim shall be made in writing to the Owner concurrently with such submittals. This notice shall be given by the Contractor before proceeding to execute the Work. No such claim shall be valid unless so made. Any change in the Contract Sum resulting from such claim shall be authorized by Change Order.

**13.5.2** If the Contractor claims that additional cost is involved because of, but not limited to, (1) any order by the Owner to stop the Work pursuant to Article 4.2 where the Contractor was not at fault, or (2) any deviation in Shop Drawing or Sample submittals from the requirements of the Contract Documents, the Contractor shall make such claim as provided in Article 13.5.1.



## **ARTICLE 14 UNDERGROUND WORK**

**14.1 Notification of Hazards:** Contractor is hereby notified that the project involves work in a former underground gold mine. The surface property related and adjacent to the underground property contains heavy machinery, high-voltage electrical connections and conduits, open catwalks, and other elevated walkways, hidden hazards of tripping or falling and numerous other serious risks of health, life and safety, and risks of damage to property. The underground property also includes and contains heavy machinery, high-voltage electrical connections and conduits, open catwalks and other elevated walkways and hidden hazards of tripping or falling. Entering the underground property involves a substantial risk of underground fires, underground floods, collapse, failure of lifts and hoists, suffocation, being trapped, being crushed to death and numerous other serious risks to health, life and safety, and risks of damage to property.

**14.2 Acknowledgement of Risk and Release:** All persons going underground, including Contractor, Contractor's officers, directors, employees, agents, consultants, subcontractors and representatives, and each of their officers, directors, employees, agents, consultants, subcontractors and representatives must execute the Acknowledgement of Risk and the Release, Exhibit F, and Release, Agreement Not to Sue and Waiver, Exhibit G in the forms attached hereto, and incorporated herein by this reference.

**14.3 Indemnification of Homestake Indemnified Parties:** Contractor, for itself and its officers, directors, employees, agents, representatives and assigns, will and does hereby release, discharge and agree not to sue the Homestake Indemnified Parties with respect to any damage or injury to any person (including natural persons, corporations, limited liability companies and other entities) or property caused in whole or in part by the Contractor or its officers, directors, employees, agents, representatives, sub-contractors and subsuppliers. For the purposes of this Agreement, the term "Homestake Indemnified Parties: means Barrick, Homestake and the Affiliates of Barrick and Homestake, and each of its and their Representatives.

## **ARTICLE 15 UNCOVERING AND CORRECTION OF WORK**

### **15.1 Uncovering of Work**

**15.1.1** If any portion of the Work should be covered contrary to the request of the Owner, or the requirements specifically expressed in the Contract Documents, it must, if required in writing by the Owner, be uncovered for Owner's observation and shall be replaced at the Contractor's expense.

**15.1.2** If any other portion of the Work has been covered which the Owner has not specifically required to observe prior to being covered, the Owner may request to see such Work and it shall be uncovered by the Contractor. If such Work is found to be in accordance with the Contract Documents, the cost of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work is found not to be in accordance with the Contract Documents, the Contractor shall pay such costs unless it is found that this condition was caused by the Owner or a separate contractor as provided in Article 7.1, in which event the Owner shall be responsible for the payment of such costs.

### **15.2 Correction of Work**

**15.2.1** The Contractor shall promptly correct all Work rejected by the Owner as defective or as failing to conform to the Contract Documents whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear all

costs of correcting such rejected Work, including compensation for the Owner's additional services and the Owner's fees made necessary thereby.

**15.2.2** If, at any time after the Owner's acceptance of the fully completed Project, any of the Work is found not to have been provided in conformance with the Contract Documents, or, if within one year after such acceptance any of the Work, is otherwise found to be faulty or defective, the Contractor shall correct it promptly after receipt of a written notice from the Owner to do so. The Contractor shall also repair or replace any part of the Work which is damaged by the defective condition or the remedial Work. This obligation shall survive termination of the Contract, subject to the terms of any applicable statute of limitations. The Owner shall give such notice promptly after discovery of the condition.

**15.2.3** The Contractor shall remove from the Site all portions of the Work which are defective or non-conforming and which have not been corrected under Articles 5.4.1, 14.2.1 and 14.2.2, unless removal is waived by the Owner.

**15.2.4** If the Contractor fails to correct defective or non-conforming Work as provided in Articles 5.4.1, 15.2.1 and 15.2.2, the Owner may correct it in accordance with Article 4.3.

**15.2.5** If the Contractor does not proceed with the correction of such defective or non-conforming Work within a reasonable time fixed by written notice from the Owner, the Owner may remove it and may store the materials or equipment at the expense of the Contractor. If the Contractor does not pay the cost of such removal and storage within 10 days thereafter, the Owner may upon 10 additional days written notice sell such Work at auction or a private sale and shall account for the net proceeds thereof, after deducting all the costs that should have been borne by the Contractor. If such proceeds of sale do not cover all costs which the Contractor should have borne, the difference shall be charged to the Contractor and an appropriate Change Order shall be issued. If the payments then or thereafter due to the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner upon demand.

**15.2.6** The Contractor shall bear the cost of making good all work of the Owner or separate contractors destroyed or damaged by such correction removal.

**15.2.7** Nothing contained in this Article shall be construed to establish a period of limitation with respect to any other obligation which the Contractor might have under the Contract Documents, including Article 5.4 hereof. The establishment of any time period prescribed by the terms of any warranty required by the Contract Documents relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which its obligation to comply with the Contract Documents may be sought to be enforced, nor the time within which proceedings may be commenced to establish the Contractor liability with respect to Contractor's obligations other than specifically to correct the Work.

