

## PROFESSIONAL SERVICES

### DBE PROVISIONS

(ON CALL - CONTRACTS)

FOR USE ON LPA/SUBRECIPIENT FEDERAL AID PROJECTS WITH DBE GOALS

\* NOTE: REFER TO EDITING INSTRUCTIONS IN SECTIONS 11.0 AND 16.0 \*

(LPA PS ON CALL EPRISE, 2/01/2017)

### DISADVANTAGED BUSINESS ENTERPRISES:

#### 1.0 Policy

The Arizona Department of Transportation (hereinafter the Department) has established a Disadvantaged Business Enterprise (DBE) program in accordance with the regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. The Department has received Federal financial assistance from the U.S. Department of Transportation and as a condition of receiving this assistance, the Department has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of the Department to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in USDOT assisted contracts. It is also the policy of the Department:

1. To ensure nondiscrimination in the award and administration of USDOT-assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for USDOT assisted contracts;
3. To ensure that the DBE program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are counted as DBEs;
5. To help remove barriers to the participation of DBEs in USDOT-assisted contracts;
6. To assist in the development of firms that can compete successfully in the market place outside the DBE program; and
7. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities.

It is also the policy of the Department to facilitate and encourage participation of Small Business Concerns (SBCs), as defined in Subsection 3.0, in USDOT-assisted contracts. The Department encourages consultants to take reasonable steps to eliminate obstacles to SBCs' participation and to utilize SBCs in performing contracts.

Local Public Agencies (LPA) and or Subrecipients of Federal financial assistance have adopted ADOT's DBE Program Plan, adhere to the Department's DBE policy and will administer and manage the On-Call contracts from procurement advertising, consultant

selection, negotiation, task order execution, processing payment reports and task order modifications, audits, DBE compliance (e.g., reporting and monitoring) through contract closeout.

## **2.0 Assurances of Non-Discrimination:**

The consultant, subrecipient, or subconsultant shall not discriminate on the basis of race, color, sex or national origin in the performance of this contract. The consultant shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the consultant to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the LPA/Subrecipient with the Department's concurrence deems appropriate, which may include, but are not limited to:

1. Withholding monthly progress payments;
2. Assessing sanctions;
3. Liquidated damages;
4. Disqualifying the consultant from submitting SOQs, or any other forms of proposals, as non-responsible;
5. Cancellation, termination, or suspension of the Contract, in whole or in part.

The LPA/Subrecipient will obtain the Department's concurrence prior to proceeding with a remedy in the event of a material breach of contract.

The consultant, subrecipient, or subconsultant shall ensure that all subconsultant agreements contain this non-discrimination assurance.

## **3.0 Definitions:**

- (A) **Commercially Useful Function (CUF):** Commercially Useful Function is defined fully in 49 CFR 26.55, which definition is incorporated herein by reference.
- (B) **Committed DBE:** A DBE that was identified by the consultant, typically on a DBE Affidavit, to meet an assigned DBE goal a condition of contract award and performance, and includes any substitute DBE that has subsequently been committed work to meet the assigned contract goal.
- (C) **Disadvantaged Business Enterprise (DBE):** a for-profit small business concern which meets both of the following requirements:
  - (1) Is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of any publicly owned business, at least 51 percent of the stock is owned by one or more such individuals; and,
  - (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

- (D) **NAICS Code:** The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.
- (E) **Non-DBE:** any firm that is not a DBE.
- (F) **Race-Conscious:** a measure or program focused specifically on assisting only DBEs, including women-owned DBEs.
- (G) **Race-Neutral (RN):** a measure or program used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.
- (H) **Small Business Concern (SBC):** a business that meets all of the following conditions:
- (1) Operates as a for-profit business registered to do business in Arizona;
  - (2) Operates a place of business primarily within the U.S., or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor;
  - (3) Is independently owned and operated;
  - (4) Is not dominant in its field on a national basis; and
  - (5) Does not have annual gross receipts that exceed the Small Business Administration size standards average annual income criteria for its primary North American Industry Classification System (NAICS) code.
- (I) **Socially and Economically Disadvantaged Individuals:** any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:
- (1) Any individual who is found to be a socially and economically disadvantaged individual on a case-by-case basis.
  - (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
    - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
    - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

- (iii) "Native Americans," which includes persons who are enrolled members of federally or State recognized Indian tribe, Alaskan Natives or Native Hawaiians;
- (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (vi) "Women;"
- (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

#### **4.0 Working with DBEs:**

The Department works with DBEs and assists them in their efforts to participate in the highway construction program. All proposers should contact the Department's Business Engagement and Compliance Office (BECO) by phone, through email, or at the address shown below, for assistance in their efforts to use DBEs in the highway construction industry. BECO contact information is as follows:

Arizona Department of Transportation  
Business Engagement and Compliance Office  
1801 W. Jefferson St, Suite 101, Mail Drop 154A  
Phoenix, AZ 85007  
Phone (602) 712-7761  
FAX (602) 712-8429  
Email: [ContractorCompliance@azdot.gov](mailto:ContractorCompliance@azdot.gov)  
Website: [www.azdot.gov/bec](http://www.azdot.gov/bec)

#### **4.01 Mentor-Protégé Program:**

The Department has established a Mentor-Protégé program as an initiative to encourage and develop disadvantaged businesses in the highway construction industry. The program encourages prime contractors to provide certain types of assistance to certified DBE subcontractors. ADOT encourages consultants and certified DBE subconsultants to engage

in a Mentor-Protégé agreement under certain conditions. Such an agreement must be mutually beneficial to both parties and to ADOT in fulfilling requirements of 49 CFR Part 23. For guidance regarding this program refer to the Mentor-Protégé Program Guidelines available on the BECO website.

The Mentor-Protégé program is intended to increase legitimate DBE activities and is not intended to diminish nor circumvent existing DBE rules or regulations.

## **5.0 Applicability:**

The Department has established an overall annual goal for DBE participation on Federal-aid contracts. The Department intends for the goal to be met with a combination of race conscious efforts and race neutral efforts. Race conscious participation occurs when the consultant uses a percentage of DBEs, as defined herein, to meet the contract-specified goal. Race neutral efforts are those that are, or can be, used to assist all small businesses or increase opportunities for all small businesses. The regulation, 49 CFR 26, defines race neutral as when a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

The consultant shall meet the goal specified herein with DBEs, or establish that it was unable to meet the goal despite making good faith efforts to do so. Prime consultants are encouraged to obtain DBE participation above and beyond any goals that may be set for this project.

