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## MEMORANDUM

**TO:** Members, Utah State Board of Education

**FROM:** Brad C. Smith  
Chief Executive Officer

**DATE:** August 6-7, 2015

**ACTION:** Understanding of and Potential Use of AIR Funds and SFY 16  
Budget Amendments

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### **Background:**

Continued review of the State Fiscal Year (SFY) 16 budget is necessary.

### **Key Points:**

Proceeds or funds from the line item appropriation for testing (SAGE) and question development were (are) used to fund positions within USOE for SFY 16.

The Finance Committee met in July and reviewed the SAGE appropriation and other items for possible funding from the SFY 16 budget.

### **Anticipated Action:**

The Finance Committee will forward recommendations regarding amendments to the SFY 16 budget for Board approval.

**Contact:** Scott Jones, Associate Superintendent, 801-538-7514

**TO:** Utah State Board of Education

**FROM:** Scott Jones, Associate Superintendent for Business and Operations, Utah State Office of Education

**THRU:** Brad C. Smith, Chief Executive Officer, Utah State Office of Education

**DATE:** August 7, 2015

**SUBJECT:** Increased Funding Request in Current Budget Year (SFY 16) by Utah State Office of Education (USOE) (Budget Amendment)

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The purpose of this request is to obtain a decision by the Utah State Board of Education on whether or not to increase (update) the State Fiscal Year 16 funding for five specific requirements by way of permission to use funding from other, existing programs. These five requirements increase the agency's capability and capacity to meet laws, rules and/or policies on fiscal responsibility, budget formulation, funds control and management, internal controls, federal grant compliance, and indirect cost pool formulation and accuracy, for effective cost management and decision making. These are all identified areas of weakness by recent external and internal audits.

The five requirements are:

- 1) Three Managerial Accounting staff (three additional on-going FTEs) to provide ongoing joint review of internal accounting for USOE Divisions and, if designated, joint review activities with school districts/charter schools
- 2) One Federal Grant Compliance Officer/Director (additional FTE)
- 3) An outside accounting, law, or auditing firm to ensure indirect cost pool reliability and accuracy and to effectively, "set the rates/percentages."
- 4) Two Administrative type assistants. One for the Internal Auditors section and one for the School Finance section.
- 5) One Division Director for the newly established Student Services section.

**Funding Requirements:**

**The total funding required is: \$910,000.00.**

1) The amount of funding required for the three Managerial Accounting Staff is: **\$400,000.00** (\$132,800 X 3 then rounded).

2) The amount of funding required for the one Federal Grant Compliance Officer/Director is: **\$180,000.00.**

3) The required amount of funding for the indirect cost pool establishment and validation is: **\$50,000.00.** 250 hours is required by a Subject Matter Expert to validate that the indirect cost pool is accurate and reliable. Market analysis is a rate of \$200 per hour. ( $\$200 \times 250$  (hours))=**\$50,000.00.** *This is one time funding.*

4) The required amount of funding for the two Administrative Type Assistants is: **\$120,000.00**

5) The required amount of funding for the Student Services Director is: **\$160,000.00**

**TOTAL: \$910,000.00**

**Expected Deliverables/Outcomes:**

For requirement #1 (Additional FTEs-Three Managerial Accountants)

The expected outcome of increased staff specifically for managerial accounting duties and joint reviews with internal accountants and districts if necessary is that all commitments, obligations, orders, earnings, disbursements, collections, accounts payable and accounts receivable are properly recorded, in an active status and the amounts reported are correct and in agreement with substantiating documents. Substantiating documents are available for audit requirement and are in good order, and properly support transactions recorded in the accounting system. These positions report directly to the Associate Superintendent for Business and Operations.

For requirement #2 (Additional FTEs-One Federal Grant Compliance Director)

Under the direct supervision of the Associate Superintendent for Business and Operations, monitors the agency and school district compliance with general and specific grant requirements contained in the various Federal, State, and local grants awarded to the agency. Interprets regulations and policies for the USOE sections and School Districts; monitors funded projects to prevent over-expenditure of funds, audits disallowance, and ensures awards are fully expended; and performs related duties as assigned.

For requirement #3 (Indirect Cost Pool training and validation)

Qualified third party Subject Matter Expert (SME) training on how to establish an indirect cost pool. Validation that the indirect cost pool calculations and percentages are accurate and reliable and comply with Federal requirements.

For requirement #4 (Administrative Assistants)

Workload increases in both the Internal Auditor and School Finance sections necessitate increased manpower to assist both Directors in the performance of Administrative duties. The additional FTEs will assist these respective Section Directors in meeting their workload commitments.

For requirement #5 (Student Services Director)

The newly established Student Services section requires an Educational Director to lead select staff in the delivery of services. The Student Services section is designed to assist in Student Achievement and School Success.

Finance Committee members directed an internal review of vacant positions as potential funding sources for these requirements. The USOE Superintendents met and discussed this option and arrived at the recommendation that all of these requirements except for the outside review, analysis, and compliance of the Indirect Cost Pool are sourced from the AIR funds this SFY (16). All USOE Superintendents acknowledge the below potential risk of using this funding this SFY. There were very few vacant positions that are funded with state funds to use as an alternative to the use of the AIR funds. The vacant positions funded by state funds are also Mission Critical to the respective USOE sections.

The information that analysis was done on the potential use of vacant position and that they are not viable sources of funding for these requirements was presented to the Finance Committee members on July 9, 2015.

#### **Decision Points:**

Further discussion and analysis by the Finance Committee and USOE Associate Superintendent for Business and Operations at the July 9, 2015 meeting led to the following Decision Points for Board Review and Action:

- 1) The \$50,000.00 requirement for the outside review, analysis, and compliance statement of the Indirect Cost Pool formulation and application is funded by using risk-mitigation funds. The funds are on-going but this requirement is a *one-time only requirement*.
- 2) The remaining requirements for the amount of **\$860,000.00** is funded using current State Appropriations from HB 15 (2012 legislative session) that were allotted originally for CRT testing but then evolved into the current SAGE testing programs/processes. This will effectively reduce the SFY 16 appropriation of \$6.7M by the required **\$860,000.00** for these positions.

