



**ADDENDUM NO. 1**  
**April 24, 2019**

Parking Lot Construction, Asphalt Concrete Surfacing, and Water Line  
Rock Point Recreation Area  
Butte County, South Dakota  
Project No. Orma16Oa

Bid Opening Date: May 14, 2019, 3:00 PM CT  
Department of Game, Fish and Parks  
2nd Floor, Foss Building  
523 East Capitol  
Pierre, South Dakota 57501-3182

Owner: State of South Dakota  
Department of Game, Fish and Parks

Scope of this Addendum:

The following becomes a part of the original plans and specifications, taking precedence over the items that may conflict. The bidder shall note receipt and make acknowledgment of the addendum on his bid form, incorporating its provisions in his bid.

- Item No. 1: Reference Project Manual, Exhibit "D," Performance and Payment Bond. Replace that form with the attached Performance and Payment Bond.
- Item No. 2: Reference Project Manual, General Conditions. Replace those conditions with the attached General Conditions.

April 24, 2019

  
\_\_\_\_\_  
Jacob Rosecky  
Engineer III

Bond No. \_\_\_\_\_

**PERFORMANCE AND PAYMENT BOND**

KNOW ALL MEN BY THESE PRESENTS, THAT WE \_\_\_\_\_

\_\_\_\_\_  
(Contractor – Name and Address)

hereinafter called "Principal", and \_\_\_\_\_

\_\_\_\_\_  
(Surety - Name and Address)

a corporation, organized and existing under the laws of the State of \_\_\_\_\_, and duly authorized to transact business in the State of South Dakota, hereinafter called "Surety", are held and firmly bound unto the State of South Dakota, hereinafter called "Obligee", in the just and full sum of \_\_\_\_\_ Dollars(\$\_\_\_\_\_) lawful money of the United States of America to be paid to the State of South Dakota, which payment to be made, we bind ourselves, our heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that:

WHEREAS, Principal has been awarded a contract with Obligee for the construction of:

PROJECT NAME:

PROJECT LOCATION:

G.F.P. PROJECT NUMBER:

which Contract is herein referred to and made a part hereof as fully and to the same extent as if the same were entirely written herein; and

WHEREAS, it was one of the conditions of the award by Obligee of the Contract that these presents should be executed.

PROVIDED, FURTHER, that the Surety, for consideration received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract, to work to be performed thereunder or to the specifications accompanying the Contract shall in any manner affect its obligation on this Bond. The Surety hereby does waive notice of any such change, extension of time, alteration or addition to the terms of the Contract, to the work or to the specifications. The Surety further stipulates and agrees that this Bond shall be valid and enforceable regardless of the time period between the date of execution of the Bond by the Surety and the date of execution of the Bond by the Principal.

PROVIDED, FURTHER, that no final settlement between the Obligee and the Principal shall abridge the right of any beneficiary hereunder whose claim may be unsatisfied.

NOW, THEREFORE, if the Principal in all respects complies with the terms and conditions of the Contract and his (their or its) obligations thereunder, including specifications therein referred to and made a part thereof and any alteration made in such specifications as herein or therein provided, then this obligation is void, but otherwise remains in full force and effect.

A further condition of this bond is that in the event the Principal fails to pay all just claims and demands on the part of any employee, person, firm or corporation for labor and materials furnished for or used in connection with the prosecution of the work under the Contract, or fails to pay any tax which may accrue to the State of South Dakota under the provisions of the "Use Tax Act of 1939 and The Excise Tax on Realty Improvements under SDCL 10-46A," and Sections 5-21-3 and 5-21-4 of the South Dakota Codified Laws, this bond and the sureties thereon shall be responsible to such person, firm or corporation and to the State of South Dakota for the full payment of the value of such labor and materials so furnished, including payment of South Dakota use taxes and excise taxes on realty improvements.

SIGNED AND SEALED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_\_\_.

**INDIVIDUAL PRINCIPAL**

By \_\_\_\_\_ Typed Name \_\_\_\_\_  
(Affix Seal if available)

**PARTNERSHIP, CORPORATE, OR LLC PRINCIPAL**

By \_\_\_\_\_ Typed Name \_\_\_\_\_

Title \_\_\_\_\_ Business Name \_\_\_\_\_  
(Affix Corporate Seal if available)

Address \_\_\_\_\_



**ACKNOWLEDGMENT OF PRINCIPAL  
(Partnership)**

State of \_\_\_\_\_ )  
  ) ss  
County of \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally  
appeared \_\_\_\_\_, who acknowledged himself/herself to be one  
of the partners of \_\_\_\_\_, a partnership, and that  
he/she, as such partner, being authorized so to do, executed the foregoing instrument for the purposes  
therein contained, by signing the name of the partnership by himself/herself as a partner.

\_\_\_\_\_  
Notary Public

My commission expires the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

**ACKNOWLEDGMENT OF PRINCIPAL  
(Corporation)**

State of \_\_\_\_\_ )  
  ) ss  
County of \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_ before me personally  
appeared \_\_\_\_\_, who acknowledged himself/herself to  
be the \_\_\_\_\_ of \_\_\_\_\_, a corporation,  
and that he/she, as such \_\_\_\_\_ being authorized so to do, executed the  
foregoing instrument for the purposes therein contained, by signing the name of the corporation by  
himself/herself as \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.



**ACKNOWLEDGMENT OF SURETY  
(Attorney-In-Fact)**

State of \_\_\_\_\_)

)ss

County of \_\_\_\_\_)

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared \_\_\_\_\_ known to me or satisfactorily proven to the person whose name is subscribed as attorney in fact for \_\_\_\_\_ and acknowledged that he/she executed the same as the act of his/her principal for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto subscribed my name and affixed my official seal at \_\_\_\_\_, the day and year last above written.

\_\_\_\_\_  
Notary Public

My commission expires the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

**APPROVAL AS TO FORM**

Approved as to form this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

\_\_\_\_\_  
Assistant Attorney General

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## **Article 1**

### **Definitions**

- 1.1 Owner:** The owner is the State of South Dakota acting through the legally appointed Secretary of Game, Fish & Parks and his representative.
- 1.2 Architect/Engineer:** The term "architect/engineer" (hereinafter A/E) means the person or entity identified as such on the cover sheet to the drawings or plans and his/her authorized representative including his/her consulting engineer(s).
- 1.3 Contractor:** The term "contractor" means the person or entity identified as such in the Agreement for Construction and his authorized representatives.
- 1.4 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.
- 1.5 The Contract Documents:** The documents identified as the Contract Documents in the Agreement for Construction.
- 1.6 The Contract:** The Contract Documents form the contract. The contract may be amended or modified only in writing in the manner set forth in Article 14. Nothing contained in the Contract Documents shall create any contractual relationship between the owner and any subcontractor, sub-subcontractor or supplier.
- 1.7 The Work:** The completed construction required by the Contract Documents, and every part thereof, and includes all labor necessary to produce such construction, and all materials and equipment incorporated or to be incorporated into such construction.
- 1.8 The Project:** The total construction of which the work performed under the Contract Documents may be the whole or a part.
- 1.9 The 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.
- 1.10 The Specifications:** The written requirements in the Contract Documents for materials, equipment, construction systems, standards and workmanship.
- 1.11 The Project Manual:** The manual compiled for the work containing the Invitation for Bid, Instructions to Bidders, blank form of Bid Bond, blank form of Agreement for Construction, blank form of Performance and Labor and Material Payment Bond, sample forms, General Conditions, and Special Conditions.

## **Article 2**

### **Execution, Correlation and Intent**

- 2.1** By executing the contract, the contractor represents he has examined the plans, specifications, site of the proposed Work and Contract Documents in accordance with the requirements of the Instructions to Bidders.
- 2.2** 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 any one 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.
- 2.3** 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.