The DBE provisions are applicable to all consultants including DBE consultants.

## **6.0 Certification and Registration:**

### **6.01 DBE Certification:**

Certification as a DBE shall be predicated on:

- (1) The completion and execution of an application for certification as a "Disadvantaged Business Enterprise."
- (2) The submission of documents pertaining to the firm(s) as stated in the application(s), including but not limited to a statement of social disadvantage and a personal financial statement.
- (3) The submission of any additional information which the Department or the applicable Arizona Unified Certification (UCP) agency may require to determine the firm's eligibility to participate in the DBE program.
- (4) The information obtained during the on-site visits to the offices of the firm and to active job-sites.

Applications for certification may be filed online with the Department or the applicable UCP agency at any time through the Arizona Unified Transportation Registration and Certification System (AZ UTRACS) website at <http://www.azutracs.com>.

DBE firms and firms seeking DBE certification shall cooperate fully with requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial or removal of certification.

ADOT is a member of the Unified Certification Program (AZUCP). Only DBE firms that are certified by the AZUCP are eligible for credit on ADOT projects. A list of DBE firms certified by AZUCP is available on the internet at <http://www.azutracs.com>. The list will indicate contact information and specialty for each DBE firm, and may be sorted in a variety of ways. However, ADOT does not guarantee the accuracy and/or completeness of this information, nor does ADOT represent that any licenses or registrations are appropriate for the work to be done.

The Department's certification of a DBE is not a representation of qualifications and/or abilities nor does it mean that a DBE firm is guaranteed or entitled to receive or be awarded a contract. Being certified simply means that a firm has met the criteria for DBE certification as outlined in 49 CFR Part 26. The consultant bears all risks of ensuring that DBE firms selected by the consultant are able to perform the work.

## **6.02 SBC Registration:**

To comply with 49 CFR Part 26.39, ADOT's DBE Program incorporates contracting requirements to facilitate participation by Small Business Concerns (SBCs) in federally assisted contracts. SBCs are for-profit businesses authorized to do businesses in Arizona that meet the Small Business Administration (SBA) size standards for average annual revenue criteria for its primary North American Industry Classification System (NAICS) code.

While the SBC component of the DBE program does not require utilization of goals on projects, ADOT strongly encourages consultants utilize small businesses that are registered in AZ UTRACS on their contracts, in addition to DBEs meeting the certification requirement. The consultant may use the AZ UTRACS website to search for certified DBEs and registered SBCs that can be used on the contract. However, SBCs that are not DBEs will not be counted toward the DBE contract goal.

SBCs can register online at the AZ UTRACS website.

The Department's registration of SBCs is not a representation of qualifications and/or abilities nor does it mean that an SBC firm is guaranteed or entitled to receive or be awarded a contract. Being SBC registered simply means that a firm has met the criteria for SBC registration as outlined in 49 CFR Part 26. The consultant bears all risks of ensuring that SBC firms selected by consultant are able to perform the work.

## **7.0 DBE Financial Institutions:**

The Department thoroughly investigates the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in its service area and makes reasonable efforts to use these institutions. The Department encourages prime consultants to use such institutions on USDOT assisted contracts. However, use of DBE financial institutions will not be counted toward the DBE contract goal.

The Department encourages prime consultants to research the Federal Reserve Board website at [www.federalreserve.gov](http://www.federalreserve.gov) to identify minority-owned banks in Arizona derived from the Consolidated Reports of Condition and Income filed quarterly by banks (FFIEC 031 and 041) and from other information on the Board's National Information Center database.

## **8.0 Time is of the Essence:**

TIME IS OF THE ESSENCE IN RESPECT TO THE DBE PROVISIONS.

## **9.0 Computation of Time:**

In computing any period of time described in this DBE special provision, such as calendar days, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, Federal or State holiday, the period extends to the next day that is not a Saturday, Sunday, Federal or State holiday. In circumstances where the LPA/Subrecipient's offices are closed for all or part of the last day, the period extends to the next day on which the LPA/Subrecipient's offices are open.

## **10.0 Consultant and Subconsultant Requirements:**

### **10.01 General:**

The consultant shall establish a DBE program that will ensure nondiscrimination in the award and administration of contracts and subcontracts.

Agreements between the proposer and a DBE in which the DBE promises not to provide subcontracting quotations to other proposers are prohibited.

### **10.02 DBE Liaison:**

The consultant shall designate a DBE Liaison responsible for the administration of the consultant's DBE program. The name of the designated DBE Liaison shall be included on the DBE Intended Participation Affidavit Summary.

## **11.0 DBE Goal:**

The minimum goal for participation by DBEs on this project is as follows:

\_\_\_\_\_Percent

THE CONSULTANT IS ENCOURAGED TO OBTAIN DBE PARTICIPATION ABOVE AND BEYOND THE GOAL ON THIS ON-CALL CONTRACT.

DBE GOAL ATTAINMENT WILL BE REVIEWED ON A TASK ORDER ASSIGNMENT BY TASK ORDER ASSIGNMENT BASIS TO HELP ENSURE THAT THE OVERALL DBE GOAL IS MET ON THIS ON-CALL CONTRACT.

The percentage of DBE participation shall be based on the total dollar value of the On-Call contract.