3) If approved by the Board USOE will seek Increased Funding for SFY 17 and beyond for all of these positions as on-going.

**Risks:**

There is risk that the legislature will not approve on-going funding for some or all of these beginning in SFY 17. Therefore, it is essential that Board Members are aware of this risk associated with a decision to use the AIR appropriation this SFY. If on-going funding is not approved for some or all of these positions beginning in SFY 17 other decisions are necessary at that time. We may have to determine what source of one-time funding we will use to continue funding the positions in SFY 17 or, in the worst case, conduct a Reduction In force (RIF) of the positions.

Conversely, there is risk that if the Board Members do not approve the use of the AIR contract funds for hiring of these positions in SFY 16 (current budget year) identified detrimental issues to our fiscal position by both external and internal Auditors will continue. For example, not hiring the three Managerial Accountants this SFY and the Federal Grants Compliance Officer deters and delays USOE from taking recommended actions to ensure reliability in its reporting of Status of Funds in the near term. USOE simply lacks the manpower to resolve all of the issues identified by the audits. Not funding these positions makes achieving proper funds control and management in the near term (SFY 16) virtually impossible then. Not having these capabilities may also impact the ability for the agency to convert or transition towards FINET.

Not funding the two Administrative type assistant positions reduces the capacities and capabilities of the Internal Audit and School Finance Divisions to sustain or increase the levels of expected output. Not funding the Student Services Director position further delays that section's ability to become Fully Operational (FO) further delaying the expected deliverables of the section.

There is risk that the use of the AIR funds to meet the \$860,000.00 requirement this SFY will reduce the ability of the Assessments section to meet its requirements. It is recommended that Board Members receive input from the Assessments Section Director and Associate Superintendent Nye prior to making a decision on whether or not to use their funds for these purposes this SFY (16).

Please direct questions to Associate Superintendent Scott Jones at 801-538-7415 or [scott.jones@schools.utah.gov](mailto:scott.jones@schools.utah.gov)

**2016 Current Vacant Positions**

Position Title	Curr Bdgt/Bene	Salary	Vacancy	Div	Funding	Director	FTE
<b>Instructional Services Teaching and Learning</b>							
Contract Grant Analyst I	\$82,927.37	\$39,090.40	23 mos	0661	State	Diana Suddreth	Reclassification from Office Spec II (Previously Jamie Ney) will be filled on July 20th with Noralee Gree
Education Specialist	\$54,009.13	\$28,346.30	5 mos	0661	FML	Diana Suddreth	40%
Education Specialist	\$131,953.90	\$70,865.76	4 mos	0661	State	Diana Suddreth	100%
<b>Licensing Non-Fee</b>							
Program Specialist I	\$65,846.88	\$36,433.72		0666	State	Diana Suddreth	100%
<b>Licensing Fee</b>							
Education Specialist	\$131,953.90	\$70,865.76	12 mos	0667	Fees	Travis Rawlings	100%
Office Specialist II	\$67,650.49	\$31,083.68	.5 mo	0667	Fees	Travis Rawlings	100%
<b>Career Technical and Adult Education</b>							
Education Specialist	\$149,909.97	\$80,633.12	3.3 mos	0662	Fed Adult Ed	Thalea Longhurst	89% Hired Stephanie Patton to begin working on August 3, 2015.
Education Specialist				0662	Fed Carl Perkins	Thalea Longhurst	11% replacing Brian Olmstead that was promoted to Coordinator
<b>Child Nutrition Program</b>							
Currently has no vacancies.				2501/2502			
<b>Assessment &amp; Accountability</b>							
Education Specialist	\$130,661.29	\$74,491.84		0760	Federal	JoEllen Shaeffer	100% Will be Julie Benson's position after she moves into Kurt Farnsworth position which will be Educational Coordinator
<b>Charter School Board</b>							
Financial Manager II	\$121,930.23	\$62,880.00	2 mos	2701	State	Marlies Burns	100% interviews next week
Training Coordinator	\$139,112.10	\$73,360.00		2701	State	Marlies Burns	100% new position not yet posted
<b>Title I</b>							
Administrative Secretary	\$75,222.98	\$37,728.00	2 mos	0668	Federal	Ann White	100% Jacqueline Perkins will start working in this position 7/14/15
<b>SPED</b>							
Educational Coordinator w/Doctorate	\$140,597.82	\$82,687.20	7 mos	0780	Federal	Glenna Gallo	100% Not sure is they are filling this position - checking with Glenna
Office Specialist II	\$49,092.59	\$28,924.80	1 mo	0780	Federal	Glenna Gallo	100% P2 approved by Supt. Smith 6/18/15
<b>Indirect Cost Pool</b>							
Financial Analyst III	\$70,940.81	\$39,614.40	3 weeks	0102		Brian Ipson	100% position filled, Margaret Lautaimi will start 7/20/2015
<b>Board</b>							
Currently has no vacancies				0221			
<b>Information Technology</b>							
Currently has no vacancies				0443			

\$1,411,809.46

**\$541,770.48**

School Finance Vacancy will be filled by Brian Ipson who will be replaced by Janica Gines on July 20.

Noralee Green is currently in Assessment and will be moving to Teaching and Learning, her current position is expected to be filled.

**Funding of Adaptive Assessment:**

There have always been two funding streams for this assessment.

\$6.7 M was appropriated from the state legislature, this is an annual appropriation for SAGE assessment.

We also receive \$4.7 M Federal (approx.) each year for that used for this assessment and other assessments. These federal dollars were previously used to pay for the CRTs. When the CRTs were replaced by the computer adaptive assessment, the funding was shifted from CRTs to SAGE. The original AIR contract did not require the use of all of the combined state and federal funds so there was funding available for the needed amendments during the five year contract. These amendments were anticipated for test development and technology enhancements. Federal funding also pays for the other contracts such as WIDA, Utah Compose, U-Tips, K-3, salaries of development staff and other assessment costs.