**2.4** Neither the Owner nor the A/E assumes any 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.

**2.5** The Contractor and all Subcontractors shall refer to all of the Drawings, including those showing primarily the work of the mechanical, electrical, and other specialized trades, and to all of the Sections of the Specifications, and shall perform all work reasonably inferable therefrom as being necessary to produce the indicated results. The Contractor shall promptly report any discrepancy or omission which it observes in the Construction Documents and any need for clarification or interpretation to the Owner and the A/E. The Contractor's failure to do so will cause any additional cost incurred by the Contractor to be its sole responsibility. The Contractor shall number Requests for Information in consecutive order. The Contractor shall maintain a log of each Request for Information indicating the date it was issued, the date or dates of any correspondence and/or discussions on the Request for Information, and the date a final answer is received.

**2.6** The General Conditions and the Special Conditions are a part of each Section of the Specifications. The Special Conditions for Mechanical and Electrical Trades, if any, are part of each Section of the Specifications referenced therein, and apply to the work of the trades affected thereby.

**2.7** A typical or representative detail indicated on the Drawings shall constitute the standard for workmanship and material throughout corresponding parts of the Work. Where necessary, and where reasonably inferable from the Construction Documents, the Contractor shall adapt such representative detail for application to such corresponding parts of the Work. The details of such adaptation shall be subject to prior approval by the A/E. Repetitive features shown in outline on the drawings shall be in exact accordance with corresponding features completely shown.

**2.8** The layout of mechanical and electrical systems, equipment, fixtures, piping, ductwork, conduit, specialty items, and accessories indicated on the Drawings is diagrammatic, and all variations in alignment, elevation, and detail required to avoid interferences and satisfy architectural and structural limitations are not necessarily shown. Actual layout of the Work shall be carried out without affecting the architectural, engineering and structural integrity and limitations of the Work and shall be performed in such sequence and manner as to avoid conflicts, provide clear access to all control points, including valves, strainers, control devices, and specialty items of every nature related to such systems and equipment, obtain maximum headroom, and provide adequate clearances as required for operation and maintenance.

**2.9** The Drawings shall not be scaled for dimensions. If figured dimensions are not given on the Drawings, the Contractor shall request same from the A/E giving reasonable advance notice.

**2.10** 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.

**2.11** 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.

**2.12** 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.

**2.13** 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 the State, 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 State. 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 state, without the express written approval of the state. The state 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 state.

### **3.3 Return Of Documents**

All documents covered by Article 3 shall be delivered to the A/E 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 state and any documents that are retained, with or without state permission, shall be subject to all of the requirements of Article 3.

### **3.4 Terms To Be Included In Subcontracts**

The contractor shall include the requirements of 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 A/E'S RESPONSIBILITIES**

**4.1** The A/E will provide administration of the Contract as hereinafter described. The A/E will represent the Owner during construction. The A/E will advise and consult with the Owner. The Owner's instructions to the Contractor may be forwarded through the A/E. The A/E will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with Sub-Article 4.15.

**4.2** The Contractor shall accept instructions only from the A/E or GFP, and not the A/E's consulting engineers, except as the A/E and GFP shall authorize in writing.

**4.3** The A/E will visit the construction site at intervals appropriate to the stage of construction to keep generally familiar with the progress and quality of the work completed and to determine in general if the Project is being constructed in a manner such that when completed it would be in conformance with the plans and specifications and other Contract Documents. The A/E will not, however, be required to make exhaustive or continuous on-site inspections to check the quality or quantity of work. On the basis of such observations or inspections, the A/E shall keep the Owner informed of the progress and quality of the work on the Project and endeavor to guard the Owner against defects and deficiencies in the work of the Contractor. The A/E will maintain written reports of all site visits.

**4.4** The A/E shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Project, since these are solely the Contractor's responsibilities under the Agreement for Construction. The A/E shall not be responsible for the Contractor's schedules or failure to carry out the Project in accordance with the Contract Documents. The A/E shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Project, except to the extent that the A/E may formally notify the Contractor of the unacceptability of various portions of the Project or failure to carry out the Work on the Project in accordance with the Contract Documents.

**4.5** The A/E will inform the Contractor on behalf of and in consultation with the Owner to cease work on the Project or portions thereof affected by those items that are unacceptable and remain uncorrected until such time as corrections are made.

**4.6** The A/E shall at all times have access to the Work wherever it is in preparation and progress. The Contractor shall provide facilities for such access so the A/E may perform his functions under the Contract Documents.

**4.7** Except as may otherwise be provided in the Contract Documents or when direct communications have been approved by the A/E, the Owner and its representatives and the Contractor shall communicate through the A/E. Communications by and with the A/E's consultants shall be through the A/E.

**4.8** The A/E will determine the amounts owing to the Contractor based on inspections and observations at the site, and on evaluations of the Contractor's Monthly Applications for Payment, and shall issue Certificates of Payment for amounts due on forms provided by the Owner's Representative. A Certificate of Payment constitutes a representation by the A/E to the Owner, based upon the inspections and the information provided by the Contractor in the Application, that the Project has progressed to the point indicated; that to the best of the A/E's knowledge, information and belief, the quality of the work on the Project is in accordance with the Contract Documents; and that the Contractor is entitled to payment in the amount certified.

**4.9** The A/E shall have authority to reject work on the Project which does not conform to the Contract Documents. Whenever the A/E considers it necessary or advisable for implementation of the intent of the Contract Documents, the A/E will have authority to recommend to the Owner additional inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such work is fabricated, installed or completed. However, neither this authority of the A/E nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the A/E to any Construction Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons performing portions of the work on the Project.

**4.10** The A/E shall review and approve or take other appropriate action on Shop Drawings, Product Data and Samples submitted by Construction Contractors to determine if they conform with the design concept for the Project and with the information provided in the Contract Documents, and submit these documents or information to the Owner indicating the A/E's approval or comments with reasonable promptness so as to cause no delay to the prosecution of the Project.

Approval or acceptance of a specific item shall not necessarily indicate the A/E's approval of an assembly of which the item is a component. When professional certification of equipment is required by the Contract Documents, the A/E will be entitled to rely upon that certification to determine that the materials, systems, or equipment will meet the performance criteria required in the Contract Documents.

**4.11** The A/E will conduct, at the time and place approved by the Owner, with representatives of the State agencies involved in the Project and the Contractor, inspections to establish dates of Project acceptance and completion. The A/E shall have other A/Es, Structural, Mechanical, or Electrical Engineers, or other consultants in their employ in attendance at this and at various progress inspections as may be necessary to evaluate whether the work completed on the Project is in conformance with the Contract Documents. The A/E will receive and forward to the Owner, with comments on completeness or acceptability, those warranties, operation manuals, and other documents required by the Contract Documents and assembled by the Contractor.

**4.12** The A/E will review the final estimate for final payment to the Contractor and provide a Certificate of Final Payment to the Owner.

**4.13** The A/E will provide to the Owner or the Contractor, upon written request in the form of a Request for Information, interpretations and decisions in writing, or in the form of drawings, on matters concerning performance under the Contract Documents, and execution or performance of the Work on the Project. Response to such requests shall be made with reasonable promptness and within any time limits agreed upon. The final decision on all such questions shall be made by the Owner's Engineering Supervisor.

**4.14** The A/E will prepare Change Orders in accordance with Article 14, and will have authority to order minor changes in the Work as provided in Sub-Article 14.6.

**4.15** The duties, responsibilities and limitations of authority of the A/E as the Owner's representative during construction as set forth in the Contract Documents will not be modified or extended without written consent of the Owner, the Contractor and the A/E.