1. Proposers are strongly encouraged to secure and include sufficient DBE firms on their team for multiple disciplines and work categories to ensure they can meet the DBE goal on the contract and for any Task Orders/Contract Modifications that are executed post-award. The On-Call contract DBE goal requirements are applied to extend to additional dollars added by Task Order revisions/On-Call Contract Modifications to help ensure that the overall DBE goal is met on the On-Call contract. Indicating there is insufficient DBE participation on a prime proposer's team to meet the DBE goal on Task Orders/On-Call Contract Modifications does not meet the criteria for Good Faith Efforts in 49 CFR 26.53, and will not be accepted by the LPA/Subrecipient as a Good Faith Effort when Task Orders/On-Call Contract Modifications are issued. As the DBE goal is included in the Request for Qualifications (RFQ) proposer's are expected to include adequate ready willing and able DBE participation in the Statement of Qualifications (SOQ) to ensure DBE goal will be met or make good faith efforts on the On-Call contract and each subsequent Task Order/On-Call Contract Modification. Firms are required to include DBEs to meet the DBE goal on each Task Order/On-Call Contract Modification. Firms may request to add additional DBEs not originally included as part of their team if necessary. The LPA/Subrecipient, with BECO concurrence, determines if there are qualified DBEs available to complete portions of the work of the Task Order or On-Call Contract Modification.
2. The consultant is required to adhere to the goal/commitment made to utilize certified DBEs as indicated in the firm's Statement of Qualifications (SOQs) or a DBE Intended Participation Affidavit Form for each DBE and DBE Intended Participation Affidavits Summary Form submitted with each approved Task Order, or subsequently agreed to by the LPA/Subrecipient, with BECO concurrence during negotiations. The LPA/Subrecipient with BECO concurrence, at its discretion and on a case-by-case basis, may waive the above limitations.
3. With each new Task Order assignment request, the consultant is required to submit the following documents certifying that:



a. The Firm will meet the established On-Call Contract DBE goal for the Task Order by providing a DBE Intended Participation Affidavit Summary Form and a completed DBE Intended Participation Affidavit for each DBE Subconsultant working on each Task Order. These forms are available from the LPA/Subrecipient. Forms shall be submitted with the Cost Proposal for each Task Order in which the firm indicates it will meet the DBE goal.

OR

b. The Firm has made good faith efforts (GFEs) to meet the DBE goal for the Task Order but did not succeed in achieving the DBE goal by providing documented good faith efforts on the consultant Certification of Good Faith Efforts form. This form is available from the LPA/Subrecipient. The good faith efforts form and supporting documents shall be submitted with the Cost Proposal for each Task Order in which the firm is unable to meet the On-Call contract DBE goal.

TASK ORDERS WILL NOT BE EXECUTED IF ONE OF THE ABOVE CONDITIONS ARE NOT MET AND/OR THE FIRM FAILS TO SUBMIT THE REQUIRED DBE PARTICIPATION FORMS FOR EACH TASK ORDER COST PROPOSAL.

RECEIVING GOOD FAITH EFFORT APPROVAL ON SOME TASK ORDERS DURING THE COURSE OF THE CONTRACT DOES NOT RELEASE THE CONSULTANT FROM ITS OBLIGATION TO MEET THE OVERALL DBE GOAL ON THE CONTRACT.

DBE utilization on all Task Orders coupled with Good Faith Effort approval of Task Orders must add up to meeting the overall On-Call contract goal at the end of the On-Call contract unless the LPA/Subrecipient determines that the size and scope of Task Orders and the number of Good Faith Effort approvals for various Task Orders did not make it feasible for the consultant to meet the overall DBE goal on the contract. In order to help ensure that the overall DBE goal is met at the end of the On-Call contract, when feasible, consultants are encouraged to maximize DBE utilization beyond the stated DBE goal on each Task Order when subcontracting opportunities makes this feasible in order to help off-set instances when Good Faith Efforts are approved on smaller or specialized Task Orders with no subcontracting opportunities.

## **12.0 Submission with SOQ Proposals:**

### **12.01 DBE Assurance/Goal Declaration**

In order to be awarded this On-Call contract, in addition to all other pre-award requirements, all proposers are required to certify on the DBE Assurance On Call form provided by the LPA/Subrecipient that:

The proposer will meet the established DBE goal or will make good faith efforts to meet the goal for the On-Call contract and that arrangements with certified DBEs have been made prior to On-Call contract task order cost proposal submission;

and

The proposer will meet the established DBE goal or make good faith efforts to meet the goal on each Task Order assignments associated with the On-Call contract and that arrangements with certified DBEs have been made prior to Task Order assignments proposal submission.

Failure to affirmatively make this declaration/certification in the manner outlined in the Request for Qualifications (RFQ) furnished by the LPA/Subrecipient will cause a Proposer's SOQ to be considered as non-responsive.

## **12.02 Bidders/Proposers List and AZ UTRACS Registration Requirement:**

Under Title 49 CFR of the Code of Federal Regulations, Part 26.11, DOTs are required to collect certain information from all consultants and subconsultants who seek to work on federally-assisted contracts in order to set overall and contract DBE goals. ADOT collects this information when firms register their companies on the Arizona Unified Transportation Registration and Certification System (AZ UTRACS) web portal at <http://www.azutracs.com/> a centralized database for companies that seek to do business with ADOT. This information will be maintained as confidential to the extent allowed by federal and state law.

Prime consultants and all subconsultants, including DBEs listed in the SOQ must be registered in AZ UTRACS. Proposers may verify that their firm and each subconsultant is registered using the AZ UTRACS website.

Proposers may obtain additional information at the AZ UTRACS website or by contacting the LPA/Subrecipient.

All proposers shall create a Bidders/Proposers list in the AZ UTRACS by selecting all firms, service providers, and vendors that expressed interest or submitted proposals or quotes for this contract. The Bidders/Proposers List form must be complete and must include the names for all subconsultants, service providers, and vendors that submitted proposals or quotes on this project regardless of the proposer's intentions to use the those firms on the project.

All proposers must complete and submit the Bidders/Proposers List online at AZ UTRACS. A confirmation email will be generated by the system. This email confirmation shall be submitted with the SOQ.

**FAILURE TO SUBMIT THE REQUIRED BIDDERS/PROPOSERS LIST CONFIRMATION EMAIL WITH THE SOQ BY THE STATED TIME AND IN THE MANNER HEREIN SPECIFIED AND AS OUTLINED IN THE RFQ SHALL BE CAUSE FOR THE PROPOSER'S SOQ TO BE REJECTED.**

## **13.0 DBE Intended Participation Affidavits:**

If the consultant indicates in the Cost Proposal submittal for each Task Order that it has met or exceeded the DBE goal, a DBE Intended Participation Affidavit form for each DBE firm, and the DBE Intended Participation Affidavit – Summary form shall be submitted to the LPA/Subrecipient Procurement Office with each Task Order Cost Proposal as follows:

- (1) The DBE Intended Participation Affidavit Form – This form must be submitted for each individual DBE firm at all tiers, including direct expense vendors, that is being proposed to be used to meet the DBE goal on each Task Order. A copy of this form is available from the LPA/Subrecipient.
- (2) The DBE Intended Participation Affidavit Summary Form – This form must be completed by the consultant summarizing information about all DBEs being proposed to meet the DBE goal that are listed on each DBE Intended Participation Affidavit Form. The DBE Intended Participation Affidavit Summary form, along with the DBE Intended Participation Affidavit form for each individual DBE firm, must be submitted together with the Task Order Cost Proposal to the LPA/Subrecipient. All forms must be accurate and complete in every detail and must be signed by an officer of the consultant(s). Percentages and dollar amounts must be accurate. Percentages shall be listed to two decimal places. The DBE Intended Participation Affidavit Summary must be submitted listing all the DBEs intended to be used and the creditable amounts. Copies of these forms are available from LPA/Subrecipient.
- (3) The DBE Intended Participation Affidavits and the DBE Intended Participation Affidavit Summary Forms must be submitted with each Task Order cost proposal documents. The same documents must be submitted as part of the On-Call Contract Modification documentation submittals reflecting any revisions to the Task Order amounts associated with the Task Order or On-Call Contract Modification.
- (4) A consultant must determine DBE credit for the contract in accordance with DBE Special Provision Subsection 17.0 Crediting DBE Participation Toward Meeting Goals. The affidavits will be reviewed by LPA/Subrecipient.
- (5) Only those DBE firms certified by the Arizona Unified Certification Program (AZUCP) at the time of the Cost Proposal submittal will be considered for DBE credit. It shall be the proposer's responsibility to ascertain the certification status of designated DBEs.

All DBE commitment amounts must be finalized between the DBE subconsultant and the prime consultant prior to affidavit submittal. Consultants shall not inflate DBE awards in order to meet Task Order/On-Call contract goals. Reduction of DBE commitments after affidavit submittal and prior to execution of the Task Order/On-Call Contract Modification without good cause may be grounds for the Consultant to be considered nonresponsive. Scheduling conflicts are not necessarily evidence of good cause as this should have been considered prior to affidavit submittal. Consultants are required to use DBEs identified in both the SOQ and/or Cost

Proposal for each Task Order to meet the contract goal, so the consultant is responsible for ensuring the DBEs listed in the SOQ and submitted with the Task Order Cost Proposal are available to meet those requirements at the time of the Task Order/On-Call Contract Modification execution.

- (6) Task Order cost proposals without affidavits shall be considered incomplete and Task Order negotiations shall not be finalized nor will the Task Order/On-Call Contract Modification be executed until affidavits are submitted and approved.

## **14.0 Documented Good Faith Effort:**

### **14.01 General:**

If the selected consultant has indicated in its Task Order cost proposal submittal that it will be unable to meet the DBE goal, that consultant must demonstrate, through detailed and comprehensive documentation, that good faith efforts have been made to solicit, assist, and use DBE firms to meet the DBE goal prior to submission of the SOQ and Task Order cost proposal.

Failure to demonstrate good faith efforts to the satisfaction of LPA/Subrecipient with BECO concurrence will result in denying the award of the Task Order and moving to the next highest ranked consultant.

The selected consultant who cannot meet the DBE goal at the time the Task Order cost proposal is due must submit its documentation of good faith efforts to LPA/Subrecipient with the cost proposal. Task Order negotiations will not be finalized nor will the contract modification be executed until the required Good Faith Effort forms and required documentation are received and approved.

The documentation of good faith efforts must include copies of each DBE and non-DBE subconsultant quotes submitted to the consultant when a non-DBE subconsultant was selected over a DBE for work on the contract. A generalized assertion that the consultant received multiple quotes is not sufficient unless copies of those quotes are provided.

Consultants are encouraged to review Appendix A of 49 CFR Part 26.

Useful information related to encouraging DBE participation and documented good faith efforts can be found in the "Good Faith Effort Guide" and other documents made available on the BECO website. The information provided in the "Good Faith Effort Guide" does not replace this specification; consultants must comply with the requirements of this specification.

In order to be awarded a Task Order on the basis of good faith efforts, a consultant must show that it took all necessary and reasonable steps to achieve the DBE goal, which, by their scope, intensity, and appropriateness to the objective, could reasonably be

expected to obtain sufficient DBE participation, even if they were not fully successful. The LPA/Subrecipient will consider the quality, quantity, and intensity of the different kinds of efforts the consultant has made. The efforts employed by the consultant should be those that one could reasonably expect a consultant to make if the consultant were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE goal. Mere pro forma efforts are not sufficient good faith efforts to meet the DBE contract requirements.

The consultant shall, as a minimum, seek DBEs in the same geographic area in which it generally seeks subconsultants for a given project. If the consultant cannot meet the goals using DBEs from this geographic area, the consultant, as part of its effort to meet the goals, shall expand its search to a reasonably wider geographic area.

The following is a list of types of efforts a consultant must address when submitting good faith effort documentation.

- (1) Contacting the LPA/Subrecipient and BECO prior to the submission of Task Order cost proposals, either by e-mail, or by telephone, to inform of the firm's difficulty in meeting the DBE goals on a given project, and requesting assistance. The Consultant must document its contact with LPA/Subrecipient and BECO, and indicate the type of contact, the date and time of the contact, the name of the person(s) contacted, and any details related to the communication. The contact must be made in sufficient time before proposal submission to allow the LPA/Subrecipient and BECO to provide effective assistance. The Consultant will not be considered to have made good faith efforts if the Consultant failed to contact LPA/Subrecipient and BECO.
- (2) Conducting market research to identify small business consultants and suppliers, and soliciting, through all reasonable and available means, the interest of all certified DBEs who have the capability to perform the work of the contract. This may include attendance at pre-proposal meetings and business matchmaking meetings and events, advertising and/or providing written notices, posting of "Notices of Sources Sought" and/or "Requests for Proposals" at reasonable locations, including the consultant's website, written notices or emails to all DBEs listed in the Department's directory of transportation firms that specialize in areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project. The Consultant should solicit this interest as early in the Task Order acquisition process as practicable to allow DBEs to respond to the solicitation and submit a timely offer for the subcontract. The Consultant should determine with certainty if DBEs are interested by taking appropriate steps to follow-up initial solicitations.
- (3) Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal will be achieved for each Task Order. This includes, where appropriate, breaking out contract work items into economically feasible units (for example smaller tasks or quantities) to facilitate DBE participation, even when the prime consultant might otherwise prefer to perform these work items with its

own forces. This may include, where possible, establishing flexible time frames for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

- (4) Providing interested DBEs with adequate information about the Task Order scope of work, plans, specifications, and requirements of the Task Order in a timely manner to assist them in responding to a solicitation with their offer for a subcontract.
- (5) Negotiating in good faith with interested DBEs. It is the Prime Consultant's responsibility to make a portion of the work available to the DBE subconsultants and suppliers, and to select those portions of work or material needs consistent with the available DBE subconsultants and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided from the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform work.