2011-12 \$6.7 M Legislature

2012-13 \$6.7 M Legislature

2013-14 \$6.7 M Legislature \$1,985,301 State additional funding

2014-15 \$6.7 M Legislature \$3,918,444 Federal added to SAGE contract

School Year	Invoice Number	Invoice Amount	SAGE License Fee Offset	Net Invoice Paid by Utah
2012-2013	03358-001	\$ 1,376,686.00	\$ -	\$ 1,376,686.00
2012-2013	03358-002	\$ 2,583,438.00	\$ -	\$ 2,583,438.00
2012-2013	03358-003	\$ 2,718,843.00	\$ -	\$ 2,718,843.00
2013-2014	03358-004	\$ 464,581.00	\$ -	\$ 464,581.00
2013-2014	03358-005	\$ 1,321,980.00	\$ -	\$ 1,321,980.00
2013-2014	03358-006	\$ 1,399,491.00	\$ -	\$ 1,399,491.00
2013-2014	03358-007	\$ 4,962,045.00	\$ -	\$ 4,962,045.00
2013-2014	03358-008	\$ 3,392,235.00	\$ -	\$ 3,392,235.00
2013-2014	03358-012	\$ 270,000.00	\$ -	\$ 270,000.00
2013-2014	03358-013	\$ 25,000.00	\$ -	\$ 25,000.00
2014-2015	03358-009	\$ 1,970,844.00	\$ -	\$ 1,970,844.00
2014-2015	03358-010	\$ 1,305,734.00	\$ -	\$ 1,305,734.00
2014-2015	03358-011	\$ 3,535,724.00	\$ 3,535,724.00	\$ -
2014-2015	03358-014	\$ 3,111,811.00	\$ 3,111,811.00	\$ -
2014-2015	03358-015*	\$ 958,504.00	\$ 423,952.50	\$ 534,551.50
		\$ 29,396,916.00	\$ 7,071,487.50	\$ 22,325,428.50

\*Invoice 03358-015 not yet paid

**To: State Board of Education**

**From: Christopher A. Lacombe, Assistant Attorney General**

**Subj: Contract between State of Utah and American Institute for Research**

**Date: May 15, 2015**

**A. Introduction**

In December 2012, the State of Utah and American Institute for Research (“AIR”) entered a \$39,303,646 contract, over a 5 year period, to develop, as mandated by Utah’s Legislature, the Utah Statewide Computer Adaptive Assessment. Since the adoption of the original AIR contract, this contract has been amended three times which has increased the contract amount to \$47,272,504. Furthermore, since June 2014, Utah and AIR have executed three License Agreements to allow Florida, Arizona and Tennessee use Utah’s SAGE Test Items for a License Fee which is projected to be as high as \$9,963,000 per year.

At the May 2015 meeting, the State Board of Education (“Board”) did not approve a fourth proposed amendment to the AIR contract. Furthermore, substantial discussion ensued regarding: 1) AIR payments of Utah educators to prepare SAGE Test Items; and 2) Use of the Proceeds Derived from the License Agreements.

Prior to this meeting, Counsel were requested to provide an analysis of the following legal issues with the AIR contract. Those legal issues were: a) The impact of the incorporation by reference into the 10 page AIR contract of AIR’s 365-page proposal; b) the AIR contract’s compliance with federal and state student privacy laws such as FERPA; and c) suggested revisions for the Board to consider in future amendments to the AIR contract.

At the conclusion of the Board May 2015 meeting discussion on the AIR contract, the contract was going to be distributed to Board members for review. Attached to this memorandum are the 10-page AIR contract and the August 2013, March 2014 and July 2014 amendments. Given the length of both the RFP Solicitation (77-pages) and the AIR proposal (365-pages), they have not been attached to this memorandum. However, they are available on the USOE website.

This memorandum provides the background information and legal analysis on the AIR contract, the three amendments, and the License Agreement. This information and legal analysis is presented in the following manner:

- A. Legislative Background and Chronology of AIR Contract
- B. The Terms of the Original AIR Contract
  - 1. AIR’s 365-page proposal has been incorporated by referenced into the 10 page contract.
  - 2. The Other Contract Provisions Identifying AIR’s Contractual Obligations under Section V of Its Proposal.
    - a. Return and Destruction of Items and Data
    - b. Timetables
    - c. Quality Assurance Requirements
    - d. Program Management Requirements
    - e. Technical Manuals
    - f. Contract Finalization or Transition from AIR to USOE

- C. License Agreements with AIR for Tennessee, Arizona and Florida to use of SAGE Assessment Items.
- D. The AIR Contract’s Compliance with the Family Educational Privacy Rights and the privacy Principles Set Forth in Utah Code Ann. §53A-1-710 (3) (e)
- E. AIR’s Contractual Right to Recruit and Compensate Utah Educators for Their Services in Developing Items for Utah’s Assessment.
- F. Suggested Revisions or Amendments to the AIR contract.

**B. Legislative Background and Chronology of AIR Contract**

During the 2012 Legislative session, HB 15 was approved which amended Utah Code Ann. §53A-1-603 and Utah Code Ann. §53A-1-611. This statute provides that “beginning with the 2014-15 school year, the State Board of Education shall annual require each school district and charter school. . . to administer a computer adaptive assessment system that adopted by the State Board of Education; and aligned with Utah’s Common Core. Furthermore, HB 15 authorized an initial appropriation of \$6.7 million dollars for this assessment system.

On August 20, 2012, the State of Utah published Utah RFP Solicitation PR13015, a 77-page document, entitled Utah Statewide Computer Adaptive Assessment System. On September 30, 2012, American Institute for Research (“AIR”) submitted a 365-page solicitation proposal, in response to Utah’s RFP, to develop the Utah Statewide Computer Adaptive Assessment System.