**4.16** In case of the termination of the employment of the A/E, the Owner shall appoint a replacement A/E whose status under the Contract Documents shall be that of the former A/E.

**Article 5**  
**OWNER'S RIGHTS AND RESPONSIBILITIES**

**5.1 Information and Services Required of the Owner.**

**5.1.1** The Owner shall furnish a survey describing the legal limitations and utility locations for the site of the project.

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

**5.1.3** 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.

**5.1.4** Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, 2 sets of paper prints of Drawings and 3 sets of Specifications necessary for the execution of the Work.

**5.1.5** The Owner may forward instructions to the Contractor through the A/E or give instructions through the Owner's Engineering Supervisor.

**5.1.6** The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein and especially those in respect to Work by the Owner or by separate contractors, Payments and Completion, and insurance in Articles 8, 10, 11 and 13.

**5.2 Owner's Right to Stop the Work:** If the Contractor fails to correct defective Work as required by Article 15 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's Engineering Supervisor or by his designated representative 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.

**5.3 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 he may have, make good such deficiencies. In such 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 the A/E'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 14, the amount of which shall not exceed an amount which equals the estimated direct cost of performing the work which the Owner elects to perform and the proportionate amount of the Contractor's fee associated therewith.

**5.4 Owner's Right to Access for Observation or Other Work:** The Owner reserves the right of access to 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.

**ARTICLE 6**  
**CONTRACTOR'S RESPONSIBILITIES**

**6.1 Review of Contract Documents:** The Contractor shall carefully study and compare the Contract Documents and shall at once report to the Owner and the A/E any error, inconsistency or omission he may discover. The Contractor shall not be liable to the Owner or the A/E for any damage resulting from any such errors, inconsistency or omission he may discover and report, nor for any damage resulting from any such errors, inconsistencies or omissions which he could not reasonably have discovered. The Contractor shall perform no portion of the work at any time without Construction Documents or, where required, Shop Drawings, Product Data or Samples for such portions of the Work bearing the A/E's appropriate action stamp.

**6.2 Supervision and Construction Procedures.**

**6.2.1** 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. Neither the Owner nor the A/E shall have control over, or responsibility for, any such matters.

**6.2.2** Nothing contained in the Contract Documents shall be interpreted by implication or otherwise as a direction by the A/E or 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 Construction Documents but such express reference shall in no way relieve the Contractor of his 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 Construction Documents, then the contractor shall notify the A/E in writing of the actual means, methods, techniques, sequences and procedures which he will employ on the Work if these differ from those expressly referred to in the Construction 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 Construction Documents.

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

**6.2.4** The Contractor shall not be relieved from his obligations to perform the Work in accordance with the Contract Documents either by the activities or duties of the A/E in his administration of the Contract, by the use or occupancy of part of the Work by the Owner as provided in Sub-Article 5.4, by the performance of work related to the Project by others as provided in Sub-Article 8.1, or by inspections, tests or approvals required or performed under Sub-Article 9.7 by persons other than the Contractor.

**6.2.5** The Contractor shall retain a competent Registered Professional Engineer or Registered Land Surveyor, acceptable to the Owner and A/E, who shall establish the exterior lines and required elevations of all buildings and structures to be erected on the site and shall establish sufficient lines and grades for the construction of associated work such as, but not limited to, roads, utilities and site grading. The Engineer or Land Surveyor shall certify as to the actual location of the constructed facilities in relation to property lines, building lines, easements, and other restrictive boundaries.

**6.2.6** The Contractor shall establish the building grades, lines, levels, column, wall and partition lines required by the various Subcontractors in laying out their work.

**6.2.7** 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 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.

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

**6.2.8.1** Coordinate his work with the dependent work;

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

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

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

**6.2.8.5** Examine dependent drawings and specifications;

**6.2.8.6** Examine previously placed dependent work;

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

**6.2.8.8** Notify Contractor of previously placed dependent work or dependent dimensions which are unsatisfactory or will prevent a satisfactory installation of his work; and

**6.2.8.9** Not proceed with his 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.

### **6.3 Labor and Materials.**

**6.3.1** 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, except the final water and sewer connection charges which shall be paid by the Owner.

**6.3.2** The Contractor shall at all times enforce strict discipline and good order among his employees and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him. The Contractor shall be responsible to maintain and observe, and to require his 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.

**6.3.3** Except in the event of emergency, no substantial field operations shall be performed outside of regular working hours without the prior notification of the A/E and 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.

#### **6.3.4 Substitutions**

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



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

**6.3.4.3** The Owner in consultation with the A/E will be the sole judge of equivalency of proposed substitute products, materials, and equipment. The A/E will make written recommendation of acceptance or rejection to the Owner. The Owner will then authorize the A/E to issue to the Contractor written approval or rejection of the substitution.

**6.3.4.4** If the Contractor desires to use a substitute item, he shall make application to the A/E 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 and A/E's review) stating and fully identifying the proposed substitute, cost changes (if any), and submitting substantiating data, sample, 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.

**6.3.4.5** Prior to proposing any substitute item, the Contractor shall satisfy himself that the item he 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.

**6.3.4.6** The burden of proof that a proposed substitution is equal to a specified item shall be upon the Contractor, who shall support his request with sufficient test data and other means to permit the A/E 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.

**6.3.4.7** 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.

**6.3.4.8** Acceptance of substitutions shall not relieve the Contractor from responsibility for compliance with all the requirements of the Construction Documents. The Contractor shall be responsible at his own expense for any changes in other parts of the work of his Contract or the work of other contractors caused by his substitutions, including cost of all design and redesign services related thereto incurred by the A/E and his consultants.

**6.3.4.9** The Contract completion time 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.

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

**6.3.5** 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.

**6.3.6** Before ordering materials, equipment, or performing Work, the Contractor shall verify indicated dimensions. If a discrepancy exists, the Contractor shall notify the A/E of same immediately. The A/E 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.

## **6.4 Guarantees/Warranty.**

**6.4.1** 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 A/E or Owner, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This guarantee/warranty is not limited by the provisions of Sub-Article 15.2.

**6.4.2** 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 Sub-Article 6.4.1, whether the loss arises before or after the Owner's acceptance of the Project.

**6.4.3** Where the contract documents provide for equipment and material warranties in addition to the Contractor's guarantees' and warranty contained in Sub-Article 6.4.1, such warranties shall at a minimum:

**6.4.3.1** 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.

**6.4.3.2** Provide for complete repair or replacement of defective equipment or material;

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

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

**6.4.3.5** 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; and

**6.4.3.6** 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 Sub-Article 6.4.3.4 or should the remedy of repair or replacement otherwise fail.

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

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

**6.5 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.

## **6.6 Permits, Fees and Notices.**

**6.6.1** 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. The State does not require that inspection and license fees be paid to a municipality for work performed on State property.

**6.6.2** 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 and the A/E against all costs, fines and damages, and all actions, claims and proceedings, due to its failure to do so.

**6.6.3** 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.

**6.6.4** 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, he shall promptly notify the Owner and the A/E in writing, and any necessary changes shall be accomplished by appropriate modification.

**6.6.5** 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 and the A/E, he shall assume full responsibility therefor and shall bear all costs attributable thereto.

**6.7 Superintendent:** The Contractor shall employ a competent superintendent 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 Superintendent shall represent the Contractor and all communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be so confirmed on written request in each case. The Superintendent shall not be changed without the Owner's consent.

#### **6.8 Construction Progress Schedule.**

**6.8.1** The Contractor shall, within 5 days, or within such time as determined by the A/E, after date of Notice to Proceed, prepare and submit to the A/E for approval a reasonable schedule showing the critical path, order in which the Contractor proposes to carry on the work and, the date on which he will start the several salient features (including procurement of materials, plant and equipment). The progress schedule shall indicate appropriately the percentage of work scheduled for completion at any time. If at any time the sequence of work is modified, the Construction Progress Schedule shall be updated.