Pro forma mailings to DBEs requesting proposals are not alone sufficient to constitute good faith negotiation.

A Consultant using good business judgment would consider a number of factors in negotiating with subconsultants, including DBE subconsultants, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a Consultant's failure to meet the DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime consultant to perform the work of a contract with its own organization does not relieve the Consultant of the responsibility to make good faith efforts. However, prime consultants are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable. Documentation, such as copies of all other proposals or quotes, must be submitted.

Another practice considered insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. The consultant must submit copies of each DBE and non-DBE subconsultant quote submitted to the Consultant when a non-DBE subconsultant was selected over a DBE for work on the contract. The LPA/Subrecipient may contact rejected DBEs as part of its investigation. However, nothing in this paragraph shall be construed to require the Consultant to accept unreasonable quotes in order to satisfy contract goals.

- (6) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The consultant's standing within its industry, membership in specific groups, organizations or associations and political or social affiliations (for example, union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of proposals in the consultant's efforts to meet the project goal. Consultant must submit documentation of past performance

and with input from the PM, consultant's qualifications are then reviewed for acceptance and approval.

- (7) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or consultant.
- (8) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- (9) Effectively using the services of available minority/women community organizations; minority/women consultants' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

In determining whether a Consultant has made good faith efforts, the LPA/Subrecipient will review the documented efforts of the Consultant and will review the performance of other Consultants in meeting the Task Order/contract goal.

A promise to use DBEs after Task Order/contract award is not considered to be responsive to the contract solicitation nor does it constitute good faith efforts.

The LPA/Subrecipient will evaluate the submittal to determine whether in fact good faith efforts have been demonstrated consistent with the specifications and the Federal regulations, 49 CFR 26, Appendix A.

#### **14.02 Protest for Denied Good Faith Efforts:**

If the LPA/Subrecipient, with BECO concurrence, determines that the Consultant failed to make adequate good faith efforts, the Consultant may protest the determination by submitting an appeal in writing to the ADOT State Engineer. The decision of the ADOT State Engineer is administratively final.

The Consultant whose Task Order was rejected for failure to meet the goal or make GFE will be given the opportunity to meet in person with the State Engineer, at the Consultant's written request to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The State Engineer shall promptly consider any appeals and notify the LPA/Subrecipient and consultant in writing of its findings and decision.

In accordance with 49 CFR 26.53(d)(5), the result of the protest decision is not subject to administrative appeal to the USDOT.

#### **15.0 Rejection of Proposal:**

If, for any reason, the Consultant's GFE is rejected or Task Order negotiations fail, LPA/Subrecipient will proceed with negotiating with the next highest ranked firm. The LPA/Subrecipient will notify the next highest ranked firm, and this firm shall submit its

subsequent detailed submission as set forth in the DBE Subsections 13 or 14.

**16.0 Payment Reporting and Prompt Payment:**

The consultant shall report on a monthly basis indicating the amounts paid to all subconsultants, of all tiers, working on the project. Reporting shall be in accordance with Payment Reporting and Prompt Payment Section \_\_\_\_\_ of the contract specifications.

**17.0 Crediting DBE Participation Toward Meeting Goals:**

**17.01 General Requirements:**

To count toward meeting the goal on a Task Order, the DBE firms must be certified at the time of Task Order Cost Proposal submission in each NAICS code applicable to the kind of work the firm will perform on the contract. NAICS for each DBE can be found on the AZ UTRACS website. General descriptions of all NAICS codes can be found at <http://www.naics.com/search/>.

Credit towards the consultant's DBE goal is given only after the DBE has been paid for the work performed.

The entire amount of a contract that is performed by the DBE's own forces, including the cost of supplies and materials purchased by the DBE for the work on the contract/Task Order and equipment leased by the DBE will be credited toward DBE participation on that Task Order. Supplies and equipment the DBE subconsultant purchases or leases from the Prime Consultant or its affiliate will not be credited toward DBE participation.

The consultant bears the responsibility to determine whether the DBE possesses the proper consultant's license(s) to perform the work and, if DBE credit is requested, that the DBE subconsultant is certified for the requested type of work.

If a DBE cannot complete its work due to failure to obtain or maintain its licensing, the consultant bears the responsibility to notify LPA/Subrecipient immediately after the consultant becomes aware of the situation, and request approval to replace the DBE with another DBE. The consultant shall follow the DBE termination/substitution requirements described in Subsection 22.0 of these DBE provisions.

The Department's certification is not a representation of a DBE's qualifications and/or abilities. The consultant bears all risks that the DBE may not be able to perform its work for any reason.

A DBE may participate as a Prime Consultant, subconsultant, or as a vendor of materials or supplies. The dollar amount of work to be accomplished by DBEs, including partial amount of a lump sum or other similar item, shall be on the basis of subcontract, purchase order, hourly rate, rate per ton, etc., as agreed to between parties for the Task Order.



DBE credit may be obtained only for specific work done for the Task Order, supply of equipment specifically of physical work on the Task Order, or supply of materials to be incorporated in the work. DBE credit will not be allowed for costs such as overhead items, capital expenditures (for example, purchase of equipment), and office items.

The consultant may credit second-tier subcontracts issued to DBEs by non-DBE subconsultants for the Task Order. Any second-tier subcontract to a DBE used to meet the goal must meet the requirements of a first-tier DBE subcontract.

A Consultant may credit the entire amount of that portion of a contract/Task Order that is performed by the DBE's own forces. The cost of supplies and materials obtained by the DBE for the work of the contract can be included so long as that cost is reasonable. Leased equipment may also be included. No credit is permitted for supplies purchased or equipment leased from the prime consultant or its affiliate(s).