On December 21, 2012, the State of Utah and AIR entered a State of Utah Contract for the development and administration of the Utah Statewide Computer Adaptive Assessment. This contract’s period was from February 1, 2013 until January 31, 2018. The contract amount was \$39,303,646. Since the execution of this AIR contract, it has been amended three times. The date, amount and nature of these contract amendments are as follows:

<b>Amendment #</b>	<b>Date</b>	<b>Amount</b>	<b>Nature of Amendment</b>
<b>Original Contract</b>	December 12, 2012	\$39,303,646	N.A.
<b>#1</b>	August 15, 2013	\$ 706, 947	*Braille Translation *February 2014 early testing. *Early release of secure browser.
<b>#2</b>	March 2014	\$ 0	Data Security and Privacy Language
<b>#3</b>	July 2014	\$ 7.261,911	*Sign Language Translation *Development of Stimuli Translation *Human validation of 20% of machine scored writing items. *Addition of Lexiles (metric for measuring reading ability) *Item Development
<b>Total</b>		<b>\$47,272,504</b>	

**C. The Terms of the Original AIR Contract**

**1. AIR’s 365 page proposal has been incorporated by referenced into the 10-page contract.**

The Original AIR Contract is 10 pages in length. However, this contract incorporates by reference the following documents: “Utah RFP Solicitation PR13015 and CONTRACTOR’S response thereto dated 09/30/2012.” The RFP Solicitation is 77 pages and the Contractor’s response or “proposal” is 365-pages. Furthermore, paragraph 28 of the contract states, in part, as follows: “Entire Agreement: This

agreement, including all attachments, and documents incorporated hereunder, and the related State Solicitation constitutes the entire agreement between the parties with respect to the subject matter, and supersedes any and all other prior and contemporaneous agreements and understandings between the parties, where oral or written.”

The legal effect of both this incorporation by reference language and paragraph 28 merger clause is that the 365 page AIR proposal is part of the contract.

**2. The Other Contract Provisions Identifying AIR’s Contractual Obligations under Section V of Its Proposal.**

Most of the AIR 365-page proposal attempts to inform and educate Utah officials regarding its proposal and is not presented in terms of contractual responsibilities or obligations. However, Section V, which is 45 pages in length, is entitled “Other Contract Provisions”. In this section, it addresses contractual provisions in six different areas which are as follows: 1) Return and Destruction of Items and Data; 2) Timetables; 3) Quality Assurance; 4) Project Management; 5) Technical Manuals; and 6) Contract Finalization Plan.

**A. Return and Destruction of Items and Data**

In its proposal, “AIR acknowledges that any test items developed under this contract or transferred to us or existing in Utah’s test item banks are and will remain the exclusive property of the State of Utah and may not be used for any other purposes (except by express written permission from USOE). [AIR] will deliver the full item bank in the agreed-upon format at the conclusion of the contract and annually at USOE request. AIR will purge [its] systems of any Utah-owned items, including those developed under this contract, at the conclusion of the contract.” **(Proposal-p. IV-1)**

**B. Timetables (P. at IV-3 to IV-4)**

In its proposal, AIR states the following: “AIR will deliver the testing system as specified on the desired timelines.” The items in the “Goals” column identify the performance objectives and time deadlines for AIR throughout the course of the contract.

Phase	Academic Year	Payment	Goals
1	Year 1-Award to August 2013	\$ 6,678,967	<ul style="list-style-type: none"> <li>*Import and align all existing USOE items by April 2013.</li> <li>*Identify and incorporate all items shared by other states under the proposed item sharing agreement by May 2013.</li> <li>*Develop approximately 4,000 new items by July 2013.</li> <li>*Ensure all new items are reviewed and approved by the USOE and committees during summer 2013, when teachers are available.</li> </ul>
1	Year 2-September 2013 to August 2014	\$10,467,400	<ul style="list-style-type: none"> <li>*Launch the Learning Point Navigator Formative Assessment system with UTIPS aligned items and AIR resources by September 1, 2013</li> <li>*Deploy the interim/summative testing system by February 2014, including delivering training</li> <li>*Conduct the operational interim/summative field test in spring 2014, with the final dates to be mutually agreed by USOE and AIR to meet reporting requirements</li> <li>*Complete all scoring, standard setting, and reporting activities to allow for accountability reporting based on spring 2014 operational field test.</li> <li>*Incorporate approximately 1,350 new and shared items for embedded field-testing and ensure all items are reviewed and approved by USOE and committees by August 30.</li> </ul>

Phase	Academic Year	Payment	Goals
2	Year 3-September 2014 to August 2015	\$7,349,683	*Operational formative, interim, and summative testing, with immediate reporting. *Complete all scoring, standard setting, and reporting activities to allow for accountability reporting based on spring 2014 operational field test. *Incorporate approximately 1,350 new and shared items for embedded field-testing and ensure all items are reviewed and approved by USOE and committees by August 30
2	Year 4-September 2015 to August 2016	\$7,276,826	*Operational . . . testing, with immediate reporting *Complete all scoring, standard setting, and reporting activities to allow for accountability reporting based on 2014 field test. *Incorporate approximately 1,350 new and shared items for embedded field-testing and ensure all items are reviewed and approved by USOE and committees by August 30
2	Year 5-September 2016 to August 2017	\$7,530,770	*Operational formative, interim, and summative testing, with immediate reporting *Complete all scoring, standard setting, and reporting activities to allow for accountability reporting based on spring 2014 Operational field test. *Incorporate approximately 1,350 new and shares items for embedded field-testing and ensure all items are reviewed and approved by USOE and committees by August 30

### C. Quality Assurance Requirements (P. IV-7 to IV-14)

In its proposal, AIR states: “Quality assurance processes are integrated into everything that we do, and many of them are described in detail in the description of our plan to complete the work above. Here, we summarize the quality assurance processes that will ensure error-free operation for Utah.”

