



State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Department of Administrative Services

KIMBERLY K. HOOD
Executive Director

Division of Facilities Construction and Management

ERIC R. THOLEN
Director

Addendum No. 2

Date: March 3, 2016

To: Interested Parties

From: Jim Russell – Project Manager

Reference: New Utah State Correctional Facility – Brokers/Consultants
Department of Corrections – Salt Lake City, Utah
DFCM Project No. 15310100

Subject: **Addendum No. 2**

Pages	Addendum Cover Sheet	1 page
	<u>Draft Professional Services Agreement</u>	<u>8 pages</u>
	Total	9 pages

Note: This Addendum shall be included as part of the Contract Documents. Items in this Addendum apply to all drawings and specification sections whether referenced or not involving the portion of the work added, deleted, modified, or otherwise addressed in the Addendum. Acknowledge receipt of this Addendum in the space provided on the Bid Form. Failure to do so may subject the Bidder to Disqualification.

2.1 SCHEDULE CHANGES: There are no Project Schedule changes.

2.2 GENERAL ITEMS:

2.2.1 DFCM is requesting a project completion date of July 30, 2020

2.2.2 See attached Draft Professional Services Agreement.

DIVISION OF FACILITIES CONSTRUCTION AND MANAGEMENT PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT, made this ___th day of _____, 201_, by and between the DIVISION OF FACILITIES CONSTRUCTION AND MANAGEMENT, hereinafter called the "DFCM", and _____, a corporation of the State of _____, whose address is _____, Utah 84___, hereinafter called the "Consultant."

WITNESSETH: That whereas, the DFCM intends to have services performed by Consultant as follows: Consult, Administer, manage, and broker an Owner Controlled Insurance Program ("OCIP") or other insurance arrangements, including the marketing, service and administration, claims service, and all functions reasonably related to the OCIP or other insurance arrangements as outlined in the scope of services set forth herein.

WITNESSETH, WHEREAS the DFCM intends to have Consultant fully complete the objectives and scope of work of this Agreement, and

WHEREAS, the Consultant, for the sum herein stated, agrees to perform the Scope of Work of this Agreement,

THEREFORE, the DFCM and the Consultant, for the consideration hereinafter provided, agree as follows:

ARTICLE 1. EXTENT OF AGREEMENT AND SCOPE OF WORK. This Agreement includes the provisions of the Solicitation for Consultant Services dated February 19, 2016, and all documents attached thereto, all of which are hereby incorporated by reference as a part of this Agreement as Exhibit "A." Except as noted in an Attachment "C" hereto **[Note: which will be created after selection]**, the Consultant's services shall include all work described in the Consultant's proposal dated March __, 2016, which is attached hereto as Exhibit "B" and incorporated as part of this Agreement. In case of conflict, the following documents supersede each other in accordance with the following hierarchy: codes and applicable law, the body of this Agreement, and attachments to this Agreement. **Attachment "C" shall supersede any other attachment or provision of this Agreement.** To the extent that the Consultant's Scope of work is broader than the scope of work set forth the Consultant's proposal, such additional scope of work shall be included in an Addendum "C" to this Agreement.

The DFCM Supplemental General Conditions at http://dfcm.utah.gov/downloads/1const/IllegalImmigration_May10_2011.pdf regarding e-verification shall apply, including all applicable law related to such e-verification.

ARTICLE 2. TIME FOR SERVICES. The Consultant shall complete the scope of work in a manner to achieve any milestones identified in the Solicitation for Consultant Services or the attachments to this Agreement. The full scope of work shall be completed within **the estimated project completion time indicated in any addendum to the Solicitation as well as administration and consultation during any period related to any claims to final resolution**, or until the DFCM determines that the services required herein have been completed to the satisfaction of DFCM, whichever occurs later.

ARTICLE 3. PAYMENT. In accordance with the provisions and considerations set forth in this Agreement, the DFCM agrees that any payment to Consultant shall the Percentage Fee in the Cost

Proposal based on the insurance premiums, which percentage fee was submitted in response to the Solicitation. No other payment shall be made by the State of Utah, DFCM or other State entity, including any amount for services, meal, travel or anything that may be considered a reimbursable. The Percentage Fee is all inclusive of all monies owed to Consultant. The Percentage Fee is ____%. No insurance shall be purchased without advance written approval of DFCM.