When a DBE subcontracts a part of the work of its contract to another firm, the value of the subcontract may be credited towards the DBE goal only if the DBE subconsultant is itself a DBE and performs the work with its own forces. Work that a DBE subcontracts to a non-DBE firm does not count toward a DBE goal.

A Consultant may credit the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consulting, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, provided the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.

## **17.02 DBE Prime Consultant:**

When a certified DBE firm proposes on a contract/Task Order that contains a DBE goal, the DBE firm is responsible for meeting the DBE goal on the contract and each Task Order or making good faith efforts to meet the goal, just like any other consultant. In most cases, DBE consultant on a contract will meet the DBE goal by virtue of the work it performs on the contract with its own forces. However, all the work that is performed by the DBE consultant or any other DBE subconsultants and DBE suppliers will count toward the DBE goal. The DBE consultant shall list itself along with any DBE subconsultants and suppliers, on the DBE Intended Participation Affidavit and Summary in order to receive credit toward the DBE goal.

## **17.03 Effect of Loss of DBE Eligibility:**

For On-Call Task Order contracts/procurements, if a DBE is deemed ineligible (decertified) or suspended by ADOT or one of its UCP Partner Agencies in accordance with 49 CFR 26.87 and 26.88, the DBE may not be considered to meet the contract/Task Order goal on a new Task Order, but may be considered to meet the contract/Task Order goal if a subcontract or contract modification for the work to be completed on the Task Order was executed before the DBE suspension or decertification is effective.

A subcontract or contract modification for work on the task order means, any subcontract or agreement for the task order, which includes a specific LPA/Subrecipient Project Number, defined scope, duration and budget for the work to be completed under the Task Order that is duly signed by the contractor/consultant and subcontractor/subconsultant.

When the contractor/consultant makes a commitment to use an ineligible DBE firm or LPA/Subrecipient made a commitment to use an ineligible DBE prime contractor/consultant, but a subcontract or Contract Modification for the work to be completed on the Task Order has not been executed before a decertification notice is issued to the DBE firm by its certifying agency, the ineligible firm does not count toward the contract goal. The contractor/consultant must meet the Task Order/contract goal with an eligible DBE firm or demonstrate good faith efforts. When a subcontract or contract modification is executed with the DBE firm for the work to be completed on the Task Order before ADOT notified the firm of its ineligibility, the DBE's work on the Task Order may continue to be credited toward the DBE contract goal for the firm's work.

#### **17.04 Notifying the Consultant of DBE Certification Status:**

Each DBE contract at any tier shall require any DBE subconsultant or supplier that is either decertified or certified during the term of the contract to immediately notify the consultant and all parties to the DBE contract in writing, with the date of decertification or certification. The consultant shall require that this provision be incorporated in any contract of any tier in which a DBE is a participant.

#### **17.05 Police Officers:**

DBE credit will not be permitted for procuring DPS officers. For projects on which officers from other agencies are supplied, DBE credit will be given only for the broker fees charged, and will not include amounts paid to the officers. The broker fees must be reasonable.

#### **17.06 Commercially Useful Function:**

A prime consultant can credit expenditures to a DBE subconsultant toward DBE goals only if the DBE performs a Commercially Useful Function (CUF).

A DBE performs a CUF when it is responsible for execution of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself that it uses on the project. To determine whether a DBE is performing a commercially useful function, the LPA/Subrecipient will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually

performing and the DBE credit claimed for its performance of the work, and other relevant factors.

A DBE will not be considered to perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the LPA/Subrecipient will examine similar transactions, particularly those in which DBEs do not participate.

If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or if the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the LPA/Subrecipient will presume that the DBE is not performing a commercially useful function.

When a DBE is presumed not to be performing a commercially useful function as provided above, the DBE may present evidence to rebut this presumption. The LPA/Subrecipient will determine if the firm is performing a CUF given the type of work involved and normal industry practices.

The LPA/Subrecipient will notify the consultant, in writing, if it determines that the consultant's DBE subconsultant is not performing a CUF. The consultant will be notified within seven calendar days of the LPA/Subrecipient's decision.

Decisions on CUF may be appealed to the ADOT BECO. The appeal must be in writing and personally delivered or sent by certified mail, return receipt requested, to the ADOT BECO. The appeal must be received by ADOT BECO no later than seven calendar days after the LPA/Subrecipient decision. LPA/Subrecipient's decision remains in place unless and until BECO reverses or modifies LPA/Subrecipient's decision. ADOT BECO will promptly consider any appeals under this subsection and notify the consultant of the ADOT BECO findings and decisions. Decisions on CUF matters are not administratively appealable to USDOT.

The LPA/Subrecipient may conduct project site visits on the contract to confirm that DBEs are performing a CUF. The consultant shall cooperate during the site visits and the LPA/Subrecipient's staff will make every effort not to disrupt work on the project.

## **18.0 Effect of Contract/Task Order Changes:**

The consultant acknowledges that uncertainties can occur during the performance of the work and if for any reason it becomes apparent that the DBE goal will not be met on the Contract or Task Order, then the consultant shall: (1) immediately notify the LPA/Subrecipient of the potential or actual decrease in DBE compensation, and (2) make good faith efforts to obtain DBE participation to meet or exceed the Contract or Task Order DBE goal.

LPA/Subrecipient will approve or deny the consultant's good faith efforts with BECO concurrence.

The consultant is not required to take work committed to another subconsultant and assign it to a DBE subconsultant in order to meet the committed DBE percentage.

If the resulting change increases the scope or quantity of work being done by a DBE subconsultant, the DBE shall be given the opportunity to complete the additional work and receive additional compensation beyond their original subcontract amount.

### **19.0 DBE Participation Above the Goal (Race-Neutral Participation):**

Additional DBE participation above the DBE participation required to meet the contract and Task Order DBE goal is an important aspect of the Department's DBE program. The consultant is strongly encouraged to use additional above the DBE goal requirement in the contract and Task Order to assist the ADOT in meeting overall DBE goal and help the Department to meet the maximum feasible portion of its DBE goals through race neutral participation as outlined in 49 CFR Part 26.

There are fewer administrative requirements on the part of the consultant when using race neutral DBEs (DBEs not listed on the DBE Intended Participation Affidavit Summary). For example, if a DBE is not listed on the DBE Intended Participation Affidavit Summary, the DBE does not have to submit an Affidavit, and the subcontract approval process follows the same process of any other subcontract. The consultant does not have to replace the DBE with another DBE subconsultant if the DBE fails to perform. Therefore these DBEs are treated as any other subconsultant on the project.