No.	Quality Assurance Area	Actions to Ensure Quality Assurance
1	Keys and scoring rubrics for the items	Several content experts review items, their keys, and machine-scored rubrics before publication.
2	Display of items	The final review before deployment includes web approval, which requires that the item be viewed as it will appear to the student.
3	Pre-deployment testing of the performance of the adaptive engine	We engage in a robust simulation process prior to the deployment of any test. During that process, we tune the parameters of the adaptive algorithm to optimize the performance of the engine for the particular item bank and blueprint.
4	Checks during configuration and deployment	The developers’ configuration tool can also detect and highlight any differences between the configuration that they are building and any past configuration— a capability that helps us ensure that all the necessary revisions are made and no accidental revisions are made.
5	Continuous monitoring of the performance of the adaptive engine	Tests administered online are monitored in real time by our Quality Monitor (QM) system. Each completed test runs through QM as soon as the test is complete, where a variety of quality checks is conducted.
6	Human scoring	The entire scoring process is managed by DRC’s electronic scoring system, which implements many programmatic controls to ensure that each item is double scored and discrepancies are appropriately resolved

**D. Program Management Requirements (P. IV-15 to IV-41)**

In its proposal, AIR states, with regards to project management, that “in working with USOE to manage the day-to-day operations of the program, AIR will adhere to the principles set forth by the National Council on Measurement in Education in the Code of Professional Responsibilities in Educational Measurement and will work with USOE.” Furthermore, AIR states that it understands that adhering to [these] standard processes and documentation is critical to the program’s successful operation.” In its proposal AIR sets forth the six following project management area and identifies the project management actions they will undertake.

No.	Project Management Area	Project Management Actions
1	Project Management (p. IV-18)	The Project Management team is responsible for orchestrating these resources to deliver and report on multiple assessments.
2	Computer and Statistical Sciences Center (CSSC) (p. IV-19)	CSSC is responsible for both our software infrastructure and our soft- ware products. CSSC takes as its mission the development of innovative products and systems that will keep AIR’s Assessment Program at the forefront of our field. It is organized into groups supporting families of software systems: 1) Preproduction Systems; 2) Test Delivery and Reporting; and 3) Data Analysis.
3	Psychometrics and Statistics (p. IV-20-22)	AIR’s Assessment Program offers psychometric and statistical services that stand alone in terms of quality and innovation. The integration of psychometrics with statistics and sampling sets AIR apart from the competition. The Psychometrics and Statistics team is responsible for the following tasks: <ul style="list-style-type: none"> <li>-Sample design</li> <li>-Field-test design</li> <li>-Item analysis</li> <li>-Analysis of differential item f</li> <li>-Calibration,</li> <li>-Parallel form equating and vertical linking</li> <li>-Design and implementation of standard- setting sessions</li> <li>-Design and implementation of special studies,</li> <li>-Randomized field trials</li> <li>-Cross-form reliability studies</li> <li>-Program and initiative evaluations</li> </ul>
4	Test Development Operations	Our test development staff has been developing and aligning existing items to Common Core State Standards. . . AIR Test Development staff are responsible for the following tasks: <ul style="list-style-type: none"> <li>-Framework development</li> <li>-Test blueprint and item specification development</li> <li>-Item development and review</li> <li>-Development and review of scoring rubric</li> <li>-Curricular content development</li> <li>-Development of supporting materials for item release</li> <li>-Client committee support and liaison with range finding</li> </ul>
5	Scoring Online Testing Systems (p. IV-22)	The AIR Operations and Scoring team includes seven full-time and more than 200 part-time professionals and is responsible for warehousing, distributing, collecting, security processing, scanning, editing, performance scoring, and preparing data files.
6	Online Reporting (p. IV-23)	AIR goes beyond simply reporting scores and other numbers to provide deep analyses of the data, reported in a way that is clear, appealing, and actionable.

**E. Technical Manuals (P. IV-41 to IV-44)**

In its proposal, AIR states: “it will produce a technical manual for the Utah statewide assessments that consists of five volumes. . . [and . . . USOE and its Technical Advisory Committee will review the annual technical manual prior to publication. . .” The technical manuals provided are as follows:

<b>Volume</b>	<b>Title of Manual</b>	<b>Explanation</b>
1	Annual Technical Report	The annual technical report will provide the basic information on the technical aspects of the Utah adaptive assessment program,
2	Test Development	This volume documents the procedures used to create the test and validate its alignment to the standards.
3	Test Administration	This is a standard setting volume which is created only once.
4	Evidence of Reliability and Validity	This will include reliability measures, content validity measures, alignment of test with Core Standards, etc.
5	Summary of Test Administration Procedures	This will include score reports, subgroup reporting and interpretation of reported scores.

**F. Contract Finalization or Transition from AIR to USOE (P. IV-45 to IV-46)**

In its proposal, AIR states: “the successful transition of a testing program entails transferring all required data, products, knowledge, and other state-owned assets. The transfer must be complete and correct, ensure that the tests remain accurately equated over time, and avoid disruption of services or support during the transition period.” The transition services provided are as follows:

<b>No</b>	<b>Transition Principles</b>	<b>Obligations</b>
1	Transition Specification and Meetings	*Initial Planning Meeting *Vendor Meeting *Transition Meetings
2	Delivery of Materials and Knowledge	-Preparation of Transition Specification Document to guide the transition, keep track of progress, and plan for contingencies around what may or may not be available. -transition plan and final report,-return and/or purge data from our systems

**G. Other AIR Responsibilities**

In its proposal, under the Program Management Section, AIR sets forth a number of communications and project coordination responsibilities it has under the contract.

<b>No.</b>	<b>Responsibilities</b>	<b>Comment</b>
1	Develop Communications Plan (P. IV-26)	Upon award of the contract, AIR will work with USOE. . . to develop a Communications Plan that specifies: *who needs to receive specific information; *when that information needs to be communicated (on a specific date or at regular intervals); *the person responsible for communicating the information; *the method used to communicate the information the processes for documentation that the information has been communicated and sign-offs have been received;
2	Production of Management Documents (P. IV-26-33)	*Schedules, *Planning Documents Tracking Documents Specification Documents
<b>No.</b>	<b>Responsibilities</b>	<b>Comment</b>
3	Weekly Meetings (P.IV-34)	*AIR will host the weekly USOE–AIR program update conference calls to discuss the period’s progress and to identify upcoming deadlines.
4	Weekly Status Reports on Key Deliverables	*Led by the project director, AIR will host the weekly USOE–AIR program update conference calls to discuss the period’s progress and to identify upcoming deadlines and possible challenges. *AIR will provide weekly status reports tracking progress against key deliverables.
5	Kickoff Meeting and Annual Planning Meeting	Although the RFP refers to a single kickoff meeting, AIR anticipates a few initial meetings in the early stages of the project to successfully transition to and launch the new assessment system. *Initial Planning Meeting *Vendor Meeting *Transition Meeting
6	Providing of Quarterly Invoicing (P. IV-40)	AIR will provide quarterly invoices (or more frequently as directed) for services rendered coinciding with USOE’s fiscal year, which ends June 30, reflecting the budget presented in the proposal and finalized at contract signing. Invoices will itemize the work completed.
7	Workshop Management (P. IV-40)	AIR will be responsible for meeting space, materials, and associated cost requirements for workshops, conferences, and district meetings requested by USOE in the RFP. AIR staff will manage the committee meetings, training sessions, outreach, and project meetings over the length of the contract.