3.1 The DFCM agrees to pay the Consultant from time to time, but not more than once each month after the date of the notice to proceed, and only upon receipt of an invoice containing sufficient detail to justify the amount of payment requested. A payment scheduled shall be reviewed and subject to approval of all parties. Monthly payments shall be approximately apportioned into equal installments over the term of the work to be performed by Consultant. Payment shall be made within thirty days of the DFCM's receipt of the Consultant's invoice except that this requirement shall not apply to any amount: (a) for which the Consultant's invoice does not provide sufficient detail to demonstrate what is due, (b) that the DFCM disputes is due under the terms of the Agreement, or (c) reasonably withheld by the DFCM to cover any default or failure to perform by the Consultant. The DFCM shall provide written notice to the Consultant of any adjustment to or rejection of Consultant's invoice.

3.2 Except as otherwise provided by law, if any payment is late based upon the provisions of this Agreement, the Consultant shall be paid interest in an amount equal to the published Wall Street Journal prime rate plus 2%. The published Wall Street Journal Prime Rate shall be determined using such rate that is published closest to the 1st of the month for each month of the late period. The amount of payment of interest shall be apportioned using such rates(s) for the late period.

3.3 The acceptance by the Consultant of final payment of its percentage fee without a written protest filed with DFCM within three calendar days of receipt of final payment, shall release the DFCM from all claims and all liability to the Consultant for fees and costs of the performance of the services pursuant to this Agreement.

3.4 All payments for services hereunder shall be made only to Consultant and Consultant assumes the sole responsibility for payments due any sub-consultant, supplier or vender.

3.5 If the DFCM determines that any services provided hereunder are incomplete or unsatisfactorily completed, the DFCM may retain payment until the Consultant has made the necessary corrections or completion of services sufficient to justify the amount billed.

ARTICLE 4. CHANGES IN WORK. Any changes in the scope of the services to be performed under this Agreement shall be in the form of a written modification to this Agreement, mutually agreed to and signed by duly authorized representatives of both parties, specifying any such changes, fee adjustments resulting therefrom, any adjustment in time of performance, or any other significant factors arising from the changes in the scope of services.

ARTICLE 5. INSURANCE. Prior to undertaking and work under this Agreement and after specific written approval from DFCM, the Consultant, at no expense to the DFCM, shall obtain and provide the insurance coverages and policies from Utah licensed insurers having an AM Best rating of A- or better. Examples of insurance, that are all subject to consultation and approval by DFCM, include, but are not limited to the following:

1. Professional Liability Insurance (Errors & Omissions). Consultant shall maintain Professional Liability Insurance with coverage retroactive to the effective date of this Agreement, in an amount not less than \$ _____ per claim and \$ _____ aggregate for all operations conducted. The actual amounts for various contractors, with the term contractors used broadly, shall be determined in consultation with DFCM. The Consultant warrants that it will notify the DFCM in writing of any reduction in the aggregate coverage within 30 days. The Consultant warrants that the coverage shall not be circumscribed by any endorsements excluding coverage arising out of the performance of this Agreement.

2. Commercial General Liability Insurance. Consultant shall maintain Commercial General Liability Insurance (CGL) with coverage retroactive to the effective date of this Agreement, in an amount not less than \$ _____ per claim and \$ _____ aggregate limit for products/completed operations. The policy shall include liability arising from premises, operations, independent contractors, products, completed operations, personal injury, advertising injury, and liability assumed under an insured contract in connection with services performed under this contract. The actual amounts for various contractors, with the term contractors used broadly, shall be determined in consultation with DFCM. The DFCM shall be named an additional insured under this policy. The Consultant warrants that it will notify the DFCM in writing of any reduction in the aggregate coverage within 30 days. The Consultant warrants that the coverage shall not be circumscribed by any endorsements excluding coverage arising out of the performance of this Agreement. This insurance shall apply primary insurance with respect to any other insurance programs afforded to the DFCM.