**6.8.2** The Construction Progress Schedule shall reflect the time required for the preparation and processing of shop drawings and submittals and the lead time required in connection with the procurement of manufactured or processed materials and equipment.

**6.8.3** The Contractor shall furnish sufficient forces, construction plant, and equipment, and shall work such hours, including night shifts, overtime operations, and Sunday and holiday work, as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule.

**6.8.4** Whenever major portions of the Work fall behind the planned schedule, the Owner and A/E shall be notified and advised of action being taken to return the project to its original schedule and such action shall be indicated on the Construction Progress Schedule which shall then be reissued. If, in the opinion of the A/E and Owner, the Contractor is not taking adequate steps to improve or maintain the progress of the work, the A/E and Owner may require him to increase the number of shifts, and/or overtime operations, days of work, and/or the amount of construction plant, all without additional cost to the Owner.

**6.9 Documents and Samples at the Site:** The Contractor shall maintain at the site for the Owner one record copy of all Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record all changes made during construction, and approved Shop Drawings, Product Data and Samples. These shall be available to the A/E and Owner and shall be delivered to A/E for the Owner upon completion of the Work.

#### **6.10 Shop Drawings, Product Data and Samples.**

**6.10.1** 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.

**6.10.2** 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.

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

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

**6.10.4.1** The A/E 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.

**6.10.4.2** The Contractor's identification of Shop Drawings, Product Data and Samples shall include verification of information required in Sub-Articles 6.10.9.2 and 6.10.10.2.

**6.10.4.3** 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 A/E's review, or does not allow ample time for revision, resubmission and subsequent review by the A/E as required.

**6.10.4.4** Composite Drawing: In the interest of coordination and expediting the work in critical areas, i.e. exterior wall components, mechanical/electrical systems, and other areas so requested by the A/E, the Contractor shall prepare and submit, to the A/E 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.

**6.10.5** By approving and submitting Shop Drawings, Product Data and Samples, the Contractor represents that he 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 he 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 he 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 he has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Construction Documents.

**6.10.5.1** Any Shop Drawing, Product Data or Sample submitted without Contractor's approval will not be processed for review by the A/E, but will be returned to the Contractor for his 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.

**6.10.5.2** 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 Sub-Article 6.10.5. Shop Drawings shall bear the seal of a registered professional engineer or A/E when required by the Specifications or State Law.

**6.10.6** The Contractor shall not be relieved of responsibility for any deviation from the requirements of the Construction Documents by the A/E's approval of Shop Drawings, Product Data or Samples under Sub-Articles 4.10 and 6.10.9 unless the Contractor has specifically informed the A/E in writing of such deviation at the time of submission and the A/E has given written approval to the specific deviation. The Contractor shall not be relieved from responsibility for errors or omissions in the Shop Drawings, Product Data or Samples by the A/E's approval thereof. Any deviation shall also be indicated on such Shop Drawing, Product Data, Sample, or related submittal by circling or other approved means.

**6.10.7** 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 A/E on previous submittals. Unless such written notice has been given, the A/E'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.

**6.10.8** 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 A/E as provided in Sub-Article 6.10.9. All such portions of the Work shall be in accordance with approved submittals.

**6.10.8.1** No Shop Drawing, Product Data or Sample shall be issued to the field without the A/E's Action Stamp affixed thereto.

#### **6.10.9 Shop Drawing & Product Data Procedures**

**6.10.9.1 Shop Drawing Requirements:** Shop Drawings shall show design, materials (kind, thickness and finish), dimensions, connections, rough openings, routing details, and other details necessary to insure that they accurately interpret Contract Drawings and Specifications and also show adjoining work in such detail as required to provide proper connection with same. Shop Drawings shall be numbered consecutively and insofar as possible shall be uniform in size.

**6.10.9.2 Identification:** All Shop Drawings and Product Data shall be identified with the name of the Project, Project Number, building or buildings for which the Shop Drawings and Product Data are being submitted, and shall contain the A/E's name, Contractor's name, Subcontractor's name, date of submittal, drawing number, revision, if any, as well as the Specification Section under which the Work is to be performed and the Drawing and detail numbers that relate to the Shop Drawings and Product Data.

**6.10.9.3 Transmittals:** All Shop Drawings and Product Data shall be accompanied by a letter of transmittal from the Contractor setting forth the same identification information as required above under Sub-Article 6.10.9.2. Contractor shall number transmittals consecutively in sequence with the sample transmittals and shall indicate the Submittal Procedure number being followed. Transmittal shall also indicate if Shop Drawing is resubmittal and note A/E's file number for original submittal.

**6.10.9.4 Submittal Procedures:** The Contractor shall submit copies of Shop Drawings and Product Data to the A/E in accordance with Submittal Procedure numbers listed below. Reproducible prints shall be sepia or ozalid prints with positive side up. Black and white prints shall be black line on white background.

**6.10.9.4.1 Submittal Procedure No. 1:** Architectural Shop Drawings: One reproducible print and three black and white prints submitted directly to A/E.

**6.10.9.4.2 Submittal Procedure No. 2:** Structural, Mechanical and Electrical Shop Drawings: One reproducible print and three black and white prints submitted directly to A/E.

**6.10.9.4.3 Submittal Procedure No. 3:** Vertical Transportation and Special equipment, i.e., Elevators, Conveyors, etc., Shop Drawings: One reproducible print and five black and white prints submitted directly to A/E.

**6.10.9.4.4 Submittal Procedure No. 4:** When Product Data is submitted in the form of brochures, manufacturers' standard drawings, or catalog cuts not readily available in reproducible form, 7 copies of each shall be submitted directly to the A/E; additional copies shall be furnished only upon request by the A/E.

**6.10.9.5 A/E's Distribution & Stamp:** Following the A/E's review of each Shop Drawing and Product Data submission, the A/E will retain the black and white prints, and return the reviewed reproducible print to the Contractor with the A/E's stamp and signature affixed thereto, annotated as follows:

**6.10.9.5.1 "A Action":** "A Action" means the submission is in general conformance with the design concept. Construction, fabrication and/or manufacture can proceed subject to the provision that the Work shall be in accordance with the requirements of the Construction Documents. Final acceptance of the Work shall be contingent upon such compliance.

**6.10.9.5.2 "B Action":** "B Action" means the submission is in general conformance with the design concept subject to notations by the A/E on the returned Shop Drawings. Construction, fabrication and/or manufacture can proceed subject to the provision that the Work shall be carried out in compliance with all annotations and/or corrections indicated on the returned Shop Drawings and Product Data and in accordance with the requirements of the Construction Documents. Final acceptance of the Work shall be contingent upon such compliance.

**6.10.9.5.3 "C Action":** "C Action" means that the Contractor shall revise and resubmit the Shop Drawings and Product Data in accordance with all annotations and/or corrections indicated therein. Construction, fabrication and/or manufacture cannot proceed. Shop Drawings and Product Data bearing "C Action" stamp shall not be permitted on the Project Site.

**6.10.9.5.4 "D Action":** "D Action" means that the submission is rejected for nonconformance with the design concept and the Contractor shall make a new submittal which shall comply with the requirements of the Construction Documents. Construction, fabrication and/or manufacture cannot proceed. Shop Drawings and Product Data bearing "D Action" stamp shall not be permitted on the Project Site.

**6.10.9.6 Contractor's Distribution:** When transparencies are returned "A Action" or "B Action", the Contractor shall obtain and provide such number of prints to the Subcontractor as may be required by the Subcontractor for his distribution. The Contractor shall have copies of all "A Action" or "B Action" Shop Drawings and Product Data at the Project Site at all times and shall make them available to the A/E's representatives.