**D. License Agreements with AIR for Tennessee, Arizona and Florida to Have Use of SAGE Assessment Items.**

Three License Agreements have been executed with AIR to “include two subject areas from the SAGE Assessment Items in the Florida, Arizona and Tennessee tests.” In these License Agreements, the Board grants AIR “a limited, non-exclusive, non-assignable, non-transferrable license to include two subject area from the SAGE Assessment items” in these three states’ tests. Under these License Agreements, AIR pays the Board an annual license fee which is “calculated by multiplying the number of Subject Areas included in the [each respective states] Test by \$1.50 (i.e. number of students x number of Subject Areas x \$1.50)” In the chart below, the “Projected First Year License Fee” column’s data has been extracted from the respective license agreements. However, this amount may not continue for the duration of these License Agreements because AIR, while it expects continued use of the SAGE items, it cannot guarantee their use to the extent projected in the first year.

State	License Agreement Date	License Agreement Term	Projected First Year License Fee	Projected Number of Students Taking Test in First Year
Florida	June 4, 2014	6/1/2014-6/30/2017	\$5,400,000	1,800,000
Arizona	Nov. 6, 2014	6/1/2014-6/30/2017	\$2,223,000	741,000
Tennessee	Nov. 6, 2014	6/1/2015-6/30/2017	\$2,340,000	780,000

In the case of both Florida and Arizona, “the Fee for the 2014-2015 school year is due and payable on or before June 30, 2015.” As for Tennessee, the fee won’t be due until June 30, 2016. Lastly, under the License Agreement, AIR may “offset the Fee on a dollar-per-dollar basis against amounts owed by the Board to AIR under the original [AIR] contract.”

Under the original AIR contract, the Board is obligated to pay AIR the amount of \$7,349.689 for services during 2014-15 school year. The projected amount due and owing to the Board, under the Florida and Arizona License Agreements is \$7,623,000.

**E. The AIR Contract’s Compliance with the Family Educational Privacy Rights and the privacy Principles Set Forth in Utah Code Ann. §53A-1-710 (3) (e)**

The contract provision which most clearly specifies USOE’s student privacy and security expectation and the measures AIR will take to safeguard an protect student level data are set forth in Contract Amendment #2 which states as follows:

“Data Security

AIR shall protect all student level data in a manner that does not permit personal identification of students by anyone except those bound by this agreement and the USOE. AIR shall safeguard, protect, and maintain the confidentiality of any student level data of any kind which come into its possession in the performance of services under this agreement. AIR shall not disclose or re-disclose any such data without prior authorization from USOE, the parent or eligible student. AIR shall comply with FERPA and all other applicable state or federal privacy laws, and shall maintain any and all personally identifiable information in a manner consistent with such laws. At USOE’s option, AIR shall return or securely destroy any such data upon the earlier of either the expiration of the termination of the contract. “

USBE’s release of this type of student level data to AIR is authorized by the Family Education Rights and Privacy Act. 34 CFR §99.31 states “an educational agency may disclose personally identifiable information from an education record of a student, without the consent required by §99.30 if

the disclosure . . . is to organizations conducting studies, for, or on behalf of, educational agencies or institutions to: develop, validate or administer predictive tests . . .”

However, FERPA requires that when such a disclosure is made to develop, validate or administer predictive tests, that USOE must “enter into a written agreement with [AIR] that

- (1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;
- (2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;
- (3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and
- (4) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

In reviewing Amendment #2, it is part of a contract whose purpose is to provide Utah Statewide Computer Adaptive Assessment System and related services from February 1, 2013 until January 31, 2018. Furthermore, Amendment #2 prohibits the disclosure of personally identifiable information “except [to] those bound by this agreement and the USOE” is compliant with subsection (2). In addition, Amendment #2 requirement that “AIR shall safeguard, protect and maintain the confidentiality of any services under the agreement is compliant with subsection (c). Lastly, Amendment #2’s requirement that “AIR shall return or securely destroy any such data upon the earlier of either the expiration or termination of this contract is compliant with subsection (4).

Amendment #2’s express terms are also consistent with 34 CFR §99.33 (1) : “an educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. Amendment #2’s expressly states that that “AIR shall not disclose or re-disclose any such data without prior authorization from USOE, the parent, or eligible student.

Besides parent and student privacy protections under FERPA, Utah recently enacted Utah Code Ann. §53A-1-710 which requires the State Board of Education to “develop a funding proposal and make recommendation to the Legislature on how the board and the Legislature can update student privacy in statute and board rule. The statute require to Board to consider the following issues as it develops this funding proposal and recommendations: “how to manage a contract with a third party service provider to ensure that a contract entered into between an education entity and third party provider includes:

- (i) Provisions requiring the specific provisions on the use of student data;
- (ii) Specific dates governing the destruction of student of student data given to a third party service provider;
- (iii) Provision that prohibit a third party service provider from using personally identifiable information for a secondary use, including sales, marketing, or advertising;

- (iv) Provisions limiting a third party service provider's use of student data strictly for the purpose of providing service to the educational entity; and
- (v) Provisions requiring a third party service provider to maintain, secure and safeguard all student data by using industry best practices to maintain, secure and safeguard the student data;

While this statute, is in its infancy, Amendment #2 seems to incorporate most of the principles set forth in Utah Code Ann. §53A-1-710 (3) (e), Amendment #2 limits the date of the use of the records until the expiration of the contract which is January 31, 2018. (Subsection (ii)). Furthermore, this amendment, in prohibiting the disclosure or re-disclosure of such data without prior authorization from USOE, the parent or eligible student, seems to comply with the requirements of subsection (iii). In addition, the requirement that AIR shall safeguard, protect and maintain the confidentiality of any student level data of any kind which come into its possession in the performance of services under this agreement" is compliant with the principles set forth in subsections (i) and (iv). Amendment #2 does not include provision that AIR "maintain, secure and safeguard all student data by using industry best practices to maintain, secure and safeguard the student data" (Subsection v) However, in AIR's proposal, under Section I.C.4.b in discussing : 1) System Security; 2) Physical Security; 3) Network Security and 4) Software Security, AIR represents that its security "system adheres to strict, industry- standard security procedures" See p. I-96.