3 Workers Compensation Insurance. The consultant shall, at its own cost and expense, maintain Worker's Compensation and Employer's Liability insurance prescribed by the laws of the State of Utah, with liability limits of not less than \$ _____ for each employee for bodily injury or disease. The actual amounts for various contractors, with the term contractors used broadly, shall be determined in consultation with DFCM. Notwithstanding this, based on the consultation, each contractor may be responsible for its own Workers Compensation Insurance.

4. Builders Risk insurance in an amount and form based on consultation and approval of DFCM.

5 Excess policies in an amounts and form based on consultation and approval of DFCM.

6. Waiver of Subrogation. The Consultant waives all rights of subrogation and recovery against the State of Utah and the DFCM, its agents, employees, and representatives, to the extent these damages are covered by any policy required by this Agreement.

7. Certificates of Insurance. The Consultant shall provide Certificates of Insurance in the form satisfactory to the DFCM evidencing the coverage's set forth herein.

8. Effect of Insurance. The carrying of insurance required by this Agreement shall not be interpreted as relieving the Consultant, or any Contractor, as that term is user broadly, of any other responsibility or liability under this Agreement or any applicable law, statute, rule, regulation or order.

ARTICLE 6. DOCUMENT OWNERSHIP. All work product, which includes but is not limited to all manuals, forms, contracts, schedules, reports, comments and any and all documents supplied to or produced by Consultant under this Agreement are the property of the DFCM, whether the work for which

they are made is executed or not. Said documents and the information contained therein are the exclusive property of the DFCM and are not to be used by Consultant on any other projects with any other parties except by the advance written agreement of the DFCM.

ARTICLE 7. LEGAL RELATIONSHIP.

7.1 **Independent Contractor.** This Agreement is for the performance of services and not the sale of goods, and is to be construed according to the laws of the State of Utah. Consultant's relationship to the State is that of an independent contractor. No partner or employee of Consultant shall, by reason of this Agreement, become an employee of the State of Utah.

7.2 **No Authority to Bind State; Exceptions.** The Consultant shall have no authorization, expressed or implied, to bind the State of Utah, or the Division of Facilities Construction and Management to any agreement, settlement, liability or understanding whatsoever, nor to perform any acts as agent for the State of Utah or DFCM, except as specifically set forth in this Agreement.

ARTICLE 8. ASSIGNMENT. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns; provided, however, that neither party shall assign its obligations hereunder without the prior written consent of the other.

ARTICLE 9. TERMINATION BY CONSULTANT. This Agreement may be terminated by Consultant upon seven calendar days written notice should the DFCM fail substantially to perform, through no fault of the Consultant and the DFCM has failed to cure the failure to perform within fourteen calendar days of the DFCM's receipt of written notice of its failure to perform. Upon termination of this Agreement, the Consultant shall deliver all work performed to the DFCM. In the event of such termination, the Consultant shall be compensated for services properly performed under this Agreement up to date of the notice of termination. The Consultant agrees that in the event of such termination for default and such default is not successfully challenged by DFCM, its total remedy and monetary recovery from the DFCM is limited to full payment for all work properly performed, reimbursable, under this Agreement up to the date of termination as well as any reasonable monies owed as a result of the Consultant having to terminate contracts necessarily entered into by the Consultant pursuant to this Agreement. Consultant further acknowledges that in the event of such termination, all work product, which includes but is not limited to all manuals, forms, contracts, schedules, reports, comments and any and all documents produced by Consultant under this Agreement up to the date of termination are the property of the DFCM.

ARTICLE 10. TERMINATION BY DFCM. The performance of service under this Agreement may be terminated by the DFCM in whole or in part at any time, whenever the DFCM shall determine that such termination is in the best interest of the DFCM. This includes any termination by DFCM for convenience or for cause. Any such termination shall be effected by delivery to Consultant of a written notice of termination specifying the extent to which performance of work under this Agreement is terminated and the date upon which such termination becomes effective. The Consultant agrees that in the event of such termination, its total remedy and monetary recovery from the DFCM is limited to full payment for all work properly performed, plus reimbursable, under this Agreement up to date of termination. Consultant further acknowledges that in the event of such termination, all work product, which includes but is not limited to all manuals, forms, contracts, schedules, reports, comments and any and all documents produced by Consultant under this Agreement up to the date of termination are the property of the DFCM.