**6.10.9.7 Cost of Submittal and Distribution:** All charges in connection with the delivery of Shop Drawings and Product Data to the A/E shall be paid by the Contractor. All charges in connection with the distribution of Shop Drawings and Product Data to the Contractor shall be paid by the Contractor.

## **6.10.10 Samples Procedures**

**6.10.10.1 Sample Requirements:** Where possible, all samples required for a particular Specification Section shall be submitted together.

**6.10.10.1.1** Samples shall be submitted from the same source which will supply the actual job. Samples shall be of adequate size to show quality, type, color, range, finish, texture and other specified characteristics.

**6.10.10.1.2** Samples of materials or products which are normally furnished in containers or packages, which bear descriptive labels and/or application or installation instructions, shall be submitted with such labels and/or instructions.

**6.10.10.2 Identification:** All Samples shall be labeled, tagged, or otherwise clearly identified. Labels or tags shall set forth the name of the Project, the project number, buildings for which the Sample is being submitted, A/E, Contractor, Subcontractor, and/or supplier, the name of the manufacturer, fabricator, or processor, the trade designation, grade and quality of the material or product, the date of submittal, and specific identification of each sample and a precise reference to the Specification Article and Sub Article wherein the material, product, or element of the Work is specified. Each label or tag shall have sufficient clear space to permit the application of the approval stamp of the Contractor, and the action stamp of the A/E.

**6.10.10.3 Transmittals:** All samples shall be accompanied by a letter of transmittal from the Contractor setting forth the same identification information as required above under Sub-Article 6.10.4.2. Contractor

shall number transmittals consecutively in sequence with the Shop Drawings and Product Data transmittals. Where appropriate, test data and/or manufacturers' certificates shall be referenced in and forwarded with the letter of transmittal. Samples without accompanying certificates or test data will be returned without action.

**6.10.10.4 Submittal Procedure:** The Contractor shall submit the number of samples as indicated below:

**6.10.10.4.1** In the event that a range of variations in texture, graining, color or other characteristics may be anticipated in furnished materials, assemblies, or elements of the Work, a sufficient number of samples of such materials or products shall be submitted to indicate the full range of characteristics which will be present in the materials or products proposed for the Work. Any such materials or products delivered or erected prior to approval of full range samples shall be subject to rejection.

**6.10.10.4.2** All Samples shall be submitted in triplicate to the A/E's home office, or where directed by the A/E, except as otherwise set forth in other Sections of the Contract Documents.

**6.10.10.5 A/E's Distribution & Stamp:** Following the A/E's review of each Sample submission, the A/E will return one set of each submission to the Contractor with the A/E's stamp and signature affixed thereto and annotated in a manner conforming to the convention established in Sub-Article 6.10.9.5.

**6.10.10.6 Contractor's Distribution:** When Samples are returned 'Action A' or 'Action B', the Contractor shall retain such Samples in a suitable place at the Project Site for use by the Contractor, his Subcontractors, the A/E and his authorized representatives to insure that all work is being installed in accordance with these Samples. The remaining Samples will be retained by the A/E.

**6.10.10.7 Cost of Submittal and Distribution:** All charges in connection with the delivery of Samples to the A/E's home office or where directed by A/E (and all charges in connection with the subsequent distribution thereof by the A/E) shall be paid by the Contractor.

## **6.11 Use of Site.**

**6.11.1** 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.

**6.11.2** 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.

**6.11.3** All operations, including pumping, draining and control of surface and ground water shall be carried out so as to avoid endangering the Work of any adjacent facility or property, or interrupting, restricting or otherwise infringing or interfering with the use thereof.

**6.11.4** The Contractor shall confine operations at the site to work related activities. The Contractor shall not use the site for lodging or as a personal residence.

## **6.12 Cutting and Patching of Work.**

**6.12.1** 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.

**6.12.2** 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 his consent to cutting or otherwise altering the Work.

**6.12.3** Structural elements of the Work shall not be cut, patched or otherwise altered or repaired without prior written authorization by the A/E.

**6.12.4** 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 A/E's right to require the removal and replacement of any work which fails to fulfill the requirements of the Contract Documents.

### **6.13 Cleaning Up.**

**6.13.1** The Contractor at all times shall keep the Site and related streets free from accumulation of waste materials or rubbish caused by his operations. At the completion of the Work he shall remove all his waste materials and rubbish from and about the Project as well as his 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.

**6.13.2** 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 so as provided in Sub-Article 5.3 and the cost thereof shall be charged to the Contractor.

**6.14 Communications:** Except where otherwise directed by the A/E or otherwise provided in the Contract Documents, the Contractor shall forward all communications to the Owner through the A/E.

**6.15 Royalties and Patents:** The Contractor shall pay all royalties and license fees. He 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 is specified, but if the Contractor has reason to believe that the design, process or product specified is an infringement of a patent, he shall be responsible for such loss unless he promptly gives such information to the A/E and Owner in writing.

### **6.16 Indemnification.**

**6.16.1** To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the Owner, the A/E 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 attorney's 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 Sub-Article 6.16.

**6.16.2** In any and all claims against the Owner, the A/E 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 6.16 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' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

**6.16.3** The obligations of the Contractor under this Sub-Article 6.16 shall not extend to indemnification of the A/E or other design consultants employed by him, his consultant, agents or employees for damages, claims, losses or expenses arising out of: (a) the preparation or approval by the A/E or his design consultants of maps, drawings, opinions, reports, Change Orders, designs or specifications, or (b) the giving of or the failure to give directions or



instructions by the A/E or his design consultants provided such giving or failure to give is the primary cause of the damage, claim, loss or expense.

**6.16.4** The Contractor agrees to defend, indemnify and save the Owner, and A/E, or any of its 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, the A/E and its 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, attorney's fees, court costs and expense of collection, occasioned in whole or in part by the failure of the Contractor, its Subcontractor, or Sub-subcontractors to comply with any of the terms or provisions of the Contract Documents.

**6.16.5** This article does not require the Contractor to indemnify the Owner, its officers, agents, or employees from claims or liability arising solely from the acts or omissions of the Owner, its officers, agents, or employees.

## **6.17 Default.**

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

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

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

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

**6.17.1.4** Contractor fails to coordinate its work with other contractors and Subcontractors as required under Article 8 of these General Conditions;

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

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

**6.17.1.7** 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.

**6.17.2** 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 A/E's fees, as it may incur from amount otherwise owing to the Contractor, or to terminate the Contract in accordance with Sub-Article 16.2 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.

## **Article 7 SUBCONTRACTORS**

### **7.1 Definitions.**

**7.1.1** 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 as if singular in number and masculine in gender and means a Subcontractor or his authorized representative. The term Subcontractor does not include any separate contractor or his subcontractors.

**7.1.2** 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

as if singular in number and masculine in gender and means a Sub-subcontractor or an authorized representative thereof.

**7.2 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.

**7.3 Subcontractual Relations.**

**7.3.1** The Contractor shall not include any provisions in its Contracts with its Subcontractors which will in any way prejudice the rights of the Owner and the Architect/Engineer under the Contract between the Owner and the Contractor.

**7.3.2** 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.

**7.3.3** Nothing in Article 7 shall be construed to create a privity of Contract between the Owner and any Subcontractor.

**Article 8  
WORK BY OWNER OR BY SEPARATE CONTRACTORS**

**8.1 Owner's Right to Perform Work and to Award Separate Contracts.**

**8.1.1** The Owner reserves the right to perform work related to the Project with his 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 Sub-Article 6.17 and whether or not the Owner has terminated the Contract under Sub-Article 16.2. 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 14. If the Contractor claims that delay is involved because of such action by the Owner, he shall make such claim as provided elsewhere in the Contract Documents.