**15.3 Acceptance of Defective or Non-Conforming Work:** If the Owner prefers to accept defective or non-conforming Work, Owner may do so instead of requiring its removal and correction, in which case a Change Order will be issued to reflect a reduction in the Contract Sum where appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## **ARTICLE 16 TERMINATION OF THE CONTRACT**

**16.1 Termination by the Contractor:** If the Work is stopped for a period of 90 days under an order of any court or any public authority having jurisdiction, or as a result of an act of government, such as a declaration of a national emergency making materials unavailable, through no act or fault of the Contractor or Subcontractor or their agents or employees or any other persons performing any of the Work under a contract with the Contractor, then the Contractor may, upon 7 additional days written notice to the Owner, terminate the Contract and recover from the Owner payment for all Work executed to the termination date, together with reasonable demobilization costs. The Contractor shall have no other right to terminate the Contract for any reason.

## **16.2 Termination by the Owner**

**15.2.1** If the Contractor is in default under the Contract Documents, the Owner may, without prejudice to any other right or remedy and upon written notice to the Contractor, terminate the contract.

Prior to termination of the Contract, the Owner shall give the Contractor and its surety 10 calendar days written notice, during which the Contractor and/or its surety may rectify the cause of the termination. If rectified to the satisfaction of the Owner within said 10 days, the Owner may rescind its notice of termination. If not rectified, the termination for cause shall become effective at the end of the 10 day notice period. In the alternative, the Owner may postpone the effective date of the termination notice, at its sole discretion, if it should receive reassurances from the Contractor and its surety that the causes of termination will be remedied in a time and manner which the Owner finds acceptable. If at any time more than 10 days after the notice of termination, the Owner determines that the Contractor or its surety has not or is not likely to rectify the causes of termination in an acceptable manner or within the time allowed, then the Owner may immediately terminate the Contract for cause by giving written notice to the Contractor and its surety. In no event shall termination for cause terminate the obligations of the Contractor's surety on its payment and performance bonds.

Notice of termination, whether initial or given after a period of postponement, may be served upon the Contractor and the surety by mail or any other means at their last known places of business in South Dakota or elsewhere, by delivery to any officer or management/supervisory employee of either wherever they may be found, or, if no such officer, employee or place of business is known or can be found by reasonable inquiry within 3 days, by posting the notice at the job site. Failure to accept or pick up registered or certified mail addressed to the last known address shall be deemed to be delivery.

Upon termination of the Contract, the Owner shall take possession of the premises and of all materials, tools, appliances, equipment, and other facilities on the Project, wherever stored, and may finish the Work by whatever method it may deem expedient. The Contractor shall assign Subcontracts to the Owner or to a designated substitute contractor promptly upon request. In such case the Contractor shall not be entitled to receive any further payment until the Work is finished and the Owner has determined its damages owing to the Contractor's default.

**16.2.2** If the costs of finishing the Work, including services made necessary by the Contractor's default, and all other damages suffered by the Owner on account of the Contractor's default, exceed the unpaid balance of the Contract Sum, the Contractor shall pay the difference to the Owner, and this obligation for payment shall survive the termination of the Contract. If the costs of finishing the Work are less than the unpaid portion of the Contract Sum, the Owner shall pay the unpaid balance of any amount properly owing to the Contractor for all Work executed to the date of

termination, less actual damages. The Owner will not be obligated to pay any further amount on account of Direct Cost, Indirect Cost or Fee.

**16.2.3** If it should be judicially determined that the Owner improperly terminated this Contract for cause, then the termination shall be deemed to be a termination for the convenience of the Owner.

### **16.3 Termination for Convenience**

**16.3.1** The Owner may terminate this Contract at any time without cause, in whole or in part, upon giving the Contractor notice of such termination. Upon such termination, the Contractor shall immediately cease Work and remove from the project site all of its labor forces and such of its materials as Owner elects not to purchase or to assume in the manner hereinafter provided. Upon such termination, the Contractor shall take such steps as Owner may require to assign to the Owner the Contractor's interest in all Subcontracts and purchase orders designated by Owner. After all such steps have been taken to Owner's satisfaction, the Contractor shall receive as full compensation for termination and assignment the following:

- (1) All amounts then otherwise due under the terms of this Contract,
- (2) Amounts due for Work performed subsequent to the latest Request for Payment through the date of termination,
- (3) Reasonable compensation for the actual cost of demobilization incurred by the Contractor as a direct result of such termination. The Contractor shall not be entitled to any compensation for lost profits or for any other type of contractual compensation or damage other than those provided by the preceding sentence. Upon payment of the foregoing, Owner shall have no further obligations to Contractor of any nature.

**16.3.2** In no event shall termination for the convenience of the Owner terminate the obligations of the Contractor's surety on its payment and performance bonds.

## **EXHIBIT A**

### **INSURANCE REQUIREMENTS**

## **EXHIBIT B**

### **ENVIRONMENT, HEALTH AND SAFETY REQUIREMENTS**

## **EXHIBIT C**

### **SCOPE OF WORK**

**(Insert – usually from RFP )**

**EXHIBIT D**

**CONTRACTOR'S PROPOSAL**

**To be inserted upon selection of Contractor**



**EXHIBIT E**  
**FEDERAL TERMS AND CONDITIONS**

**EXHIBIT F**  
**CERTIFICATE OF EXEMPTION**

## **EXHIBIT G**

### **Acknowledgement of Risk Waiver**

## **EXHIBIT H**

### **Release, Agreement Not to Sue and Waiver**

**(to be signed with the Contract Documents)**