ARTICLE 11. HOLD HARMLESS REQUIREMENT. To the fullest extent permitted by law, the Consultant hereby agrees to indemnify and save harmless the State of Utah, the Division of Facilities Construction and Management, their officers, agents and employees and anyone for whom DFCM may be held liable from and against any and all claims, damages or liabilities arising from wrongful or negligent acts, errors or omissions of the Consultant, any of Consultant's sub consultants or subcontractors at any tier and anyone for whom Consultant may be liable.

ARTICLE 12. PRELIMINARY RESOLUTION EFFORTS, CLAIMS AND DISPUTES; GENERAL CONDITIONS REQUIREMENTS APPLY.

12.1 **General Conditions Requirements Apply.** The provisions of Articles 7.7 through and including 7.14 of the DFCM General Conditions dated May 25, 2005 and Supplemental General Conditions are on file with the DFCM as well as available on the DFCM website at (and hereby incorporated by reference shall apply to Preliminary Resolution Efforts, Claims and Disputes under this Agreement. References in said Articles 7.7 through and including 7.14 to the term "Contractor" and "Subcontractor" shall refer to the Consultant and Sub consultants or Subcontracts at any tier under this Agreement, respectively. Unless inconsistent with the provisions of this Agreement, definitions in the DFCM General Conditions and Supplemental General Conditions shall apply to this Agreement.

12.2 **Time for Filing.** Notwithstanding paragraph 12.1 above, the PRE must be filed in writing with the DFCM Representative within twenty-one days of any of the following:

1. Issuance of a denial by DFCM of a Consultant request for additional monies or other relief under this Agreement;
2. In the case of a Sub consultant, after the expiration of the time period for the Consultant/ Sub consultant PRE process under Paragraph 7.7.5 of DFCM General Conditions; or
3. When the Consultant knows or should have known about any other issue where the Consultant seeks additional monies, time or other relief from the State of Utah or DFCM.

12.3 **Not Limit DFCM Rights.** As stated in Rule R23-26-1(6), this does not limit the right of DFCM to have any of its issues, disputes or claims considered. DFCM reserves all rights to pursue its issues, disputes or claims in law or equity including, but not limited to, any or all of the following: damages, delay damages and impacts, losses, liability, patent or latent defects, or failure to perform under this Agreement. If the Director appoints an expert or a panel to consider any such issue(s), dispute(s) or claims(s) of DFCM, the Consultant shall cooperate with such expert or panel process.

ARTICLE 13. CONFIDENTIALITY. Subject to State law, including the Governmental Records and Access Management Act, all data contained in documents supplied by the DFCM or by any party under a DFCM contract are to be considered confidential and shall solely be used in connection with the prison relocation project.

ARTICLE 14. STANDARD OF CARE. The services of Consultant and its Sub consultants, if any, shall be performed in accordance with and judged solely by the standard of care exercised by licensed members of their respective professions having substantial experience providing similar services on projects similar in type, magnitude and complexity to the Project that is the subject of this Agreement. The Consultant shall be liable to the DFCM or the State of Utah for claims, liabilities, additional

burdens, penalties, damages or third party claims (i.e. a Contractor claim against DFCM or the State of Utah), to the extent caused by errors or omissions that do not meet this standard of care.

ARTICLE 15. USE OF “SALES AGENTS.” The Consultant warrants that no sales agent has been employed or retained except as indicated in writing to DFCM.

ARTICLE 16. LAWS, CODES AND REGULATIONS. Consultant and its Sub consultants shall use their best efforts consistent with the Standard of Care stated herein to comply with all applicable laws, codes, rules, regulations, ordinances and quality requirements applicable to the Project.