**8.1.2** When separate contracts are awarded for different portions of the Project or other work on the site, the term Contractor in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

**8.1.3** The Owner will provide for the coordination of the work, of his own forces and of each separate contractor with the Work of the Contractor, who shall cooperate therewith as provided in Sub-Article 8.2.

**8.2 Mutual Responsibility.**

**8.2.1** 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 his Work with theirs as required by the Contact Documents.

**8.2.2** 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 A/E 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 his Work, except as to defects which may subsequently become apparent in such work by others.

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

**8.2.4** 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 as provided in Sub-Article 12.2.5.

**8.2.5** 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 a litigation 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 costs which the Owner has incurred.

**8.3 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, the Site and related streets and walks on a routine basis as required by Sub-Article 6.13, the Owner may clean up and charge the cost thereof to the contractors responsible therefore as the Owner shall determine to be just.

## **Article 9 MISCELLANEOUS PROVISIONS**

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

**9.2 Successors and Assigns:** The Owner and the Contractor each binds himself, his 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 him hereunder, without the previous written consent of the Owner.

**9.3 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.

**9.4 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 his employees, agents or others for whose acts he 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.

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

**9.6 Rights and Remedies.**

**9.6.1** 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 Sub-Article 15.2.2.

**9.6.2** No action or failure to act by the Owner, A/E or Contractor shall constitute a waiver of any right or duty afforded any 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.

**9.7 Tests.**

**9.7.1** If the Construction 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 A/E and Owner timely notice of its readiness so the A/E and 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.

**9.7.1.1** Where certain testing and inspection requirements are set forth in the various Sections of the Construction 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 Construction 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.

**9.7.1.2** 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 Construction 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 Construction Documents. In the event that the Contractor shall not concur with such modification of scope or re-allocation of such services, he shall immediately notify the A/E and Owner in writing.

**9.7.2** If the A/E determines that any Work requires special inspection, testing, or approval which Sub-Article 9.7.1 does not include, he will upon written authorization from the Owner, 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 Sub-Article 9.7.1. If such special inspection or testing reveals a failure of the Work to comply with the requirements of the Construction Documents, the Contractor shall bear all costs thereof, including the cost of the tests, correction of the Work, the cost of retesting, and compensation for the A/E's additional services made necessary by such failure; otherwise the Owner shall bear such costs, and an appropriate Change Order shall be issued.

**9.7.2.1** If A/E's observation or any inspection or testing undertaken pursuant to Sub-Article 9.7 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 Construction 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 A/E 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 he may in his reasonable opinion consider necessary or advisable, and the Contractor shall bear all costs thereof, including the cost of the tests, correction of the Work, the cost of retesting, and the A/E's additional services, if any are required, made necessary thereby. However, neither the A/E's authority to act under Sub-Article 9.7 nor any decision made by him in good faith either to exercise or not to exercise such authority, shall give rise to any duty or responsibility of the A/E to the Contractor, any Subcontractor, any of their agents or employees, or any other person performing any of the Work.

**9.7.3** Required certificates of inspection, testing or approval shall be secured by the Contractor and promptly delivered by him to the A/E and the Owner.

**9.7.3.1** The Contractor shall obtain and deliver promptly to the Owner any certificates of final inspection of any part of his 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 Sub-Article 10.1.3, receipt of such permits or certificates by the Owner shall be a condition precedent to Completion of the Work.

**9.7.3.2** 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.

**9.7.4** If the A/E or owner is to observe the inspections, tests or approvals required by the Contract Documents, they will do so promptly and, where practicable, at the source of supply.

**9.7.5** 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.

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

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

**9.7.8** 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 A/E that the Contractor or said agent has failed to perform such work in a satisfactory manner, the Contractor shall, at his own expense, retain the services of a service organization which is satisfactory to the A/E for the performance of such work.

## **9.8 Litigation.**

**9.8.1** 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 direct negotiations, by non-binding mediation if the parties mutually agree, or in a circuit court of competent jurisdiction within the State of South Dakota. Notice of a request for mediation 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. If the party receiving notice of request does not agree to mediation in writing within 10 calendar days, it will be deemed that the parties do not mutually agree to mediate the matter. If the parties agree to mediate, a mediator to hear the dispute will be agreed upon by the parties. If agreement on a mediator cannot be reached, the State shall select the mediator.

**9.8.2** The Contractor shall carry on the Work and maintain its progress during any dispute 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 10 TIME**

### **10.1 Definitions.**

**10.1.1** The Contract Time is the period of time allotted in the Construction Contract for Substantial Completion of the Work as defined in Sub-Article 10.1.3, including authorized adjustments thereto.

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

**10.1.3** The date of Substantial Completion of the Work is the date certified by the A/E 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.

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

### **10.2 Progress and Completion.**

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

**10.2.2** The Contractor shall begin the Work on the date of commencement as defined in Sub-Article 10.1.2. He shall carry the Work forward expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

### **10.3 Delays and Extensions of Time.**

**10.3.1** If the Contractor is delayed at any time in the progress of the Work by any act or neglect of the Owner or the A/E, or by any employee of either, 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 over-time labor).

**10.3.2** Any claim for extension of time shall be made in writing to the Owner with a copy to A/E 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.

**10.3.2.1** 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.

**10.3.2.2** 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.

**10.3.2.3** The Owner shall have the right to defer his 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.

**10.3.2.4** Notwithstanding the provisions of Sub-Article 10.3.2, 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.

**10.3.2.5** 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 five (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 five (5) year average weather conditions. Time extensions for weather delays do not entitle the Contractor to "extended overhead" recovery.

**10.3.3** If no agreement is made stating the dates upon which interpretations as provided in Sub-Article 4.13 shall be furnished, then no claim for delay shall be allowed on account of failure to furnish such interpretations until 15 days after written request is made for them, and not then unless such claim is reasonable.

**10.3.4** 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 public, added cost of engineering and supervision, and other items which have caused an expenditure of public 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 or the A/E 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 the A/E and their agents and employees from and against all costs, fees, losses, damages, and expenses arising out of such claims enforced against the owner or the A/E.

**10.3.5** No extension of time will be granted to the Contractor for any delay other than those described in Sub-Article 10.3.1.

**10.3.5.1** Should the Contractor fail, refuse or neglect to supply a sufficiency of workmen 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 his 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.

**10.3.5.2** 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.

**10.3.6** The Contractor's right to make a claim or claims for an extension of time, as provided in Sub-Article 10.3.1, 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.

#### **10.4 Beneficial Occupancy.**

**10.4.1** 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 him in completing the entire Work. Such occupancy and use shall be further subject to the provisions set forth herein and the provisions of SDCL § 5-18B-13.

**10.4.2** In the event that the Owner desires to exercise the privilege of Beneficial Occupancy, he shall give reasonable notice to the A/E and the Contractor. If the A/E determines that such proposed occupancy is reasonable and proper, the Contractor shall 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.

**10.4.3** The Owner's Beneficial Occupancy or use of such designated areas, subdivisions, or portion 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 his 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 11 PAYMENTS AND COMPLETION**

**11.1 Contract Sum:** The Contract Sum is stated in the Agreement for Construction.

**11.2 Schedule of Values:** Before the first Application for Payment, the Contractor shall submit to the Owner and A/E 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 and A/E may require. The format and number of copies of such Applications for Payment shall be as directed by the Owner and the A/E. This schedule, unless objected to by the Owner, shall be used as a basis for the Contractor's Applications for Payment.