In conclusion, the security and privacy language in the AIR Contract, particularly Amendment #2 appears compliant with the provisions of the Family Employment Rights Procedure Act. Furthermore, the AIR Contract's language appears consistent with the principles espoused by Utah's legislature in recently enacted Utah Code Ann. §53A-1-710 (3) (e). It should be noted that while the AIR contract period is February 1, 2013 until January 1, 2018, that Amendment #2, which articulate Data Security, was not enacted until March 2014 which was more than one year into the contract term. Furthermore, while Amendment # 2 is sufficient to set forth privacy and security requirement, the language in the provision could be improved greatly.

**F. AIR's Contractual Right to Recruit and Compensate Utah Educators for Their Services in Developing Items for Utah's Assessment.**

Concern has been raised regarding AIR's recruitment and payments to Utah educator to develop items (test questions) for the Utah Statewide Computer Adaptive Assessment.

Utah RFP Solicitation PR 13015, which is incorporated into the contract, required AIR as part of its bid proposal to, as part of its proposed plan for "System Functionality" to "specify the sources of item (e.g. released or retired summative, teacher created, vendor provided)" RFP at p. 40.

The RFP stated, with respect to the use of new items developed for this proposal, the offeror "shall provide a detailed description of the item development process it will employ to develop new items, including at least the following information: . . . criteria and recruitment process for item writers and content reviewers. USOE values the inclusion of the Utah teacher in the item development process, but does not require items to be written by Utah teachers." RFP at p. 37.

In AIR's proposal, Section II.B.2 addresses "Item Development and Procurement". In the proposal, AIR represents that it will develop newly developed items for the Utah Assessment. P. II-56. In the writer recruitment and selection section, AIR states that it will "recruit external item writers from our current pool of experienced writers, as well as Utah educators." It further represents that AIR's "objective is to recruit Utah educators because of the breadth of their core knowledge of the Utah Core Standards and their genuine interest in the Utah summative and interim assessments." P. II-58.

In Amendment #3 to the AIR contract, AIR represented that the original cost associated with Item Development was \$2,009,303. This original cost projects a total of 1,350 teacher-drafted items. Amendment #3 increased this Item Development cost by \$301,238 to \$2,310,541. It would appear that approximately \$1,318,517 of the \$2,310,541 was allocated for creating 54 passages, 45 listening stimuli and 1,350 teacher drafted items. Amendment #3 at p. 10.

The Board, while paying this amount to AIR, has as part of its contract terms an acknowledgement by AIR “that any test items developed under this contract or transferred to us during or existing in Utah’s test item banks are and will remain the exclusive property of the State of Utah . . . (P. IV-11)

Given that AIR proposal dated September 30, 2012 is incorporated by reference into the contract, AIR’s use of Utah educators to develop test items is authorized because AIR expressly stated that “its objective is to recruit Utah educators” as item writers. Furthermore, the proposed budget appended to it proposal includes a line item for Item Development. Finally, under this contract, following the July 2014 amendment, \$1,318,517 is allocated for development of reading passages, listening stimuli and test items. *A simple calculation of this budget amount reflects that approximately \$1,263 per reading passage, \$2,338 per listening stimuli and \$848 per teacher drafted item is projected respectively.*

#### **G. Recommended Amendments to the AIR Contract**

Paragraph 11 of the AIR Contract addresses contract modification. In this section, it states that: “this contract may be amended, modified, or supplemented only by written amendment to the contract, executed by authorized persons of the parties hereto, and attached to the original signed copy of the contract.” Thus, in order to amend the contract, the amended provision will need to be in writing and signed by both parties. Taking into account this provision the following contract modifications, or revisions to the contract formation process, are suggested:

- 1. The Incorporation by Reference Provision in paragraph 7 is not effective in identifying the legal responsibilities or duties of either AIR or the State of Utah. In the future a separate attachment should be provided which clearly identifies both AIR and the State of Utah’s contractual duties.**

**Comment:** AIR’s 365-page proposal is a document which is intended to educate and persuade the Board to use their services. In the proposal, it is difficult to identify what AIR’s responsibilities are under the contract. Effort should have been undertaken during the 2012 negotiation to extract, from the RFP and the proposal, the contractual duties and obligations of both parties, into an attachment which clearly sets forth the duties. Furthermore, a provision could have been added that “any conflicts between Attachment [ ] and the RFP will be resolved in favor of the Attachment. Given that 30+ months and over \$15 million in payments remains on this contract, this should be done.

As a practical matter, persuading AIR to agree to a substantial amendment or novation to this contract, which clearly defines both Utah and the company’s contractual obligations may be difficult. However, some optimism exist in USOE that AIR will make this concession in return for the economic benefit of proposed Amendment #4.

- 2. While a deliverable’s log and secure document sharing site called “Knowledge Tree” apparently exists to keep track of compliance under the contract, consider amending the contract to add an express requirement that AIR provide, at no cost, a Quarterly**

**Compliance Report to the Board which clearly and succinctly identifies tasks to be completed during the contract year, deadline dates and accomplishments or problems encountered.**

**Comment:** Since project management and communication is an important part of the AIR proposal and at least 3 weekly conference calls are occurring between USOE and AIR staff, adding this Compliance Report may assist both the Board and USOE staff on the progress of this complicated project. In addition, in the RFP, at page 10, there is a liquidated damages clause which states:

“It is understood and agreed by the offeror that time is of the essence in the delivery of tests, reports, and data of the content and quality specified in this RFP, its proposal document, and any resulting contract. In the event these specified tests, reports, and data are not available by the dates specified in a resulting contract, there will be deducted, not as a penalty but as liquidated damages, the sum of \$40,000 per day;”

Through this Compliance report, and USOE staff’s input, the Board can evaluate whether this liquidated damages clause is applicable.