ARTICLE 17. DFCM REVIEWS, LIMITATIONS. The right of the DFCM or any entity/user to perform plan checks, plan reviews, other reviews and/or comment upon the work of the Consultant, as well as any approval by the DFCM, shall not be construed as relieving the Consultant from its professional and legal responsibility for services required under this Agreement. No review by the DFCM or any entity/user, approval or acceptance, or payment for any of the services required under this Agreement shall be construed to operate as a waiver by the DFCM of any right under this Agreement or of any cause of action arising out of the performance or nonperformance of this Agreement, and the Consultant shall be and remain liable to the DFCM in accordance with applicable law for all damages to the DFCM caused by the Consultant's acts, errors and/or omissions.

ARTICLE 18. DISCRIMINATION AND SEXUAL HARASSMENT PROHIBITED. Pursuant to the laws of the State of Utah, the Consultant, or any person acting on behalf thereof, will not discriminate against any employee or applicant for employment because of race, creed, color, sex, religion, ancestry or national origin. To the extent applicable, said persons will comply with all provisions of Executive Order No. 11246 dated September 24, 1965 and rules, regulations, orders, instructions, designations and other directives promulgated pursuant thereto. The Consultant, or anyone for whose act the Consultant may be liable, shall not act in any manner as would violate the laws, regulations and policies of the United States or the State of Utah prohibiting sexual harassment.

ARTICLE 19. PERFORMANCE EVALUATION. DFCM may conduct a performance evaluation of the Consultant's services, including specific personnel of Consultant or any Sub consultant at any time. Results of any evaluation will be made available to the Consultant.

ARTICLE 20. STATUTE OF LIMITATION AND STATUTE OF REPOSE. An action by or against the Consultant, the Consultant's Sub consultant, agent, independent Sub consultant, or anyone for whom the Consultant may be liable, shall comply with and be bound by the applicable and lawful statute of limitation and statute of repose provisions. Notwithstanding this, any action by or against the Consultant, the Consultant's Sub consultant, agent, independent Sub consultant, or anyone for whom the Consultant may be liable, that is based in contract or warranty shall be commenced within six (6) years of the date of substantial completion of the improvement or abandonment of construction except that such period of limitation shall be modified as follows:

20.1 **Fraudulent Concealment.** In the event that the Consultant, the Consultant's Sub consultant, agent, independent Sub consultant, or anyone for whom the Consultant may be liable has fraudulently concealed the act, error, omission or breach of duty, or the injury, damage or other loss caused by the act, error, omission or breach of duty, the six year period shall not begin to run until such time as the DFCM discovers or, through the exercise of reasonable diligence, should have discovered its claim.

20.2 **Willful and Intentional.** In the event that the Consultant, the Consultant's Sub consultant, agent, independent Sub consultant, or anyone for whom the Consultant may be liable commits a willful or intentional act, error, omission, or breach of duty, the six year period shall not begin to run until such time as the DFCM discovers or, through the exercise of reasonable diligence, should have discovered its claim.

20.3 **Unintentional and No fraudulent Latent Acts, Errors, Omissions or Breaches of Duty.** In the event of an unintentional and no fraudulent latent act, error, omission or breach of duty, the DFCM shall have the time period allowed by Utah law and the Utah Code, unless a longer period is provided for in an attachment to this Agreement.

20.4 **"Different Period of Limitation" from Utah Code.** These provisions are understood and agreed to by the Consultant as establishing a "different period of limitations" as that term is used in UCA 78B-2-225(3)(a) or any other similar statute of the Utah Code. These provisions are not intended to shorten any time period allowed by Utah law and code for non-contract actions, including but not limited to, those based in tort.

ARTICLE 21. WAIVERS. No waiver by the DFCM or Consultant of any default shall constitute a waiver of the same default at a later time or of a different default.

ARTICLE 22. APPLICABLE LAW AND VENUE. This Agreement shall be construed in accordance with the laws of the State of Utah. Venue for any legal proceeding regarding this Agreement shall in the Salt Lake County, State of Utah.

ARTICLE 23. AUTHORITY TO EXECUTE. The Consultant and DFCM each represent that the execution of this Agreement and the performance thereunder is within their respective duly authorized powers.