**11.3 Monthly Application for Payment.**

**11.3.1** No later than the 5th day of each month the Contractor shall submit to the A/E his 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 and supported by such data substantiating the Contractor's right to partial payment as the Owner or A/E may require; including but not limited to receipts, releases, and waivers of liens.

**11.3.1.1** In applying for payment, the Contractor shall submit his 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 his 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.

**11.3.1.2** If the Contractor chooses to apply for payment for materials which cannot be incorporated into the Work, and cannot be stored on the site, he 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 Sub-Article 11.3.1.2. Contractor shall provide the Owner with bills of sale or such other documents as will establish the ownership of the materials.

**11.3.2** 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.

**11.3.3** Monthly applications received after the 5th day of the month will be treated as if submitted on the 5th day of the following month.

**11.4 Recommendation for Payment.**



**11.4.1** By the 15th of each month, the A/E will review the Contractors Monthly Application for Payment and make his certification to the Owner with a copy to the Contractor, for such amount as the A/E believes is properly due, or notify the Contractor in writing his reasons for withholding a Certificate as provided in Sub-Article 11.6.1.

**11.4.2** The issuance of a Certification for Payment will constitute a representation by the A/E to the Owner, based on his observations at the site as provided in Sub-Article 4.3 and the data comprising the Monthly Application for Payment, that the Work has progressed to the point indicated; that, to the best of his knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to the result of any subsequent tests required by or performed under the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in his Certificate); and that the A/E believes that the Contractor is entitled to payment in the amount recommended. However, by issuing a Certification for Payment, the A/E shall not thereby be deemed to represent that he has made exhaustive or continuous on-site inspections to check the quality or quantity of the Work or that he has reviewed the construction means, methods, techniques, sequences or procedures, or that he has made any examination to ascertain how or for what purpose the Contractor has used the moneys previously paid on account of the Contract Sum. The Owner will not be bound by the amount stated in the A/E's Certification for Payment in making determinations of amounts properly payable to the Contractor.

## **11.5 Progress Payments.**

**11.5.1** Based upon his review of the Monthly Application for Payment, and the A/Es Certification, 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 15th of each month. unless the A/E's certification was delayed by following the procedures of Article 11.6.1. In such case, payment shall be 25 days after the 15<sup>th</sup> of each month. The Owner shall at all times retain an amount sufficient to complete the Work pursuant to SDCL .§§ 5-18B-11 and 5-18B-13. If the Owner retains any portion of a certified progress payment that is properly due and undisputed beyond the time for payment specified herein and for reasons other than those required by statute, the Owner shall owe and pay the Contractor four percent (4%) interest compounded annually on the retained amount starting from the date payment first becomes due under this article.

**11.5.2** 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.

**11.5.3** 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.

**11.5.4** Neither the Owner nor the A/E shall have any obligation to pay or to see to the payment of any moneys to any Subcontractor except as may otherwise be required by law.

**11.5.5** 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.

## **11.6 Payments Withheld.**

**11.6.1** The A/E may decline to certify the full payment of the amount requested by the Contractor in his monthly application to the extent necessary to reasonably protect the Owner. If the A/E is unable to certify payment in the amount of the Application, he will, within 10 days after receipt of the monthly application, notify the Contractor in writing the reasons he cannot make such a certification. If the Contractor and the A/E cannot agree on a revised amount within five days of A/E sending written notice, the A/E will promptly issue a Certification for Payment for the

amount for which he is able to certify to the Owner pursuant to Sub-Article 11.4.2. The A/E may also decline to certify payment because of subsequently discovered evidence or subsequent observations, he may nullify the whole or any part of any Certification for Payment previously issued, and the Owner 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:

**11.6.1.1** Defective work not remedied;

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

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

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

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

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

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

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

**11.6.1.9** 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;

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

**11.6.1.11** Reasonable evidence that the Contractor is in material breach of his obligations under the Contract.

**11.6.2** When the above grounds in Sub Article 11.6.1 are removed, payment shall be made for amounts withheld because of them.

## **11.7 Substantial Completion.**

**11.7.1** When the Contractor considers that the Work, or a designated portion thereof which is acceptable to the Owner, is Substantially Complete as defined in Sub Article 10.1.3 the Contractor shall prepare for submission to the A/E and 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 A/E and Owner on the basis of an inspection determines that the Work or designated portion thereof is Substantially Complete, the A/E 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.

**11.7.2** Upon Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the A/E, 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 shall be retained by the Owner pursuant to SDCL § 5-18B-13.

## **11.8 Final Completion and Final Payment.**

**11.8.1** 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 A/E and Owner will promptly make such inspection and, when they find the Work acceptable under the Contract Documents and the Contract fully performed, the A/E will promptly issue a final Certificate for payment stating that to the best of his observations and inspections, the Work has been completed in accordance with the terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in said final Certificate, is due and payable. The A/E's Final Certificate for Payment will constitute a further representation that the conditions precedent to the Contractor's being entitled to final payment as set forth in Sub-Article 11.8.2 have been fulfilled.

**11.8.2** The final payment shall not become due until the Contractor submits to the A/E and Owner (1) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or his property might in any way be responsible, have been paid or otherwise satisfied, (2) consent of surety to final payment, (3) if required by the Owner, other data establishing payment or satisfaction of all such obligation, such as receipts, releases and waivers of liens arising out of the Contract, to the extent and in such form as may be designated by the Owner, (4) an Unemployment Compensation Contribution Certificate from the South Dakota Department of Labor, and (5) a full and complete release of the Owner from all liability under the Contract and otherwise, except to the extent provided in Sub-Article 11.8.4. If the Contractor fails to furnish such releases or waivers of liens as the Owner reasonably requires to determine that there are no outstanding liens, the Owner may require that Contractor, as a condition of final payment to furnish a bond satisfactory to the Owner to indemnify the Owner against any such liens. Cost of such bond shall be borne by the Contractor. If any such lien remains unsatisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

**11.8.3** 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 11.8.2 above. If the Owner fails to make final payment to the Contractor within the time specified herein, the Owner shall pay the Contractor interest at the rate of four percent (4%) compounded annually on the amount retained starting from the date final payment first becomes due.

**11.8.4** 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.

## **Article 12 PROTECTION OF PERSONS AND PROPERTY**

**12.1 Safety Precautions and Programs:** The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work, and for safeguarding all adjacent properties and facilities.

### **12.2 Safety of Persons and Property.**

**12.2.1** The Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

**12.2.1.1** All employees on the Work and all other persons who may be affected thereby;

**12.2.1.2** All the Work and all materials and equipment to be incorporated therein, whether in storage or off the site, under the care, custody or control of the Contractor and any of his Subcontractors or Sub-subcontractors; and

**12.2.1.3** Other property at the site or adjacent thereto, including but not limited to, work of the Owner or of separate contractors, trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

**12.2.2** The Contractor shall give all notices and comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property or their protection from damage, injury or loss, and shall indemnify the Owner and the A/E and save them harmless against all claims, penalties, actions and proceedings relating thereto or the Contractor's failure so to comply.

**12.2.3** The Contractor shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities.

**12.2.4** When the use or storage of any hazardous materials or equipment is necessary for the execution of the Work, the Contractor shall exercise the utmost care and shall carry on such activities under the supervision of properly qualified personnel.

**12.2.5** The Contractor shall promptly remedy all damage or loss to any property referred to in Sub-Articles 12.2.1.2 and 12.2.1.3 caused in whole or in part by the Contractor, any Subcontractor, any Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable and for which the Contractor is responsible under Sub-Articles 12.2.1.2 and 12.2.1.3, except damage or loss attributable to the acts or omissions of the Owner or A/E or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to his obligations under Sub-Article 6.16.