### **20.0 Required Provisions for DBE Subcontracts:**

All subcontracts of any tier, all supply contracts, and any other contracts in which a DBE is a participant shall include as a physical attachment, DBE Subconsultant Compliance Assurances available from LPA/Subrecipient and all of the Uniform Terms and Conditions set forth in other sections of this contract.

Consultants executing agreements with subconsultants, DBE or non-DBE, that materially modify federal regulation and state statutes such as, prompt payment and retention requirements, through subcontract terms and conditions will be found in breach of contract which may result in termination of the contract, or any other such remedy as the LPA/Subrecipient and ADOT deemed appropriate as outlined in DBE Subsection 2.0.

The LPA/Subrecipient reserves the right to conduct random reviews of DBE and non-DBE subcontract documentation to ensure compliance with federal requirements.

The consultant shall ensure that all subcontracts or agreements with DBEs to supply labor or materials require that the subcontract and all lower tier subcontracts be performed in

accordance with 49 CFR Part 26 provisions.

The Consultant shall provide electronic copies of subcontract agreements for all DBE Subconsultants listed on the DBE Intended Participation Affidavit Summary Form by uploading them within 15 calendar days of an executed contract to the LPA DBE System. Subcontract agreements shall include all required assurances and clauses as outlined in any other sections of this contract. Each agreement and required attachment shall be dated and signed by the Subconsultant in order for the subcontract to be considered valid.

## **21.0 Contract Performance:**

Contract items of work designated by the consultant to be awarded to DBEs shall be performed by the designated DBE or a LPA/Subrecipient, with BECO concurrence, approved DBE substitute. The Consultant or a non-DBE Subconsultant shall not perform DBE contract work items without prior approval by LPA/Subrecipient with BECO and execution of the Contract Modification by the LPA/Subrecipient. The DBE must perform a commercially useful function; that is, the DBE must manage, perform, and supervise a distinct element of work.

The consultant is required to use DBEs identified in the SOQ or Task Order documents to meet the contract goal. The prime consultant is responsible for ensuring that the DBEs are available to meet scheduling, work and other requirements on the On-Call Contract Task Order.

The LPA/Subrecipient may visit the consultant's office to conduct reviews to ensure compliance with CUF and other DBE requirements. The reviews may include, among other activities, interview of DBEs and their employees and the consultant and its employees. The consultant shall cooperate in the review and make its employees available. The consultant shall inform the LPA/Subrecipient in advance when each DBE will be working on the project to help facilitate reviews.

The LPA/Subrecipient reserves the right to request and inspect all records of the consultant and all records of the DBEs and non-DBE subconsultants concerning the On-Call contract. The consultant must make available a copy of any related On-Call contract documents to the LPA/Subrecipient upon request.

Use of every DBE listed on the DBE Intended Participation Affidavit Summary is a condition of this contract and each the task order. The consultant shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed on the DBE Intended Participation Affidavit Summary unless the consultant obtains written consent from the LPA/Subrecipient with BECO concurrence. The consultant shall not be entitled to any payment for work or material that is not performed or supplied by the listed DBE unless the consultant obtains written consent from the LPA/Subrecipient with BECO concurrence.

## **22.0 DBE Termination/Substitution:**

### **22.01 General Requirements:**

The consultant shall make all reasonable efforts to avoid terminating or substituting a DBE listed on the DBE Intended Participation Affidavit Summary. At a minimum, the consultant shall negotiate in good faith, give timely notices and/or extend deadlines to the extent that it will not jeopardize the contract with the LPA/Subrecipient. Reasonable methods to resolve performance disputes must be applied and documentation provided to the LPA/Subrecipient before attempting to substitute or terminate a DBE.

### **22.02 Consultant Notice of Termination/Substitution:**

All terminations, substitutions, and reductions in scope of work to be performed by DBEs listed on the DBE Intended Participation Affidavit Summary must be approved in writing by LPA/Subrecipient, with BECO concurrence, and by means of the executed contract modification. The consultant shall contact the LPA/Subrecipient within 24 hours from the first sign of any reason for DBE termination/substitution.

The consultant shall not terminate a DBE subconsultant listed on the DBE Intended Participation Affidavit Summary or complete the work contracted to the DBE with its own forces or with a non-DBE firm without LPA/Subrecipient written consent and BECO concurrence. Before submitting formal request to the LPA/Subrecipient for DBE termination/substitution, the consultant shall give written notice to the DBE subconsultant with a copy to the LPA/Subrecipient of its intent to terminate or substitute the DBE identifying the reason for the action. The DBE shall be allowed a minimum of five calendar days to respond to the consultant's notice advising the consultant and LPA/Subrecipient of its position. LPA/Subrecipient, with BECO concurrence, will consider both the consultant's request and the DBE firm's response before approving the consultant's termination and substitution request.

### **22.03 Consultant Request of Termination/Substitution:**

The consultant shall formally request the termination or substitution of a DBE listed on the DBE Intended Participation Affidavit Summary by submitting the DBE Termination/Substitution Request Form and supporting documentation to LPA/Subrecipient. The submission shall include the following information:

- 1) The date the consultant determined the DBE to be unwilling, unable or ineligible to perform.
- 2) A brief statement of facts describing the situation and citing specific actions or inaction by the DBE firm giving rise to consultant's assertion that the DBE firm is unwilling, unable, or ineligible to perform.
- 3) A brief statement of the good faith efforts undertaken by the consultant to enable the DBE firm to perform.

- 4) The total dollar amount currently paid for work performed by the DBE firm.
- 5) The total dollar amount remaining to be paid to the DBE firm for work completed, but for which the DBE firm has not received payment, and over which the consultant and the DBE firm have no dispute.
- 6) The remaining work that has not been completed by the DBE and the corresponding dollar amount.
- 7) The projected date that the consultant requires a substitution or replacement DBE to commence work, if consent is granted to the request.

Written consent for terminating the performance of any DBE listed on the DBE Intended Participation Affidavit Summary will be granted only where the consultant can demonstrate good cause showing that the DBE is unable, unwilling, or ineligible to perform. Such written consent to terminate any DBE shall concurrently constitute written consent to substitute or replace the terminated DBE. Termination or substitution of a DBE listed on the DBE Intended Participation Summary will not be allowed based solely on a consultant's ability to negotiate a more advantageous contract with another subconsultant. Prior to making a determination for approval regarding the consultant's termination and substitution request, the LPA/Subrecipient, with BECO concurrence, will consider both the consultant's request and the DBE firm's response.