- 3. The \$40,000 per day liquidated damage provision in Utah’s RFP proposal may provide the Board with substantial leverage to secure concessions from AIR with respect to clarifying contract terms as well as developing contract terms which are more beneficial to Utah. An inquiry of USOR staff should be conducted to determine whether in the past AIR has failed to meet deliverable deadlines.**

**Comment:** Based on discussions with USOE staff, some relatively small adjustments of the amounts due and owing to AIR have been made due to their failure to meet deadline, however, it does not appear that AIR has been subject to the \$40,000 per day standard. Based on information provided, more substantial liquidated damages could likely be collected. There are potentially three problems with the use of this liquidated damages clause which are as follows: a) the lack of clearly defined deliverable dates may impede liability; b) Utah’s agreement to modified delivery dates may be construed as a contract modification and waiver of the liquidated damages provision; and c) use of this provision may result in the deterioration of the USOE and AIR and nearly 30 months remains on this contract. *An inquiry of USOR staff should be conducted to determine whether in the past AIR has failed to meet deliverable deadlines.*

- 4. The Limitation of Liability language in Condition #4 of Attachment “B” is overly broad, especially in light of the subsequent License Agreements with AIR to provide SAGE test items to Florida, Arizona and Tennessee.**

**Comment:** This limitation of liability condition states “. . . in no event shall the Contractor (AIR) be liable for any special, indirect, incidental, economic, consequential or punitive damage, including but not limited to lost revenue or profits, loss of technology rights or services, loss of data or interruption or loss of use of software of any portion thereof regardless of the legal theory under which damages are sought. . . .” “Given that Utah’s SAGE test items are going to be used by Florida, Arizona and Tennessee, Utah’s right to collect from AIR, if there is improper distribution or redistribution of these items, is non-existent. Furthermore, the License Agreement, which contains similar, but not identical limited liability language, also restricts Utah’s remedies against AIR. Finally, the liquidated damage clause in the RFP is only triggered by failure to comply with time deadlines.

5. **AIR Contract Attachment D, which sets forth the contract's fixed price billing schedule may not sufficiently and clearly identify or breakdown Utah's obligation to make payments to AIR for its completion of projects, objections and goals. Revisions to this section should be considered.**
6. **The Data Security language in Amendment #2 could be revised to expressly re-state both Federal and state student data privacy laws, as opposed to paraphrasing the concepts in these laws.**
7. **Consideration should be given to requesting AIR to provide the terms of its agreement with Florida, Arizona and Tennessee. An alternative could be for Utah to submit a GRAMA request, or its equivalent to those states to obtain their agreement with AIR.**

DRAFT

# Increased Funding Requirements (this SFY 16)

- Three (3) Managerial Accountants-\$400,000.00
- One (1) Federal Grants Compliance Officer-\$180,000.00
- Outside law, accounting, audit agency to formulate, train on and validate indirect cost pool calculation-\$50,000.00
- Total: **\$630,000.00**
  - Can wait on all three of these until special session and/or SFY 17 Budget Request
  - No immediate funds available due to other carryover and discretionary funds requests (AIR revenue is a possibility)-need to close the Year out and then determine the availability of funds
  - However, not having the Managerial Accounting capabilities impedes ability to know just exactly what the Status of Funds (SOF) is at right now
  - Even when approved 3-9 month realization of the positions (announcements, interviews, start dates)
- Enterprise Business System-**\$28,000,000.00**
  - Convert to FINET first?
  - Make this an SFY 17 request?
  - Not clear on how comprehensive this system is designed for-standardize the whole state?
  - Three options
- Student Services Director
  - Replacing Margaret in Teaching and Learning. They will not use her FTE. There is one coded to David Smith when he was a specialist that is still assigned to Teaching and Learning. (Two vacant positions to fund)

# Risk Mitigation Narrative

The total risk mitigation funds appropriated in HB2 were \$1,840,300, with an additional \$264,700 in rent savings that were not taken from USOE and became part of the risk mitigation funds, for a total of \$2,105,000. However, \$1,145,400 of that was just a replacement of the legislative reduction in the base budget. Of the remaining \$959,600, \$200,000 was put into IT's budget for FY16 and \$295,300 is one time money. That leaves \$464,300 in ongoing risk mitigation funds for FY16.

*These ongoing funds may be used to fund Angie's position, but funding her position was not part of the original risk mitigation plan that was presented to some individual understandings.*



# AIR Funding and Positions (IDR)

**Issue:** How to fund Associate Superintendent Nye's Position and the Three (3) Managerial Positions and One (1) Federal Grant Compliance Officer Position

**Discussion:** \$6.7 M was appropriated from the state legislature. \$4.7 M Federal funding was also targeted for the computer adaptive assessment. The federal dollars were previously used to pay for the CRTs. When the CRTs were replaced by the computer adaptive assessment, the funding was shifted from CRTs to SAGE. The original AIR contract did not require the use of all of the combined state and federal funds so there was funding available for the needed amendments. Requires additional discussion on the, "revenue producing licensing agreements."

## **Recommendations to consider:**

- 1) **Move funding from Associate Superintendent Stalling's position to Associate Superintendent Nye's position (on-going). Fund Associate Superintendent Stalling's position with on-going risk mitigation funds (potential for legislative concerns). Request funding for an on-going FTE during the next legislative session so as not to rely on contract or federal funds to pay for positions. Or,**
- 2) **Use AIR revenue producing licensing agreements and then request additional funds from the legislature starting in SFY 17**

## Concerns:

- 1) **Are we clear on the amount of funding required for the future of this program? If not, the \$6.7M could already be spent. Director Schaefer is working on a report.**
- 2) **Relying on one time or offsets to fund positions is not necessarily a good idea.**
- 3) **What is the plan for the offset gained from Arizona (\$2.1M)? How much is of the \$2.1M, "offset," is state money?**