**12.2.6** The Contractor shall designate a responsible member of his organization at the Site whose duty shall be the prevention of accidents. This person shall be qualified as a safety supervisor by experience, training, or education and shall have the responsibility to insure and enforce safety requirements on behalf of the Contractor and shall be designated by the Contractor in writing to the Owner and the A/E.

**12.2.7** The Contractor shall issue weekly safety reports to the Owner and the A/E attesting to conditions on the Site relating to safety and to actions taken.

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

**12.2.9** The structure of the Project is designed to support the loads of the finished building. No provision is included for stresses or loads imposed by construction operations. If the Contractor desires to place such loads in excess of the design load shown on drawings, he shall submit drawings and calculations prepared by, and bearing the seal of a professional structural engineer of the proposed method for supporting such loads for the A/E's review and approval. No loading of any kind in excess of design loads shall be placed on any part of the building structure prior to the A/E's approval of submitted drawings and calculations. The costs of the A/E's review shall be borne by the Contractor.

**12.2.10** The Contractor shall prepare a written report setting forth the circumstances and details related to any accident or occurrences involving death, bodily injury, sickness, disease, personal injury, and/or loss or injury to or destruction of tangible property. Such reports shall be forwarded promptly to the insurance carriers, the A/E and the Owner.

**12.3 Emergencies:** In any emergency affecting the safety of persons or property, the Contractor shall act, at his discretion, to prevent threatened damage, injury or loss and shall as promptly as conditions permit notify the insurance carriers, Owner, and A/E of the nature of the emergency and circumstances related thereto. Immediately thereafter, the Contractor shall prepare a written report setting forth in detail the action taken and describing in detail all circumstance and conditions which are related to such action.

## **Article 13 INSURANCE**

**13.1** The Contractor shall not commence work under this contract until he has obtained all the insurance required under this article and such insurance has been approved by the Owner. Each contractor shall maintain and shall ensure that each subcontractor maintain for the life of the contract:

**13.1.1 Worker's Compensation Insurance** with a limit as per Statute.

**13.1.2 Employers Liability Insurance** with a limit of not less than \$1,000,000 each accident.

**13.1.3 Commercial General Liability Insurance** or equivalent form with a limit of not less than \$1,000,000 each occurrence. If such insurance contains a general aggregate limit it shall apply separately to this Agreement or be no less than two times the occurrence limit. The owner shall be included as a named Additional Insured on the General Liability Policy of insurance for ongoing and complete operations.

**13.1.4 Business Automobile Liability Insurance** or equivalent form with a limit of not less than \$1,000,000 each accident. Such insurance shall include coverage for owned, hired, and non-owned vehicles.

**13.1.5 Builder's Risk Insurance** in the full amount of this contract, upon any building, structure, equipment and appliance in the process of construction or installation under state contract and upon all materials on site, until such time as the building, structure, equipment and appliances have been finally accepted by the Owner and the contract completed. This insurance shall include the interest of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Work and shall insure against loss by physical damage including, without duplication of coverage, fire, flood, extended coverage, theft, vandalism, malicious mischief, and collapse.

## **13.2 Certificates of Insurance.**

**13.2.1** Certificates of the above insurance shall be filed with the Owner and shall be subject to the Owner's approval for adequacy of protection. Each respective contractor shall provide the certificates for the insurance required herein.

**13.2.2** The Owner's approval or acceptance of such certificates of insurance shall in no way release or relieve the respective contractor from any responsibility, liability or obligation devolving upon him.

**13.2.3** All insurance policies and certificates shall be issued only by companies authorized to do business in the State of South Dakota and acceptable to the Owner. It shall be the Contractor's responsibility to keep the respective insurance policies and coverages current and in force for the life of the contract.

## **Article 14 CHANGES IN THE WORK**

**14.1 Change Orders:** 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 his agreement therewith, including the adjustment in the Contract Sum or the Contract Time.

**14.2** 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. No later than the 5<sup>th</sup> day of each month, the A/E will process a written change order to include all outstanding RFPs.

**14.3** 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:

**14.3.1** 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:

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

**14.3.1.2** 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.

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

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

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

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

**14.3.1.6.1** 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).

**14.3.1.6.2** 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).

**14.3.1.6.3** Hourly rental rates determined from the 'Green Book' or 'Blue Book' includes all items of cost and expense to the Contractor, including gas, oil, maintenance, repairs, insurance, and transportation to and from construction site.

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

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

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

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

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

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

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

**14.3.4** By the method provided in Sub-Article 14.3.12.

**14.3.5** 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 analysis shall be appended to the Contractor's itemized analysis of the proposed change in the Work.

**14.3.6** 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 Sub-Articles 14.3.1.1 through 14.3.1.11.

**14.3.7** 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.

**14.3.8** 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.

**14.3.9** 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.

**14.3.10** 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:

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

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

**14.3.10.3** Use of small tools.

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

**14.3.11** 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 A/E and/or 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.

**14.3.12** If none of the methods set forth in Sub-Articles 14.3.1, .3.2 or .3.3 is agreed upon, the Contractor, provided he 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 Sub-Articles 14.3.3 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 or his designated representative: (a) daily time slips showing the name of each workman employed on such work, the number of hours which he is employed thereon, the character of his duties, and the wages and benefits to be paid to him 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 or workmen'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 A/E 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.

#### **14.4 Differing Site Conditions**

**14.4.1** The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the A/E 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.

**14.4.2** The A/E 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 and A/E as provided in Sub-Article 14.1 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.

#### **14.5 Claims for Additional Cost.**

**14.5.1** If the Contractor wishes to make a claim for an increase in the Contract Sum, he shall give the A/E and 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 A/E concurrently with such submittals. This notice shall be given by the Contractor before proceeding to execute the work, except in an emergency endangering life or property in which case the Contractor shall proceed in accordance with Sub-Article 12.3. 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.

**14.5.2** If the Contractor claims that additional cost is involved because of, but not limited to, (1) any written interpretation pursuant to Sub-Article 4.13, (2) any order by the Owner to stop the Work pursuant to Sub-Article 5.2 where the Contractor was not at fault, (3) any written order for a minor change in the Work issued pursuant to Sub-Article 14.6, or (4) any deviation in Shop Drawing or Sample submittals from the requirements of the Contract Documents, the Contractor shall make such claim as provided in Sub-Article 14.5.1.

**14.6 Minor Changes in the Work:** The A/E will have authority to order minor changes in the Work not involving an adjustment in the Contact Sum or an extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order, and shall be binding on the Owner and the Contractor. The Contractor shall carry out such written orders promptly.

### **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 A/E or the Owner, or the requirements specifically expressed in the Contract Documents, it must, if required in writing by the A/E or the Owner, be uncovered for his 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 A/E or the Owner has not specifically required to observe prior to being covered, the A/E or the Owner may request to see such Work and it shall be uncovered by the Contractor. If such work be found in accordance with the Construction Documents, the cost of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such work be found not in accordance with the Construction Documents, the Contractor shall pay such costs unless it be found that this condition was caused by the Owner or a separate contractor as provided in Article 8, 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 A/E as defective or as failing to conform to the Construction 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 A/E's additional services 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 Construction 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 Sub-Articles 6.4.1, 15.2.1 and 15.2.2, unless removal is waived by the Owner.

**15.2.4** If the Contractor fails to correct defective or non-conforming Work as provided in Sub-Articles 6.4.1, 15.2.1 and 15.2.2, the Owner may correct it in accordance with Sub-Article 5.3.

**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 A/E, 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, including compensation for the A/E's additional services made necessary thereby. 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 Sub-Article 6.4 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 his 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 his 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, he 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 and the A/E, 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.**

**16.2.1** 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 his surety 10 calendar days written notice, during which the Contractor and/or his 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 he 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 compensation for the A/E's additional 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.