Any requests for substitutions or terminations of DBEs shall be made on the forms provided by LPA/Subrecipient.

#### **22.04 Good Cause:**

The LPA/Subrecipient will make the determination of the good cause by providing written consent to the consultant after evaluating the consultant's good cause to terminate or substitute a DBE firm. Good cause for this purpose includes the following in relation to the listed DBE subconsultant:

1. Fails or refuses to execute a written contract.
2. Fails or refuses to perform the work of its subcontract in a way consistent with normal industry practice standards. However, good cause does not exist if the failure or refusal of the DBE subconsultant to perform its work on the subcontract results from the bad faith or discriminatory action of the prime consultant.
3. Fails or refuses to meet the prime consultant's reasonable, nondiscriminatory insurance/bond requirements.
4. Becomes bankrupt, insolvent, or exhibits credit unworthiness.
5. Is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to federal or state law.
6. Is not a responsible consultant.
7. Voluntarily withdraws from the project and provides written notice of its withdrawal to the LPA/Subrecipient.
8. Is ineligible under a specific NAICS code to receive DBE credit for the type of work required.
9. A DBE owner dies or becomes disabled with the result that the firm is unable to

complete its work on the contract.

10. Other documented good cause that the LPA/Subrecipient determines compels the termination or substitution of the DBE subconsultant.

If good cause is determined, the LPA/Subrecipient will notify the Consultant of the decision and necessary modifications to the contract can be made.

#### **22.05 DBE Replacement Good Faith Effort:**

If the LPA/Subrecipient, with BECO concurrence, approves the termination of a DBE, the consultant shall make good faith efforts to find another DBE subconsultant to substitute for the original DBE. The good faith efforts as identified in DBE Subsection 14.0 shall be directed at finding another DBE to perform at least the same amount of work under the contract/Task Order as the DBE that was terminated, to the extent needed to meet the contract/Task Order goal. The good faith efforts shall be documented and provided, upon request, to the LPA/Subrecipient within seven calendar days from the date of the request.

A consultant's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the consultant has the ability and/or desire to perform the contract work with its own forces does not relieve the consultant of the obligation to make good faith efforts to find the replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

The termination of a DBE firm shall not relieve the consultant of its obligations under this Special Provision, and the unpaid portion of the terminated DBE firm's subcontract will not be counted toward the DBE goal. If the LPA/Subrecipient has eliminated items of work subcontracted a committed DBE, the prime consultant shall still make good faith efforts to replace the DBE with another DBE to the extent necessary to meet the goal. The LPA/Subrecipient will review the quality, thoroughness, and intensity of those efforts.

When a DBE substitution has been approved by the LPA/Subrecipient and concurred by BECO, the consultant shall submit an amended DBE Intended Participation Affidavit and Intended Participation Affidavit Summary to LPA/Subrecipient for approval with the substitute DBE's name, description of work, NAICS code, AZ UTRACS registration number, and dollar value of work. Approval from LPA/Subrecipient, with BECO concurrence, must be obtained prior to the execution of Contract Modification by LPA/Subrecipient and before substituted DBE can begin work.

#### **22.06 Sanctions:**

Failure by the consultant to carry out the requirements of these DBE Termination/Substitution specifications is a material breach of contract and will result in such remedies as the LPA/Subrecipient deems appropriate, which will include, but are not limited to the assessment of liquidated damages. The LPA/Subrecipient will deduct from monies



due or becoming due the consultant, the dollar amount of the wrongfully substituted/replaced DBE subcontract plus 25% of the amount remaining to be paid to the DBE as liquidated damages. These liquidated damages shall be in addition to all other retention or liquidated damages provided for elsewhere in the contract.

### **23.0 Certification of Final DBE Payments:**

The consultant's achievement of the goal is measured by actual payments made to the DBEs. The consultant shall submit the "Certification of Final DBE Payments" form for each DBE firm working on the contract. This form shall be signed by the consultant and the relevant DBE, and submitted to LPA/Subrecipient no later than 30 days after the DBE completes its work.

LPA/Subrecipient will use this certification and other information available to determine applicable DBE credit allowed to date by the Consultant and the extent to which the DBE firms were fully paid for that work. By the act of filing the forms, the consultant acknowledges that the information is supplied in order to justify the payment of state and federal funds to the consultant.

The consultant will not be released from the obligations of the contract until the Certification of Final DBE Payments forms are received and deemed acceptable by the LPA/Subrecipient.

### **24.0 Sanctions for Not Meeting Contract DBE Goal:**

If the LPA/Subrecipient determines, with BECO concurrence, that the consultant has not met the DBE goal at the end of the contract, the LPA/Subrecipient, at its discretion, may assess liquidated damages up to two times the amount of the unattained portion of the original DBE goal, based on the circumstances of the noncompliance. Not meeting the DBE goal will also be reflected in the consultant evaluation.

When evaluating if the consultant has met the overall DBE goal for the contract, the LPA/Subrecipient, with BECO concurrence, will evaluate the size, amount and scope of Task Orders, consultants' efforts to exceed the DBE goal on larger Task Orders with subcontracting opportunities, approved Good Faith efforts for Task Orders, and other factors.

In determining whether liquidated damages will be assessed and the amount of the liquidated damages, the LPA/Subrecipient will consider whether there have been other violations on this or other contracts, whether the failure was due to circumstances beyond the control of the consultant, whether the consultant has made good faith efforts to meet the goal, and other appropriate circumstances.

In addition to any other sanctions, willful failure of the consultant, DBE or other subconsultant to comply with this contract or with the Federal DBE regulations may result in disqualification from further contracting, subcontracting, or other participation in the

LPA/Subrecipient's projects.

**25.0 False, Fraudulent, or Dishonest Conduct:**

In addition to any other remedies or actions, the LPA/Subrecipient will bring to the attention of the US Department of Transportation any appearance of false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take steps such as referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General for possible initiation of suspension and debarment proceedings against the offending parties or application of "Program Fraud and Civil Penalties" rules provided in 49 CFR Part 31.